

1 BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

2 SIERRA CLUB, MIDEWIN TALLGRASS)
PRAIRIE ALLIANCE, AUDUBON COUNCIL)
3 OF ILLINOIS, ILLINOIS AUDUBON) PCB No. 99-136
SOCIETY, and LAND AND LAKES,) PCB No. 99-139

4) PCB No. 99-140
Petitioners,)

5) Pollution Control
vs.) Facility

6)
WILL COUNTY BOARD and WASTE) Siting Appeal

7 MANAGEMENT OF ILLINOIS, INC.,)
)

8 Respondents.) Volume I

9

10

11 REPORT OF PROCEEDINGS before JOHN C.

12 KNITTLE, Hearing Officer for the Illinois Pollution

13 Control Board, Will County Courthouse, 14 West

14 Jefferson Street, Room 300, Joliet, Illinois,

15 commencing at 9:41 a.m. on the 1st day of June,

16 A.D., 1999.

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7
8 POLLUTION CONTROL BOARD MEMBERS PRESENT

9 Mr. Ronald Flemal
Ms. Kathleen Hennessey
10 Ms. Marili McFawn
Mr. Nicholas Melas

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12 POLLUTION CONTROL STAFF ATTORNEYS PRESENT

13 Ms. Karen Cavanagh
Ms. Cathy Glenn
14 Ms. Amy Muran-Felton
Ms. Marie Tipsord

15
16 MEMBERS OF THE PUBLIC WERE ALSO PRESENT

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1 HEARING OFFICER KNITTLE: Hello. My name is
2 John Knittle. I'm the hearing officer with the
3 Illinois Pollution Control Board. I'm also the
4 assigned hearing officer in the matter set for
5 hearing today. It's a consolidated case entitled
6 Sierra Club, Midewin Tallgrass Prairie Alliance,
7 Audubon Council of Illinois, and the Illinois
8 Audubon Society vs. The Will County Board and Waste
9 Management of Illinois and also the second part of
10 the consolidated case is Land and Lakes Company vs.
11 The Will County Board and Waste Management of
12 Illinois, Incorporated. Those are PCB 99-136 and
13 99-139.

14 It is June 1st approximately 9:45 a.m. We
15 do have members of the public present. We also have
16 members of the Illinois Pollution Control Board
17 present. Specifically, we have board member Ron
18 Flemal, board member Nicholas Melas, board member
19 Marili McFawn. We have attorneys Marie Tipsord,
20 Cathy Glenn, and I know I saw hearing officer and
21 staff attorneys Amy Muran-Felton and Karen Cavanagh
22 here as well. That's it for board personnel.

23 I want to thank you all formally for your
24 attention to this matter. One note of caution: In

1 order to avoid any impropriety or appearance
2 thereof, I'm going to ask that everybody refrain
3 from addressing any comments or questions to the
4 board members. Instead, please direct any such
5 comments to me. If it's during the hearing or if
6 after the hearing, direct those comments to Marie
7 Tipsord who is the designated press liaison for this
8 matter for the board.

9 This hearing has been scheduled in
10 accordance with the Illinois Environmental
11 Protection Act and the Pollution Control Board rules
12 and procedures. It will be conducted according to
13 the procedural rules found at Section 103.202.

14 As discussed in the prehearing coverage,
15 I'm going to allow members of the public to comment.
16 They will have the opportunity to file public
17 comment after the hearing. But any person speaking
18 here will be sworn in and will be subject to cross
19 examination. The statement must be relevant to the
20 case and to the issues pending before the board.

21 Citizens are going to be allowed to make
22 statements after the parties present their case.
23 However, if any member of the public who has to
24 leave before the case-in-chief is closed, please let

1 me know by raising your hand at the appropriate
2 time, and we will try to accommodate your needs.
3 It's very important to us to have all comments on
4 this matter and for you to have your opportunity.

5 Before we begin, I would like to talk for
6 just a moment about the board's hearing process.
7 First, I think the majority of people here are
8 familiar with this, but you should realize that I
9 will not be deciding this case. Rather, the
10 Illinois Pollution Control Board will be deciding
11 this case. The board is comprised of seven members,
12 three of which we have here today. These seven
13 members are located throughout the state of
14 Illinois. They're going to view the transcript of
15 the proceedings and the remainder of the record and
16 decide this case. My job is strictly to ensure that
17 an orderly hearing and a clear record is developed
18 so that the board can have all the proper
19 information before it when they're deciding this
20 case.

21 After the hearing, the parties will have
22 the opportunity to submit posthearing briefs.
23 These, too, will be considered by the board. A
24 statutory decision deadline exists in this case.

1 That means the board has until August 5th to decide
2 this matter, and briefs and comments will be
3 scheduled accordingly.

4 I'm also noting for the record that board
5 member Kathleen Hennessey has just arrived, and the
6 same caution of directing comments to her applies --
7 the same caution of directing comments to board
8 members applies to her as well.

9 That's pretty much all I have. I want to
10 take a moment for the parties to introduce themselves
11 first, and then we'll address any preliminary matters
12 that we have.

13 Petitioners?

14 MR. ETTINGER: I'm Albert Ettinger. I'm
15 counsel for the Sierra Club, Midewin Tallgrass,
16 Prairie Alliance, Audubon Council of Illinois, and
17 the Illinois Audubon Society.

18 MS. HARVEY: My name is Elizabeth Harvey, and
19 I'm the attorney for Land and Lakes Company which is
20 the Petitioner in PCB 99-139.

21 MR. MORAN: My name is Donald Moran. I
22 represent Waste Management of Illinois, Inc., one of
23 the Respondents in each of the two appeals here
24 today.

1 MS. ZEMAN: My name is Christine Zeman with
2 Hodge & Dwyer for the Will County Board.

3 MR. PORTER: Good morning. I'm Rick Porter.
4 I'm also for the Will County Board.

5 MR. HELSTEN: Chuck Helsten, Will County Board
6 as well.

7 HEARING OFFICER KNITTLE: Okay. Thank you all
8 very much.

9 We do have some preliminary matters to
10 address. First, I want to ask -- I know we've
11 talked to Kathleen Konicki off the record, and you
12 have something you wish to state at this time,
13 Ms. Konicki. If you could come in, I'm going to ask
14 you to swear her in.

15 (The witness was duly sworn.)

16 MS. KONICKI: My name is Kathleen Konicki. I'm
17 a member of the Will County Board, and I do plan on
18 speaking here today. However, I've stepped forward
19 at this point in time because I cannot stay. I'm
20 under a gag order, and I'm in the process of
21 appealing that gag order to the Appellate Court, and
22 I need to leave to file my paperwork with the court,
23 but I will be back, and I step forward at this point
24 to state that I am here on the record and do ask

1 your assurance that you will be open until 6:00

2 because I am relying on that.

3 HEARING OFFICER KNITTLE: Yes. Is that all you

4 have to say?

5 MS. KONICKI: That's all I have to say.

6 HEARING OFFICER KNITTLE: Okay. Thank you.

7 You can step down. We are going to be open until

8 6:00, and I probably should have covered that

9 initially. The hearing is schedule to go until

10 6:00 p.m. today, and we will be open for the whole

11 time period in order to obtain any public comments

12 that may or may not come in.

13 Are there any other members of the public

14 who want to issue a public comment but will not be

15 able to stay until after the cases-in-chief are

16 closed?

17 I see none, and so we'll move on to the

18 preliminary motions.

19 We have, to my count, five outstanding

20 motions. That's not entirely true. We have three --

21 four outstanding motions and two motions that have

22 been held, but I want to discuss what we did with

23 those on the record.

24 First, there's a motion for in camera

1 inspection. It was filed on May 27th by Will
2 County. We had a telephone status conference about
3 this issue, and the parties reached an agreement.
4 No ruling was made on whether the document was
5 privileged or not. Will County voluntarily produced
6 the memorandum that was in question, and that was
7 satisfactory to Land and Lakes Company.

8 MS. HARVEY: Yes. Thank you.

9 HEARING OFFICER KNITTLE: The second item is a
10 motion in limine regarding the testimony of Charles
11 Norris. It was also filed on May 27th by Will
12 County. We have a response to that motion filed by
13 the Sierra Club.

14 Just for the record, when I refer to the
15 Sierra Club, I'm going to be referring to all of the
16 Petitioners in PCB 99-136 and will only state
17 differently if, in fact, we need to.

18 So Sierra Club filed a response. We
19 discussed this and had argument about this, and
20 motion was granted. And as discussed at the
21 prehearing conference, I failed to see how the
22 testimony regarding the inadequacy of the decision
23 made by the Will County Board or the conditions
24 attached to the decision of the Will County Board

1 can be related to fundamental fairness of the
2 proceeding. It seems to go to criterion, and it
3 should be limited for the record, and the motion was
4 denied accordingly.

5 MR. MORAN: You mean granted.

6 HEARING OFFICER KNITTLE: Pardon me. Yes.

7 Thank you, Mr. Moran. Granted accordingly.

8 So Charles Norris will be barred from
9 testifying to the adequacy or insufficiency of the
10 conditions and the siting decision by the Will
11 County Board.

12 The next item was what I've referred to as
13 motion in limine number two filed on May 28th in
14 regard to the communications between the applicant
15 and county employees who are not decision makers in
16 this matter. We had a response from Land and Lakes
17 Company and the Sierra Club. We also had argument
18 at the prehearing conference. I would like to say
19 we did get responses on this and the remaining
20 motions, but we didn't have any opportunity for the
21 Petitioners to respond orally with argument. Is
22 there a desire to do that? Do we need argument on
23 this right now? And I'm asking both Elizabeth
24 Harvey and Al Ettinger.

1 MS. HARVEY: I would just briefly summarize.
2 We did file a written response that was faxed to you
3 over the weekend and faxed to all opposing counsel
4 as well as to this motion in limine which seeks to
5 prohibit testimony regarding communications between
6 the applicant and the non-decision making county
7 employees.

8 Land and Lakes has simply pointed out in
9 our response that the county, who is the movent on
10 this, cannot cite a single case or statute that
11 states that all communications between the applicant
12 and non-decision making county employees are not
13 relevant to fundamental fairness. The major case
14 that they cite talks about it's not relevant to a
15 claim of bias or an allegation of conflict of
16 interest. There's also case law they cite that
17 states that it's not relevant to the issue of ex
18 parte contacts.

19 Land and Lakes has not raised any of those
20 issues. Our fundamental fairness claim is
21 different, and we would ask that the motion in
22 limine be denied because there's no basis to deny it
23 on all fundamental fairness grounds.

24 HEARING OFFICER KNITTLE: Mr. Ettinger?

1 MR. ETTINGER: I believe the papers that we
2 filed late Saturday night or early Sunday morning
3 are adequate to state our position. I think that
4 the basic point is that there's a large number of
5 cases that recognize that contacts with non-decision
6 makers, particularly when those contacts relate
7 information which is later given to decision makers,
8 is relevant.

9 HEARING OFFICER KNITTLE: Thank you,
10 Mr. Ettinger. Is there reply to the response? I
11 don't know who's representing Will County on this
12 matter.

13 MR. PORTER: I am, your Honor.

14 HEARING OFFICER KNITTLE: Please, and refer to
15 me as Mr. Knittle.

16 MR. PORTER: I'm usually in court. I'm sorry
17 for that, Mr. Knittle.

18 Yes, I have a quick response.

19 First of all, the law is pretty clear on
20 the issue. An ex parte contact is a contact being
21 one a decision making role of the party before it.
22 We are seeking to bar evidence of contacts that
23 aren't involving one in the decision making role.

24 We've cited the ESG Watts case that says

1 that courts considering fundamental fairness have
2 focused on the alleged bias or conflict of interest
3 of the decision maker, the hearing officer, not
4 their advisor. In this case, counsel is trying to
5 distinguish the ESG Watts case by saying that
6 they're asserting that this is a matter of first
7 impression. It isn't. They're alleging that the
8 pre-application contacts somehow tainted the
9 process; that is, the board was biased by all of
10 these pre-application contacts. That's the exact
11 same allegation that was at issue in ESG Watts.
12 They found that that information was completely
13 irrelevant, and therefore, our motion should be
14 granted.

15 HEARING OFFICER KNITTLE: Mr. Moran, do you
16 have anything?

17 MR. MORAN: Yes, just a few remarks.

18 As we've pointed out I think repeatedly
19 and as the county pointed out in its initial motion,
20 the predicate in addition to the Watts case for the
21 motion is the Residents Against the Polluted
22 Environment vs. County of LaSalle and LandComp
23 Corporation. In that case, we dealt with a number
24 of different pre-filing communications and contacts

1 between the county board and between the applicant
2 in that case.

3 As I understand what the Petitioners have
4 said, they've attempted to distinguish the LandComp
5 case on the basis that somehow it dealt only with a
6 certain pre-annexation agreement and host agreement
7 negotiations and discussions when, in fact, it went
8 beyond that. But the board's holding in that case,
9 I believe, was quite unequivocal and was not
10 qualified in any form, particularly as the
11 Petitioners are trying to make out.

12 As the board says at page 7 of the opinion
13 which was entered on June 19th of 1997, the
14 statement is this: Contacts between the applicant
15 and the county board prior to the filing of the
16 application are irrelevant to the question of
17 whether the citing proceedings themselves were
18 conducted in a fundamentally fair manner. And when
19 we think about the reason for this rule, it seems to
20 me that the reasons behind it are compelling.

21 Prior to the filing of an application, any
22 discussions or contacts have not and cannot be
23 defined as ex parte and that there has not been a
24 proceeding that's been commenced to which that

1 adjective could apply. But more importantly, if we
2 assume that the contacts indeed related to an
3 application or related to communications which
4 resulted in material being placed before the county
5 board once the application is filed, we're doing
6 away with and addressing the very concern that any
7 Petitioners have, and that is that information is
8 made part of a record, made part of the siting
9 proceeding, which is made part of a record which any
10 objector, any person who appears can attack, can
11 evaluate, can assail, or can in any other way
12 criticize.

13 And indeed, the reason for the rule in the
14 LandComp case was to address just these issues;
15 that, in fact, if you put forward in an application
16 anything that may be the result of a communication
17 between an applicant and a decision maker, what
18 difference does it make? It's out there for those
19 objectors and anyone who else wants to speak to
20 address. You have an opportunity to do that.

21 There is, I would agree, based upon
22 LandComp and based upon common principles of how we
23 view these types of proceedings, that in the event
24 that there was a communication or there was an

1 agreement, for example, from the applicant to the
2 decision maker to in some way predetermine the
3 outcome, let's say there was an agreement to pay a
4 sum of money or there was an agreement to do
5 something else that clearly had an effect on the
6 outcome, we aren't saying that those kind of
7 contacts are inappropriate because in that instance,
8 there would be an act which, in effect, would
9 predetermine the outcome. However, unless you have
10 some evidence that something along these lines
11 occurred, that indeed there was this predetermining
12 act that occurred prior to filing -- which we don't
13 have here. There's been no indication here
14 whatsoever that there was ever any type of contact
15 or communication of that nature. Unless you have
16 that, these pre-filing communications and contacts
17 are not relevant. The Pollution Control Board said
18 it. They said it for sound reasons, for persuasive
19 reasons, and it's my view that the motion ought be
20 granted.

21 MS. HARVEY: Mr. Hearing Officer, I'm a little
22 confused as to whether Mr. Moran was addressing the
23 issues of communications between the county -- a
24 non-decision making county employee and the

1 applicant or the other motion in limine which
2 addresses things that occurred before the filing of
3 the application.

4 HEARING OFFICER KNITTLE: I hear what you're
5 saying, and I hesitate to speak for Mr. Moran, but
6 it was my understanding that you were addressing
7 kind of both motions.

8 MR. MORAN: I think both motions are related,
9 and I think my motion with respect to Mr. Rubak
10 obviously will mirror some of the same statements
11 that I just made, but I think the principles are
12 very similar absolutely.

13 HEARING OFFICER KNITTLE: Okay. Anything
14 else?

15 MS. HARVEY: I would just like to respond to
16 what Mr. Porter said.

17 Contrary to what Mr. Porter said, Land and
18 Lakes has not claimed that there was a bias of the
19 county board as a result of the prefiling review of
20 the draft application. We've specifically stated
21 that in at least two -- at least two written filings
22 regarding motions.

23 What we have raised is a claim that the
24 prefiling review, in essence, made the hearing and

1 comment procedure required by section 39.2 almost
2 meaningless, and it shifted the burden of proof from
3 the applicant on to the objectors to disprove the
4 application. That is a different argument than
5 saying that the county board was biased or had
6 predetermined its vote on the application. That is
7 not Land and Lakes' argument.

8 HEARING OFFICER KNITTLE: Final statement,
9 Mr. Ettinger.

10 MR. ETTINGER: Well, just to note that it does
11 seem like we've conflated two issues here, and the
12 LandComp case --

13 HEARING OFFICER KNITTLE: This will save us
14 time on the next motion in limine.

15 MR. ETTINGER: Right.

16 The LandComp case, in fact, found that
17 there had been ex parte contacts, in part, based on
18 evidence of contacts with an expert who later talked
19 to the relevant deciding authority. So LandComp
20 pretty clearly dictates the denial of the one
21 motion.

22 I think on the other hand in terms of time
23 period, the Respondents are trying to get a wealth
24 of material out of one sentence in an opinion that

1 doesn't address the issue that was before it here.

2 HEARING OFFICER KNITTLE: Thank you,

3 Mr. Ettinger.

4 Final comments?

5 MR. PORTER: I guess I'll add a comment. It

6 seems that we're arguing about the second one as

7 well. I might as well finish that off.

8 HEARING OFFICER KNITTLE: You can do that now

9 or reserve it.

10 MR. PORTER: I'll do it right now, if you don't

11 mind.

12 The LandComp case is clear. It says, and

13 I'll quote, contacts between the applicant and the

14 county board prior to the filing of the siting

15 application are irrelevant to the question of

16 whether the siting proceedings themselves were

17 conducted in a fundamentally fair manner.

18 I have nothing further.

19 HEARING OFFICER KNITTLE: Mr. Moran?

20 MR. MORAN: I have nothing further.

21 HEARING OFFICER KNITTLE: Let's see. Let's

22 start with the motion in limine number two regarding

23 the communications between the non-decision makers

24 and the applicant in this matter. This motion is

1 denied. On review of the cases cited, at least to
2 my way of thinking, does not reveal at all the
3 comments between the applicant and the non-decision
4 makers are not relevant to a fundamental fairness
5 inquiry.

6 It seems to me that the board leaves open,
7 especially in ESG Watts, that the possibility that
8 such contact could be relevant exists and has, in
9 fact, been found relevant in the past, at least in a
10 similar situation. So that motion is denied.

11 Motion in limine number three, which is
12 seeking to bar testimony concerning communications
13 occurring outside the relevant time period, which
14 Will County states is August 14th, 1998, to March 4th,
15 1999, is there any further argument on this motion?

16 MS. HARVEY: Since everyone else has made their
17 argument, I just wanted to echo Mr. Ettinger's that
18 I believe we've argued quite persuasively that the
19 LandComp case does not bar all communications or
20 events that occurred prior to the filing.

21 You have, Mr. Hearing Officer, in the
22 context of a motion for a protective order already
23 said that you agreed that those cases do not find
24 that all pre-application information would be

1 irrelevant, and I also agree with Mr. Ettinger that
2 the sentence that Mr. Moran has quoted this morning
3 needs to be taken in the context of the entire
4 decision that the board was making at the time, and
5 I think that context is quite clear. It's limited
6 to the issues raised in that case.

7 HEARING OFFICER KNITTLE: I'll let the movant
8 have a final comment here.

9 MR. PORTER: Mr. Hearing Officer, in regard to
10 the previous motion, that was on discovery order,
11 whether or not it could lead to admissible
12 evidence.

13 In this case, we've now filed a motion to
14 bar that evidence, and it's then -- the burden now
15 shifts to the Petitioners to show us exactly what
16 evidence it is that they're alleging, show this new
17 cause of action that they're creating in trying to
18 distinguish from bias, and they haven't done that.
19 The evidence is completely irrelevant and under
20 LandComp must be barred.

21 HEARING OFFICER KNITTLE: Mr. Moran, do you
22 have anything else?

23 MR. MORAN: I have nothing further.

24 HEARING OFFICER KNITTLE: I forgot to note that

1 there were responses received both by Land and Lakes
2 Company and the Sierra Club in this motion.

3 I also want to note I've made a couple
4 rulings here, and I'm sure everybody knows their
5 rights after these rulings are made. However, you
6 can file a motion to reconsider a hearing officer
7 with the board on any of my hearing officer
8 rulings.

9 I find that this motion is essentially the
10 same as was made previously in the motion for a
11 protective order. It's true that there is a
12 different context. However, it's going to be denied
13 for the same reasons.

14 The cases cited, and we're talking
15 primarily about the LandComp case, but for the
16 record, that's Residents Against Polluted
17 Environment vs. County of LaSalle. There's two of
18 those, PCB 97-139 and PCB 96-242. There's also an
19 appellate opinion affirming the board.

20 It's my finding that these cases did not
21 find that all information outside the application
22 and decision time frame to be irrelevant as to
23 whether the proceeding was conducted in a
24 fundamentally fair manner, and this is set out in

1 the hearing officer order that was already issued
2 on, like I said, the similar factual situation,
3 which leads us to motion in limine number four
4 regarding mental processes of the Will County Board
5 and its consideration of a siting application
6 through all of various counsel representing it. We
7 have a response on this filed by the Sierra Club.
8 We've had no argument on it.

9 Mr. Porter, do you want to start us?

10 MR. PORTER: Mr. Hearing Officer, I believe
11 that my brief speaks for itself.

12 HEARING OFFICER KNITTLE: Mr. Moran?

13 MR. MORAN: I wholly support the motion. I
14 think it states the black letter law in the area,
15 and I don't know that there is much room for
16 disagreement with the motion.

17 HEARING OFFICER KNITTLE: Thank you, sir.

18 Mr. Ettinger.

19 MR. ETTINGER: I think I also stated in my
20 brief pretty well what we think here, so maybe I'll
21 just let it at that.

22 HEARING OFFICER KNITTLE: Ms. Harvey, you
23 didn't file a response. Do you have anything you
24 want to add?

1 MS. HARVEY: No. Land and Lakes is not taking
2 a position on this motion. Thank you.

3 HEARING OFFICER KNITTLE: Okay. I notice we
4 have more people from the public coming in. Maybe
5 not. If anybody is wanting to sit down and there's
6 not areas, feel free to pull up a chair, or we will
7 make sure that you have chairs to sit in.

8 I'm going to deny this motion as well.
9 The board has held that before an inquiry into
10 administrators' mental process can begin, there must
11 be a strong showing of bad faith or improper
12 behavior. I think it's a little premature to rule
13 out that such a showing could be made.

14 The motion also seeks to bar evidence as
15 to the understanding of Will County Board of the
16 role of its counsel because the board consists of
17 many people, and conjecture and surmise would be
18 needed to testify for the whole board. While I
19 don't disagree with this proposition, I think that
20 if the situation arises, we can handle it with the
21 appropriate objections. So I'm going to deny the
22 motion in that regard.

23 There's a couple other arguments, and I
24 think those too can be handled with an objection, so

1 I'm going to deny that motion.

2 The final motion in limine is a motion in
3 limine seeking to bar testimony of Kathleen Konicki
4 who was originally going to be called as a witness
5 by the Sierra Club. Because she's no longer on
6 anybody's witness list and will not be being called
7 as a witness, I'm not going to rule on that motion.
8 It's moot. Although, Mr. Helsten, or, Mr. Porter,
9 either one, it's your motion. What I'm going to do
10 is allow you to reoffer if, in fact, she wants to
11 testify. We just don't know for sure that she's
12 going to be back to do that. Since she's not on
13 anybody's witness list, I don't want to address it
14 right now.

15 MR. PORTER: We'll withdraw it right now and
16 reoffer when we need to.

17 MR. ETTINGER: I just want to mention I'm going
18 to be making an offer of proof as to what Ms. Konicki
19 would have testified as part of my presentation.

20 HEARING OFFICER KNITTLE: A bulk offer of
21 proof, correct?

22 MR. ETTINGER: Well, no. I've got a bulk offer
23 for Mr. Norris. As to Ms. Konicki, I just have her
24 petition. You, Mr. Knittle, did not rule on that

1 motion. However, as a practical matter, the
2 temporary restraining order that was issued by the
3 Will County Circuit Court has kept out this
4 information, so I just wish to make an offer of
5 proof which would be very brief.

6 HEARING OFFICER KNITTLE: You can do that
7 during your case.

8 That's all preliminary matters that I
9 have. I don't have any other outstanding motions.
10 Am I missing anything?

11 MR. MORAN: Yes. You were missing one that we
12 talked about on Friday.

13 HEARING OFFICER KNITTLE: It was my
14 understanding that you never actually made the
15 motion about Mr. Rubak.

16 MR. MORAN: Well, I did make the motion then.
17 We were going to hold it until today. We argued at
18 some length on Friday.

19 HEARING OFFICER KNITTLE: We need a motion on
20 the record, I think.

21 MR. MORAN: Well, I will make that motion again
22 now. That motion was to exclude Mr. Rubak's
23 appearance for purposes of testifying on the basis
24 that at his deposition, which occurred on Friday, he

1 testified on questioning from the counsel from both
2 Land and Lakes and Sierra Club as to the
3 communications or lack of communications he had with
4 any representative of either Will County or of the
5 consulting firm retained by Will County in
6 connection with the Prairie View Recycling and
7 Disposal facility.

8 As I -- as we learned in his deposition,
9 Mr. Rubak had indicated that during the relevant
10 time period; that is, August 14th of 1998 through
11 March 4th of 1999, he had absolutely no
12 communication or contact with any individuals from
13 Will County, either representatives, employees,
14 agents or otherwise.

15 What we also learned was that prior to
16 August 14th of 1998, Mr. Rubak had certain
17 communications and contacts with Will County. A
18 number were related to the contract that Will County
19 had entered into with Waste Management of Illinois
20 to develop the property known as the Joliet Army
21 Ammunition Plant property. Obviously, those
22 communications did not relate to any siting matters.

23 There were also communications relating to
24 various site investigative work that were being

1 done, status reports that were being prepared, and
2 communications that might in a more, I guess,
3 liberal view of those communications relate in some
4 way to the proposed facility, the Prairie View
5 Recycling and Disposal facility.

6 Based upon the principles laid forth in
7 the LandComp case and also the principles that we
8 addressed earlier today regarding the appropriate
9 time period, my motion was to excuse Mr. Rubak
10 because obviously based upon his testimony, there
11 would be no communication whatever to be addressed
12 in the relevant time period, and the contacts that
13 predated the filing of the application also had no
14 relevance for fundamental fairness on the basis that
15 obviously if we're to accept the LandComp principle,
16 those communications do not relate and do not
17 support any contention that there was fundamental
18 unfairness in the proceedings.

19 So it was my motion to excuse Mr. Rubak's
20 appearance here today because I believe the counsel
21 for Land and Lakes indicated that he was to be her
22 only named witness at the hearing this morning, and
23 that's the basis for our motion.

24 HEARING OFFICER KNITTLE: Ms. Harvey?

1 MS. HARVEY: Thank you, Mr. Knittle.

2 I do indeed intend to call Mr. Rubak. I
3 continue to have the same position as to the
4 interpretation of the LandComp and other cases as to
5 whether or not events that occurred prior to the
6 filing of the application can be relevant. I
7 believe that they can be relevant to fundamental
8 fairness, and I think you've just ruled that they
9 can be relevant.

10 I would like to clarify that my intent in
11 calling Mr. Rubak is to ask him only about contacts
12 relating to the siting application itself. I do not
13 intend to ask him about any contacts that relate to
14 the contract or other site investigation issues. I
15 am interested only in the contact with the county
16 and/or its consultants regarding the draft siting
17 application prior to the date of filing of that
18 application, which is August 14th of 1998. So I
19 think his testimony on that limited issue is
20 relevant.

21 HEARING OFFICER KNITTLE: Mr. Moran, can I ask
22 you a question?

23 MR. MORAN: Certainly.

24 HEARING OFFICER KNITTLE: Is the situation with

1 Mr. Rubak in any way different than it was with the
2 other pre-application contact we were talking about
3 earlier?

4 MR. MORAN: Well, certainly from our standpoint
5 it is.

6 HEARING OFFICER KNITTLE: How so?

7 MR. MORAN: Well, from the standpoint that we
8 have is an individual who's addressing clearly
9 matters that are not in any way related to siting;
10 that is, the contract between Will County and Waste
11 Management involved obligations, responsibilities
12 that in no way could reasonably be attributed to
13 siting.

14 With respect to those matters that could
15 in some way be tied in or related, however broadly,
16 to a siting issue, we're dealing, as we learned at
17 the deposition, with various status reports that
18 were given to the county which arguably could also
19 be asserted to have been related to the contract
20 inasmuch as there were issues relating to the site
21 investigation but those issues and also issues
22 relating to the application as it was initially put
23 forth and as the county's consultant had reviewed.
24 But as I pointed out previously, if we assume for a

1 moment -- and clearly the evidence will bear this
2 out, but if indeed an applicant and a county board
3 or a decision maker had come to a point where they
4 had, prior to the filing of an application,
5 conferred on what ought be in that application and
6 if they agreed on what was to be in that application
7 and that application were filed and made part of a
8 siting proceeding so that any individual, any entity
9 who had any interest in the proceeding had an
10 opportunity to review that application, to comment
11 on it, to present its case, to present whatever
12 objections it had, there can, as a matter of law,
13 have been no fundamental unfairness inherent in that
14 process.

15 So it was for that reason as well, the
16 whole notion of these communications and discussions
17 between Mr. Rubak and the county's consultants or
18 others are entirely beside the point, and they're
19 not relevant to the issue of fundamental fairness.

20 In addition, if we consider the whole
21 purpose of the Environmental Protection Act as it
22 sets out these siting provisions, it is to ensure
23 that first whatever proposal that is made will
24 address various issues relating to public health,

1 safety, and welfare in the design and operation of a
2 facility. And if indeed those issues have been
3 addressed, put in writing in an application, and
4 anyone who wishes to address that application has
5 had an opportunity to do so and has done so -- and
6 we haven't heard anything in this proceeding by any
7 of the Petitioners that they were foreclosed in any
8 fashion from taking that application, picking it
9 apart, setting forth whatever objecting evidence
10 they had, and presenting it, that's the essence of
11 the fundamental fairness that's required in these
12 kinds of proceedings, and that occurred here. And
13 we have no indication, no evidence whatsoever from
14 Mr. Rubak that there was some communication prior to
15 filing which would justify going into those
16 communications and that kind of contact. The kind
17 of contact I'm talking about is if there were some
18 indication, for example, that someone was offering
19 to pay money in order to determine a situation.
20 Something as inappropriate and improper and in as
21 bad faith as that would be appropriate to allow
22 inquiry into prefiling communications.
23 We've had full discovery in this case.
24 The Petitioners have come up with nothing close to

1 those kinds of allegations. So as was pointed out
2 previously, we're now in the area of admissible
3 evidence at this hearing, not discovery. Discovery
4 was broad ranging. It allowed a lot of material
5 in. But here after deposing Mr. Rubak, we have
6 heard nothing and we have seen nothing that
7 indicates any bad faith, any improper contact by way
8 of an attempt to pay somebody money to make a
9 decision or anything else that would be improper in
10 that respect.

11 So no, Mr. Rubak's testimony, pre-filing of
12 the application is entirely consistent with the
13 principle laid down in LandComp that unless there is
14 a communication that specifically has tainted or
15 predetermined that decision making process, it isn't
16 relevant, and it isn't relevant here. And to allow
17 it in to suggest that somehow these communications
18 were improper or fundamentally unfair misses the
19 point of LandComp and I think misses the point of
20 the underlying objective of the act as well.

21 Thank you.

22 HEARING OFFICER KNITTLE: Thank you.

23 Ms. Harvey, do you want to respond to
24 that?

1 MS. HARVEY: Well I believe Mr. Moran is
2 basically laying out the argument that he apparently
3 will use before the board when the board is
4 presented with making a decision on Land and Lakes'
5 claim as to whether or not this procedure was
6 fundamentally unfair.

7 I continue to disagree with his
8 interpretation of LandComp. Land and Lakes intends
9 to use Mr. Rubak's testimony simply to demonstrate
10 what contacts did occur prior to the filing of the
11 application, to get that evidence into the record,
12 and then essentially in its written brief to present
13 its legal argument as to why that was fundamentally
14 unfair and to allow the board to make a decision
15 than rather than having the evidence of those
16 contacts kept out so that we're left with nothing to
17 argue basically on exclusion of a witness who I
18 believe his testimony is relevant to the issue that
19 Land and Lakes has raised.

20 HEARING OFFICER KNITTLE: Any final comments,
21 Mr. Moran?

22 MR. MORAN: As I understand, the issue that
23 Land and Lakes has raised is with respect to some
24 fundamental unfairness in this proceeding, and as

1 best as I can tell having participated in those
2 proceedings, no one was precluded or otherwise
3 prevented from presenting whatever case they believe
4 was appropriate on the application. There's been no
5 indication that there were any communications or
6 contacts after this proceeding commenced that would
7 in any way taint or negatively affect Land and
8 Lakes' position.

9 So our view is based upon what we've
10 presented with here, there is no fundamental
11 unfairness, and as I understand Land and Lakes'
12 position, the proceedings were fundamentally
13 unfair. We have no evidence of it. Land and Lakes
14 should not be permitted to go into a -- basically an
15 expedition looking for some impression or suggestion
16 that by virtue of contacts that were appropriate,
17 lawful, continuing, and, by the way, which were not
18 communications of which anybody here in the county
19 interested in this proceeding were unaware. These
20 weren't secret meetings. These weren't surreptitious
21 meetings. Everybody knew about these. So from the
22 standpoint of having said well, these were going on,
23 where did we see in any part of these hearings
24 before Will County this issue being raised? It was

1 never raised. And you're right. This is an issue
2 that perhaps goes in my legal argument, but I think
3 there's a waiver issue here. We have nothing that
4 was suggesting during the course of these
5 proceedings that anyone objected to what everyone
6 knew was going on by virtue of the contract existing
7 between Will County and Waste Management.

8 So having said all that, there's certainly
9 no fundamental unfairness. We shouldn't be allowed
10 at this hearing to go into matters that are simply
11 going to delay and extend the period of this hearing
12 for matters that clearly are irrelevant.

13 MR. ETTINGER: Mr. Knittle, I just want to
14 register -- I think you're going to rule, but I just
15 want to say that we have a slightly different view
16 of what the fundamental unfairness was here. I
17 think it shares with Land and Lakes in many ways,
18 but I think for us to keep saying that there was
19 nothing that went on during the proceedings which
20 anyone contends affected the determination is simply
21 untrue.

22 The same people who had these contacts
23 before the application were the people who authored
24 the Olson report which came in after the close of

1 the record to which none of the public could
2 respond, and so I just want to make clear that there
3 are two bases in which this evidence is critical.

4 HEARING OFFICER KNITTLE: Mr. Moran, if you
5 want to respond to that, you can.

6 MR. MORAN: Well, simply that the Will County
7 ordinance, which everyone was aware of from the very
8 day this application was filed, provided the
9 procedure by which Will County would review this
10 application. The Olson report was a result of that
11 procedure, and if the Petitioners or anyone else had
12 a problem with that procedure, it should have been
13 raised during the course of proceedings. This is
14 the first time we're hearing of that or I'm hearing
15 any of it. So that's just simply to respond to
16 Mr. Ettinger.

17 HEARING OFFICER KNITTLE: I don't see how this
18 is any different from the previous motions in limine
19 on this issue, so I'm going to deny the motion.
20 Once again, I reiterate that you can move to
21 reconsider these orders in front of the board, and
22 they will strike the testimony if they find it not
23 to be relevant or appropriate.

24 So anything else from the Petitioners?

1 MS. HARVEY: I don't have anything. Thank
2 you.

3 HEARING OFFICER KNITTLE: Mr. Ettinger?

4 MR. ETTINGER: No.

5 HEARING OFFICER KNITTLE: Respondents?

6 MR. PORTER: No.

7 HEARING OFFICER KNITTLE: Mr. Moran?

8 MR. MORAN: Nothing further.

9 HEARING OFFICER KNITTLE: We have a couple more
10 people, I'm assuming, from the public come in. Does
11 anyone have any comments that they have to make now,
12 or can you stick around for the end of the hearing?

13 I don't see anybody who has to leave
14 anytime soon, so we're going to proceed with the
15 hearing itself which takes us to opening
16 statements.

17 Do the Petitioners have statements they
18 would like to make?

19 MR. ETTINGER: No, not at this time.

20 MS. HARVEY: I will make an extremely brief
21 statement, Mr. Hearing Officer.

22 OPENING STATEMENT

23 MS. HARVEY: Land and Lakes has raised three
24 issues in its appeal in this case. Two of those

1 issues relate to the manifest weight of the
2 evidence.

3 Land and Lakes contends that the county's
4 decision on criterion two and criterion five finding
5 that those criterion have been -- criteria have been
6 satisfied by the applicant was against the manifest
7 weight of the evidence.

8 In conjunction with the restrictions
9 impose in section 40.1, we will not, of course, be
10 presenting any evidence on those issues, nor will we
11 be making any legal argument today on those issues.

12 The third issue that Land and Lakes has
13 raised is, as you've heard already today, a
14 fundamental fairness claim. Briefly, Land and Lakes
15 contends that the review of the draft application by
16 the county's staff and consultants prior to filing
17 was fundamentally unfair.

18 I want to be clear again about what we're
19 not arguing. We're not arguing that those were
20 impermissible ex parte contacts. We are not arguing
21 that there was some kind of predecisional bias by
22 the county board. Rather, we are contending that
23 this procedure essentially rendered the entire
24 process that's required by 39.2 fundamentally unfair

1 in that it made it almost meaningless, and it
2 shifted the burden of proof from the applicant who
3 has the burden of proof specifically under section
4 39.2 basically to the objectors to disprove that --
5 the elements of that application.

6 My purpose today is simply to present
7 evidence on that issue, not to make legal argument.
8 As I think everybody knows, there are usually
9 extensive written briefs following these kind of
10 hearings, and we will reserve our legal argument for
11 our briefs.

12 Thank you.

13 HEARING OFFICER KNITTLE: Thank you, Ms. Harvey.

14 Anything from the Respondents?

15 MR. PORTER: Yes, county board first.

16 OPENING STATEMENT

17 MR. PORTER: The evidence in this case is going
18 to show that after the contract was awarded on June
19 7th of 1997 to Waste Management, Incorporated, no
20 nonpublic communications of the county board members
21 took place with Waste Management, Incorporated.
22 After August 14th of '98, the date the application
23 was filed, there was no nonpublic communications of
24 county board members with Waste Management,

1 Incorporated. During the hearing, there were no
2 nonpublic communications of county board members
3 with Waste Management, Incorporated.

4 Only county police or consultants such as
5 the land use department who had no voting rights had
6 communications with Waste Management, Incorporated,
7 prior to the filing of the application. These
8 communications involved logistical issues because
9 the county owned the property. The army was going
10 to deed the property over to the county. The county
11 was going to license it to Waste Management,
12 Incorporated. There were many planning issues that
13 had to take place during the preapplication process
14 in order to facilitate an application even being
15 filed.

16 Waste Management had to get on the property.
17 There had to be some communications with the owner
18 of the property with the potential applicant. These
19 communications were not forwarded to the board.
20 There is no evidence that the board was ever
21 infected by any such communication.

22 Finally, as an added protection, during
23 the county board deliberations, the board hired new
24 counsel attorney, Christine Zeman to my left, to

1 guide them through the deliberation process.
2 Therefore, the attorney Mr. Helsten who had been
3 representing the county throughout the process,
4 could continue to receive telephone calls regarding
5 procedural issues and avoid any argument of lack of
6 integrity in this process.

7 Finally, the evidence will show that the
8 report submitted, the Olson report referenced by
9 counsel, was required by county ordinance, it had to
10 be filed, and was submitted to the public after the
11 public comment period so that the land use
12 department could adequately consider the counting
13 period. It was then made part of a public record.

14 For that reason, we will be asking the
15 Pollution Control Board to make a finding affirming
16 the approval of siting.

17 HEARING OFFICER KNITTLE: Thank you, sir.

18 Mr. Moran?

19 MR. MORAN: Thank you.

20 OPENING STATEMENT

21 MR. MORAN: The record in this case firmly
22 establishes that the nine criteria which were
23 presented by way of both the written application and
24 the testimony presented by Waste Management were

1 established indeed by the overwhelming weight of
2 this evidence.

3 With respect to the fundamental fairness
4 issue, there will be, as far as I can tell, no
5 evidence set forth or offered that will in any way
6 indicate that any of the objectors, anyone who
7 participated in these hearings did not have a full
8 and fair opportunity to present their case, to cross
9 examine witnesses, to make whatever objections, or
10 present whatever opposing evidence they had in
11 connection with this application.

12 There was nothing in this application that
13 was concluded and nothing as part of this process
14 which was not laid bare for public review and
15 comment as part of the hearing process, and the
16 argument that in some way these proceedings were
17 fundamentally unfair will be unsupported by either
18 the facts or evidence as we hear them at this
19 hearing and as they've presented in this record
20 below.

21 Thank you.

22 HEARING OFFICER KNITTLE: Thank you, sir.

23 That's it for openings.

24 Mr. Ettinger, Ms. Harvey, who wants to

1 begin?

2 MS. HARVEY: I have a procedure issue to
3 raise. I'm wondering, I have a series of documents
4 that I intend to move into the record without a
5 witness. Would you prefer that I do that prior to
6 calling Mr. Rubak or after I call Mr. Rubak? Do you
7 have a preference?

8 HEARING OFFICER KNITTLE: I have no preference.
9 Do the Respondents have any preference?

10 MR. HELSTEN: Mr. Hearing Officer, I'm sorry.
11 I'm in a dilemma here since I've been listed as a
12 witness, so I don't know if I should speak to this.
13 That's why Mr. Porter and Ms. Zeman are here on
14 behalf of the board. The only comment I would make
15 is I would think for the convenience of the witness
16 you would want to call the witness first and allow
17 him to be on his way. After that, he probably has a
18 number of things to do.

19 HEARING OFFICER KNITTLE: Is that all right
20 with you, Ms. Harvey?

21 MS. HARVEY: Absolutely.

22 I would like to call Mr. Christopher
23 Rubak, please.

24 (The witness was duly sworn.)

1 CHRISTOPHER G. RUBAK,
2 called as a witness herein, having been first duly
3 sworn, was examined upon oral interrogatories, and
4 testified as follows:

5 DIRECT EXAMINATION

6 BY MS. HARVEY:

7 Q Would you state your name and spell it for
8 the record, please?

9 A Christopher G. Rubak. Last name is
10 R-u-b-a-k.

11 Q And who is your employer, Mr. Rubak?

12 A Waste Management.

13 Q Can you give me a little bit of background
14 in your education history?

15 A I have a bachelor's of science in general
16 engineering from the University of Illinois, a
17 master's of science in civil engineering from Purdue
18 University.

19 Q What's your job title with Waste Management?

20 A I'm a senior engineer with Waste Management.

21 Q And can you please describe for me the
22 responsibilities that you have in that position?

23 A Currently, I'm involved with landfill
24 development projects, both greenfield landfills and

1 expansions. Also, I handle site-specific

2 responsibilities for the landfill in Grayslake,

3 Illinois.

4 Q By greenfield landfills, do you mean new

5 landfills created on a virgin site, so to speak?

6 A Yes.

7 Q Have you been involved in the siting

8 process for the proposed Prairie View facility

9 that's at issue in this case?

10 A Yes.

11 Q Can you give me a summary of your

12 involvement in that siting process?

13 A Yes.

14 Q Please go ahead.

15 A I became involved in this project starting

16 in 1995 when the county had sent out various request

17 for proposals to different companies. That process

18 took approximately two years. There were three

19 different request for proposals sent out at various

20 times. Waste Management of Illinois was awarded the

21 contract in June of '97. After that point in time,

22 I became involved with the preparation of a siting

23 application for the facility.

24 Q I'm going to show you what I'd like to

1 have marked as Land and Lakes Exhibit 1.

2 (Land and Lakes Exhibit No. 1 marked

3 for identification, 6-1-99.)

4 BY MS. HARVEY:

5 Q Mr. Rubak, have you ever seen that

6 document before?

7 A Yes.

8 Q Can you please read into the record the

9 date of the document?

10 A It's dated April 28th, 1998.

11 Q And what is the document briefly?

12 A It's a letter from Hinshaw & Culbertson

13 addressed to Fred Heinrich, who at that time was a

14 lawyer for Waste Management, and John Noel, who at

15 the time was outside Council for Waste Management.

16 Q And directing your attention to the

17 paragraph at the bottom of that letter, would you

18 read the beginning of the -- read the paragraph,

19 please?

20 A It says: Any preliminary information

21 which Waste Management would like to submit and/or

22 discuss with Will County (relating to issues such as

23 compliance with all siting ordinance requirements,

24 compliance with solid waste management plan,

1 compliance with section 39.2 of the act, et cetera),
2 which is technical/scientific in nature can be
3 submitted to Donna Shehane and Engineering Solutions
4 (the engineering firm which Will County has retained
5 to assist in this process). Designated representatives
6 from Engineering Solutions and Donna will be more
7 than happy to discuss any issues which may arise
8 between now and the time that you prepare and file
9 your siting application concerning the issues noted
10 above.

11 Q Okay. You can stop.

12 Did Waste Management subsequently follow
13 such a procedure?

14 A Yes.

15 Q Did Waste Management submit draft reports
16 on each of the applicable nine criterion to the
17 county?

18 A No.

19 Q On which criterion did they not draft
20 reports?

21 A Criterion seven and nine.

22 Q Seven being?

23 A Hazardous waste.

24 Q And nine being?

1 A Whether the facility is over a regulated
2 recharge area.

3 Q Were you responsible for the actual
4 submission of these reports to the county?

5 A Yes.

6 Q To whom were they submitted?

7 A To Ms. Shehane.

8 Q When were they submitted? Do you know the
9 month and year?

10 A The time period was approximately April of
11 '98 to July of '98.

12 Q Would it be fair to say that all draft
13 reports that you submitted were submitted prior to
14 July 1st of '98?

15 A Yes.

16 Q Did you keep copies of those submissions?

17 A No.

18 Q Did you keep copies of the submissions at
19 the time that you submitted them?

20 A Yes.

21 Q Do they exist today?

22 A No.

23 Q What happened to them?

24 A They were thrown away.

1 Q Was there an event that triggered when you
2 threw them away?

3 A When a new draft was created.

4 Q Were all draft copies thrown away upon the
5 filing or upon the preparation of the final application?

6 A Yes.

7 Q Okay. Did you receive comments back from
8 the county on each report that you submitted?

9 A Yes.

10 Q From whom did you get those comments from
11 the county?

12 A From Ms. Shehane.

13 Q Okay. Would you describe the procedure by
14 which you received those comments?

15 A Generally, the comments were written on
16 the draft report in handwriting as to whatever
17 comment they had.

18 Q Did you ever receive comments from
19 Ms. Shehane orally?

20 A Other than discussing her written comments,
21 no.

22 Q Okay. What did you do after receiving
23 those comments?

24 A I discussed each comment with our various

1 consultants.

2 Q Okay. Did you have any contact directly
3 with Engineering Solutions, the county's consultant?

4 A Prior to filing of the application, yes.

5 Q I'm sorry. My questions will all go to
6 the time period between April of 1998 through August
7 13th of 1998.

8 A Thank you.

9 Q Who did you talk to at Engineering
10 Solutions?

11 A Mr. Devin Moose.

12 Q Anybody else?

13 A Some of his staff people.

14 Q Do you remember names?

15 A Jerry Krueger, Amy Schultz, another
16 individual. I don't remember her name.

17 Q Okay. How did you receive the comment
18 from Engineering Solutions?

19 A They were forwarded us through Donna.

20 Q Were they also handwritten on the draft
21 report you had previously submitted?

22 A Yes.

23 Q Did you ever discuss those comments
24 verbally with Engineering Solutions?

1 A Yes.

2 Q About how many conversations did you have
3 with Engineering Solutions?

4 A Probably ten.

5 Q Did you have any contact directly with the
6 subconsultants retained by Engineering Solutions?

7 A Yes.

8 Q Can you name them for me, please?

9 A There was a subconsultant who worked on
10 criterion three, property value impact. His name
11 was Pete Poletti. And then the traffic consultant --
12 and I forget the individual's name, but the firm was
13 KLOA. I don't know what that stands for, but that
14 was the acronym for their firm name.

15 Q Okay. Did you use the same procedure with
16 the subconsultants in that their comments were
17 handwritten on the draft that Waste Management had
18 submitted?

19 A Yes. Generally, yeah.

20 Q And then you followed up with a phone call
21 to each subconsultant?

22 A No. Most of those comments were handled
23 through Mr. Moose.

24 Q Okay. But you did have at least one

1 conversation with each of those two subconsultants?

2 A Yes.

3 Q And the comments that you received from

4 Engineering Solutions and/or its subconsultants, did

5 you pass those on to the authors -- the applicable

6 comments on to the authors of Waste Management's

7 reports?

8 A Yes.

9 Q Did you discuss those comments with those

10 Waste Management consultants?

11 A Yes.

12 Q Okay. Were any changes or revisions made

13 as a result of the comments received from the county

14 or its subconsultants?

15 A Some, yes.

16 Q Were any draft reports resubmitted after

17 revisions were made?

18 A Only as it relates to criteria two and

19 five.

20 Q How many times were those reports

21 resubmitted?

22 A Once.

23 Q Did you get additional comments from the

24 county on those resubmitted reports?

1 A Yes.

2 Q Did you get additional comments from
3 Engineering Solutions on the resubmitted reports?

4 A Yes.

5 Q Did you follow that same procedure of
6 passing those comments on to your consultant?

7 A Yes.

8 Q Were revisions made in response to those
9 additional comments?

10 A Some.

11 Q Is it fair for me to say that all of the
12 comments that were made on the draft reports by
13 Ms. Shehane from the county, Engineering Solutions,
14 and the subconsultants were at least considered by
15 Waste Management?

16 A Yes.

17 Q Is it fair to say that all the comments
18 applicable to their individual reports were
19 considered by Waste Management's consultants?

20 A Yes.

21 Q And just so I'm clear, there are no
22 written documents that exist today that reflect this
23 submission and review procedure?

24 A That is correct.

1 MS. HARVEY: I don't have anything else.

2 HEARING OFFICER KNITTLE: Thank you, Ms. Harvey.

3 Anything from Mr. Porter?

4 MR. PORTER: Yes.

5 CROSS EXAMINATION

6 BY MR. PORTER:

7 Q Mr. Rubak, the county did not instruct

8 Waste Management, Incorporated, what to put in its

9 application, did it?

10 A No.

11 Q The county only made comments to WMI,

12 didn't it?

13 A That's correct.

14 Q Waste Management, Incorporated, alone

15 determined what would be put into the application,

16 correct?

17 A That is correct.

18 Q There was no commitment by Waste

19 Management, Incorporated, to address any of the

20 county's comments, was there?

21 A No.

22 Q There were county comments that were not

23 included in the application, weren't there?

24 A That is correct. It was made very clear

1 to us that these were the county's comments, and we
2 could do what we want with them. Whether we
3 incorporated or not was strictly up to us.

4 Q Waste Management, Incorporated, had no
5 contact with the county board on siting issues
6 either prior to or after the filing of the
7 application; isn't that correct?

8 A That is correct.

9 Q What was with your answer? I'm sorry.

10 A That is correct.

11 MR. PORTER: Nothing further.

12 HEARING OFFICER KNITTLE: Any redirect?

13 MS. HARVEY: No thank you.

14 MR. ETTINGER: I have one question.

15 DIRECT EXAMINATION

16 BY MR. ETTINGER:

17 Q In relation to the gentleman's question
18 here, Waste Management did not have to make any of
19 the revisions. Was it your understanding at the
20 time that these proposed revisions were made --
21 suggested to you that the same county board people
22 who proposed these revisions would later be writing
23 a report that would be filed after the close of the
24 comment period?

1 A No.

2 MR. ETTINGER: Thank you.

3 HEARING OFFICER KNITTLE: Anything else,

4 Mr. Porter?

5 MR. PORTER: No, sir.

6 HEARING OFFICER KNITTLE: Mr. Moran, you didn't

7 have anything?

8 MR. MORAN: I don't now.

9 HEARING OFFICER KNITTLE: Sir, you can step

10 down. Thank you very much.

11 Ms. Harvey, do you have anybody else you

12 would like to call?

13 MS. HARVEY: No. I don't have any further

14 witnesses to call. I do have some documents I'd

15 like to move into the record.

16 HEARING OFFICER KNITTLE: Let's do that now.

17 (Land and Lakes Exhibit No. 2 marked

18 for identification, 6-1-99.)

19 MS. HARVEY: The second document, which would

20 be Land and Lakes Exhibit Number 2, is a document

21 entitled Will County Illinois Request for Proposals

22 Review of Application for Siting Approval of Will

23 County Landfill. It's dated February of 1998.

24

1 (Land and Lakes Exhibit No. 3 marked
2 for identification, 6-1-99.)

3 MS. HARVEY: The third exhibit is dated
4 March 19th, which would be Land and Lakes Exhibit 3.
5 This is entitled The Agreement for the Provision of
6 Professional Services Between the County of Will and
7 Engineering Solutions.

8 I should state for the record that all of
9 these documents were provided in response to Land
10 and Lakes -- with the exception of Land and Lakes
11 Exhibit Number 2, which is the request for
12 proposals, all these documents were provided by the
13 county in response to Land and Lakes' discovery
14 requests. The parties had previously stipulated as
15 to no objection as to the authenticity of the
16 documents, not anything further.

17 HEARING OFFICER KNITTLE: Is that correct?

18 MR. PORTER: We have agreed to the authenticity
19 of the documents, but we will have objections to
20 each and every document possibly.

21 HEARING OFFICER KNITTLE: After she gets
22 through going over them, we'll take them one by
23 one.

24 MS. HARVEY: Land and Lakes Exhibit Number 5 is

1 a series of time sheets from Donna Shehane from

2 March of 1998 through August of 1998 reflecting time

3 spent working on Prairie View.

4 HEARING OFFICER KNITTLE: Did I miss Number 4?

5 I've only got three so far, Ms. Harvey.

6 MS. HARVEY: I'm sorry. You're right. Land

7 and Lakes Exhibit Number 1 is the letter that

8 Mr. Rubak --

9 HEARING OFFICER KNITTLE: Right.

10 MS. HARVEY: Number 2 is the request for

11 proposals. Number 3 is the agreement for provision

12 of professional services. You're correct that this

13 would be Exhibit Number 4.

14 HEARING OFFICER KNITTLE: Thank you.

15 (Land and Lakes Exhibit Nos. 4 and

16 5-A through 5-E were marked for

17 identification, 6-1-99.)

18 MS. HARVEY: Exhibit Number 5 would be a group

19 exhibit. It is a series of invoices from

20 Engineering Solutions to Will County that I will

21 further identify within the group exhibit in a

22 moment.

23 Group Exhibit 5-A -- these are all

24 separately stapled within this bundle. Group

1 Exhibit 5-A has a facsimile cover sheet on it dated
2 June 1st of 1998 and a note indicating it contains
3 backup material for March and April invoices.

4 5-B also has a facsimile cover sheet on it
5 from Engineering Solutions dated August 14th, 1998,
6 and this indicates it includes the project history
7 information sheets for the month of June.

8 HEARING OFFICER KNITTLE: Can I see what that
9 looks like, please?

10 MS. HARVEY: Sure.

11 (Document tendered.)

12 HEARING OFFICER KNITTLE: I've got it.

13 MS. HARVEY: They're all separately stapled
14 within there.

15 HEARING OFFICER KNITTLE: Thank you.

16 MS. HARVEY: So that's 5-B.

17 5-C is an invoice dated July 1st of 1998
18 from Engineering Solutions to Will County.

19 5-D is entitled Engineering Solutions
20 letter of transmittal. It's dated August 28th,
21 1998, and it says it's Will County siting review
22 July invoice and backup material.

23 And Group Exhibit 5-E is Engineering
24 Solutions' invoice to Will County dated September 1st

1 of 1998.

2 And that I believe makes up Group Exhibit 5.

3 (Land and Lakes Exhibit No. 6 marked

4 for identification, 6-1-99.)

5 MS. HARVEY: And the final exhibit, Land and

6 Lakes Exhibit 6, is a February 5th, 1999, letter

7 from the Will County land use department from Dean

8 Olson to Mr. Moran entitled Application for Site

9 Location Approval for Prairie View RDF filed by

10 Waste Management of Illinois, Inc., (Request for

11 Reimbursement of Costs Incurred by the County).

12 And I don't have any other exhibits that

13 I'd like to move into the record.

14 HEARING OFFICER KNITTLE: Okay. Have you

15 offered all of these? Do you want to do them one by

16 one? I understand that there's going to be some

17 objection on each.

18 MS. HARVEY: Then I'll move the admission of

19 Exhibit 1 which is the April 28th, 1998, letter from

20 Hinshaw & Culbertson to attorneys representing Waste

21 Management, Incorporated.

22 HEARING OFFICER KNITTLE: Any objection to this

23 exhibit?

24 MR. MORAN: Yes.

1 HEARING OFFICER KNITTLE: Mr. Moran?

2 MR. MORAN: This letter is addressed to counsel
3 for Waste Management authored by counsel for Will
4 County. It was offered, I assume, for the reason
5 that the language in the first paragraph which
6 Mr. Rubak read indicated that Waste Management may,
7 if it saw fit, submit information to the county
8 which the county could review and provide comment
9 on. That request and that information is in no way
10 relevant to any issues relating to the fundamental
11 fairness of this hearing, so my objection here is on
12 the basis of relevance.

13 HEARING OFFICER KNITTLE: Mr. Porter?

14 MR. PORTER: I join in that objection on the
15 basis of relevance, and counsel has not provided us
16 any insight as to what the relevancy of this
17 document is. In addition, it's clearly hearsay.
18 Though we've agreed to the authenticity of the
19 document, there has been no foundation laid as to a
20 hearsay exception. Mr. Rubak did not testify that
21 this was a business record.

22 HEARING OFFICER KNITTLE: Ms. Harvey?

23 MS. HARVEY: As to the relevancy of the
24 document, I believe the relevancy is that this is a

1 document that communicates directly from the county
2 to Waste Management -- and by the way, Mr. Rubak
3 testified he did see this letter at about the time
4 that it was written -- as to what the procedure was
5 to be for contact on technical issues between the
6 county and Waste Management. Therefore, I do
7 believe it's relevant to our fundamental fairness
8 claim regarding the contact prior to the filing of
9 the application.

10 As to the hearsay claim, as I'm sure you
11 know, the board's procedural rules 103.204 A
12 provides a limited exception to the hearsay rule if
13 the material is relevant and material and would be,
14 quote, relied upon by reasonably prudent persons in
15 the conduct of serious affairs. I think that this
16 document certainly fulfills that; that this is an
17 actual communication between the county -- the
18 county's attorneys, excuse me, and the applicant
19 regarding the procedures to be used, and it's those
20 procedures that are challenged. So I think it,
21 under 103.204 A, should be admitted regardless of
22 its status as hearsay.

23 MR. ETTINGER: And it's an admission against
24 interest.

1 HEARING OFFICER KNITTLE: Anything else?

2 MR. PORTER: I stand by the hearsay objection

3 and primarily the relevancy objection previously

4 stated.

5 HEARING OFFICER KNITTLE: Mr. Moran?

6 MR. MORAN: I, again, just affirm that there's

7 been no establishing of any relevance to this

8 paragraph.

9 HEARING OFFICER KNITTLE: I'm going to admit

10 this into evidence over objection.

11 (Land and Lakes Exhibit No. 1

12 admitted into evidence.)

13 HEARING OFFICER KNITTLE: Next exhibit?

14 MS. HARVEY: The next exhibit, which is Land

15 and Lakes Exhibit Number 2, is the Will County

16 Request for Proposals Review of Application for

17 Siting Approval dated February of 1998, and I will

18 move this into evidence.

19 HEARING OFFICER KNITTLE: Objections?

20 MR. MORAN: Yes.

21 HEARING OFFICER KNITTLE: Mr. Moran?

22 MR. MORAN: Again, what we have here is a

23 request for a proposal to review an application. It

24 is -- it appears to be a somewhat generic document

1 as it was put together for purposes of obtaining
2 these requests. There's no indication as to how in
3 any way it relates to the contention that the
4 proceedings before the Will County Board and the
5 siting application were fundamentally unfair. I
6 mean, there's just absolutely no probative value to
7 this document, and I object on relevance grounds.

8 HEARING OFFICER KNITTLE: Mr. Porter?

9 MR. PORTER: I join in that objection, and I'd
10 like to add that there has been no showing as to
11 what the county's contact with its reviewing
12 consultant has to do with the county board's
13 decision. It's just simply not relevant.

14 MS. HARVEY: The relevancy of the document goes
15 to what it is that the county asked its consultant
16 to do.

17 On the second page of the document under
18 scope of work, it specifically explains -- in the
19 third sentence, it says: During Phase 1, all of the
20 details of the proposal siting application will be
21 reviewed prior to submittal of the actual
22 application. The selected consultant will be asked
23 to provide technical assistance to county staff on
24 an as-needed basis regarding the proposed

1 application.

2 The relevance of this document is that it
3 shows what it was the county wanted its consultant
4 to do during this, what they themselves call, Phase 1.
5 It certainly is relevant to Land and Lakes' claim
6 that that prefiling review was fundamentally
7 unfair. It establishes that in February of '89
8 that's what the county wanted to do.

9 HEARING OFFICER KNITTLE: Mr. Porter, you look
10 like you want to say something.

11 MR. PORTER: Again, apparently their cause of
12 action has just changed to the point where a county
13 no longer has the right to hire a consultant. It's
14 not relevant to what the petition says their cause
15 of action is here.

16 MS. HARVEY: Land and Lakes does not claim that
17 the county can't hire consultants. In fact, we
18 believe that they can.

19 The problem is what this consultant was
20 asked to do in terms of our claim again that it is
21 fundamentally unfair to review the actual draft
22 reports that subsequently were revised and were
23 turned into the final siting application. We have
24 no problem with them hiring a consultant. It has to

1 do with what the consultant was asked to do.

2 HEARING OFFICER KNITTLE: This document will be
3 admitted as well on that basis.

4 (Land and Lakes Exhibit No. 2
5 admitted into evidence.)

6 HEARING OFFICER KNITTLE: Number 3.

7 MS. HARVEY: Exhibit Number 3 is -- Land and
8 Lakes Exhibit 3 is the March 19th, 1998, agreement
9 for the provision of professional services between
10 the County of Will and Engineering Solutions.

11 Also, for the record, I would like to
12 state that the handwriting that's on the copies is
13 not my handwriting. It was on the copies that I
14 received from county.

15 Just to head off or to respond to the
16 relevancy objection that I'm sure is coming, in
17 section 1.2 of this contract, which is on page 2 of
18 the contract, it specifically sets out the consultant's
19 obligations during Phase 1 of the application review
20 process, specifically subsection A: Assist the
21 county with the review of the applicant's draft
22 siting application to determine its compliance with
23 the requirements of section 39.2 of the Illinois
24 Environmental Protection Act, the Illinois Pollution

1 Control Board regulations, and the county's local
2 siting ordinance. I believe it's relevant to show
3 that that's what it was to do.

4 HEARING OFFICER KNITTLE: Mr. Moran?

5 MR. MORAN: Yes. I object. In looking at that
6 section 1.2 that Ms. Harvey just pointed out, she
7 misread that first subparagraph A. It says assist
8 the county with the review of the applicant's
9 finalized siting application.

10 Clearly, we have an agreement here that
11 addresses the consultant's responsibility to review
12 the siting application once its filed. How that has
13 any relevance to what we're considering here I have
14 not been able to discern.

15 MS. HARVEY: Mr. Moran, my copy on page 2,
16 section 1.2 A says assist the county with the review
17 of the applicant's draft siting application.

18 MR. MORAN: Well, the copy you handed me --

19 MS. HARVEY: Page 2.

20 MR. MORAN: I'm sorry.

21 Phase 2 indicates what we're referring to
22 is the finalized siting application. Ms. Harvey is
23 correct. Section 1.2, Phase 1 indicates the draft
24 application. Either way, as I pointed out

1 previously, this county has the right to review
2 obviously the finalized siting application. Any
3 drafts that are prepared, as Mr. Rubak pointed out,
4 that were reviewed and any changes that were made
5 were made part of the final siting application.
6 That's what we have here. That's what was reviewed.
7 This agreement doesn't add any probative or relevant
8 evidence that relates to that fundamental fairness
9 issue.

10 We've already heard from Mr. Rubak. We
11 already have this request for proposal from Will
12 County in. The relevance between the fundamental
13 fairness claim and these reviews, which in some
14 instances resulted in a change which was made part
15 of the final siting application, can't be probative
16 of any fundamental fairness issue.

17 HEARING OFFICER KNITTLE: Mr. Porter?

18 MR. PORTER: I join in the relevancy objection,
19 as well as the cumulative objection. We've now
20 heard several pieces of evidence that Engineering
21 Solutions was going to review the draft siting, as
22 well as county. So how many pieces of evidence are
23 we going to submit that the county looked at some
24 drafts as did Engineering Solutions?

1 Also, this particular document may contain
2 attorney-client privileged communications. I don't
3 know whose handwriting this is on the right-hand
4 side. It mentions Paul Heltsen. If this is a
5 county document, that's maybe the note of a county
6 employee. I guess I'm objecting on that grounds as
7 well.

8 MS. HARVEY: Well, I think clearly --

9 HEARING OFFICER KNITTLE: Are you making a
10 claim of attorney-client privilege? And if so,
11 please specify what it is.

12 MR. PORTER: I am aware that we have already
13 produced this, so I will not make that claim.

14 HEARING OFFICER KNITTLE: Thank you.

15 Ms. Harvey?

16 MS. HARVEY: I wanted to clarify for the record
17 that it is indeed page 2 that says draft siting, and
18 it's page 3 that talks about the finalized siting.
19 I just want to be sure the record is clear.

20 HEARING OFFICER KNITTLE: Okay.

21 MS. HARVEY: As to the cumulative objection --
22 I think I've already addressed relevancy -- it does
23 show, if you will, the course that the county and
24 its consultant undertook issuing their request for

1 proposals, then subsequently actual contracting with
2 Engineering Solutions as the selected entity to
3 perform the review.

4 HEARING OFFICER KNITTLE: Okay. This will be
5 admitted as well over objection.

6 (Land and Lakes Exhibit No. 3
7 admitted into evidence.)

8 HEARING OFFICER KNITTLE: Let's move onto the
9 time sheets.

10 MS. HARVEY: Exhibit Number 4, as I stated, are
11 time sheets from Donna Shehane from March of 1998
12 through August of 1998 reflecting her work on the
13 Prairie View facility during that time period. It's
14 relevant to show the extent of the county's review
15 of these draft siting applications -- or draft
16 siting reports, if you will.

17 HEARING OFFICER KNITTLE: Respondents?

18 MR. MORAN: I object, again, on the basis of
19 relevance, but moreover, these employee time and
20 activity reports only reflect purportedly a number
21 of hours spent by Ms. Shehane on something she calls
22 Prairie View. As we've heard previously, Prairie
23 View included any matters that apparently related to
24 the property itself, the Joliet Army Ammunition

1 Plant property. It may have related to contractual
2 matters. It may have related to issues that had
3 nothing to do with the siting of this case.

4 So I think for that reason alone without
5 any explanation as to what these hours relate to it
6 can't be probative even for the issues that Land and
7 Lakes is attempting to present it for. That is this
8 fundamental fairness issue related to the presiting
9 application review. So for those two bases, I
10 object to this.

11 MR. PORTER: And I join in that objection.
12 Mr. Moran stole my thunder. There's no doubt that
13 this is completely irrelevant without that
14 foundation.

15 HEARING OFFICER KNITTLE: Ms. Harvey, maybe you
16 can explain to me why this is relevant.

17 MS. HARVEY: Maybe we need to jump to Exhibit 6.
18 This essentially buttresses some of the information
19 in Exhibit 6, which Exhibit 6 is the February 5th of
20 1999 letter to Mr. Moran from the Will County land
21 use department.

22 This document is a compilation of what --
23 on the second page of this document, it says siting
24 application filing fee for Prairie View RDF Will

1 County, Illinois, moneys expended in preparing for
2 processing, reviewing, and evaluating the
3 application to its final resolution. These pages
4 unfortunately are not numbered, but if you go back
5 to -- actually, it's easier to go -- it's the fourth
6 page from the back.

7 HEARING OFFICER KNITTLE: Counting the back
8 page?

9 MS. HARVEY: Yes. Under number 8, it says
10 Donna Shehane -- number 8 says county staff hours;
11 A, Donna Shehane waste services; number, 1 review of
12 the draft application, 400 hours. These time sheets
13 reflect that 400 hours that are listed in the
14 document as being a review of the draft siting
15 application that was subsequently actually paid for
16 by Waste Management as part of its siting application.

17 HEARING OFFICER KNITTLE: Why don't you address
18 Exhibit 6 as well? Do you have anything you want to
19 add on that?

20 MS. HARVEY: Simply that this exhibit is a
21 summary of all of the expenses incurred by the
22 county in hearing the siting application, not the
23 contractual issues, not any of the investigative
24 issues, but the siting application itself. That's

1 the title of the document.

2 In addition to presenting the 400 hours of
3 review by Ms. Shehane, it summarizes the invoices of
4 Engineering Solutions on the second page of the
5 document showing its extensive review of the draft
6 siting application or at least a total of it. The
7 figures up through August of 1998 add up to about
8 \$75,000. In other words, it shows that it was an
9 extensive review. It was not a review done in a
10 short matter of time, rather briefly.

11 HEARING OFFICER KNITTLE: Thank you.

12 Is there anything else after the
13 clarification on Exhibit 4 regarding Exhibit 4 from
14 Mr. Moran or Mr. Porter?

15 MR. PORTER: I still don't believe that adds
16 the sufficient clarification that this was as to
17 exactly what Donna Shehane was doing.

18 HEARING OFFICER KNITTLE: Okay. Mr. Moran?

19 MR. MORAN: I have no further response.

20 HEARING OFFICER KNITTLE: I'm going to allow
21 this based on the fact that it looks like you can
22 extrapolate that it's a review of the draft
23 application, and I think the board would want to see
24 this, and it meets our evidentiary requirements and

1 other regulations. So Exhibit 4 is admitted.

2 (Land and Lakes Exhibit No. 4

3 admitted into evidence.)

4 HEARING OFFICER KNITTLE: What about objections

5 to Exhibit 6? You've offered that as well?

6 MS. HARVEY: Yes, please. I would move

7 Exhibit 6 into evidence.

8 MR. MORAN: Yes. I object on the basis, again,

9 of relevance, also on the basis that the document

10 includes within it apparently invoices that go

11 beyond the period that Land and Lakes is contending

12 is relevant here. You've got a lot of entities

13 post-August 14th, 1998.

14 The other objection is that clearly this

15 letter was sent pursuant, as it indicates, to the

16 Will County siting ordinance, and the act itself

17 provides that the applicant is responsible to pay

18 the reasonable expenses of the county board or the

19 decision maker in connection with the siting

20 process.

21 So for the relevance objections and also

22 the objections that you have material here that

23 clearly is not relevant to any of the issues that

24 Land and Lakes has raised and that we can't separate

1 out clearly, even with these designations without
2 some testimony, as to what those hours were that are
3 differentiated between pre-August 14th and
4 post-August 14th. We object to that as well.

5 HEARING OFFICER KNITTLE: Mr. Porter?

6 MR. PORTER: I join in that objection.

7 I would add that I think that this
8 document lacks foundation. I don't believe that
9 there's been sufficient testimony that each of the
10 charges even preapplication were indeed incurred for
11 reviewing those drafts that the Petitioners are
12 considering for relevancy, and I'll reiterate my
13 hearsay objection from earlier.

14 MS. HARVEY: As to the hearsay claim, I would
15 only respond that I believe, again, this falls under
16 the exception of the board's rules as an
17 administrative agency for material that is relevant
18 material and would reasonably be relied upon by
19 persons in the conduct of serious affairs.

20 I also think this arguably falls under the
21 exception for business records in 103.208; that it's
22 certainly admissible of the act of asking Waste
23 Management to reimburse the county for what the
24 county itself says are expenses incurred in the

1 consideration of the siting application, not in any
2 of the contractual issues.

3 As to Mr. Moran's objection about some of
4 this information goes beyond, it certainly does. We
5 don't intend to use it to argue anything other than
6 things prior to August 14th of 1998, but I can't
7 redact a copy of the information. That would be
8 wrong.

9 HEARING OFFICER KNITTLE: Okay. I'm going to
10 admit this. I think the board is capable of
11 disregarding dates that are not relevant to the
12 petition.

13 As to the hearsay objection, I agree with
14 Ms. Harvey in that 103.204 answers that question.
15 There also does seem to be, if there had been
16 appropriate foundation laid, a business record. So
17 I'm admitting this.

18 (Land and Lakes Exhibit No. 6
19 admitted into evidence.)

20 HEARING OFFICER KNITTLE: Let's go to Group
21 Exhibit Number 5.

22 MS. HARVEY: Group Exhibit Number 5 is, as I
23 stated, a series of invoices from Engineering
24 Solutions to the County of Will covering the time

1 period -- I believe actually the first work is from
2 March 23rd, 1998, through -- the invoice is dated
3 September of 1998. However, that September invoice
4 reflects work through August 13th of 1998.
5 Anticipating an objection, I will indicate again
6 that Land and Lakes will use the September invoice
7 only to argue as to events prior to August 14th,
8 1998. But, again, those are all contained in the
9 same invoice.

10 This information is relevant because it
11 includes indications of what the services performed
12 by Engineering Solutions was. For example, on the
13 heading of the May 1st, 1998, invoice, which is in
14 5-A, it states: Services consisted of review of
15 preliminary application materials. There are
16 several other similar descriptors of work that was
17 done throughout this four-month time period, and
18 what Engineering Solutions has referred to as backup
19 materials is more specific as to the actual hours
20 spent and, in some cases, on which criteria
21 Engineering Solutions was providing review.

22 Again, going to the issue, this was an
23 extensive review undertaken by Engineering Solutions
24 as to almost all of the application.

1 HEARING OFFICER KNITTLE: Mr. Moran?

2 MR. MORAN: Yes. I object on the basis of
3 relevance. Again, here we have aggregate
4 descriptions of work that was performed for -- I
5 can't tell looking at this document what
6 specifically was done. We don't know what aspects
7 of any draft was being reviewed, what comments were
8 provided. There's just simply no way to know, and
9 to try to tie this into some relevance for the
10 issues raised by Land and Lakes, I can't do it
11 looking at this document. So therefore, I don't
12 think it's probative of anything. It doesn't help
13 us, apart from having specific testimony from an
14 individual, address any of these issues, and I don't
15 think this document adds anything to our inquiry as
16 to fundamental fairness.

17 HEARING OFFICER KNITTLE: Mr. Porter?

18 MR. PORTER: I obviously join in that
19 objection. I'm just going through 5-A. The one
20 reference that counsel made appears on page 4, and I
21 don't see that it appears anywhere else within this
22 document, so why that entire group exhibit should be
23 admitted hasn't been explained. It's irrelevant.
24 And I imagine we can do the same review of the

1 remaining group exhibits.

2 I'm now flipping through B, and I have yet
3 to see that it mentions anything about reviewing the
4 application. So again, it's irrelevant, and even --
5 I would like to add one other one. Even if it did
6 mention reviewing the application, it's clearly
7 cumulative. We now have several documents saying
8 Engineering Solutions did indeed review the draft
9 application before it was filed.

10 We did not mention it one time, and C
11 likewise does not mention review of the
12 application. D -- unless counsel can point out, I
13 don't see that D references review of the
14 application.

15 MS. HARVEY: I can point Mr. Porter to the
16 reference in C. On the very first page, it says at
17 the top: Services consisted of reviewing criteria
18 1, 2, 3, 4, 5, 6, 7 and 9; meetings, conference
19 calls, and correspondence with client Waste
20 Management, Rust, and subconsultants, and copies and
21 supplies from meetings.

22 MR. PORTER: I'm sorry, counsel. Point that
23 out again.

24 MS. HARVEY: At the top, 5-C is the July 1st

1 invoice.

2 MR. PORTER: So not in A or B.

3 MS. HARVEY: Well, A does reference the
4 preliminary review of the preliminary applications.

5 MR. PORTER: Again, review of material 1, 2, 3,
6 4, 5, 6, 7, and 9 doesn't say anything about the
7 application. Engineering Solutions was indeed hired
8 to review the criteria in this case, so my objection
9 continues.

10 And as well, on 5-E I see it does say
11 review of criteria. There's one reference to review
12 of filed application. Well, that's clearly
13 irrelevant. They're acknowledging that Engineering
14 Solutions can review the filed application.

15 MS. HARVEY: Again, perhaps -- I would be happy
16 to either go through these exhibit by exhibit, or I
17 can give you an idea of what the purpose we believe
18 this serves.

19 HEARING OFFICER KNITTLE: I think it would be
20 helpful for the record if we had a better idea.

21 MS. HARVEY: On each?

22 HEARING OFFICER KNITTLE: Yes.

23 MS. HARVEY: Group Exhibit 5-A on the fourth
24 page specifically says services consisted of review

1 of preliminary application materials. The
2 supporting documents or what Engineering Solutions
3 referred to as backup history or backup documents
4 specifically breaks down by day and time and
5 individual what they performed. There is
6 handwritten on the last two pages of this an
7 indication of which criteria was being reviewed. I
8 think that's pretty clear that they were reviewing
9 criterion two and, in a lesser case, criterion four
10 on this. They themselves say review of preliminary
11 application.

12 MR. PORTER: Again, I think it's cumulative,
13 but at a minimum, pages 1, 2, and 3 then should not
14 be admitted. They're two different bills of Exhibit
15 5-A.

16 MS. HARVEY: You'll see that page 3 does refer
17 to review of criteria two five different times.

18 HEARING OFFICER KNITTLE: I'm going to admit
19 this one.

20 (Land and Lakes Exhibit No. 5-A
21 admitted into evidence.)

22 HEARING OFFICER KNITTLE: Let's go onto B.

23 MS. HARVEY: B is the August 14th 1998 fax to
24 the county from Engineering Solutions with, as they

1 call it, revised project history information for the
2 month of June.

3 There are a number of pages. I believe
4 there's 13 pages following that cover sheet that is
5 a breakdown of the activities undertaken by
6 Engineering Solutions during the month of June on
7 the application. It is not arranged by criterion.
8 However, I think you will see that what they were
9 hired for on this was to review this draft siting
10 application during this phase prior to the filing.
11 I think it's fairly clear that what they were
12 reviewing was indeed -- this is a bill from
13 Engineering Solutions to the county. Engineering
14 Solutions was retained to review the preliminary
15 siting application at this period of time. They had
16 other duties afterwards, and we're not contending
17 that those duties are at issue here.

18 HEARING OFFICER KNITTLE: And this is related
19 to fundamental unfairness?

20 MS. HARVEY: Because it shows the extensive
21 nature of the review that was undertaken by
22 Engineering Solutions.

23 Part of Land and Lakes' argument is that
24 this is not a case where Waste Management prepared a

1 draft application, submitted it to the county, the
2 county looked at it for a day, and said I don't know
3 if I like this or I don't like this and sent it back
4 to them. This is a case where there was prolonged,
5 extensive contact and review between Engineering
6 Solutions, the county, its subconsultants, and Waste
7 Management and that this indicates the extensive
8 nature of that review.

9 HEARING OFFICER KNITTLE: Mr. Porter?

10 MR. PORTER: I'll reiterate, Engineering
11 Solutions did not vote on the siting application,
12 and obviously the county would have been remiss not
13 to conduct extensive review in this case. Beyond
14 that, this particular 5-B never references the
15 application.

16 HEARING OFFICER KNITTLE: I admit it over
17 objections.

18 (Land and Lakes Exhibit No. 5-B
19 admitted into evidence.)

20 HEARING OFFICER KNITTLE: Let's go on.

21 MS. HARVEY: 5-C is the July 1st of 1998
22 invoice. The heading on that says services
23 consisted of review of criteria 1, 2, 3, 4, 5, 6, 7,
24 and 9; separate entry, meetings, conference calls,

1 and correspondence with client Waste Management,
2 Rust, and subconsultants, and copies and supplies
3 for meetings.

4 This invoice is actually broken down by
5 criteria. You will see on the subsequent pages that
6 it says -- for example, the first one is criteria
7 two. Then it's broken down into labor and
8 expenses. Criteria one also broken down to labor
9 and expenses and so forth throughout the criteria.

10 HEARING OFFICER KNITTLE: Do you have any
11 objections to this?

12 MR. PORTER: I believe I stated them earlier.

13 HEARING OFFICER KNITTLE: You stand by your
14 previous objections?

15 MR. PORTER: Yes.

16 MR. MORAN: As do I.

17 HEARING OFFICER KNITTLE: I admit this one.

18 (Land and Lakes Exhibit No. 5-C
19 admitted into evidence.)

20 HEARING OFFICER KNITTLE: 5-D?

21 MS. HARVEY: 5-D is the August 28th, 1998,
22 letter transmittal from Engineering Solutions to --
23 well, it's addressed to Dean Olson and Donna Shehane
24 enclosing the July invoice and detailed description

1 of work performed on the project.

2 On the second page of that, it says
3 services consisted of further review of criteria 2,
4 3, 4, 6, and 8; correspondence with client Waste
5 Management, Rust, and subconsultants, and copies and
6 shipping charges for correspondence.

7 Again, this invoice is also broken down by
8 criteria by labor and expenses. This document
9 includes the transmittal sheet, the actual invoice,
10 and then attached to the back is apparently
11 Engineering Solutions' computer printout of the
12 actual activity type, again, broken down by the
13 criteria.

14 MR. PORTER: Once again, the services consisted
15 of do not reference review of the draft application
16 and cumulative and relevancy.

17 HEARING OFFICER KNITTLE: Mr. Moran?

18 MR. MORAN: I just restate my objection
19 previously. There's not sufficient detail. You
20 can't make hide nor hare of what's in this or what
21 it means. It isn't relevant.

22 HEARING OFFICER KNITTLE: Thank you. I'm going
23 to admit this one as well.

24

1 (Land and Lakes Exhibit No. 5-D
2 admitted into evidence.)

3 HEARING OFFICER KNITTLE: 5-E?

4 MS. HARVEY: 5-E is the September 1st of 1998
5 invoice. Again, as I stated earlier, we'll be
6 using -- we'll be arguing only as to activities
7 performed by Engineering Solutions up through
8 August 13th of 1998.

9 The services consisted of reviewing of
10 criteria 2, 5, 6, and 8. It does say a review of
11 filed application. We have not raised that, nor
12 will we. Correspondence with clients REI and WMI
13 and copy, fax, and Fed Ex charges for correspondence.
14 Again, this invoice is broken down by review of
15 criteria, including the dates on which those
16 criteria were reviewed, so it's easy to see whether
17 that was the filed or the draft application, and
18 again, at the back the computer printout by
19 Engineering Solutions as to actually what happened
20 on what day.

21 HEARING OFFICER KNITTLE: Thank you.

22 Objections?

23 MR. PORTER: Same as before regarding the filed
24 application: Relevance, cumulative.

1 HEARING OFFICER KNITTLE: Mr. Moran?

2 MR. MORAN: Same objections as stated before.

3 HEARING OFFICER KNITTLE: Thank you.

4 I'll admit this as before over objections.

5 (Land and Lakes Exhibit No. 5-E

6 admitted into evidence.)

7 HEARING OFFICER KNITTLE: Ms. Harvey, do you

8 have anything else?

9 MS. HARVEY: No, I don't. Thank you,

10 Mr. Knittle.

11 HEARING OFFICER KNITTLE: Mr. Ettinger, are you

12 going to want -- are you going to call witnesses?

13 MR. ETTINGER: I have no witnesses. I have a

14 series of documents to present which they may not

15 like either.

16 HEARING OFFICER KNITTLE: Let's take a break

17 before we do that. Ten minutes.

18 (Whereupon, a recess was taken.)

19 HEARING OFFICER KNITTLE: Let's go back on the

20 record. It's Al Ettinger, Sierra Club case.

21 MR. ETTINGER: Correct.

22 I have a couple of offers of proof first.

23 Mr. Knittle ruled the testimony of Charles Norris

24 was excluded from this hearing. I wish to offer

1 proof as to what Mr. Norris would have said.

2 HEARING OFFICER KNITTLE: Can I interject,
3 please? Just for the record, my ruling was that
4 Mr. Norris cannot testify to the adequacy of the
5 conditions attached to the decision. I did not
6 exclude all of his testimony if, in fact, there was
7 anything else he wanted to testify to. All I did
8 was grant the motion in limine for that limited
9 purpose.

10 MR. ETTINGER: Well, the motion in limine will
11 speak for itself. I believe this offer of proof
12 could be characterized as offering evidence
13 regarding the adequacy of the conditions. We'll, of
14 course, take that up.

15 I do wish to, in addition to this, explain.
16 There was discussion on, I guess, Friday about us
17 making a motion for reconsideration to the board,
18 and it was decided that that could not be ruled upon
19 before Thursday. But conceivably, Mr. Norris could
20 have testified on Friday. I elected not to make
21 that motion because Mr. Norris is not, in fact,
22 available on Friday or -- in fact, until June 17th
23 because he is working on a federal case regarding
24 mountain top removal in West Virginia, so I elected

1 not to make that motion for reconsideration at that
2 time.

3 Having said that, I would just like to put
4 this offer of proof in the evidence.

5 HEARING OFFICER KNITTLE: This is an offer of
6 proof of the testimony of Charles Norris.

7 Mr. Ettinger, do you have any argument that you want
8 to make on this?

9 MR. ETTINGER: Well, you have ruled. I don't --
10 I don't --

11 HEARING OFFICER KNITTLE: If you want to say
12 something about your offer of proof, you can state
13 it.

14 MR. ETTINGER: Well, I will just state that I
15 believe that the offer of proof will show that, in
16 fact, the conditions attached to the Will County
17 Board's approval of the permit do not fix the
18 problems and that it is our belief and we will argue
19 that attaching conditions which were not discussed
20 at the hearing in any way and which the Petitioners
21 had no opportunity to comment on and using those
22 conditions as part of the rationale for approval of
23 the permit is fundamentally unfair.

24 We also believe that some of the conditions

1 that were attached, in fact, weakened the permit and
2 that that was also fundamentally unfair to weaken
3 the application without giving us an opportunity to
4 comment in any way on that matter.

5 HEARING OFFICER KNITTLE: Okay.

6 MR. ETTINGER: Our second offer of proof is the
7 petition for review of decision by Kathleen --

8 HEARING OFFICER KNITTLE: Can you hold on a
9 sec, sir? I just want to make sure that we're
10 accepting this offer of proof for the board. If you
11 have any comment you want to make, you will be able
12 to respond, of course, in writing also.

13 MR. PORTER: Our objections to the testimony of
14 Mr. Norris stand.

15 HEARING OFFICER KNITTLE: Okay. Mr. Moran, did
16 you have anything?

17 MR. MORAN: Just the understanding that this is
18 not obviously being admitted as evidence in this
19 record, just made part of the record for purposes of
20 whatever it's worth, and obviously we haven't
21 reviewed it, so we don't know what it says.

22 HEARING OFFICER KNITTLE: Understood. Thank
23 you.

24 You can go ahead, Mr. Ettinger.

1 MR. ETTINGER: Okay. The second offer of proof
2 relates to the testimony that would have been
3 offered by Kathleen Konicki. Now, we don't know.
4 Perhaps she will be able to offer some testimony
5 depending on her appeal of the temporary restraining
6 order that has been entered against her.

7 Because of the temporary restraining
8 order, I have not been able to talk to Ms. Konicki,
9 so I don't know what she would have said exactly, so
10 I'm offering as an offer of proof her petition for
11 review which was filed in the Pollution Control
12 Board.

13 I would also like to note that there are
14 particular paragraphs of the petition which contain
15 the testimony that we believe would have been
16 relevant to the fundamental fairness of this
17 proceeding, and those are paragraph 16, paragraph 17,
18 paragraph 18, paragraph 21, and paragraph 22.

19 MS. ZEMAN: Could you repeat those, please?
20 Sixteen, 17?

21 MR. ETTINGER: Eighteen, 21, and 22.

22 MS. ZEMAN: Thank you.

23 HEARING OFFICER KNITTLE: Is that it,
24 Mr. Ettinger, on the offer of proof?

1 MR. ETTINGER: That's it for offers of proof.

2 HEARING OFFICER KNITTLE: Did any of the
3 Respondents have anything you wanted to state about
4 this second offer of proof?

5 MR. HELSTEN: Could we review it a little?

6 HEARING OFFICER KNITTLE: Do you want to take a
7 couple minutes?

8 MR. HELSTEN: Yes.

9 HEARING OFFICER KNITTLE: Okay. I'll give you
10 five. Let's go off the record.

11 (Whereupon, a discussion was
12 held off the record.)

13 HEARING OFFICER KNITTLE: We're back on the
14 record. I asked Respondents if they had any
15 comments about offer of proof number two. Will
16 County Board is reviewing it and will have comments
17 momentarily, but, Mr. Moran, I think you have
18 something now.

19 MR. MORAN: Thank you.

20 The whole notion that we submit an offer
21 of proof for evidence that as counsel has indicated
22 has not been verified of late, has indicated he
23 hasn't talked to Konicki lately about what's in
24 here, he hasn't confirmed that, in fact, if she were

1 here today and you admitted or allowed her to
2 testify, she would testify to the things contained
3 in this document is just extremely unusual. I've
4 never seen a situation where someone makes an offer
5 of proof and says well, I don't know. I haven't
6 talked to the person whose testimony I'm offering,
7 but I think simply to protect something, I'm not
8 sure what we're protecting, I want to offer a
9 petition that was already filed in an appeal that's
10 been dismissed.

11 I don't know that I necessarily could even
12 object to an offer of proof if it was properly
13 presented, but based upon what Mr. Ettinger said
14 about his dealings with Ms. Konicki, I don't believe
15 there's any basis on which in all good conscience
16 the board can accept that offer of proof. There's
17 no indication that if she were here today she'd
18 state any of the things in here. In fact, he said
19 just the opposite; that he doesn't know what she
20 would say because nobody knows what she would do if
21 she were here.

22 So I object to the offer of proof on that
23 basis. I don't know that I've ever done this
24 before, but this is just highly unusual.

1 HEARING OFFICER KNITTLE: Mr. Porter?

2 MR. PORTER: I have several comments.

3 First of all, this does not appear to be
4 an offer of proof. This is a refile of a petition
5 of Kathleen Konicki, and she has been dismissed from
6 this case, so I join in counsel's comments.

7 Also, this petition contains various
8 statements which in and of themselves are
9 inadmissible for reasons beyond that contained in
10 our motion in limine or the gag order.

11 Furthermore, our motion in limine has not
12 been ruled upon yet, so I don't see how we can even
13 argue whether or not the specifics would have been
14 admissible or not. Our motion in limine did have
15 specific grounds and was limited to some certain
16 testimony. I suppose there's some testimony
17 Ms. Konicki could have provided, though I don't
18 agree because it wasn't disclosed to us.

19 Now, having said all that, in addition,
20 this offer of proof violates a court order which is
21 presently in place restraining Ms. Konicki from
22 making certain statements, and I want it clear that
23 the county is in no way waiving its rights under
24 that order.

1 Furthermore, this document contains
2 testimony as to the mental impressions of various
3 third parties which, again, is a separate ground
4 beyond that contained in the court order which is
5 currently barring Ms. Konicki from testifying for
6 exclusion of the testimony. She's trying, through
7 this petition, I assume, to present evidence that
8 the board had a certain impression in regard to
9 Mr. Helsten's representation of it, and she cannot
10 conjecture as to what the mental impressions are of
11 several other members of the board.

12 This document is a rank conclusion and
13 surmise, and it's pure argument, and it is not a
14 valid offer of proof.

15 HEARING OFFICER KNITTLE: Mr. Ettinger, do you
16 have anything?

17 MR. ETTINGER: Well, first of all, I'm not
18 really sure how we argue with offers of proof.
19 That's a difficult issue.

20 I guess the first point I would make is
21 that the county has got a lot of chutzpah getting an
22 order telling me that I can't talk to somebody and
23 then criticizing me for not talking to her. And the
24 particular paragraphs that we offered here are

1 covered by the TRO which the county secured. These
2 deal with discussions with counsel and that these
3 are listed counsel in the TRO. So I simply do not
4 see how that objection can have any validity
5 whatsoever.

6 I think all of these comments reflect
7 firsthand knowledge from Ms. Konicki which would
8 have been arguably admissible had we been allowed to
9 make them. For example, she reports statement made
10 at the public hearing that Mr. James Glasgow,
11 state's attorney of Will County, told the board for
12 the first time that Mr. Helsten did not represent it
13 but instead represented the waste services
14 division.

15 HEARING OFFICER KNITTLE: Hold on a second,
16 Mr. Ettinger.

17 MR. PORTER: Well, it's difficult, again,
18 because I'm objecting to an offer of proof, but that
19 is clearly hearsay and is not admissible despite
20 what counsel just said in and of itself. It isn't a
21 direct observation of Ms. Konicki.

22 HEARING OFFICER KNITTLE: I agree. Let me say
23 what I think about this, Mr. Ettinger. I am not
24 sure about my ability to deny an offer of proof.

1 I'm going to deny this, and it's going to still come
2 into the board's offices. If they disagree with me,
3 they can reconsider. But what I'm going to ask you
4 to do since an offer of proof is pretty much the
5 attorney or the witness saying what he would testify
6 to if, in fact, he or she were allowed to testify,
7 I'm going to ask you to summarize what you think
8 Kathleen Konicki would say if she were called to
9 testify. I'm going to accept that as an oral offer
10 of proof. I think it's inappropriate to accept her
11 petition as an offer of proof.

12 MR. ETTINGER: Okay. I believe -- and once
13 again, I've not been able to talk to Ms. Konicki
14 about these matters. I believe she would testify
15 regarding these statements which she heard made by
16 Mr. James Glasgow and the statements that she heard
17 made by Ms. Zeman and the statements that she heard
18 made by Mr. Helsten in meetings relating to who
19 Mr. Helsten represented, and also in particular that
20 she will -- would have testified that Ms. Zeman
21 advised the board's three-member siting committee
22 that it did not need to do its own report or
23 recommendation but simply involved the waste county
24 services division and that that was -- that's what

1 the committee did with no debate or discussion.

2 I believe she would also testify because

3 she was there and heard this that Ms. Zeman then

4 advised the board that this report was a good report

5 and that the board should adopt it as its own

6 decision. Ms. Konicki will also testify that

7 Ms. Zeman then vouched personally to the board for

8 the integrity of an applicant's experts. The board

9 then adopted the report as its decision.

10 HEARING OFFICER KNITTLE: I'll accept that as

11 an oral offer of proof as to what she would testify

12 if she were able to.

13 MR. PORTER: May I make a record?

14 HEARING OFFICER KNITTLE: Yes, you can,

15 definitely.

16 MR. PORTER: Again, counsel prefaced his

17 comments by he did not know what she would say, and

18 therefore, under the law that's an insufficient

19 offer of proof.

20 HEARING OFFICER KNITTLE: Mr. Moran, did you

21 have anything else?

22 MR. MORAN: Nothing further.

23 HEARING OFFICER KNITTLE: Okay. Mr. Ettinger,

24 let's move on with your case-in-chief.

1 MR. ETTINGER: Okay. And you're aware, I have
2 no witnesses. The witnesses that I was going to
3 offer were Mr. Norris and Ms. Konicki.

4 I have a series of exhibits. The first
5 one I'm not certain needs to be an exhibit, but I
6 want to make sure it's in the record if it's not
7 already, which is the Will County ordinance relating
8 to the siting.

9 HEARING OFFICER KNITTLE: This is Sierra Club
10 Number 1.

11 MR. ETTINGER: That's Sierra Club Number 1.

12 (Sierra Club Exhibit No. 1 marked for
13 identification, 6-1-99.)

14 MR. ETTINGER: Should I present all of these at
15 once and then argue them?

16 HEARING OFFICER KNITTLE: Let's go through them
17 one at a time. Otherwise, we have two summaries.
18 You're admitting this into evidence?

19 MR. ETTINGER: Yes.

20 HEARING OFFICER KNITTLE: Are there any objections?

21 MR. PORTER: We have no objection.

22 MR. MORAN: No objection.

23 HEARING OFFICER KNITTLE: Okay. This is
24 admitted.

1 (Sierra Club Exhibit No. 1 admitted
2 into evidence.)

3 (Sierra Club Exhibit No. 2 marked for
4 identification, 6-1-99.)

5 MR. ETTINGER: Sierra Club Exhibit Number 2 is
6 a memo from a Mr. Bruce Friefeld to the county board
7 members entitled Proposed Communication to County
8 Board Members Re: Prohibition Against Contact with
9 Will County Landfill Siting Evaluation Group. I
10 move this into admission as evidence.

11 HEARING OFFICER KNITTLE: Any objection?

12 MR. MORAN: Yes. My objection basically is
13 there's no date on this document. It appears to
14 relate to a period covering the end of the hearings;
15 that is, December 7th of '98, until whenever this
16 document was written, but without any basis to know
17 when it was prepared and, in fact, to whom it was
18 sent --

19 MR. ETTINGER: At the top of this, there's a
20 fax number here which gives a date and indicates
21 that it came from the offices of Hinshaw &
22 Culbertson.

23 MR. MORAN: It was faxed to the county board
24 members or faxed to Friefeld or faxed to whom?

1 MR. ETTINGER: I do not know who it was faxed
2 to. I know it was produced to me as part of the
3 documents produced by the county board.

4 MR. MORAN: But that's not my point. I guess
5 my point is by whom was this document prepared and
6 who was it sent to and what period does it cover?

7 MR. ETTINGER: Well, I believe it covers the
8 period sometime prior to December 15th, 1998.

9 HEARING OFFICER KNITTLE: Mr. Porter?

10 MR. MORAN: That was my objection.

11 MR. PORTER: I join in that objection. I
12 believe there's been absolutely no foundation laid.
13 This is clearly a hearsay document. We also
14 reiterate the earlier relevancy objections on this
15 issue. I don't see how the board hiring its own
16 counsel is any way relevant to the fundamental
17 fairness of the process.

18 HEARING OFFICER KNITTLE: Mr. Ettinger, do you
19 have a different copy of this? If you're referring
20 to some date on the top, I don't have it on my
21 copy.

22 MR. ETTINGER: It may have been cut off. I'm
23 very sorry. We will have to substitute --

24 HEARING OFFICER KNITTLE: It's cut off. It's

1 on this one. Here's what I'm going to do.

2 MR. ETTINGER: Let me explain the relevance.

3 HEARING OFFICER KNITTLE: Go ahead, sir.

4 MR. ETTINGER: Actually, in this case, the
5 portion of the document that I am most interested in

6 and find most relevant does not relate to legal

7 counsel. It is instead the portion that states when

8 the application was first received, it was thought

9 that Dean Olson and Donna Shehane, Will County waste

10 services division, would not be involved in review

11 of the Waste Management of Illinois siting proposal

12 in in-depth, significant fashion. However, it

13 ultimately became necessary for both of these

14 individuals to become involved in the evaluative

15 process on behalf of the county.

16 HEARING OFFICER KNITTLE: Is there anything

17 else?

18 MR. PORTER: I reiterate my relevancy

19 objection.

20 HEARING OFFICER KNITTLE: I'm going to sustain

21 the objection. I'm going to deny this. I don't

22 know what it is. I'm more in agreement with

23 Mr. Moran here that there's been no evidence as to

24 when this was created or who created it or what

1 exactly it is. I'm going to -- so I'm going to deny
2 this exhibit. It will, of course, still go to the
3 board, and you can file a motion to reconsider.

4 (Sierra Club Exhibit No. 3 marked for
5 identification, 6-1-99.)

6 MR. ETTINGER: My Sierra Club Exhibit 3 is a
7 document entitled Executive Committee Meeting
8 Minutes, January 14th, 1999. I would offer this
9 into evidence.

10 HEARING OFFICER KNITTLE: Objections?

11 MR. MORAN: Yes.

12 HEARING OFFICER KNITTLE: Mr. Moran?

13 MR. MORAN: Again, this is a document that is
14 now after the hearings have been completed referring
15 to, I suppose, the further procedures to be employed
16 in consideration and vote on the application. I
17 don't see any relevance to the issues raised as to
18 the substantive criteria that the Sierra Club has
19 raised or to any fundamental fairness issue.

20 HEARING OFFICER KNITTLE: Mr. Porter?

21 MR. PORTER: I join in that objection. I would
22 also add that I'm afraid that this document delves
23 into the deliberative process of the board which is
24 irrelevant and inadmissible.

1 Beyond that, I want to -- regardless of
2 whether or not it's admitted, I want to make a
3 record that this is not a verbatim accounting of the
4 executive committee. This is someone's
5 summarization thereof.

6 MR. ETTINGER: Should I respond?

7 HEARING OFFICER KNITTLE: Yes. Mr. Ettinger.

8 MR. ETTINGER: Well, first of all, these are
9 the official record of the meeting, and they are
10 entitled minutes. I believe it's extremely relevant
11 with regard to the procedures that were used in
12 analyzing the evidence and that that's central to
13 the fundamental fairness here. In particular,
14 Mr. Helsten talks about -- in this document -- or is
15 reported discussing in this document the --

16 MR. PORTER: Page, please.

17 MR. ETTINGER: I'm sorry. Page 5.

18 -- (continuing) who is going to be
19 submitting reports in the future. One of these
20 reports is the Olson report, which is central to our
21 case in fundamental unfairness. He also expresses
22 the expectation that Mr. Clark, the hearing
23 examiner, will submit his draft findings to the
24 committee which, in fact, was not done.

1 This also explained that Mr. -- by
2 Mr. Mikan that Mr. Helsten had advised this
3 committee that he needs to review -- remove himself
4 from the siting process. I think it is interesting
5 at this point and relevant to our consideration here
6 that after -- after the close of the hearing, after
7 he had been advising the Will County Board for
8 months, Mr. Glasgow then withdrew from his continued
9 representation of the Will County Board, and also
10 subsequently to this document, he was one of the
11 authors of the Olson report filed over 13 days after
12 the close of the public hearing record.

13 MR. PORTER: Same objections as before.

14 HEARING OFFICER KNITTLE: Mr. Moran?

15 MR. MORAN: I restate my earlier objection.

16 HEARING OFFICER KNITTLE: I will admit this one
17 over objections.

18 (Sierra Club Exhibit No. 3 admitted
19 into evidence.)

20 (Sierra Club Exhibit No. 4 marked for
21 identification, 6-1-99.)

22 MR. ETTINGER: Sierra Club Exhibit 4 is
23 entitled Agenda, Special Meeting, the Will County
24 Pollution Control Facility Committee Siting

1 Committee, February 5th, 1999. And attached to that
2 is a document entitled Pollution Control Facility
3 Committee Siting Committee, February 5th, 1999,
4 which, again, consists of notes or minutes of the
5 meeting that was held in this case, the meeting of
6 February 5th, 1999. I offer this document into
7 evidence.

8 HEARING OFFICER KNITTLE: Any objection?

9 MR. MORAN: Same objection as I indicated
10 before. I don't see any relevance to the issues
11 that have been raised by either Land and Lakes or by
12 the Sierra Club.

13 MR. PORTER: Same objections as to the
14 objections to Sierra Club Number 3.

15 HEARING OFFICER KNITTLE: Mr. Ettinger, could
16 you explain why this is relevant?

17 MR. ETTINGER: Again, this is extremely
18 relevant in the sense that it discusses the actual
19 consideration of the board in the matters that were
20 important to the board. In considering the evidence
21 here, that's extremely important in determining the
22 importance of the prejudice to Petitioners from the
23 admission of the Olson report. And, in fact, this
24 document discusses how central the Olson report was

1 to the consideration of the siting committee which
2 adopted the Olson report as its recommendation to
3 the full Will County Board.

4 HEARING OFFICER KNITTLE: This will be admitted
5 as before over the objection.

6 (Sierra Club Exhibit No. 4 admitted
7 into evidence.)

8 (Sierra Club Exhibit No. 5 marked for
9 identification, 6-1-99.)

10 MR. ETTINGER: And finally, I will offer the
11 proceedings of the Will County Board special meeting
12 March 4th, 1999, special meeting Thursday, March 4th,
13 1999, 9:30 o'clock a.m. I'll also move this into
14 evidence.

15 HEARING OFFICER KNITTLE: Objections?

16 MR. MORAN: Yes. Relevance. How does it
17 relate to fundamental fairness or any of the
18 substantive finding on the criteria?

19 HEARING OFFICER KNITTLE: Mr. Porter?

20 MR. PORTER: Same objection I made previously.
21 It's obviously irrelevant, and it delves into the
22 deliberate process of the board.

23 HEARING OFFICER KNITTLE: Mr. Ettinger?

24 MR. ETTINGER: First of all, it doesn't delve

1 into the deliberative process of the board. The
2 deliberative process of the board inasmuch as it's
3 reflected in this document is all for us to see, so
4 I'm not cutting anywhere new there.

5 Secondly, this document, again, is central
6 to the analysis of the Olson report and the
7 importance and the extreme prejudice that was worked
8 on Petitioners by the late admission of the Olson
9 report. I would point in particular to pages 128 on
10 that, also 136. In particular there Ms. Zeman is
11 reported as stating the Olson report includes things
12 that in its expert opinion, I am not an engineer nor
13 a geologist, in its expertise feels is warranted by
14 the testimony. This shows clearly that the Olson
15 report includes expert testimony that was delivered
16 to the board after the close of the public hearing.

17 Finally, there's also information here of
18 Ms. Zeman's remarks, which I would argue is in the
19 nature of testimony to the board off the record,
20 regarding the very critical review of the IEPA or
21 the very critical review that the IEPA would give to
22 this petition that is on page 137. We certainly are
23 not offering that for the truth of the statement
24 made because we do not believe that the IEPA gives

1 very critical review to anything. However, the fact
2 that this statement was made and was allowed to
3 contaminate the board's proceeding is of
4 significance.

5 HEARING OFFICER KNITTLE: Mr. Porter, did you
6 have a response?

7 MR. PORTER: The only response is the same
8 objections as before, and I would like to, since we
9 seem to be making speeches, mention that this
10 document does show the extensive analysis done by
11 the board after the application was filed and before
12 the decision was made.

13 HEARING OFFICER KNITTLE: Do you still have an
14 objection, though, Mr. Porter?

15 MR. PORTER: Yes.

16 HEARING OFFICER KNITTLE: I will admit it over
17 your objection and Mr. Moran's.

18 (Sierra Club Exhibit No. 5 admitted
19 into evidence.)

20 HEARING OFFICER KNITTLE: Anything else,
21 Mr. Ettinger?

22 MR. ETTINGER: No. I've got it all.

23 HEARING OFFICER KNITTLE: Thank you, sir.

24 Let's go off the record for a second.

1 (Whereupon, a discussion was

2 held off the record.)

3 HEARING OFFICER KNITTLE: We are going to take

4 a break and meet back at 1:30 p.m.

5 (Whereupon, a lunch recess was taken.)

6 AFTERNOON SESSION

7 HEARING OFFICER KNITTLE: We are back on the

8 record after a nice lunch break.

9 Petitioners have closed their case, and

10 the Respondents are up. Do you have an order that

11 you want to follow? Will County first or Waste

12 Management first?

13 MR. PORTER: Will County will go first. We

14 call Attorney Helsten.

15 HEARING OFFICER KNITTLE: Mr. Helsten, you can

16 have a seat.

17 Would you swear him in, please?

18 (The witness was duly sworn.)

19 CHARLES HELSTEN,

20 called as a witness herein, having been first duly

21 sworn, was examined upon oral interrogatories, and

22 testified as follows:

23

24

1 DIRECT EXAMINATION

2 BY MR. PORTER:

3 Q Would you state your name for the record?

4 A Charles Helsten. Chuck Helsten.

5 Q What's your occupation?

6 A I'm an attorney.

7 Q Where are you licensed?

8 A I'm licensed in the state -- currently in

9 the state of Illinois and the state of Iowa and in

10 various Federal Courts, Circuit Courts, and District

11 Courts in the country.

12 Q What area of law do you emphasize?

13 A Environmental law.

14 Q What is your relevant experience in that

15 area of law?

16 A I've been in the practice of the

17 environmental law area since coming out of law

18 school. I came out in 1979. I had got my feet wet

19 right away so essentially 20 years of experience in

20 that area.

21 I've done a significant amount of

22 superfund work. I've served as chairman of a number

23 of superfund committee groups. I've done a

24 significant amount of work before the board on

1 permitting and compliance and enforcement matters.
2 I've done a significant amount of landfill siting
3 work and just consultation to certain private
4 entities, too, on the issue of development of
5 landfills. I have also done some criminal defense
6 of environmental matters as well.

7 Q Have you ever been the special state's
8 attorney for any counties?

9 A Yes. I have been and currently am a
10 special state's attorney for Will County. I've
11 served in that capacity since 1993, I believe. I
12 also presently serve as a special state's attorney
13 for Randolph County and for Perry County. I have
14 done some contract work for Lee County and for
15 Lawrence County as well.

16 Q In all of those counties, that work has
17 involved environmental law?

18 A Yes. As a matter of fact, it's involved
19 landfill work. With Will County, it's not only
20 involved landfill work. It's involved solid waste
21 management compliance issues, enforcement issues.
22 Will County is a delegated enforcement entity, so I
23 assist them. Obviously, that means in Will County,
24 I cannot participate on the other side and defend

1 entities that have enforcement actions against them
2 in Will County. I also have -- I also serve as
3 special environmental counsel to the various cities
4 in northern Illinois that have landfills as well.

5 Q And what are your specific experiences in
6 regard to landfill siting hearings?

7 A My first experience was in the mid-1980s
8 in what's called the Baxter Road landfill siting
9 appeal. I represented an objector, not one of the
10 objectors that went up of record on the decision
11 that was decided by this board and by the second
12 district, but that was my first involvement.

13 Since that time, I've been involved in a
14 number of landfill sittings in a number of
15 capacities: As hearing officer, as attorney for the
16 applicant that was developing the landfill, as
17 counsel for either the city or the county which was
18 the governing body. And also, I have attended
19 certain hearings where I was not of record. It's
20 not unusual for one competitor in the landfill
21 business to hire an attorney to go monitor the
22 process and what's going on during the course of
23 those hearings to just keep pace of what's going on
24 in the industry. So I've served in that capacity as

1 well.

2 Q In Illinois, how many attorneys have this
3 type of experience?

4 A Probably in-depth experience, anywhere
5 from five or six to maybe as many as ten or 12 that
6 do it on what I call a steady diet or steady ration
7 of this type of work.

8 Q When did you first come to know of the
9 proposed landfill at the Joliet Army Arsenal Plant?

10 A I was first contacted in -- I'm going to
11 have to back up now. I believe it was late 1995 by
12 the state's attorneys office. Prior to that point
13 in time from I think approximately 1990 to 1994,
14 there had been ongoing discussions in this area
15 about the decommissioning of what I call the JAAP
16 facility, the J-A-A-P facility. And some -- once it
17 was decommissioned and cleaned up, some of the
18 public uses -- one of those public uses was going to
19 be a proposed landfill for the county. That
20 eventually came true in the form of legislation that
21 was enacted in Congress, federal legislation, in, I
22 believe, 1996. But that was my first involvement.

23 Specifically what I was contacted for was
24 to assist the county in the RFP process whereby they

1 were attempting to obtain a contractor to operate --
2 develop and operate the landfill on the arsenal
3 property if, in fact, the legislation went through.

4 Q Once a contract was awarded in this case,
5 what was your role to be?

6 A Once the contract was awarded in this
7 case, I was asked by the state's attorneys office to
8 follow through and represent the county and the
9 siting proceeding.

10 Q For the record, when was the contract
11 awarded?

12 A The contract was awarded and filed with
13 the clerk of -- the county clerk by resolution on
14 June 2nd, 1997.

15 Q And when was the application filed?

16 A The application in this case, I believe,
17 was filed on August 14th, 1998.

18 Q And when was the decision approving siting
19 issued?

20 A A decision approving siting, I believe,
21 was entered on March 4th, 1999.

22 Q To your knowledge, did any member of the
23 Will County Board communicate in any way with the
24 applicant Waste Management, Incorporated, without

1 notice before the application was filed?

2 A No, no. Any communications that were
3 ongoing on what I call the preapplication review
4 period were specifically conducted by Donna Shehane,
5 and she was instructed by me to have no contact with
6 the Will County Board.

7 Q To your knowledge, did any member of the
8 Will County Board speak with the applicant without
9 notice after the application was filed and before a
10 decision?

11 A Not to my knowledge, no. And again, that
12 was pursuant to instruction by me to keep the county
13 board detached and objective, detached from any
14 preapplication process so that they could review the
15 record which was made at the siting hearing and the
16 public comments objectively and in a detached
17 fashion.

18 Q Were any procedures implemented to
19 insulate the board from communications with the
20 applicant?

21 A Just as I spoke about, as far as a little
22 bit of background, I had been involved in a
23 fundamental fairness case before this board on
24 remand. I was not involved in the case when --

1 before it was remanded. It was hired by Perry
2 County in what's generally called the COAL vs. Gere
3 Landfill case where there had been a remand by this
4 board on an ex parte contact, fundamental fairness
5 issue. Based upon my personal involvement in that
6 case and based also upon my review of the case as I
7 try and keep up on the decisions of this board and
8 the decisions of the various Appellate Courts, I was
9 most interested in LandComp one and LandComp two and
10 the case I was involved in, which was the Perry
11 County case, the COAL Landfill.

12 I thought one thing was critical. The one
13 thing that was critical was to segregate and insulate
14 the decision makers, which would be the county board
15 in this case, from anyone that was doing any
16 technical review of the either preapplication
17 technical review or review of the application once
18 it had been filed, again, to keep the county board
19 objective. To me, that was the key. My analysis of
20 the case going into this process, that was the key.

21 Q Were there any communications of county
22 employees who were not on the board with the
23 applicant WMI before the application was filed?

24 A Yes, in two respects. From the time the

1 contract was filed going forward, the contract which
2 I drafted provided -- or host agreement it was
3 called. That's what I called the contract. The
4 contract provided for periodic progress meetings
5 between the county and Waste Management on a number
6 of issues. Those type of issues had to do with --
7 there was interaction with the army. There was
8 interaction with I believe it's Wilmington
9 Township. There was interaction with lessees whose
10 leases were going to ultimately be terminated out
11 there when the waste footprint was constructed. We
12 had preliminary wetlands issues, we had preliminary
13 site location issues, all those type of things, and
14 members of waste services, specifically Dean Olson
15 and Donna Shehane were involved with Waste
16 Management. To some extent, I was called in to some
17 of those meetings on what I call contract issues.

18 In addition, there was, as we've heard
19 today, a preapplication review by the county. I
20 would call it a completeness review to determine
21 what their concerns were about the preliminary --
22 what I call the preliminary technical information
23 that was being considered at that point in time.

24 Q Are you aware of other cases where the

1 county owned the property where the landfill is
2 proposed?

3 A Yes, and cities as well where they are the
4 ultimate decision making authority. I am aware of
5 those situations. I can think of several in
6 northern Illinois outside of Rockford.

7 Q In your experience, is it unusual for the
8 county to communicate with the applicant when the
9 county owns the property?

10 A No, no. They have to. I think proper
11 planning dictates that. I think the county would be
12 remiss if it did not engage in some sort of
13 preliminary review and preliminary analysis.

14 Q To your knowledge, was the content of
15 these preliminary communications discussed with the
16 board members?

17 A No. Again, that was by specific order
18 from me that there should be no communication with
19 the board. Communications with the board, if they
20 want to know the status of things, just generally
21 how are things coming, when do you expect an
22 application to be filed, those kind of things, those
23 would be handled through legal counsel. There was
24 to be no communications.

1 Q Why did you insulate the board from these
2 communications when the Illinois case law makes it
3 clear that they may be privy to these communications
4 before the application is filed?

5 A I wanted to be doubly safe. Again, based
6 upon the two LandComp cases -- as I understood
7 LandComp number one, the concern was -- and I'm only
8 giving my understanding of the case when I reviewed
9 it as part of my involvement in the Gere case, the
10 COAL case down in Perry County.

11 To me, the gravamen of that case was the
12 fact that there were postfiling, again postfiling,
13 contacts between a person in the LaSalle County, for
14 want of a better word, waste services division with
15 the county board at a later point in time as part of
16 the decision making process. I wanted to make
17 doubly sure that there were no contacts either
18 preapplication or postapplication between people
19 such as Ms. Shehane and the county board. Again, I
20 wanted to bulletproof the process to the greatest
21 extent I could.

22 Q Did Mr. Olson, Ms. Shehane, Engineering
23 Solutions, or yourself vote on siting approval?

24 A No.

1 Q After the application was filed on
2 August 14th of '98 and before a decision, did there
3 continue to be contacts with the county, consulting
4 Engineering Solutions, and Waste Management?

5 A No, no contacts. Again, that was by
6 specific instruction. There would be no contacts at
7 that point in time. I had specifically instructed
8 that.

9 Q After the application was filed and before
10 a decision, were there any communications between
11 county employees, for example, members of the land
12 use department, and Waste Management regarding the
13 application?

14 A No.

15 Q After the application was filed, did you
16 have any discussions with Waste Management,
17 Incorporated, or its attorneys?

18 A I had conversations with Mr. Moran, Waste
19 Management's attorney, not on the substance of the
20 application.

21 To put this case into context, Mr. Moran
22 was the third attorney that had -- that became
23 involved in this process on behalf of Waste
24 Management. As one of the exhibits that was

1 introduced I think by Ms. Harvey this morning
2 indicated and I think Mr. Rubak testified, at one
3 point in time, it was contemplated that Waste
4 Management may do a lot of this in-house. I was then
5 dealing with Fred Heinrich quite a bit. That was
6 all preapplication just on logistical issues,
7 background issues. Then a Mr. John Noel from
8 Lombard was introduced to me and was -- I was told
9 he would be representing Waste Management during the
10 siting process, so I had to talk to him about
11 preliminary matters.

12 Finally, shortly before the application
13 was filed, several months before, Mr. Moran was
14 introduced in the process. Mr. Moran would ask me
15 preliminary questions like my understanding of
16 something under the siting ordinance, or more
17 typically, the questions that Mr. Moran would ask
18 were questions like how big is the board room where
19 we're going to have the hearing, is there security
20 there, is there computer Power Point capabilities,
21 who do I talk to, all those type of things, but
22 never did I have a discussion with him on the
23 substance of the application.

24 Q Why didn't you have a county employee

1 handle these communications with Waste Management
2 attorneys?

3 A Because I knew the rules under land -- I
4 knew what this board requires, I believe, under
5 LandComp one, LandComp two, Perry County, and some
6 of the other decisions before that point in time.
7 The more -- so I could better filter and make sure
8 there was no upset in the process whereby there was
9 an ex parte communication of substance. I could
10 better filter those things if it's just me talking
11 to Mr. Moran.

12 Secondly, it's always more efficient when
13 one party is talking to the other rather than
14 delegating the responsibility to four or five
15 people. Sort of like the triple option in football,
16 the more people that handle the ball and the more
17 times it's up the air, the more chance that it can
18 be fumbled.

19 Q Did you do anything to ensure that your
20 communications with Waste Management after the
21 application was filed and before the decision was
22 rendered could not be considered ex parte
23 communications?

24 A Two things -- well, one thing. I made

1 sure that what I talked about did not -- with them
2 did not in any way go to the merits of the
3 application or the substance of the application, and
4 eventually to eliminate any question as to whether
5 that went on since I did have some postapplication
6 contacts with them, after the siting hearing
7 process, I exited the process and recommended to the
8 county just to be safe they hire new counsel going
9 into the decision making process to make sure,
10 again, that there was no, quote-unquote, supposed
11 taint by me going forward. Could I have gone
12 forward? Probably so because I didn't have any
13 substantive contacts with Mr. Moran. I chose not
14 to, again, to be doubly safe. I wanted this process
15 to be as safe as possible.

16 Q Okay. I think you've probably made the
17 record clear on this. I'm going to ask you one more
18 time, though.

19 At any time after the filing and before a
20 decision, did you discuss the content or merit of
21 the application with Waste Management, Incorporated,
22 or its attorneys?

23 A No.

24 Q Did anyone from the county have such a

1 discussion?

2 A Not to my knowledge, and I was monitoring
3 the process.

4 Q Were there any discussions between county
5 employees -- Will County employees about the content
6 of the application?

7 A Yes. Once it was received, there was
8 considerable review of the application. Under the
9 ordinance, the ordinance calls for county
10 departments to review the application, for a copy of
11 the application to be submitted to county
12 departments such as the highway department, the
13 health department, waste services, the sheriff's
14 department, and there was considerable review and
15 dialogue between those county departments. They met
16 on at least one occasion as an entire group to
17 discuss the merits of the application and make their
18 suggestions.

19 MR. PORTER: May I approach?

20 (Will County Exhibit No. 1 marked for
21 identification, 6-1-99.)

22 BY MR. PORTER:

23 Q I would like to show you a document that
24 will be marked as Will County Exhibit Number 1.

1 Have you seen that document before?

2 A Yes. This is a copy of a memo that was
3 sent to me and a number of other people within
4 various county departments on September 21st, 1998,
5 from Donna Shehane. She was with waste services.

6 Q And is that a document kept in the usual
7 course of business of Will County?

8 A Yes. As part of the discovery -- to
9 comply with the discovery request that were
10 submitted by the Sierra Club and Land and Lakes, I
11 reviewed all those documents and found that it was
12 kept in the normal course of business.

13 Q Again, what does the memorandum discuss?

14 A The memorandum discusses a meeting that
15 was scheduled for October 5th, 1998, between all
16 county departments -- these were the heads of
17 various county departments -- to discuss the merits
18 of the application which had been filed and any
19 comments that any of those county departments had
20 concerning the application.

21 Q Were the individuals who were expected to
22 attend the meeting warned not to discuss it with
23 county board members?

24 A Yes, both prior to this time, and, again,

1 I reminded Donna Shehane to place that in the memo
2 itself before it went out.

3 Q What does the memo say about that?

4 A It says: Finally, per the county's legal,
5 it is important to remember that contacts with the
6 county board members regarding the landfill siting
7 application must not occur. As the county board
8 members are the deciding body for the siting
9 application, they must base their judgment on the
10 record of the proceedings and the testimony given at
11 the hearing.

12 MR. PORTER: I would like to move for the
13 admission of Exhibit 1.

14 HEARING OFFICER KNITTLE: Objections?

15 MS. HARVEY: I object only on the grounds of
16 relevancy. I don't think anybody has contended that
17 there was a contact between county board members
18 after the siting application -- the county staff,
19 excuse me, after the siting application was filed.

20 HEARING OFFICER KNITTLE: Mr. Ettinger?

21 MR. ETTINGER: I like the exhibit a lot, and I
22 think it's particularly useful, so I think it should
23 be admitted.

24 HEARING OFFICER KNITTLE: I take that to mean

1 you have no objection?

2 MR. ETTINGER: Correct.

3 HEARING OFFICER KNITTLE: I'm going to admit

4 this over Ms. Harvey's objection.

5 (Will County Exhibit No. 1 admitted

6 into evidence.)

7 BY MR. PORTER:

8 Q Was the meeting held on October 5th of

9 1998?

10 A Yes.

11 Q Did you attend the meeting?

12 A Yes. I was about 15 or 20 minutes late as

13 I recall.

14 Q Did the county board members attend that

15 meeting?

16 A No.

17 Q At the meeting, were any further

18 precautions taken to avoid communications with

19 county board members?

20 A I just reminded the people in the meeting

21 once we deliberated and discussed various portions

22 of the application, I sat there and monitored the

23 process and reminded them at the end of the meeting.

24 Q For the record, when was the siting

1 hearing held?

2 A The siting hearing started, I believe,
3 November 16th. I know it was in mid-November. It
4 was a Monday in mid-November. I believe it was the
5 16th. I'm not sure.

6 Q All right. Moving on, are you aware of
7 the Sierra Club ever having communications with the
8 county before Waste Management was awarded the
9 contract?

10 A There were several meetings where in
11 February of 1997 when we were going through
12 formulation of the last drafts of the contract the
13 Sierra Club contacted the county and asked to meet
14 with the county, yes.

15 Q And --

16 A And those meetings took place in February
17 of 1997.

18 Q Did the Sierra Club give the potential
19 applicants notice of that meeting?

20 A Not to my knowledge.

21 MR. ETTINGER: I would like to object at this
22 point. I'm pleased that the county now recognizes
23 that events prior to the filing of the application
24 are relevant, but I don't believe that events

1 relating to the Sierra Club's contact with the Will

2 County officials at this time are.

3 HEARING OFFICER KNITTLE: Mr. Porter?

4 MR. PORTER: Well, Mr. Hearing Officer, why

5 not? We don't agree that contacts before the

6 application are relevant, but that's the petition --

7 MR. ETTINGER: Why are you asking questions

8 about that?

9 MR. PORTER: Please, allow me to finish.

10 HEARING OFFICER KNITTLE: Let him finish his

11 response.

12 MR. PORTER: That is the petition we're now

13 responding to, which we have attempted to file

14 motions to bar all evidence of those preapplication

15 filings -- or contacts. Excuse me. Now we're

16 having to respond to those preapplication contacts.

17 The very organization that is alleging those

18 contacts were inappropriate has had their own

19 contacts with the county in discussing and

20 determining the extent of this landfill. Obviously

21 that's very relevant if indeed their petition even

22 states a cause of action.

23 MR. ETTINGER: I think that's a very interesting

24 argument. I don't believe our contacts are in the

1 same nature or quality of what we're talking about,
2 but I think it's a very interesting argument to say
3 that if both sides have ex parte contacts that that
4 would be -- that that would make it more fair.

5 HEARING OFFICER KNITTLE: I'm going to overrule
6 the objection and allow him to continue.

7 (Will County Exhibit No. 2 marked for
8 identification, 6-1-99.)

9 BY MR. PORTER:

10 Q Let me show you a document I'm going to
11 have marked Exhibit Number 2. Have you seen that
12 document before?

13 A Yes.

14 Q What is that document?

15 A This is a copy of a letter I received
16 which was addressed from the Sierra Club to Charles
17 Adelman, who is the Will County executive. The
18 letter is dated November 13th, 1998. The copy I've
19 seen was a faxed copy. Mr. Adelman's office faxed
20 it to me, I believe, on the same date that they
21 received it. Whether that was November 13th or not
22 I don't know, but it would have been within several
23 days after the date of this letter.

24 Q And I apologize if I didn't hear you

1 correctly. This document is copied to the Will
2 County land use department; isn't that correct?

3 A Yes, among other people.

4 Q And is this a document which is kept in
5 the normal course of business of Will County?

6 A Yes. It was included within the records
7 which I reviewed as part of the exercise of
8 responding to the Petitioners' discovery request.

9 Q Was this document sent to Will County by
10 the Sierra Club after the application was filed and
11 before the decision on the siting?

12 A Yes.

13 Q And was this letter copied to Waste
14 Management, Incorporated?

15 A No.

16 MR. PORTER: I would move for the admission of
17 Exhibit 2.

18 HEARING OFFICER KNITTLE: Objections?

19 MR. ETTINGER: No. Actually, I don't think I
20 do object.

21 HEARING OFFICER KNITTLE: Ms. Harvey?

22 MS. HARVEY: I have an objection as to the
23 relevancy of the document to the issues that have
24 been raised here. And also, I'm unclear as to

1 whether or not the business records exception to the
2 hearsay rule can be used for a document that was not
3 prepared by the agency that was keeping it in the
4 course of its normal business. However, I'll not
5 strenuously object to the admission of this.

6 MR. ETTINGER: I'll stipulate that this was
7 done by the Sierra Club. We have nothing to hide
8 here, and we would be pleased to have this entered
9 into the record.

10 HEARING OFFICER KNITTLE: Thank you,
11 Mr. Ettinger. I'm going to admit it for the same
12 reasons we're admitting other documents into
13 evidence earlier. What is it, 103 -- do you have it
14 off the top of your head, Ms. Harvey?

15 MS. HARVEY: 204.

16 HEARING OFFICER KNITTLE: 103.204.

17 So this will be admitted.

18 (Will County Exhibit No. 2 admitted
19 into evidence.)

20 BY MR. PORTER.

21 Q What issues are brought up in the letter?

22 A The letter requests certain deed
23 restrictions be placed in the deed which the county
24 contemplated receiving from the army for the

1 property. They're restrictions as to the -- the
2 period of operation of the landfill. These were
3 similar to the request which the Sierra Club had
4 made to us in early 1997 when they requested to meet
5 with us. At that time, they had asked that
6 restrictions of this sort be included not only in
7 the contract that would be awarded to the successful
8 contractor but as conditions upon siting when siting
9 was to occur.

10 Q In the November 13th, '98, letter in your
11 hand, did the Sierra Club suggest a meeting with the
12 county?

13 A It says in the last paragraph: Finally,
14 and I quote finally, we would be happy to make
15 ourselves available to meet with you or your
16 representatives to discuss our concerns.

17 Q Did that meeting take place?

18 A No.

19 Q Why not?

20 A Again, even though this was framed in the
21 context of a deed restriction, it dealt with
22 conditions upon the operation of the landfill. The
23 siting application had been filed. I thought the
24 safest way to address this was to have no meetings

1 or no contact with anyone. At that point in time,
2 it was apparent that the Sierra Club was going to
3 appear at the siting hearing, formally appear.

4 Q Was Exhibit 2 copied to Waste Management,
5 Incorporated?

6 A No.

7 Q During the siting hearing itself, did you
8 have any communications with Waste Management,
9 Incorporated, or the board outside of the hearing?

10 A The board meaning the county board?

11 Q Let me ask the question again so our
12 record is clear.

13 During the hearing, did you have any
14 communications with Waste Management, Incorporated,
15 or the county board outside of the hearing?

16 A No.

17 When you say outside the hearing, you mean
18 outside the actual process that was going on during
19 the hearing?

20 Q If I were to say that that is what I
21 meant, is your answer the same?

22 A Yes.

23 Q At any time, did you ever have any
24 discussion with Mr. Clark about your opinions on

1 whether the application should be approved?

2 A No.

3 Q And Mr. Clark is who?

4 A The hearing officer that presided over the
5 hearing.

6 Q After the hearing, did Hearing Officer
7 Clark make any recommendations to the board?

8 A No.

9 Q Did you ever tell the hearing officer not
10 to issue a report on his recommendations?

11 A No.

12 Q Did you tell the county board not to
13 request a report from Hearing Officer Clark?

14 A No. At that point in time, I had taken
15 myself out of the process, and that was within the
16 province of county board. I don't know what
17 happened at that point in time.

18 Q After the hearing, did the Will County
19 land use department issue a report to the board?

20 A Yes.

21 Q And is that the report that has been
22 referred to as the Olson report?

23 A Yes.

24 Q Who drafted the Olson report?

1 A The report was drafted substantially -- it
2 had substantial input by the outside technical
3 consultants Engineering Solutions, Ms. Shehane, and
4 Mr. Olson. My only contribution to the report was,
5 I guess you would say, form, syntax, grammar. I
6 would take certain paragraphs and put them in
7 certain other places to make it read more cogently.
8 I would take what I call engineerese and knock it
9 down. Engineers are -- that's why we had engineers
10 to do the technical and scientific review. I would
11 simply put the sentences in more readable fashion,
12 splice them together, or maybe separate them if they
13 were compound sentences. That was my only
14 contribution to the report.

15 Q Why was the report drafted?

16 A The ordinance at section 12, I believe it
17 is, the county ordinance --

18 Q I'm sorry. The Will County ordinance?

19 A Yes. The Will County ordinance contemplates
20 the request of these type of reports by the
21 committee -- the landfill committee that -- I think
22 it's called the pollution control facility
23 committee, whatever it is, could request these
24 reports, and we thought that a report may be -- we

1 weren't sure, but we thought that a report may be
2 requested.

3 Q Was one requested?

4 A One was requested, yes, in January of
5 1999, so we started some work in January on that
6 report.

7 Q Was the report made part of the public
8 record?

9 A Yes. It was made part of the public
10 record, not part of the public comment period
11 record, within 30 days after the close of the
12 hearing. But after it had been requested from use,
13 we filed it.

14 Q Why was the report not made part of the
15 public record until after the public comments?

16 A Two reasons -- well, the primary reason is
17 it had not been requested by Mary Ann Gearhart, who
18 was the chairman of the committee that oversaw the
19 siting hearing, the actual evidentiary hearing.
20 Until it's requested, we can't submit it. We had
21 done some preliminary work on it because she could
22 ask for it. If you look at the ordinance, she could
23 ask for it on three days' notice, and we wanted to
24 make sure that we had done a thorough analysis.

1 Here's the second reason, and again, this
2 is my call. We possibly could have submitted
3 something had we elected to during the public
4 comment period before that closed. However, at that
5 point in time, in my opinion, with knowing we have
6 objectors, you're in a damned if you, damned if you
7 don't scenario. If you submit it before you receive
8 all public comment, you're open to the criticism
9 that you did not consider all public comment. We
10 had only done some preliminary work at that point in
11 time based upon what we had heard in the siting
12 hearing itself. We elected let's wait. Let's look
13 at all public comments that come in. Because of
14 inclement weather at the time, there was a chance
15 that postmarked comments may have come in four or
16 five days after the actual close of the evidence,
17 but they would have a postmark which would make --
18 include them within the 30-day posthearing comment
19 period. In addition, we did not consider this to be
20 evidence. Under the ordinance, I considered this to
21 be simply our review and summary of the hearing,
22 what went on in the hearing, and the public comments.

23 Q Did anyone having input in the report have
24 any communications other than the public hearing

1 with Waste Management, Incorporated, or its agents
2 after the application was filed and before the
3 decision by the board?

4 A No.

5 Q What was your input into the Olson report?

6 A Again, just syntax, form, grammar, those
7 type of things. I did not make any recommendations
8 as to the substance of the report.

9 Q And the report was filed on January 19th
10 of 1999; is that right?

11 A Thereabouts.

12 Q Was new counsel hired for the board before
13 the report was filed?

14 A Yes.

15 Q Why was new counsel hired?

16 A Again, simply as a precaution. As I said
17 before, I didn't want anyone accusing me of having
18 formulated a portion of the recommendations or
19 findings or summary and then carry that across the
20 line and put on a different hat and meet with the
21 county board during their deliberations. To me, the
22 most critical point in these cases based upon my
23 experience is the deliberations of the county
24 board. I wanted those to be totally detached,

1 totally objective, so I suggested to be doubly safe
2 that we obtain new counsel.

3 Q Did you communicate with the county board
4 after new counsel, Ms. Zeman, was hired?

5 A No. My only communication was, I believe,
6 January 14th in an open session of the executive
7 committee meeting where I gave my reasons for why I
8 thought new counsel should be appointed just to keep
9 this process bulletproof.

10 Q Before the county issued its decision, did
11 you ever communicate with the board or their attorney
12 about your thoughts on the deliberations or the
13 application?

14 A No.

15 Q Did you ever repeat any communication you
16 had with WMI counsel to the board after the filing
17 of the application?

18 A No.

19 Q Again, did Ms. Shehane or Mr. Olson or
20 Engineering Solutions have any voting rights in the
21 siting application?

22 A No.

23 Q At any time before the decision was
24 issued, did you know what the decision would be?

1 A No, not with this county board. I've
2 dealt with this board -- it has some new members
3 now, but I've dealt with this board in whole or in
4 part since 1993 when I was -- late 1993 when I was
5 first hired to represent the county in the Willow
6 Ranch, the Land and Lakes siting appeal at Willow
7 Ranch. Since that time, I've been before this board
8 enumerable times on enumerable issues where they had
9 to decide, and I can tell you, you could never
10 predict the decision. This is a very independent
11 group. I had no idea, nor did I care what the
12 decision of the board was.

13 Q Was there an extensive review of the
14 application after the application was filed?

15 A Yes. There was an extensive review of the
16 application done both by Dean Olson and Donna
17 Shehane and Engineering Solutions. I looked at it
18 extensively and prepared extensive cross examination
19 for the hearing.

20 Q Did you cross examine each of Waste
21 Management, Incorporated's, witnesses on all
22 portions of the applications which had been filed?

23 A Yes. I cross examined all witnesses
24 because I feel that's my job to cross examine them

1 all thoroughly no matter who presents the witnesses.

2 Q At any time, did you make any

3 recommendation to the board to approve siting?

4 A No.

5 Q Based on your experience and knowledge,

6 was this process fundamentally fair?

7 A In my opinion, it was.

8 MR. PORTER: I have nothing further.

9 HEARING OFFICER KNITTLE: Mr. Moran, do you

10 have anything?

11 MR. MORAN: Yes. I have a few questions.

12 HEARING OFFICER KNITTLE: Why don't we do those

13 before we do the cross?

14 DIRECT EXAMINATION

15 BY MR. MORAN:

16 Q Mr. Helsten, you had indicated that you

17 have had experience in the siting area. Are you

18 aware of any situations in which a county board or a

19 city counsel has filed itself an application to

20 itself to approve siting for a given facility?

21 A Yes.

22 Q And in those instances, would it be

23 accurate to say that those applicants who were, in

24 effect, applying to themselves could prepare their

1 own application?

2 A Sure, yes.

3 Q And, in fact, in your knowledge and
4 experience, has that occurred in a number of
5 instances here in Illinois under the Senate bill 172
6 process?

7 A It's occurred. I'm trying to think
8 where -- I'm aware of in a Pollution Control Board
9 decision where that allegation came up that you
10 cannot -- you know, obviously the governing
11 authority must be biased because they submitted, in
12 essence, their own application, and that was
13 rejected. But I know the issue has come up in the
14 state of Illinois.

15 Q Isn't it true that the Illinois Supreme
16 Court has opined in a decision entitled E&E Hauling
17 that, in fact, there is a presumption that the
18 county or local decision maker acts without bias in
19 those instances where the county or the city
20 council, is in fact, the applicant to itself?

21 MR. ETTINGER: Objection. Is Mr. Helsten here
22 to testify as an expert on law? I think that's the
23 job of the board and the clerks working for the
24 board. I hope Mr. Moran doesn't hope to go through

1 all the decisions and get Mr. Helsten's opinion on
2 that. He'll have an opportunity to file a brief.

3 MR. MORAN: If I might respond, one of the
4 issues raised by these Petitioners is that somehow
5 the specter of an applicant and a county board
6 working in any way on preparing an application
7 somehow has tainted the process. If indeed as a
8 matter of law an applicant and a county board or a
9 city council could prepare and submit an application
10 which is -- as I pointed out earlier, it's the
11 application which forms the basis for an opportunity
12 for objectors or opponents to respond, attack an
13 application. If indeed the law says a county can do
14 that, how in the world is an allegation that somehow
15 there were discussions about an application prior to
16 filing between the county board and an applicant
17 improper? That's what this question is directed to
18 to establish that as a matter of law, this is an
19 appropriate practice.

20 HEARING OFFICER KNITTLE: Okay.

21 MS. HARVEY: I would just, for the record, join
22 in Mr. Ettinger's objection as to an interpretation
23 of an Illinois Supreme Court or any other appellate
24 or board case.

1 MR. PORTER: May I respond before you rule?

2 HEARING OFFICER KNITTLE: Sure.

3 MR. PORTER: Mr. Helsten was hired to develop a
4 process to comport with Illinois law. He is an
5 expert in the field, and therefore, his opinion as
6 to what that law is is relevant.

7 HEARING OFFICER KNITTLE: I'm going to overrule
8 the objection, and in all due deference to Mr. Helsten,
9 I have faith that the board will be able to make
10 their own decisions about the state of Illinois law
11 in environmental matters. So I'm going to overrule
12 that.

13 Mr. Ettinger, I want to caution you, if I
14 can, if you have an objection object, but I'm
15 hearing a lot of audible sighs and stuff from that
16 side of the table. I'd appreciate if you kept that
17 to yourself.

18 Go ahead, Mr. Moran

19 MR. MORAN: Thank you, Mr. Knittle.

20 BY MR. MORAN:

21 Q Mr. Helsten, are you aware of the E&E
22 Hauling decision which presumed that decision makers
23 act without bias even in those instances where a
24 financial benefit may be forthcoming and even in a

1 situation where the applicant may include the
2 decision maker itself?

3 A To tell you the truth Mr. Moran, as I sit
4 here, I can't remember the exact fact situation in
5 E&E. I only know it to be one of the touchstones
6 that we go on for fundamental fairness, and what you
7 said about the fundamental fairness aspects I
8 remember, but to tell you the truth, I do not
9 remember the in-depth factual background in that
10 case.

11 Q Well, let's focus for a minute on the
12 discussion that I believe we explored a little
13 earlier on the direct examination with respect to
14 the review by the county consultant of the draft
15 application that Waste Management was putting
16 together.

17 Do you recall some of that testimony?

18 A Yes.

19 Q And I believe you characterized that as a
20 completeness review for purposes of the county's own
21 consideration, at least in the early stages of the
22 application; is that correct?

23 A That's correct.

24 Q Are you aware of whether any individuals

1 either within or without the county were aware that
2 the county or its consultant was undertaking this
3 prefiling application review?

4 A All I can tell you is since the RFP
5 process was in the public whereby we described what
6 we were going to do, I presume that people knew. It
7 was no secret. In other words, are you asking me
8 was this some type of clandestine procedure? No.

9 Q Do you have any facts or information to
10 suggest that any individuals either within the
11 county or on the county board were unaware that this
12 prereview of the application was taking place?

13 A No. I do not believe so because I believe
14 the RFPs now even for professional services go
15 before the board in resolution form. Every board
16 meeting that I have seen, there's a number --
17 there's a thick number of resolutions attached each
18 month to the county board agenda as to resolutions
19 that are going to through for hiring of various
20 people.

21 Q Now, you testified in direct examination
22 in response to some questions from counsel for the
23 county with respect to Exhibit 2, which was a letter
24 from the Sierra Club that was prepared and sent to

1 the -- I guess the Will County Board chairman, are
2 you aware of, in addition to this letter, whether
3 there were any contacts or communications between
4 any parties who participated at this hearing and
5 specifically either the Sierra Club, Mr. Salem, or
6 anyone at Land and Lakes with any of the county
7 board members from the period of filing of the
8 application August 14th of 1998, through March 4th
9 of 1999?

10 A I cannot recall. As I sit here, I can't
11 recall.

12 Q You also testified on direct examination
13 that you had a number of telephone conversations, I
14 believe, with me?

15 A Yes.

16 Q And did those phone conversations begin
17 sometime the early part of August of 1998?

18 A I believe they were early August, maybe a
19 little -- maybe a little earlier than that in the
20 summer.

21 Q And after you had had those initial
22 conversations with me, did you ever have occasion to
23 deal with either Mr. Heinrich or Mr. Noel again?

24 A No.

1 Q Okay. And prior to the siting hearings
2 which began in November of 1998, had you ever had
3 occasion to meet me personally before then?

4 A I wouldn't know you if you walked in the
5 door in my suit as my dad used to say. I knew of
6 you by reputation. I knew you had a good reputation.
7 You did a lot of work before the board. As a matter
8 of fact, I didn't know you. You had to walk up to
9 me and introduce yourself to me on the morning of
10 the siting hearing.

11 MR. MORAN: Thank you very much. I have
12 nothing further.

13 HEARING OFFICER KNITTLE: Cross?

14 MS. HARVEY: I have two short questions.

15 CROSS EXAMINATION

16 BY MS. HARVEY:

17 Q Mr. Helsten, just so I'm sure that I
18 understand your testimony, to your knowledge, were
19 Will County Board members aware that this pre-filing
20 review of draft application materials was being
21 undertaken by the county staff and county
22 consultants?

23 A Ms. Harvey, I can't speak for their
24 individual awareness or their state of mind. The

1 point -- the thrust of my response to Mr. Moran was
2 this was not any secret, okay. These -- this was an
3 RFP which would have been publicized. I believe at
4 this point in time the county had also adopted the
5 procedure of -- even for professional services of
6 telling the county board, even though it did not
7 need to go through a formal bid procedure, they were
8 doing that, and I believe if there was not actual
9 notice, there was constructive notice.

10 Q Okay. Did you ever discuss the RFP or the
11 contract with Engineering Solutions with any of the
12 county board members?

13 A No, no.

14 Q And then just to clear up something that
15 Mr. Moran raised the specter of, are you aware of
16 any contacts between Land and Lakes personnel and
17 county board members during the time that this
18 application was pending?

19 A No.

20 MS. HARVEY: Thank you. I don't have anything
21 else.

22 HEARING OFFICER KNITTLE: Mr. Ettinger?

23

24

1 CROSS EXAMINATION

2 BY MR. ETTINGER:

3 Q You've referred at various times that you
4 are the special state's attorney for Will County.

5 A That's right.

6 Q What entities of Will County do you
7 represent?

8 A I represent Will County as a collective
9 whole. I've consulted in the past, Mr. Ettinger. I
10 have been asked to consult with the state's
11 attorney's office, with the county executive's
12 office, and with the county board. The county board
13 has specifically asked me to consult with them.

14 Q When you were representing Will County
15 during the siting hearing, were you also representing
16 the Will County Board?

17 A In my opinion, I was representing the
18 county as a whole collecting evidence and making a
19 record, yes.

20 Q And that included the Will County Board?

21 A Yes.

22 Q And in January, you elected to cease
23 representing Will County or the Will County Board
24 or --

1 A Let me -- go ahead. I'm sorry.

2 Q You can go ahead.

3 A I thought at that point in time -- the
4 Will County Board at that point in time becomes the
5 decision make -- well, they're the decision making
6 entity all the way throughout process, but at that
7 time, they were going to collect all of the
8 evidence, all of the comments, all of the reports
9 which had been filed by various parties, and they
10 were going to consider all that, make their
11 decision. And I thought at that point in time there
12 should be separate counsel just to eliminate any
13 possibility of any argument that I carried some
14 taint forward or that I was predisposed or anything
15 like that because that was -- that's -- that's what
16 I heard -- that was what I heard circulating, you
17 know, that those were the kind of arguments that
18 objectors were going to raise.

19 Q Well, you were right.

20 My next question then is when exactly did
21 you cease to represent the Will County Board?

22 A It would have been -- I can't tell you the
23 exact date, but the latest date it would have been
24 would have been when I appeared at their request

1 before the executive committee in public session on
2 January 14th, I believe, 1999, but I think I had
3 advised the county prior to that time, you know, it
4 would probably be a good idea if you would start
5 looking for other counsel just to make sure that
6 nobody can say hey, Helsten represented the county
7 during the fact gathering process. He may be
8 involved in formulation of a report. How can he do
9 that and then represent the county board at the same
10 time? So it would have been -- to answer your
11 question, it would have been sometime in early
12 January of 1999, I believe.

13 Q Early January of 1999?

14 A Yes, I believe so.

15 Q And the Olson report was filed January 19th
16 of 1999?

17 A Yes.

18 Q So when that report says at the top that
19 it was being filed by the Will County special
20 assistant state's attorney as one of the authors,
21 was that correct or false?

22 A That's correct, but that's -- author
23 means, as I said, grammatical. To say that I was
24 eutherian that would be a stretch because I had no

1 input into the substance of that report.

2 Q I see.

3 So you disqualified yourself, but you
4 still felt that you could help draft the report that
5 was filed after you were no longer representing the
6 board?

7 A Yes, because this was simply recommendations
8 to the board, just like you filed recommendations to
9 the board, just like Mr. Moran filed recommendations
10 to the board. All I was doing was following up on
11 the process of the evidence which we had gathered
12 during the --

13 Q Who were you representing on January 19th,
14 1999?

15 A At that time, Will County -- what I would
16 call the Will County department such as the state's
17 attorney's office, the county executive, the staff.

18 Q You didn't have a client in July when this
19 report was filed; is that what you're saying?

20 MR. PORTER: Objection. Asked and answered.

21 BY THE WITNESS:

22 A No. My client is Will --

23 HEARING OFFICER KNITTLE: Wait, Mr. Helsten.

24 I'm going to overrule and let him answer.

1 BY THE WITNESS:

2 A My client was the Will County state's
3 attorney's office, the county executive's office,
4 and the Will County departments.

5 BY MR. ETTINGER:

6 Q Okay. You've said that -- you've said
7 that you were very careful to insulate the county
8 board from people who did any preapplication review --

9 A Yes.

10 Q -- is that correct?

11 You've also said that those people did not
12 have any communications with the county board?

13 A Not on the application. To the best of my
14 knowledge, that's correct.

15 Q Okay. I think we have a problem with
16 language here, so I need to ask you, if I made a
17 report to you, would you consider that a
18 communication?

19 A No. I do not consider that to be -- I'll
20 tell you why because it was --

21 Q Wait a minute. Please answer my question.

22 MR. PORTER: Objection.

23 BY THE WITNESS:

24 A I can't answer that a yes or no. That's a

1 trick question, and I'll argue with you all -- I'll

2 argue with you all day, too.

3 HEARING OFFICER KNITTLE: Hold on. Stop here a

4 second. If you can answer it with a yes or no,

5 which you can, you have to. Now, you can be

6 rehabilitated by your attorney on redirect.

7 BY THE WITNESS:

8 A It's a communication of sorts, but it's a

9 public communication.

10 BY MR. ETTINGER:

11 Q Okay. Fine. If I gave you a written

12 document, would that be a communication?

13 A Of sorts it would be, yes.

14 Q Of sorts.

15 If I gave you a thing entitled final

16 report and recommendations, would that be a

17 communication?

18 A It would be a communication. What's

19 critical, Mr. Ettinger, is the context in which that

20 is presented.

21 Q We'll discuss that later.

22 Did the county offer any evidence during

23 the siting hearing?

24 A No. The county did not offer any evidence.

1 As far as a case-in-chief, no. We felt that our
2 cross examination of the witnesses brought out as
3 much evidence as we needed.

4 Q Just to be clear, where did you believe in
5 this ordinance that it permits the filing of a
6 report subsequent to the closure of the comment
7 period?

8 MS. ZEMAN: It's Sierra Exhibit 1.

9 HEARING OFFICER KNITTLE: Pardon?

10 MS. ZEMAN: It's Sierra Exhibit 1.

11 HEARING OFFICER KNITTLE: Is that the document
12 you're asking the question about?

13 MR. ETTINGER: Yes.

14 BY MR. ETTINGER:

15 Q Take your time.

16 (Brief pause.)

17 BY THE WITNESS:

18 A In paragraph 12 where it says: Upon
19 completion of the evidentiary hearing, county
20 departments, county board members and the county
21 executives shall have reasonable time to file their
22 final reports and recommendations with the county
23 board -- and here's the key language -- when
24 requested by the pollution control facility

1 committee. That does not mean that the pollution
2 control facility committee has to request those
3 reports within the 30-day posthearing period. We
4 have to wait for them to request them.

5 BY MR. ETTINGER:

6 Q I think you've answered my question.

7 THE WITNESS: I'm sorry. Page 4, section 12,
8 Ms. Harvey.

9 HEARING OFFICER KNITTLE: And it looks to be
10 page 9 on the fax up top.

11 MS. HARVEY: Okay. Thank you. I'm sorry.

12 BY MR. ETTINGER:

13 Q Is there any reason why the siting
14 committee couldn't have requested that report prior
15 to the close of the 30-day comment period?

16 MR. MORAN: Objection. It's asking this
17 witness to speculate about why the facility siting
18 committee didn't do something or why it may not have
19 done something. How can he address that issue?

20 MR. PORTER: I join in the objection.

21 MR. ETTINGER: I'll rephrase the question.

22 BY MR. ETTINGER:

23 Q Is there any reason why -- in this
24 ordinance why the Will County committee -- the

1 siting committee couldn't have requested this report
2 and it could not have been filed within the comment
3 period?

4 A It's possible under section 12. In my
5 opinion, it could have been, but in this case, we
6 did not receive the request until sometime in
7 January.

8 MR. ETTINGER: No further questions.

9 HEARING OFFICER KNITTLE: Any redirect?

10 MR. PORTER: Yes. Mr. Hearing Officer, may I
11 see Petitioners Exhibit 1, the ordinance, I believe
12 it is?

13 HEARING OFFICER KNITTLE: Sierra Club Exhibit
14 Number 1?

15 MR. PORTER: It's Sierra Club whatever they
16 marked the ordinance as. It is Exhibit 1. I just
17 want to know what page I'm going to direct the
18 witness to.

19 (Document tendered.)

20 REDIRECT EXAMINATION

21 BY MR. PORTER:

22 Q I would like to direct your attention to
23 Sierra Club Exhibit Number 1, page 6. Do you see
24 that?

1 A Yes.

2 Q And what is that on page 6?

3 A This is what I call a -- I guess for want
4 of a better term now, I'm drifting or lapsing into
5 my superfund experience under consent decrees. I
6 call this a schedule of deliverables where the
7 parties have to -- it outlines -- these steps
8 outline what takes place after the date of submittal
9 of the application, the submittal of the application
10 being day one under this schedule and then within 14
11 days step one, within X amount of days step two,
12 step three, et cetera.

13 Q And the steps that are referenced are the
14 paragraphs numbered in the preceding pages; is that
15 correct?

16 A Yes, to the best of my knowledge.

17 Q And isn't it true that step 11 is regarding
18 the public comment period?

19 A Yes.

20 Q And step 12 is regarding the submission of
21 reports?

22 A Yes.

23 Q And so these submission reports are to
24 occur after the public comment period, correct?

1 A Yes, arguably.

2 Q Did you know what would be included in the
3 application --

4 A No.

5 Q -- before it was filed?

6 A No.

7 Q Did the board know what would be included
8 in the application before it was filed?

9 A No, because it had no communications
10 concerning the application.

11 Q As a matter of fact, were all of the
12 suggestions of the Will County land use department
13 to Waste Management, Incorporated, incorporated into
14 application?

15 A No.

16 Q And how do you know that?

17 A I just know that I did not participate in
18 that. I just know that that sentiment was expressed
19 during the course of the postfiling review.

20 Q Did the Olson report suggest a certain
21 amount of conditions?

22 A Yes.

23 Q How many?

24 A Fifty some. I don't recall right now.

1 Again, I didn't draft them.

2 Q So those were additions or conditions to
3 the application which the Will County land use
4 department believed should have been in the
5 application; is that right?

6 A I don't know if they thought they should
7 have been included in the application. I think it
8 was our opinion it was a sufficient application.
9 These conditions simply made it a better application,
10 and that's the goal of 39.2 for the governing
11 authority to make the application if it is going to
12 be approved, which we didn't know, as good an
13 application as possible.

14 MR. PORTER: Nothing further.

15 REDIRECT EXAMINATION

16 BY MR. MORAN:

17 Q Mr. Helsten, prior to the date of decision,
18 March 4th of 1999, did the applicant have any
19 opportunity to respond or cross examine any witnesses
20 or present any testimony with respect to the final
21 report and recommendations dated January 19th of
22 1999?

23 A No.

24 Q And has, in fact --

1 A I've never known that to be the case under
2 process and under the case law. I remember a case --
3 I can't think of the name of it -- from this
4 pollution control board. Mr. Immel represented the
5 applicant where that was one of the complaints; gee,
6 we didn't have an opportunity to comment on other
7 people's comments or other people's special
8 conditions, and the board said nobody does. 39.2
9 doesn't contemplate that.

10 If you look at the ordinance, the hearing
11 officer, if he would have submitted a report, his
12 report specifically comes after the close of the
13 30-day public comment period. No one would have had
14 any opportunity to comment upon his recommendations
15 either.

16 Q And isn't it true that Waste Management of
17 Illinois, Inc., has, in fact, challenged one of the
18 conditions that was contained in this January
19 report?

20 A Yes.

21 MR. MORAN: Nothing further.

22 HEARING OFFICER KNITTLE: Ms. Harvey.

23 MS. HARVEY: I don't have anything else. Thank
24 you.

1 MR. ETTINGER: I just have one question.

2 RE CROSS EXAMINATION

3 BY MR. ETTINGER:

4 Q Did Mary Ann Gearhart, did she ask for
5 briefs at the close of the hearing?

6 A I don't remember. I couldn't -- the
7 record -- the transcript will speak for itself,

8 Mr. Ettinger. I can't remember

9 HEARING OFFICER KNITTLE: Anything else,
10 Mr. Ettinger?

11 MR. ETTINGER: No.

12 MR. PORTER: I have a follow-up to the last
13 one.

14 FURTHER REDIRECT EXAMINATION

15 BY MR. PORTER:

16 Q Ms. Gearhart did request the land use
17 department to draft a report; isn't that correct?

18 A Yes. It was in the form of a written
19 request sometime in January. I think what
20 Mr. Ettinger is asking is were the parties asked for
21 briefs.

22 MR. PORTER: Nothing further.

23 BY THE WITNESS:

24 A I don't consider the county to be a party

1 in the proceeding.

2 HEARING OFFICER KNITTLE: You can step down,

3 sir.

4 THE WITNESS: Thank you.

5 HEARING OFFICER KNITTLE: Can we go off the

6 record for a second?

7 (Whereupon, a discussion was

8 held off the record.)

9 HEARING OFFICER KNITTLE: We're back on the

10 record after a short break. I've noticed that

11 Mr. Porter has not filed an appearance in this

12 matter, although he is, as stated from Mr. Helsten's

13 firm, and Mr. Helsten does have an appearance on the

14 record with his firm.

15 Is there any objection to his appearing on

16 behalf of Will County Board here today?

17 MS. HARVEY: I have no objection.

18 HEARING OFFICER KNITTLE: Mr. Ettinger?

19 MR. ETTINGER: No.

20 HEARING OFFICER KNITTLE: Thank you.

21 Do you have any other witnesses?

22 MR. PORTER: We do not have any other witnesses

23 at this time. However, we would reserve our right

24 to recall Mr. Helsten if Ms. Konicki is allowed to

1 testify and there is something that she testifies

2 therein that we need to call him on.

3 HEARING OFFICER KNITTLE: Any objection to

4 that?

5 MS. HARVEY: No.

6 MR. HELTSEN: The only other individual as

7 well, Mr. Knittle, may be Mr. James Glasgow since

8 Ms. Konicki's -- state's attorney of Will County,

9 since the offer of proof mentions him to rebut

10 things that she has contended.

11 HEARING OFFICER KNITTLE: Any objection to

12 that?

13 MR. ETTINGER: I don't object to those people

14 testifying at a hearing date in rebuttal of whenever

15 Ms. Konicki testifies. I think we may have a

16 problem as to when she might testify, but that's a

17 separate topic.

18 HEARING OFFICER KNITTLE: Okay. That's fine.

19 Anything else aside from those two items?

20 MR. PORTER: No.

21 HEARING OFFICER KNITTLE: Thank you.

22 Mr. Moran, does Waste Management have any

23 witnesses?

24 MR. MORAN: We have no witnesses.

1 HEARING OFFICER KNITTLE: Do you have any
2 exhibits you wish to present?

3 MR. MORAN: At this time, based on the
4 presentation made by the Petitioners, we have no
5 documents to present either.

6 HEARING OFFICER KNITTLE: Okay. Are there any
7 members of the public present who wish to testify?

8 I see none.

9 We've talked about this previously, and
10 we're going to leave the hearing open today. We're
11 not going to make you sit here all day, but we'll
12 remain on the record until 6:00 o'clock today in
13 case any public comment or any public citizens come
14 in and wish to file a public comment. But short of
15 that, I would like to go off the record now for a
16 while. Let's go off.

17 (Whereupon, a recess was taken.)

18 HEARING OFFICER KNITTLE: We're back on the
19 record. It's 3:05 p.m.

20 What we're going to do is we're going to
21 allow for closings by all the parties, if they
22 choose to file a closing at this point. Then we'll
23 discuss briefs. Then we will stick around until
24 6:00 p.m. in the hopes of citizens coming and

1 offering public comments.

2 So we have closings. Ms. Harvey or

3 Mr. Ettinger?

4 MS. HARVEY: I would be happy to start.

5 HEARING OFFICER KNITTLE: Ms. Harvey.

6 CLOSING STATEMENT

7 MS. HARVEY: I have only a brief closing

8 statement to make, Mr. Hearing Officer.

9 As I indicated in my opening statement, we

10 will reserve all of our argument on our manifest

11 weight claims for the briefs that will be filed

12 after this proceeding, and we will reserve the bulk

13 of our legal argument on our fundamental fairness

14 claim for the briefs as well. However, I would just

15 like to sum up Land and Lakes' position on the

16 fundamental fairness claim in this case.

17 We've demonstrated today that the county

18 and its consultants undertook an extensive review of

19 the draft application that was submitted by Waste

20 Management to the county staff and consultants for

21 their review. Waste Management received comments

22 from both the county staff and from the consultants

23 regarding those draft application reports, and those

24 comments were passed onto Waste Management's

1 consultants. Mr. Rubak, Waste Management's
2 employee, testified this morning that Waste
3 Management and its consultants did indeed consider
4 all of the comments made by the county and its
5 consultants.

6 This afternoon, the city -- or the county
7 has elicited testimony that there were efforts made
8 to insulate the decision makers from the substance
9 of the application. I think it's important to note
10 for the record that Land and Lakes has not raised
11 any claim that the county decision makers were in
12 some way the victims or participants in
13 inappropriate contact regarding the substance of the
14 application.

15 The issue -- the fundamental fairness
16 issue raised by Land and Lakes is limited to our
17 claim that the preapplication review in and of
18 itself resulted in a situation where the hearing
19 process required by section 39.2 was rendered
20 essentially meaningless and that the burden of proof
21 was switched from the applicant onto the objectors
22 to disprove the elements of the application.

23 The county and Waste Management have
24 raised many other issues regarding predecisional

1 bias and what the efforts were to prevent any ex
2 parte contacts. I want to be crystal clear that
3 that's not what Land and Lakes is arguing in this
4 case.

5 I appreciate your listening to the
6 evidence in this case, and we'll reserve the rest of
7 our arguments for briefs to be filed subsequently.
8 Thank you very much.

9 HEARING OFFICER KNITTLE: Thank you, Ms. Harvey.

10 Mr. Ettinger, do you have any closing you
11 wish to make at this time?

12 MR. ETTINGER: Yes. I just want to highlight a
13 few points.

14 CLOSING STATEMENT

15 MR. ETTINGER: I think as we've made clear, we
16 feel that the crux, the most serious example of
17 fundamental unfairness here was to allow the Olson
18 report to be filed after the close of the public
19 record without allowing the other parties to have
20 any way to respond to this whatsoever. It really
21 doesn't do us any good to know that it's public if
22 there's nothing we can do about it.

23 Furthermore, this report, it was not
24 simply a recommendation in a report. It was clearly

1 in the nature of expert testimony as, in fact, it is
2 characterized both through the report and obviously
3 is, and it's an expert piece of expert testimony
4 that should have been made part of the hearing
5 record.

6 Furthermore, this expert testimony itself
7 refers to evidence that is outside of the hearing
8 record. In particular, for example, the most clear
9 point on page 5 of the Olson report, it refers to:
10 Based on our knowledge and past experience with
11 leachate characteristics of Illinois landfills,
12 there's no reason to believe that the leachate from
13 the proposed landfill will be significantly
14 different in quality from other landfills in the
15 area.

16 If you're going to make -- if you're going
17 to add to the hearing record by base -- adding new
18 testimony regarding your experience, it's quite
19 clear that that has to be part of the hearing. It
20 can't be part of a shot made after the close of the
21 public record.

22 The fact that the drafters of the Olson
23 report themselves prereviewed the application is
24 even more damning because what we have here in

1 extent and effect are coauthors of the application,
2 people who had very significant input to the
3 application. Changes were made, as Mr. Rubak
4 testified, in response to these comments. Then
5 being put in a position of commenting or purporting
6 to give a neutral review of the application that was
7 filed, it's a little like a playwright secretly
8 writing a review of his play and saying how good it
9 is. What we have then -- without disclosing that he
10 was one of the playwrights.

11 I think a further problem here is -- I
12 think a very interesting analogy can be made here as
13 to a judicial clerk, someone who advises the judge,
14 or a clerk who advises the Pollution Control Board.
15 Does anybody believe that if the Plaintiff had
16 prereviewed a complaint with a judicial clerk and
17 then that clerk later wrote the judge's opinion that
18 that would be fair? I certainly would assume that
19 no clerk from the Illinois Pollution Control Board
20 would ever prereview one of the pleadings that was
21 made by one of the parties in the case with those
22 parties and then come in later and author the draft
23 opinion for the board. That would clearly be
24 improper. So the report -- the Olson report was

1 made public, but I would assume, again, that it was
2 too late to do anything about it at that point as is
3 quite clear.

4 I think there are -- the problem here is --
5 and I too don't want to -- and I think the Sierra
6 Club and the other parties don't want to say that
7 there was some terrible, vicious scandal here.
8 There was a group of things that coming together
9 worked out to a process which was fundamentally
10 unfair. There's a lot of things here that could
11 have been done that if they were handled a little
12 differently might have been all right. If the
13 people who had written the Olson or helped write the
14 Olson report had merely put their report in the
15 record during the hearing, it might not have been so
16 bad that they prereviewed the application.

17 We're not saying that the county cannot
18 hire an expert, but if they're going to hire an
19 expert and rely on that expert testimony, then that
20 expert testimony has to be in the record.

21 We're also saying that -- we're also not
22 saying that you can't hire an expert to summarize
23 the record under some circumstances, but in that
24 case, it's got to be quite clear that they're

1 strictly limited to the record that was created in
2 the hearing. We can't then go out and file evidence
3 off the record. I refer to evidence off the
4 record.

5 The critical thing here is that the
6 authors of the Olson report basically made
7 themselves a critic of their own work and that it
8 was very critical also in that this Olson report was
9 clearly prejudicial. It was bought almost
10 completely by the Will County Board. This is not a
11 situation in which there was some random contact,
12 some letter from a citizen that reached a board
13 member. The law is quite clear. Minor contacts --
14 it's inherent in the nature of the process that Will
15 County Board members and other people involved in
16 the thing are going to hear things, but this is not
17 what happened.

18 What happened here was an expert opinion
19 was delivered to the Will County Board after the
20 close of the record and that that opinion became the
21 opinion of the Will County Board. It was clearly
22 given great deference by the Will County Board all
23 through their considerations.

24 We have some other comments with regard to

1 other matters in the nature of evidentiary materials
2 which reached the decision makers. Particularly,
3 we're referring to the comment regarding the quality
4 of the IEPA review. Certain other things are
5 alluded to, but I'll just drop that.

6 Finally, I believe that the Olson report
7 itself makes clear that the burden was put on the
8 opponents to refute many of the statements. If one
9 reads the Olson report, it will say things like
10 Ms. Jennings could not offer test reports to support
11 her opinions; Mr. Norris did not have specific
12 evidence to support this based on site review or
13 something like that. Well, of course they didn't.
14 They didn't have access to the site.

15 The people who are opposing these
16 petitions can only do one thing. They can read the
17 application. They can look at the application and
18 see whether it makes sense if there are
19 inconsistencies in the application, if there are
20 problems in the application. They are in no
21 position to take on the burden of proof and show
22 that the application is not proper. They can only
23 do what the application -- what the law requires
24 them to do, which is to argue that the applicant has

1 failed to make its demonstration. The Olson report
2 in many cases shifts that burden.

3 Finally, I do want to say also that a
4 number of the individuals here, Mr. Rubak and
5 others, we're not saying that they did anything
6 wrong. They did what they were told. It's just
7 that the combination of what was done here was
8 clearly unfair.

9 HEARING OFFICER KNITTLE: Thank you,
10 Mr. Ettinger.

11 Do we have any closing from the
12 Respondents?

13 MR. MORAN: Yes.

14 HEARING OFFICER KNITTLE: Mr. Moran.

15 CLOSING STATEMENT

16 MR. MORAN: As I understand the contentions as
17 they have been made by Land and Lakes, the
18 proceedings that were conducted here on the siting
19 application for the Prairie View Recycling and
20 Disposal Facility were fundamentally unfair because
21 somehow the prefiling review of portions of the
22 application shifted the burden of proof from the
23 applicant to Land and Lakes and I guess presumably,
24 as Mr. Ettinger said, his client as well.

1 I fail to understand how anything that's
2 been presented here today establishes any prejudice
3 or any legally cognizable harm as a result of this
4 alleged fundamental unfairness.

5 Indeed, as the case law points out, a
6 county decision maker, a city council, a local
7 governing body itself could prepare and file an
8 application for site location approval to itself.
9 It can do that in a number of different situations
10 where it owns the property, intends to own the
11 property, or alternatively it could serve or present
12 an application as a co-applicant. In those
13 instances, it's entirely appropriate and proper
14 prior to filing the application to have had
15 discussion or input in what goes in an application.

16 In this case, what we've heard is
17 testimony that there was discussion and review
18 prefiling between the applicant and between the
19 county's consultant. And what we also heard was
20 that with respect to these communications, each
21 decision made about what went into the application
22 was the applicant's, was Waste Management's and
23 Waste Management's alone.

24 The county in no way dictated or told

1 Waste Management what to put in the application. In
2 fact, as Mr. Rubak pointed out, although each of the
3 comments were considered as they obviously would be
4 out of deference to the people who prepared them, in
5 no way were all of the conditions or all of the
6 provisions or all the recommendations followed. In
7 fact, only some of them were incorporated.

8 And to the extent some of them were
9 incorporated, they were made part of the written
10 application in which Land and Lakes, in which the
11 Sierra Club, in which any other person who appeared,
12 Mr. Salem, others, reviewed, attacked, challenged in
13 whatever way they saw fit. That's the way this
14 process is supposed to work.

15 And here it would be illogical to conclude
16 that in general instances a local decision maker
17 could file its own application to itself or be a
18 co-applicant on an application and yet say in this
19 instance where there was some pre-filing
20 communication or contact to provide recommendations,
21 some of which were adhered to, most of which were
22 ignored, that that's somehow improper or that
23 somehow shifted the burden of proof. There was no
24 shifting of any burden in this instance.

1 Indeed, Land and Lakes has not articulated
2 any basis on which, if that shifting of burden of
3 proof occurred, how it prejudiced Land and Lakes.
4 What would Land and Lakes have done differently if
5 indeed there had been some shifting of the burden of
6 proof? Goodness knows, this hearing, over 2500
7 pages of transcript, over seven days of hearings
8 gave every objector, including Land and Lakes, a
9 full and fair opportunity to comment on any part of
10 the application and to make their comments as
11 persuasive and as cogent as they could. They had
12 that opportunity.

13 Based upon the review of the county, based
14 upon the decision of the county board, those
15 objections were considered in the final decision and
16 unfortunately for Land and Lakes were decided
17 against them, but that doesn't establish that there
18 was some shifting of the burden of proof or that
19 there was some other fundamental unfairness in the
20 proceeding. Indeed, that did not occur here,
21 precisely the opposite, and each of the parties had
22 every opportunity to take this application, to pick
23 it apart, to present their case, and to make their
24 strongest argument. That happened.

1 With respect to Mr. Ettinger's argument,
2 it seems to focus almost entirely on the Olson
3 report. The Olson report was prepared and was
4 submitted on January 19th. January 19th came
5 approximately two weeks after the close of the
6 30-day written comment period.

7 Well, one of the things that I think is
8 ignored in all the argument about the Olson report
9 is that no one had an opportunity to comment or
10 respond to what was in the Olson report. The
11 applicant certainly didn't. None of the other
12 parties did. That went the function of the Olson
13 report.

14 The Olson report was put together after
15 the close of all the evidence. It could only have
16 meaning and significance if indeed it took into
17 account all the evidence that was properly presented
18 and made part of the hearing. That's precisely what
19 happened.

20 Mr. Ettinger talks about this analogy with
21 a judicial clerk, if he had reviewed a complaint,
22 and then somehow at some point had then helped in
23 preparation of the order that disposed of the
24 complaint, it would be improper. It's an entirely

1 inept analogy. We're talking here about a quasi
2 adjudicative process and one that, until the
3 application is filed, is really a legislative or an
4 administrative process, one whose ultimate purpose
5 in function is to ensure that for any proposed
6 pollution control facility that that facility is
7 designed, proposed to be operated in a means as to
8 protect the public health, safety, and welfare.

9 In this instance, if you took the whole
10 world and attempted to put together the best
11 application you could, to be sufficiently protected
12 and perhaps more protective of the public health,
13 safety, and welfare as any application, where is the
14 ultimate harm? What's inappropriate about putting
15 together that type of application where once it's
16 filed, everyone has an opportunity to attack that
17 application, to assail it, to criticize it, and to
18 put forward the best argument as to why it's either
19 flawed or insufficient? That wasn't done here.

20 Mr. Ettinger as well in terms of
21 analogizing to the judiciary should have brought to
22 your attention another specific instance that
23 happens repeatedly in litigation and in matters
24 involving highly technical matters, and that is the

1 appointment by courts of special masters or of
2 experts which are retained by the decision maker to
3 assist him or her in reviewing highly technical
4 information. The special master certainly doesn't
5 do anything different than what had occurred here by
6 way of the Olson report: Taking the evidence,
7 reviewing what's presented, making recommendations
8 to which in few instances do the parties have an
9 opportunity to comment or to provide input.

10 So in this instance, any statement made
11 that the Olson report somehow was improperly
12 prepared and submitted is beside the point. That
13 was exactly the purpose for which it would be
14 prepared to assist in summarizing the evidence
15 presented at the hearing and being of assistance to
16 the decision maker in ultimately rendering a
17 decision. In this instance, that was done.

18 This applicant had no opportunity to
19 review that report, and indeed, as was brought out
20 here and is clear in the record, Waste Management
21 has appealed one of the conditions that were
22 referred to or at least part of that earlier
23 review.

24 So with all of those statements, Waste

1 Management rejects the motion that there was any
2 fundamental unfairness in these proceedings. Quite
3 the contrary, they were designed and conducted in a
4 way as to ensure fairness to all the parties.

5 In addition, Waste Management would
6 reserve its right to present any argument with
7 respect to both this issue and the manifest weight
8 of the evidence issues relating to the challenge
9 criteria from both Land and Lakes and the Sierra
10 Club.

11 Thank you.

12 HEARING OFFICER KNITTLE: Thank you, Mr. Moran.

13 Ms. Zeman?

14 CLOSING STATEMENT

15 MS. ZEMAN: We also will reserve the right to
16 present in our brief the arguments with respect to
17 the criterion.

18 With respect to fundamental fairness, the
19 collective arguments of Land and Lakes and Sierra
20 are that the process was so tainted as to make the
21 hearing and decision a sham. And as already pointed
22 out, Larry Clark as the hearing officer conducted
23 this proceeding in a manner that left no question
24 about the fairness of the proceeding at all.

1 As I came into this proceeding at the
2 point where the record had already closed, I was
3 taken by the fact that this proceeding had two
4 attorneys for objectors. The two attorneys for the
5 objectors each presented witnesses. Those lawyers
6 were given the opportunity to cross examine the
7 evidence. Land and Lakes' individual -- is it
8 Karpas?

9 MS. HARVEY: Karpas.

10 MS. ZEMAN: Mr. Karpas participated fully in
11 the proceeding in questioning witnesses, and it's
12 not usual to have a competitor do that process, but
13 he had every opportunity to critique the application,
14 to ask the questions of witnesses, Mr. Moran for the
15 applicant and Mr. Helsten for the county.

16 There's no question but that the role of
17 the governing body in these proceedings is somewhat
18 unique, and the issues that have been raised get to
19 the very crux of that, but I don't think that
20 there's any evidence that any of the processes
21 violated fundamental fairness as it has been
22 established by the Pollution Control Board and by
23 the Appellate Courts.

24 Again, going back to those decisions, one

1 of the first was E&E Hauling and then it's the city
2 of Salem where the city served as both the applicant
3 and the decision maker, and it does make perfectly
4 clear that as long as the objectors are given an
5 opportunity to comment, the legislative functions
6 that take place before the filing of the application
7 are not relevant as long as there's no evidence
8 about bribery or something critical to the decision.

9 Land and Lakes has not pointed out
10 anything about the fundamental fairness issue that
11 bears on the decision. Their entire argument is
12 about the hearing process itself, and yet the very
13 purpose of fundamental fairness in section 40.1 of
14 the act is so that there is a complete record of the
15 arguments of all the parties and evidence for the
16 decision maker to rule upon and that there's nothing
17 outside of that process that impacted the decision
18 maker. And yet, Land and Lakes today has said they
19 don't think that that's the case. There wasn't any
20 activities that the -- that took place here that
21 impacted the county board. They just want the
22 process to be a little bit fairer with respect to
23 the prefiling exchange.

24 With respect to that prefiling exchange,

1 it should be noted that E&E Hauling was one of the
2 first to also establish that in order to preserve
3 your right to argue fundamental fairness, you have
4 got to bring those issues before the hearing and
5 decision is ever made. Now, there are certainly
6 exceptions to that, but critical here is that the
7 ordinance itself sets forth when the Olson report
8 was likely to be submitted. Had you gone by the
9 ordinance, it would become perfectly clear that the
10 comments of the departments were anticipated after
11 the close of hearing and after the receipt of public
12 comment.

13 If Sierra Club had a problem with that
14 process, it was their duty to present that issue
15 before the hearing commenced to preserve their right
16 to argue fundamental fairness at this point. It
17 would have allowed the participants to determine
18 whether they wanted to modify that process in any
19 respect because of the argument. Not that they
20 necessarily would, but maybe there would be leave to
21 modify it, et cetera.

22 It's simply too late. The courts make
23 clear you can't wait until the decision is made and
24 then come out and argue something about the

1 procedure that you knew in advance.

2 In all honesty, the same can be said of
3 Land and Lakes. They waived their right to argue
4 fundamental fairness here. The evidence that they
5 have relied upon for the prefiling exchange is the
6 RFP and the agreement with Engineering Solutions
7 about what the county anticipated using its experts
8 for. If, in fact, that's their argument, that took
9 place well before the hearing, and Mr. Karpas at no
10 time raised that issue to the county board during
11 the proceedings. So in this context, that issue
12 about waiver becomes very critical. It should have
13 been raised earlier, and they waived their right to
14 argue that now.

15 The issues about the prefiling contacts
16 really relate to the planning process that has to
17 take place for a county to effectuate its
18 responsibilities as Mr. Helsten said. Otherwise,
19 they would be remiss.

20 One of the issues that has been raised by
21 these petitions is where do you draw the line. Up
22 until LandComp, it was many people's understanding
23 that the date of filing the application was the
24 critical point of deciding what constitutes

1 fundamental fairness. After that time, it becomes
2 quasi adjudicative. Well, now, we're looking at
3 events taking place several years before the
4 application is filed and several types of comment.
5 The question then becomes where do you draw the line
6 and what can the board advise the practitioners in
7 this area about what is fair and what isn't.

8 Mr. Helsten made clear that the process
9 that he utilized was an effort to work within the
10 confines of LandComp as he understood it, and I
11 think that is the critical element given that the
12 appellate cases have said what takes place before
13 the filing is legislative; what takes place after is
14 quasi adjudicative.

15 In terms of Sierra's argument about
16 reliance on the Olson report and some comments in
17 that report that they would construe as evidence, he
18 pointed to one phrase in that entire report -- and
19 it's a multipage report -- where it talks about
20 through their knowledge and experience, it's their
21 understanding that the leachate characteristics
22 would not be any different here. That was so
23 cumulative of the evidence in the record that even
24 if it was stated in that fashion to be something

1 other than a summary, the record itself states that
2 over and over and over, and the county board members
3 had that available to them in their deliberations.

4 Similarly, with respect to their
5 allegation that during the meetings I may have
6 overstated a discussion about the IEPA permit
7 process, again, that is one little phrase taken out
8 of context of the entire minutes where the county
9 board is referred repeatedly to the briefs of the
10 parties in order to understand the testimony,
11 including the Olson report, and then given the
12 option of deciding what to do from there. But the
13 transcript, too, goes on and on about the IEPA
14 process that will occur here, and it's no secret
15 that it's a two-step process, so you can even use
16 your common sense in that, and therefore, any
17 comments in that vein certainly didn't prejudice the
18 outcome.

19 In terms of prejudice, there was no
20 prejudice here in terms of the Olson report being
21 filed after the public comment period closed. It's
22 no secret in these proceedings that people generally
23 wait until the last day of public comment to file
24 your report. Even if the Olson report had been

1 filed on the last day, there would have been no
2 opportunity for anyone to comment on the
3 conditions. And again, 40.1 and 39.2, neither of
4 them and the case law construing this process does
5 not require the parties to comment on conditions.

6 There is precedent for late reports having
7 been utilized by the county board. I believe Tate
8 is one. CARL is one. The county board and cities
9 are entitled to utilize the expertise of either
10 their in-house consultants or those that they have
11 retained in developing comments on the application,
12 the transcript, and the comments that have come in
13 after that proceeding.

14 Just to sum up, I don't think that there
15 has been any evidence presented of any fundamental
16 unfairness in these proceedings. I think the record
17 really does make clear that Larry Clark conducted
18 the hearing in a manner where everyone had a full
19 opportunity to challenge the application, and that's
20 all the fundamental fairness that in this context is
21 raised by these Petitioners really requires.

22 HEARING OFFICER KNITTLE: Thank you.

23 Shall we talk about briefs?

24 MR. ETTINGER: I just want to mention that

1 obviously we reserve argument also.

2 HEARING OFFICER KNITTLE: Oh, definitely.

3 We have had a discussion about the
4 briefing schedule off the record. As stated
5 earlier, this is a very limited time frame we're
6 working with with the August 15th statutory decision
7 deadline. We're looking to have briefs in, as I
8 stated, the Petitioners' briefs by June 14th, a
9 response brief by June 21st, and then the reply
10 brief by June 28th. Is that going to be possible?

11 We're also requesting an expedited transcript which
12 will help speed things up. That should be in the
13 board's offices Friday morning, who the court
14 reporter, I shall indicate for the record, is
15 nodding her head.

16 MS. HARVEY: My only question, Mr. Hearing
17 Officer, there has been a little discussion about
18 possibly extending some of these dates to the
19 following Wednesday.

20 HEARING OFFICER KNITTLE: You mean the 17th,
21 the 24th, and the --

22 MS. HARVEY: The 16th.

23 HEARING OFFICER KNITTLE: The 16th. I'm
24 sorry. That would be Thursday.

1 MS. HARVEY: That would also be my birthday, so
2 please don't put it on the 17th.

3 HEARING OFFICER KNITTLE: We'll have to take
4 that into account.

5 Yes. I don't have a problem with that.
6 We can extend it. Is that what you're requesting,
7 Ms. Harvey?

8 MS. HARVEY: If that gives the board sufficient
9 time, June 16th, June 23rd, and then June 30th
10 gives, I think, everybody a little bit more time.

11 HEARING OFFICER KNITTLE: Any objections to
12 that?

13 MR. PORTER: No.

14 MR. MORAN: What's the absolute drop dead date
15 the board needs the briefs by?

16 HEARING OFFICER KNITTLE: Which briefs?

17 MR. MORAN: All the briefs.

18 HEARING OFFICER KNITTLE: The briefing period
19 is going to end on June 30th. The mailbox rule will
20 not apply, so we need it for any of these --

21 MR. MORAN: So June 30th is the drop dead
22 date?

23 HEARING OFFICER KNITTLE: No. That's the drop
24 dead for their reply brief. The drop dead date for

1 any brief that you may --

2 MR. MORAN: I'm just saying for all the briefs,
3 they have to be in by June 30th? Obviously, their
4 brief is the last brief.

5 HEARING OFFICER KNITTLE: Correct. June 30th
6 will be the final briefing date. The mailbox rule
7 is not going to apply for any of this under the
8 hearing officer order so that they'll have a record
9 of it.

10 I'm going to set the briefing schedule
11 then to be June 16th for the Petitioners' brief,
12 June 23rd for the Respondents' brief, and June 30th
13 for the reply brief.

14 Also, the public comment period for
15 written public comments is going to go also until
16 June 16th.

17 MR. ETTINGER: Sorry. We've discussed what the
18 mailbox rule means in this case. I've generally
19 been -- because of these things being very quick in
20 some cases, I've generally been faxed things. I
21 probably won't want to do that with the June 16th
22 brief, so I'll probably try and overnight that
23 getting it done, in effect, on the 15th. But is a
24 faxed brief on the 30th acceptable?

1 HEARING OFFICER KNITTLE: As long as you follow
2 it up with a regulation filing. That would be
3 acceptable. And by no mailbox rule, I, of course,
4 mean filed and served, so not only does the board
5 have to have your June 16th but so do the
6 Respondents.

7 That's it. Are there any members of the
8 public here who wish to give a statement?

9 I see none, so we're going to keep this
10 open until 6:00 o'clock.

11 Just for the record, one last thing. I'm
12 required to give a credibility statement. Based on
13 my legal judgment and experience, I find no
14 credibility issues with either of the two witnesses
15 who were offered today. That's it.

16 Let's go off the record.

17 (Whereupon, a recess was taken.)

18 HEARING OFFICER KNITTLE: Let's go back on the
19 record.

20 We are back on the record. It is about
21 5:30 p.m.

22 We have had no citizens wishing to offer
23 testimony to this point in time. However, it now
24 appears that Kathleen Konicki has returned.

1 And, Ms. Konicki, do I understand it's
2 your intention to offer testimony in this matter?

3 MS. KONICKI: For the record, my name is
4 Kathleen Konicki.

5 HEARING OFFICER KNITTLE: I know you've been
6 sworn in before, but let's swear her in again just
7 to make sure.

8 (The witness was duly sworn.)

9 MS. KONICKI: And I do want to inform the board
10 that I -- that I am under a gag order. The
11 Appellate Court is reviewing it. They have an
12 appeal pending for review of the temporary
13 restraining order that's been entered against me. I
14 did also file a request for an emergency stay of
15 that TRO.

16 The court has -- because of the complexity
17 of the issues and the importance, I believe, has
18 indicated that it's going to follow -- it's going to
19 not rule on the motion but follow the temporary
20 restraining order schedule, which means that
21 opposing counsel, in this case would be Dennis Walsh
22 for the county board, has through the end of
23 tomorrow to file a response to the pleadings I filed
24 today. And then the Appellate Court will have

1 through the end of Monday to issue its ruling. So
2 the ruling on the TRO is going to come fairly
3 quickly.

4 I have brought with me today to file in
5 open court a request for a continuance. Now, I
6 understand that the issue -- the question of whether
7 or not I as a member of the public have any standing
8 to file the document has not been settled, but I'm
9 going to file it, and I guess we'll have to get a
10 ruling on it. I have nine copies for you,
11 Mr. Knittle, if you'd take it for the board. And
12 then I have copies which I'd like to serve in open
13 court on all the attorneys. Let the record show
14 that I am serving one to Mr. Ettinger and one to
15 Ms. Harvey, and I'll give counsel -- there's three
16 counsel for the county board. I'm sure they can
17 share. And one for the applicant.

18 What I'm requesting in that -- what I'm
19 requesting is a second date or a continuance or
20 another date for public comment if only for myself,
21 something after June 7th so I could get a ruling
22 from the court. I just feel that my rights as a
23 public citizen to comment obviously are not what
24 they should be at this point in time. I'm going to

1 make some comment, but I'm going to make every
2 effort to abide by the temporary restraining order
3 that's been entered against me.

4 HEARING OFFICER KNITTLE: Ms. Konicki, can I
5 ask you a quick question?

6 MS. KONICKI: Certainly.

7 HEARING OFFICER KNITTLE: Hopefully to clarify
8 things. You're wanting to offer comment. Are you
9 aware that we have a public comment period where you
10 can file written comments?

11 MS. KONICKI: Actually, that is something that
12 I just heard about today because it was not in the
13 scheduling order that you issued earlier, and I know
14 it's not in your formal rules. So apparently, it's
15 just a practice that you have to be a member of
16 the -- I guess the bar specializing in this area. I
17 wasn't aware of it.

18 HEARING OFFICER KNITTLE: No. Actually, we
19 discuss it at the hearing unusually, and we don't
20 always do it because you are correct, it's not
21 required by the regulations. But we do here, at the
22 Pollution Control Board, want to get all comments
23 from interested citizens that we can on the record.
24 So we try to do that, and this is one of the ways we

1 try to do that.

2 For your information, the public comment
3 period in this case will end, I think, June 16th
4 actually. You'd be able to file a written public
5 comment, and if, in fact, you wanted to go that
6 route, we wouldn't have to -- it would moot your
7 request for a continuance, but I don't know if
8 that's going to be sufficient for your purposes.

9 MS. KONICKI: Let me ask you, do you give a
10 lesser weight to material that is filed as opposed
11 to testimony that's given under oath in person?

12 HEARING OFFICER KNITTLE: Definitely, because
13 you're not subject to cross examination.

14 MS. KONICKI: That makes me somewhat
15 uncomfortable.

16 HEARING OFFICER KNITTLE: But I can tell you,
17 for the record, that the board does consider all
18 public comments received.

19 MS. KONICKI: I anticipate filing something
20 during that period. I probably will use that filing
21 period for purposes of addressing the manifest
22 weight of the evidence issue. I had hoped to get
23 into that today, but quite frankly, because of the
24 time demands put upon me by this last-minute motion

1 by the county board, I'm really not prepared to do
2 justice to the issue. So I would anticipate using
3 that comment period. I think manifest weight of the
4 evidence arguments could be made adequately then.
5 But I would like to address the fundamental
6 unfairness of the procedures, make some of my
7 comments, not as many as I would make. Again, I
8 will curtail myself in accordance with what I
9 understand my obligations to be under that temporary
10 restraining order.

11 HEARING OFFICER KNITTLE: Okay. Let's give
12 people a chance to respond to your request. I see
13 the Respondents are making signs as if they want to
14 interject something. Mr. Porter?

15 MR. PORTER: First of all, Mr. Hearing Officer,
16 we object to this witness testifying at all at this
17 proceeding. She is not a member of the public. As
18 a matter of fact, the document she's tendered to the
19 Pollution Control Board today says she's a duly
20 elected member of the Respondent, Will County
21 Board. That is not a member of the public and is
22 not permissible for her to give a public comment
23 period.

24 This is the exact reason that she was

1 dismissed from this process in the first place
2 because she is not a member of the public. She's
3 not a third-party. That's our primary reason.

4 Also, Mr. Hearing Officer, we filed a
5 motion in limine to bar her from testifying as well,
6 and that has yet to be ruled upon. And whether we
7 consider it to be the public comment period or not,
8 I don't believe -- I think that's splitting a hair.
9 I think we have to address whether or not she can
10 testify at this hearing, and we stand by the reasons
11 announced in our motion in limine.

12 Also, we are very concerned because there
13 is currently a temporary restraining order against
14 Ms. Konicki from offering testimony regarding the
15 deliberative process of the board and the privilege --
16 any privileged communications, and because I don't
17 have a document stating what it is that she's going
18 to be testifying to, we're not doing this in a
19 question-answer format, I'm going to be put into a
20 position where she's literally going to speak, and
21 then I guess I have to cut her off and say that
22 violates the order or not. Regardless, I guess I
23 want it clear on the record that the county is in no
24 way waiving its rights under that temporary

1 restraining order.

2 HEARING OFFICER KNITTLE: Mr. Moran?

3 MR. MORAN: Yes. I had requested quite some
4 time ago when the Sierra Club had identified
5 Ms. Konicki as a potential witness to produce her
6 for deposition. That obviously never occurred.

7 The motion in limine and my motion to
8 exclude are based on the fact that she's going to
9 testify under oath and has issues to address and
10 testimony to provide, and I'm entitled to take her
11 deposition. Obviously, that wasn't afforded to us.
12 I don't think there's any basis to allow her to go
13 forward at this time.

14 In addition, I don't know how practically
15 this request can be considered or implemented even
16 if you were to decide that she has standing to make
17 this request. I think there's some real issues
18 there, but even if you did, we have the briefing
19 schedule set up. There clearly isn't a time
20 available for her to present sworn testimony subject
21 to cross examination, and I think for that practical
22 reason, it just isn't doable. So we object as
23 well.

24 MR. PORTER: Mr. Hearing Officer, I was only

1 voicing my objection to her testifying today on the
2 fundamental fairness issue. I also have comments on
3 the request for a continuance. I don't believe that
4 she has the right to file this document.

5 HEARING OFFICER KNITTLE: Anything from the
6 Petitioners?

7 MS. HARVEY: Land and Lakes has not taken a
8 position on whether or not Ms. Konicki can testify
9 or what the extent of the TRO is. That's not an
10 issue involved.

11 On the motion for a continuance, we don't
12 have an objection per se to a request for a
13 continuance for additional hearing time given the
14 way the events have played out. However, I am very
15 concerned about when it would be and how we would
16 schedule it consistent with the very short briefing
17 schedule that we have.

18 HEARING OFFICER KNITTLE: Mr. Ettinger?

19 MR. ETTINGER: Well, I have just a couple of
20 comments.

21 First of all, we have no objection to the
22 continuance. As I understand it, if all went well
23 in terms of getting the TRO modified that she would
24 be able to testify on June -- I'm sorry. Did you

1 say June 7th?

2 MS. KONICKI: There would be a ruling issued no
3 later than June 7th, so certainly June 8th forward I
4 should know where I stand.

5 MR. ETTINGER: As I understand it, our brief is
6 not due until the 16th now. I think as a practical
7 matter, her testimony is unlikely to require
8 substantial changes to our brief. It might lead to
9 a few extra points being made, but I doubt that it's
10 going to change too much.

11 Further, as far as the reason that
12 Ms. Konicki's petition was dismissed, I believe what
13 the board said was that her petition was dismissed
14 because she did not participate in the siting
15 hearing. I don't believe that the legal requirement --
16 that there's any legal requirement that you have to
17 have participated in the siting hearing to
18 participate in the PCB hearing with public comment.
19 At least if there is, that's not been briefed.

20 Finally, as to the motion in limine, that
21 was against Petitioners. In fairness to Ms. Konicki,
22 I did not respond to the motion because I couldn't
23 talk to her at that time to respond. In any case,
24 Ms. Konicki certainly couldn't respond to a motion

1 in limine that was given when she was not a party to
2 the case and I believe, although I don't have it in
3 front of me, was addressed to Petitioners. So for
4 the following reasons, I believe that her motion for
5 a continuance should be granted subject to whatever
6 limitations there are in the testimony.

7 MR. HELSTEN: Mr. Knittle, can I raise one
8 further logistical problem? I've looked at
9 Ms. Konicki's offer of proof that was prepared by
10 the Sierra Club and offered this morning. There are
11 things in there I would definitely, again, get on
12 the witness stand and controvert. My problem is
13 next Monday afternoon we start a -- I'm the hearing
14 officer in a hearing -- a landfill siting hearing in
15 McHenry County, Illinois, and once we start that,
16 from the afternoon of the 7th on -- we have the
17 pretrial on the afternoon of the 7th, and then we
18 have objectors there, so Lord knows how long we're
19 going to go there. But we're going to start on the
20 next day and go until we end. The problem is I
21 would not be available to rebut whatever is said.

22 MS. KONICKI: May I address, Mr. Knittle? I
23 would like to address Mr. Helsten's time problems.
24 I would like to --

1 HEARING OFFICER KNITTLE: I want to limit what
2 we're going to address right now. I'm not going to
3 make a decision on this request for a continuance
4 right now. I want to take a look and read it. It
5 doesn't seem as if, Ms. Konicki, you could testify
6 until after June 7th regardless.

7 MS. KONICKI: I would certainly feel -- my
8 preference would be --

9 HEARING OFFICER KNITTLE: Your request for a
10 continuance is seeking a continuance until after
11 June 7th, correct?

12 MS. KONICKI: Correct. There might be sometime
13 early on the 7th or in the afternoon.

14 HEARING OFFICER KNITTLE: Well, I'm not sure of
15 your right as a member of the public to file a
16 request for a continuance in this proceeding, and I
17 want to look into that a little bit, and I'm not
18 prepared to make a decision on that right now. I
19 don't think we have to make a decision on this issue
20 right now. I think what I want to focus on is your
21 oral testimony here today.

22 MS. KONICKI: The only thing I would say is
23 that to the extent that the continuance were
24 available to me, it would certainly be something I

1 would leap to take because it would take me out of
2 harm's way. I have no desire to violate that
3 restraining order. The judge has made very clear,
4 stated to me in open court that he would put me in
5 jail. So I am thoroughly, I guess, and maybe
6 properly intimidated. I would prefer to put
7 everything off until whether I know that is an order
8 that will stand up in court.

9 The type -- I do want to certainly not
10 bear the burden of any time constraints in this
11 action. It is very clear from the affidavit that
12 Ms. Zeman filed to support the county board's motion
13 for temporary restraining order, they were well
14 aware back on May 12th that I was going to go into
15 matters that they considered privileged. As a
16 matter of fact, there's no way they could not have
17 been aware back on April 8th when I filed my
18 petition I was going into those matters.

19 The position -- they justified their
20 eleventh hour back-door -- I felt blindsided, sucker
21 punched by that motion filed -- the TRO filed so
22 late in this process. You have put all of us in
23 this position. This is not I. This is county's
24 timing on this.

1 I have had my fellow county board members,
2 you know, angry at me that I am going to reveal
3 these matters. They have known it. They should
4 have come forward a lot sooner so this thing could
5 have been handled in a very civilized and scheduled
6 fashion. I'm sorry for your time problems, but you
7 created them. You've created enormous problems --

8 MR. HELSTEN: Ms. Konicki, I didn't have
9 anything to do with the TRO, so please be careful --

10 MS. KONICKI: Your client did. The county
11 board is your client.

12 HEARING OFFICER KNITTLE: Hold on. Let me
13 interrupt here. I don't want to get involved in an
14 argument between Mr. Helsten and Ms. Konicki on the
15 record here. I'm going to ask you to address your
16 comments toward me.

17 MS. KONICKI: Okay.

18 HEARING OFFICER KNITTLE: Mr. Helsten --

19 MR. HELSTEN: I'm sorry.

20 HEARING OFFICER KNITTLE: No, no. You, of
21 course, will have a chance to respond, either
22 through Mr. Porter or yourself.

23 Like I said, I don't want to get into the
24 request for a continuance. I do caution you,

1 however, that I'm not going to give you any
2 guarantees that this is going to be granted. Number
3 one, I don't know that you have a standing to do
4 this, and even if you do, you still have the timing
5 constraints, and we have a decision deadline that we
6 have to meet, and we're not going to run afoul of
7 that decision deadline at the Pollution Control
8 Board.

9 So I want you -- you're going to have to
10 make a choice here. I'm going to allow you to
11 testify in a limited degree here. Of course, we
12 have some objections that are going to come in
13 here. We are going to address those as they go
14 forward. We also have a motion in limine that we're
15 going to have to decide.

16 MS. KONICKI: I would like the hearing officer
17 and the public record to reflect the fact that at
18 the entry of the TRO, counsel for the county board,
19 which would be Mr. Helsten's client also, did
20 indicate that if the Sierra Club made a motion for a
21 continuance, county board would not object. That is
22 in the record.

23 HEARING OFFICER KNITTLE: I'm not going to make
24 any assertions on the record about that. I have no

1 idea whether that's true or not.

2 MS. KONICKI: I can tell you. I'm testifying

3 under oath. I was there in court. I know what

4 representations county board's counsel made.

5 HEARING OFFICER KNITTLE: Let's hold off. This

6 is getting into the realm of testimony, and I think

7 we have some motions.

8 Are you going to reoffer your motion in

9 limine?

10 MR. PORTER: Yes, particularly in light of

11 the --

12 HEARING OFFICER KNITTLE: Ms. Konicki, maybe

13 you could sit down here.

14 MS. KONICKI: Yes. I feel like I'm in

15 everyone's way.

16 HEARING OFFICER KNITTLE: It's just that I

17 can't see people then.

18 MR. PORTER: I'm going to reoffer my motion in

19 limine and characterize it as also a motion to bar

20 Ms. Konicki testifying, particularly in light of the

21 Sierra Club's statement, and rightfully so, that

22 that was a motion against one of their witnesses,

23 and that was my understanding that Ms. Konicki was

24 going to be their witness. So I want the record

1 clear that in the United States Supreme Court, the
2 Illinois courts, and the Illinois Pollution Control
3 Board have held that the introductions of the
4 deliberative process -- the deliberative thought
5 processes of administrative decision makers is
6 privileged and inadmissible, and that's U.S. vs.
7 Morgan, 313 U.S. 409, 1941; St. Charles vs. Kane
8 County Board and Elgin Sanitary District, PCB Number
9 83-228, 229, and 230, and that's a 1984 decision; as
10 well as the City of Rockford vs. Winnebago County,
11 PCB 87-92. Ms. Konicki is -- or was a board member,
12 and therefore, her testimony relates to the
13 deliberative process of the board and is
14 inadmissible under Supreme Court precedent.

15 In relation to the petition that she's
16 filed for a request for a continuance, it's her
17 burden to provide legal authority for a petition.
18 Number one, she's not a party, and I don't think she
19 has standing to bring a motion. Even if she did,
20 number two, she has to provide some legal authority
21 for bringing a motion, and she's failed to bring --
22 cite any authority that allows a public -- a member
23 of the public here to testify in the public comment
24 period to file a request for a continuance, and the

1 parties should not be prejudiced by her failure to
2 provide legal authority.

3 HEARING OFFICER KNITTLE: Mr. Moran, I think
4 you had something first.

5 MR. MORAN: Yes. As I mentioned a few moments
6 ago, my objection, together with all the well-taken
7 objections the county has made, is maybe even more
8 fundamental. I have requested for the last two and
9 a half weeks that I be allowed to take Ms. Konicki's
10 deposition.

11 She was initially disclosed as a witness
12 for Sierra Club. Now she's coming in and seeking to
13 be sworn and to provide testimony, and I think under
14 those circumstances, I have the right to take her
15 deposition before she testifies. She hasn't made
16 herself available.

17 Mr. Ettinger, with all due respect,
18 indicated he didn't have contact with her, could not
19 bring her in for a deposition, and that's okay as
20 far as it goes. However, I'm entitled to take her
21 deposition. She's not made herself available. She
22 isn't here for a deposition. She wants to testify
23 now or tomorrow, I suppose. I move to bar her on
24 that basis putting aside the issues. And I agree

1 with the issues regarding whether she has standing
2 to even bring this motion. She can't proceed with
3 presenting sworn testimony without being subject to
4 some discovery by these parties. I've requested it
5 for weeks.

6 So on that basis, I move to exclude any
7 testimony including testimony here today about
8 anything she may want to provide information or
9 statements about.

10 HEARING OFFICER KNITTLE: I'm going to go in
11 order here. Ms. Harvey, did you have something?

12 MS. HARVEY: No. I don't have anything to add
13 to what I previously said.

14 HEARING OFFICER KNITTLE: Mr. Ettinger?

15 MR. ETTINGER: I have two points.

16 First of all, the Sierra Club hereby joins
17 in Ms. Konicki's request for a continuance, and I
18 will now make it as though the Sierra Club made this
19 motion. I believe that that's appropriate in the
20 interest of allowing Ms. Konicki to put forward
21 whatever evidence the Appellate Court eventually
22 decides she may do that is consistent with her role
23 as a county board member. The Will County Board
24 may, of course, object on the basis of relevance or

1 privilege or whatever other objections they want to
2 make.

3 Furthermore, I will represent that the
4 Sierra Club is not going to offer Ms. Konicki as a
5 witness in the sense that I am not -- do not intend
6 to confer with Ms. Konicki. I do not intend to ask
7 her any questions on direct at whatever time she
8 does testify, if she does testify.

9 Finally, with regard to Mr. Moran's point
10 that he's entitled to take a deposition of
11 Ms. Konicki, I -- without necessarily joining in
12 that argument, I would say we have no objection to
13 him taking a deposition before she testifies, and so
14 if hypothetically the Appellate Court should rule on
15 the 7th that it is all right for her to testify or
16 clarifies what she can and cannot testify about,
17 then Mr. Moran, I think, should be free to depose
18 her or could be free to depose her on the 8th or
19 7th, depending on when the time came in, and then
20 she could make -- state whatever she intends to
21 state subsequent to that deposition.

22 Having said that, I want to say again we
23 are -- we will not be offering her as a witness, but
24 we do believe that Ms. Konicki should be allowed to

1 offer whatever she feels she can offer to this

2 proceeding that would be appropriate.

3 MR. PORTER: I guess I have a response to
4 that. Apparently, there was a statement in the
5 Circuit Court that if the Sierra Club was going to
6 present Ms. Konicki as a witness and there was a
7 motion to continue because of her ongoing litigation
8 with the TRO that we would not object to that
9 continuance. I do object to Ms. Konicki filing a
10 pleading in this case. The Sierra Club is not
11 calling her as a witness, and they have closed their
12 case. It's the public comment period.

13 HEARING OFFICER KNITTLE: One second,
14 Ms. Konicki.

15 A couple points, Mr. Ettinger. If you do
16 want to file a motion to continue, you're going to
17 have to file it in writing as required by the
18 board's regulations. I'm not going to let you just
19 join in to Ms. Konicki's request for a continuance
20 and thereby give it some sort of validity.

21 Secondly, there seems to be an end run of
22 the fact that she's not a party to this case, and I
23 would not be inclined to view it that way. However,
24 regardless, before I'm going to make a decision on

1 that -- and as I've stated before, I'm not going to
2 make a decision on this right now. If you're going
3 to attempt to join into this -- and once again, I
4 state that I would view that with some leeriness,
5 if, in fact, that is a word. You know, I would want
6 to see something in writing as is required by the
7 board's regulations when you're filing a motion to
8 continue.

9 The second part of this is I want to focus
10 on the oral testimony here. We've got the motion in
11 limine. Have you -- Ms. Konicki, what's going on?

12 MS. KONICKI: I would like to get a pen. It's
13 so long between when I'm allowed to speak, I'm
14 losing my thoughts, so I would like to get a pen and
15 paper. I would appreciate being included in the
16 round robin.

17 HEARING OFFICER KNITTLE: You understand you're
18 not a party in this case? You are a citizen
19 attempting to provide oral testimony, and that's
20 what I'm focusing on. I do not allow generally
21 citizens to make legal arguments about whether the
22 oral testimony is going to be accepted or not.

23 Have you responded to the full extent that
24 you want to, Mr. Ettinger, to the motion in limine?

1 MR. ETTINGER: To the motion in limine?

2 HEARING OFFICER KNITTLE: Mr. Porter's argument
3 thereof.

4 MR. ETTINGER: Portions of his motion in limine
5 I implicitly responded to in our response to one of
6 their motions, I think, regarding mental
7 impressions.

8 HEARING OFFICER KNITTLE: You have. This is a
9 lot of the same territory.

10 MR. ETTINGER: I think it's a lot of the same
11 territory. And I think -- I would say typically
12 it's very hard at this point not knowing what
13 Ms. Konicki would say as to what would come within
14 and without their objections. So I guess my basic
15 problem with the motion in limine, particularly in
16 this situation, is we don't know what the Appellate
17 Court will let her say. I don't know what
18 Ms. Konicki wants to say, and it's very difficult at
19 this point to, you know, blank out large areas of
20 testimony without knowing what precisely the
21 question is or what the issue is with regard to that
22 particular question.

23 As far as making a written motion, we can
24 certainly do that. I do wish to make clear, though,

1 that the county is correct. We've closed our case.
2 We are not offering Ms. Konicki as a witness. We
3 are simply -- we simply wish a member of the public
4 who wants to say something in this matter on the
5 record to be allowed to do so.

6 HEARING OFFICER KNITTLE: Okay. Here's what
7 I'm going to do. In regard to the motion in limine,
8 I am not going to enforce the Circuit Court of Will
9 County's temporary restraining order. That's not my
10 motion. That's not my job. If Ms. Konicki wants to
11 provide relevant testimony that is not privileged
12 and is not running afoul of any other relevancy
13 issues, I'm going to allow that, and she's going to
14 have to face whatever consequences come with the
15 breaching of that temporary restraining order.

16 As to the deliberative thought processes
17 of administrative decision makers, we talked about
18 this before. If she can -- whoever is offering that
19 testimony can make a showing of -- a strong showing
20 of bad faith, you know, that there's an exception to
21 that deliberative thought process, and so I'm going
22 to allow her to start with that, and if she can,
23 within the confines of the temporary restraining
24 order, make that showing, I'm going to allow that

1 testimony. If she's not made that showing, then I
2 do agree with you that the deliberative thought
3 processes of an administrative decision maker is
4 privileged and inadmissible. So I would advise you
5 that if you think that hasn't been made to make the
6 appropriate objections at the point in time.

7 That leaves us with -- once again, there's
8 a few arguments in this motion. I'm trying to hit
9 them all for you.

10 MR. PORTER: Do you want me to reiterate the
11 final one?

12 HEARING OFFICER KNITTLE: Which one was that
13 exactly?

14 MR. PORTER: Under the Illinois Pollution
15 Control Board case of ESG Watts, it's clear that the
16 role of the attorney for the county is irrelevant
17 and inadmissible.

18 HEARING OFFICER KNITTLE: No. I recall you
19 saying that. I do think, though, that that would be
20 covered by the temporary restraining order. It
21 doesn't seem as if she's going to attempt to speak
22 about that here today in regards to the temporary
23 restraining order.

24 MS. KONICKI: Can you repeat the topic?

1 MR. PORTER: The role of Mr. Helsten and your
2 understanding of his role.

3 HEARING OFFICER KNITTLE: As the attorney, and
4 that, at least to my understanding of the court
5 order, is enjoining you from publishing, describing,
6 or discussing any personal contacts or
7 communications or information, written or oral,
8 between the Will County Board and its attorneys,
9 which I think would be covered by -- what you're
10 saying would be covered by that. Once again, I
11 would advise you to make that objection when it
12 comes up, but I don't think it's going to come up.

13 As to the final argument, I can see in
14 this motion in limine regarding her ability to
15 testify as to the Will County Board as a whole, is
16 that in this motion, or is that in the other one?

17 MR. PORTER: That may be another motion, but I
18 agree --

19 HEARING OFFICER KNITTLE: That would constitute
20 conjecture and surmise, and I would agree. I don't
21 think she can testify for the Will County Board.
22 She can testify her to understanding. Of course,
23 she's got the temporary restraining order to deal
24 with.

1 Now, finally, as to the -- Mr. Moran's
2 motion about the discovery, she is not a witness for
3 the Sierra Club. She is a citizen, and a citizen
4 can come to these Pollution Control Board hearings
5 and testify. I realize it does seem like she's
6 conducting an end run of that discovery requirement
7 as well because she did not make herself available
8 for deposition, but she's not a witness to anybody
9 in this case, so I don't see how she has to do that
10 at this point in time.

11 MR. MORAN: Mr. Hearing Officer, if I might be
12 heard on that...

13 HEARING OFFICER KNITTLE: You can be heard on
14 that briefly.

15 MR. MORAN: Well, clearly it is an attempt to
16 thwart the legitimate discovery processes of this
17 proceeding. Had I known that the Sierra Club
18 intended not to call her after identifying her
19 initially as one of their witnesses, I would have
20 had the opportunity to subpoena her individually for
21 deposition if she intended to offer any sworn
22 testimony as part of this proceeding. Because the
23 Sierra Club identified her and has now at the
24 eleventh hour said well, we can't contact her, we

1 don't control her, she does what she want do, that
2 effort has been thwarted, and that's something that
3 is important only because with respect to any
4 witness who has testified at this hearing who has
5 been sworn and subject to cross examination, there's
6 been that fair opportunity to conduct discovery.

7 In this instance, because of the
8 last-minute durations and manipulations of these
9 procedural rules, Ms. Konicki is not being presented
10 for a deposition, and even though she indicates that
11 she's only testifying as a member of the public, the
12 fact of the matter is she's presenting whatever
13 evidence she has on the basis of the appeal that she
14 has filed that's been dismissed, on the basis of her
15 position as a county board member, and under those
16 circumstances, I think we're all fooling ourselves
17 if we conclude that somehow she's testifying as an
18 individual citizen coming in to address matters of
19 general public import.

20 That's clearly not what's going on here.
21 That's not what she's going to offer testimony on.
22 And I think based upon what ought to be allowed in
23 terms of fairness to all the parties in terms of
24 discovery is to take her deposition before she

1 testifies under oath as part of this process.

2 HEARING OFFICER KNITTLE: Your objection is
3 noted for the record, and I've made my ruling, and I
4 do advise you that you can file whatever motion to
5 reconsider a hearing officer ruling you would like
6 with the board, and they will not consider that
7 testimony if they think it's improper.

8 Ms. Konicki?

9 MS. KONICKI: I might suggest, the phrase has
10 not made herself available has been bandied upon
11 rather irresponsibly. Gentlemen, I have been
12 there. You know where I live. I'm a public
13 official. You have my phone number. None of you,
14 all four of you, four different law firms sitting
15 here, contacted me, not by phone, not in writing.
16 You made absolutely no effort. You want me. I was
17 yours. You want to agree to a continuance, I'm
18 yours. You can depose me before I give my sworn
19 testimony. And I would advise, Ms. Zeman, that
20 my -- you weren't there in open court.

21 HEARING OFFICER KNITTLE: Ms. Konicki, let me
22 interrupt again. I'm going to allow you to orally
23 testify, but as I've stated before, I don't want you
24 arguing with the attorneys for the Respondents

1 here.

2 MS. KONICKI: I will tell you, Mr. Knittle,
3 then in open court the communication that came to
4 the court was that if the Sierra Club made the
5 motion to continue, County Board would not object.

6 The reason we thought Sierra Club would
7 have to make the motion is exactly for the problem
8 I've run into today. I would be viewed as not
9 having standing. It was not conditioned on their
10 offering me as a witness.

11 HEARING OFFICER KNITTLE: Okay. Well --

12 MS. KONICKI: So if everyone would agree to a
13 continuance, I think we'd all apparently be happy,
14 including me.

15 HEARING OFFICER KNITTLE: Well, that remains to
16 be seen. However, I'm not going to address, as I've
17 stated, the request for a continuance at this point
18 in time. And I don't think you have proper standing
19 to file this, and I'm not sure Mr. Ettinger's
20 attempt to join into this is proper. But until I
21 have a chance to look at it, I'm not going to make a
22 ruling. I don't think it's timely anyway. I think
23 we can wait for his written motion to continue, if
24 he's going to file one, before we make this

1 decision.

2 MS. KONICKI: Unless, of course, all the
3 opposing counsel for the defense in this case would
4 care to agree. It's a matter of good faith to back
5 up all the hardship they've been banding about here
6 in open court.

7 HEARING OFFICER KNITTLE: Agree to what?

8 MS. KONICKI: A continuance so they can depose
9 me.

10 HEARING OFFICER KNITTLE: Do the Respondents
11 agree to a continuance in this case?

12 MS. KONICKI: And I will make myself available
13 for a deposition prior to giving sworn testimony.

14 HEARING OFFICER KNITTLE: I'll ask first,
15 Mr. Porter?

16 MR. PORTER: I cannot agree until the Sierra
17 Club files a written motion. They have not done
18 so.

19 HEARING OFFICER KNITTLE: Mr. Moran?

20 MR. MORAN: I cannot agree given the decision
21 deadlines in place until the Petitioners are in a
22 position to agree that there would be no changes
23 whatever in the briefing schedule and the decision
24 deadline as we've agreed to previously.

1 HEARING OFFICER KNITTLE: Mr. Ettinger?

2 MR. ETTINGER: I -- as far as the change in the
3 briefing schedule, I don't think there's a problem
4 with that. I'm certainly not proposing a change in
5 the briefing schedule.

6 HEARING OFFICER KNITTLE: Just for the record,
7 I'm not changing the briefing schedule. I'm just
8 saying it's a non-issue.

9 MR. ETTINGER: Right. So that is exactly
10 right. It's a non-issue.

11 I would just want to make sure that this
12 is clear for the record. Ms. Konicki, you don't
13 have a lawyer here today?

14 MS. KONICKI: No, I do not.

15 MR. ETTINGER: I think that further bodes in
16 favor of not playing with the temporary restraining
17 order at this point or allowing her to testify at
18 this time because of a concern that she's not going
19 to be receiving counsel, I think, from anyone here
20 as to the order.

21 HEARING OFFICER KNITTLE: As I've stated, I
22 am -- to me, the order is a non-entity. If she
23 wants to testify here and I think it's relevant, I'm
24 going to allow her to testify. If she thinks she's

1 going to run afoul here, that's her decision.

2 Whether she has counsel here or not does not concern

3 me. I'm only here to judge whether I think any

4 testimony she's offering is relevant and germane to

5 the case at hand.

6 MR. PORTER: Mr. Hearing Officer, there's one

7 outstanding issue here.

8 HEARING OFFICER KNITTLE: Did I miss

9 something?

10 MR. PORTER: Our primary motion for barring

11 this witness is the fact that she is not a member of

12 the public. She was a member of the board and,

13 therefore, should not be offering testimony in the

14 public comment period. Obviously, it would be to

15 her protection, I would think, to not go forward and

16 potentially violate that temporary restraining

17 order.

18 HEARING OFFICER KNITTLE: Ms. Harvey, I didn't

19 mean to skip you while we were eliciting comments.

20 Do you have any comments?

21 MS. HARVEY: No. I would simply reiterate Land

22 and Lakes does not have an objection to a

23 continuance. My concern is the timing of the

24 continuance given the decision deadline which Waste

1 Management controls and the fact that the briefing
2 schedule will remain as it's set. So I guess that's
3 a whimpy position to take. I don't have an
4 objection per se to a continuance for purposes of
5 allowing her to testify, but my concern is how we
6 deal with the decision deadline and that backing
7 up.

8 HEARING OFFICER KNITTLE: Okay.

9 MR. ETTINGER: Can I just make one statement?

10 HEARING OFFICER KNITTLE: Sure.

11 MR. ETTINGER: In response to Mr. Moran, I just
12 want to make sure -- and frankly, all the dates
13 don't correspond in my mind exactly, but Mr. Moran
14 was correct. He did request of me that we make our
15 witnesses available, and I was beginning to do that
16 when the temporary restraining order arose, and that
17 is when we decided to withdraw Ms. Konicki as a
18 witness, and we have never -- given that situation,
19 we were in no position to offer her.

20 HEARING OFFICER KNITTLE: Mr. Porter?

21 MR. PORTER: Again, I just think we need a
22 ruling on the issue of whether or not a board member
23 can come and testify in the public comment period.

24 HEARING OFFICER KNITTLE: I'm going to allow

1 her to testify. That would be my ruling. But I do
2 think if there's a chance that we're going to agree
3 to a continuance -- is that a possibility?

4 MR. MORAN: I haven't been able to depose her,
5 so clearly --

6 HEARING OFFICER KNITTLE: The continuance would
7 allow you to depose her if you wanted to, I would
8 imagine.

9 MR. MORAN: So you're saying if the continuance
10 is granted, then you would reconsider the order that
11 you've just made denying me the opportunity to
12 depose her because you said I don't have that right
13 now?

14 MS. KONICKI: I would, on the record, give it
15 to you.

16 MR. MORAN: But it's up to the hearing
17 officer.

18 HEARING OFFICER KNITTLE: I would extend the
19 discovery deadline and let you depose her if she
20 would make herself available, and if she wouldn't
21 make herself available --

22 MS. KONICKI: I would.

23 HEARING OFFICER KNITTLE: -- under these
24 circumstances and we came to another date and time

1 when she had not made herself available, I would
2 grant your motion to exclude her testimony.

3 MR. PORTER: I've stated my position earlier.

4 HEARING OFFICER KNITTLE: Okay. Perhaps you
5 could give me a quick summary.

6 MR. PORTER: It was simply that the Sierra Club
7 has not filed a motion to continue this, and
8 therefore, I cannot agree. I do not have the
9 authority to agree to that.

10 HEARING OFFICER KNITTLE: If that's the case,
11 then I'm going to ask you, Ms. Konicki, do you want
12 to offer oral testimony here as a private citizen?

13 MS. KONICKI: The motion will not be
14 continued?

15 HEARING OFFICER KNITTLE: I'm not addressing
16 the motion for a continuance at this point in time
17 because I don't think I have one. I think I have a
18 request for a continuance from a private citizen who
19 does not have the right to continue this hearing.

20 MS. KONICKI: And my understanding of what took
21 place here is that counsel for all parties have
22 waived -- would consent to a continuance except for
23 counsel for the county board.

24 HEARING OFFICER KNITTLE: That seems, with some

1 qualifications, to be an accurate statement.

2 MR. PORTER: Because the Sierra Club has not
3 filed such a motion.

4 HEARING OFFICER KNITTLE: I understand that. I
5 didn't mean not to give you a full explanation.

6 So, Ms. Konicki, do you want to offer
7 testimony at this point in time?

8 MS. KONICKI: I feel I have no choice. It's a
9 danger sign, and I will try to show due respect for
10 the court order and keep myself out of trouble. And
11 what I have to say will not be as broad as what I
12 would have said without the temporary restraining
13 order either on the topics I'm covering -- I won't
14 be covering nearly as many topics as I would have
15 covered without the TRO in place simply because I
16 expect that counsel for the county board are going
17 to -- no matter what I say here today -- the fact
18 that I'm here is going to cause additional
19 litigation, and I would like to keep the issues
20 between us as simple as possible.

21 MR. MORAN: Before we begin, the hearing was
22 supposed to have gone until 6:00 o'clock. Can we
23 get some sense to perhaps how long Ms. Konicki has
24 to address these issues because as we've indicated

1 before and I think as it evident by virtue of some
2 of the colloquy we've had thus far, there are going
3 to be issues raised, and there are going to be
4 objections, and there is going to be, I think, quite
5 a flurry of activity, and we may be here for a
6 while.

7 HEARING OFFICER KNITTLE: If it's going to go a
8 long time, I'm going to hold it over until tomorrow
9 as it's properly noticed up for.

10 Ms. Konicki, do you have a time frame as
11 to how long you think you're going to be
12 testifying?

13 MS. KONICKI: Uninterrupted -- I don't know.

14 HEARING OFFICER KNITTLE: Let's work with
15 uninterrupted.

16 MS. KONICKI: I wouldn't think more than about
17 20 minutes.

18 MR. PORTER: I would suggest proceeding.

19 HEARING OFFICER KNITTLE: Any objection?

20 Okay. Go ahead, Ms. Konicki. Then
21 proceed.

22 MS. KONICKI: My understanding as a member of
23 the county board was that Mr. Helsten did represent
24 the county board as counsel.

1 MR. PORTER: I object. Immediately we're
2 testifying as to the role of Mr. Helsten which is
3 clearly barred under the ESG Watts case,
4 inadmissible, irrelevant.

5 HEARING OFFICER KNITTLE: I've got that case
6 before me. Can you direct me to where it's barred?

7 MR. PORTER: I don't have that case in front of
8 me.

9 HEARING OFFICER KNITTLE: I would be happy to
10 give it to you.

11 (Brief pause.)

12 MR. PORTER: The ESG Watts case provides that
13 in that case, the assistant state's attorney
14 appeared for Lake County which was not an objector,
15 and the court held that the assistant state's
16 attorney's testimony was irrelevant and
17 inadmissible. The petitioner, ESG Watts in that
18 case, was seeking to conduct discovery as to the
19 state's attorney's testimony, and the ultimate
20 finding of this case was that his testimony was
21 irrelevant.

22 The board finds that the -- excuse me.
23 This is a quote at page 13 of the document that you
24 have handed me -- I'm sorry. Page 7: The board

1 finds that the OSA's alleged conflict of interest is
2 irrelevant to fundamental fairness because he was
3 not a decision maker. They quote The Citizens
4 Against Regional Landfill Case vs. Pollution Control
5 Board holding that the role of a hearing officer in
6 a siting hearing was irrelevant because he did not
7 have a vote on whether the site application was to
8 be granted.

9 Again, the ultimate holding in the ESG
10 Watts case was that -- at the last page, the board
11 cautions that it is not holding OSAs free to act as
12 a conduit for ex parte communications; that the role
13 would be improper. However, ESG Watts did not make
14 that claim, and therefore, discovery as to the role
15 of the OSA was inadmissible.

16 HEARING OFFICER KNITTLE: Okay. I'm going to
17 overrule that objection then. This case does leave
18 open the fact that if, in fact -- leaves open the
19 possibility that the role could be improper. At
20 least that's my reading of it. So I'm going to
21 allow her to continue. Overruled.

22 MS. KONICKI: My understanding is that he -- as
23 a county board member is that he was counsel for the
24 county board. He participated in closed executive

1 sessions. He rendered legal advice.

2 MR. MORAN: I'm going to object. As a county
3 board member, Mr. Helsten was involved in these
4 discussions. I don't think you meant to say that.

5 MS. KONICKI: No. I said as a county board
6 member, my impression was and that he was involved
7 in executive sessions, closed sessions of our
8 executive committee in which he did render us legal
9 advice and that as an individual county board
10 member, myself and others did approach him and
11 receive legal advice. So my understanding --

12 MR. MORAN: Just an error in syntax.

13 MS. KONICKI: My understanding and I believe an
14 accurate assessment of his role would be that he was
15 acting as counsel for the county board. However,
16 after the close of public hearings, myself and the
17 rest of the county board were advised by our state's
18 attorney --

19 MR. PORTER: Objection. Attorney-client
20 privilege and violates the temporary restraining
21 order.

22 HEARING OFFICER KNITTLE: I'll sustain it on
23 attorney-client privilege.

24 MS. KONICKI: I don't believe it took place

1 under circumstances where the attorney-client
2 privilege would attach. There were not
3 circumstances where other parties weren't present.
4 This is something that's even known to the press.

5 HEARING OFFICER KNITTLE: Under what
6 circumstance did this take place?

7 MS. KONICKI: Discussions in the hallway.

8 HEARING OFFICER KNITTLE: Were other members
9 present? Were other citizens present to overhear
10 this?

11 MS. KONICKI: It's a public hallway. People
12 are milling through it.

13 HEARING OFFICER KNITTLE: Was it intended to be
14 a confidential communication?

15 MS. KONICKI: Certainly not that I understood.

16 MR. PORTER: Same objection. She's offered no
17 testimony that anyone who was not protected by the
18 privilege heard the conversation, was privy to the
19 conversation, or intended to be privy to the
20 conversation. The attorney-client privilege clearly
21 attaches.

22 HEARING OFFICER KNITTLE: I'll sustain that
23 objection.

24 MS. KONICKI: It is something the press was

1 aware of.

2 HEARING OFFICER KNITTLE: Pardon?

3 MS. KONICKI: It is a fact that the press and

4 the public were aware of. That's why Ms. Zeman was

5 hired. Ms. Zeman came on board because we were told

6 we didn't have counsel; that Mr. Helsten was the

7 land use department's counsel, not ours.

8 HEARING OFFICER KNITTLE: Okay.

9 MR. PORTER: I object and move to strike if

10 this was a reference to the very conversation that

11 my objection was just sustained on.

12 HEARING OFFICER KNITTLE: I'm not sure what

13 conversation you're talking -- you're not testifying

14 about a conversation. Are you talking about a

15 general impression that you held? I will allow that

16 to go on.

17 MS. KONICKI: Okay. General impression that I

18 held.

19 HEARING OFFICER KNITTLE: Let's move forward.

20 MS. KONICKI: That he was our attorney, that he --

21 but after the close of public hearings that that had

22 been a misconception. In fact, he was not our

23 attorney. He was the attorney for the land use

24 department. And the county board, therefore, if it

1 wanted its own attorney, needed to hire someone

2 else, which is why Ms. Zeman came on board.

3 I at this point was quite shocked to learn

4 that Mr. Helsten was not our attorney when he had

5 been participating in these executive sessions and

6 rendering us legal advice. The more I thought about

7 it the more concerned I got because I realized that

8 if in indeed though he had been our attorney, what

9 was he doing at the public hearings? You have the

10 county board conducting the public hearings sitting

11 on your side, if you would, of the bench and also

12 playing a role in front of the bench. It was a dual

13 role.

14 MR. PORTER: Objection. Are we getting into

15 legal argument now?

16 HEARING OFFICER KNITTLE: Sustained. Try to

17 keep your testimony to your observations and your

18 understanding.

19 Mr. Ettinger?

20 MR. ETTINGER: Excuse me. I'm not -- first of

21 all, I want to make clear that because I don't

22 attempt to refute objections he makes, I don't

23 necessarily agree with legal principles he's

24 stating.

1 Secondly, maybe just for my benefit,
2 perhaps you all know this, what is the role of the
3 public comment here? Are they not allowed to make
4 legal arguments, or is the public not -- what are
5 the limits as to what the public can --
6 HEARING OFFICER KNITTLE: The limits are very
7 tenuous. Mr. Ettinger, I'm going to allow her to
8 testify, but I'm not going to allow her to make
9 legal comments and legal conclusions. That's my
10 decision.
11 MR. ETTINGER: Can they make comments on
12 legal -- can members of the public make comments on
13 their legal conclusions in their written statements?
14 HEARING OFFICER KNITTLE: They can -- I'm not
15 going to give you a blanket endorsement as to what's
16 permissible in the legal statements that may or may
17 not be filed.
18 MR. ETTINGER: Okay. Thank you.
19 HEARING OFFICER KNITTLE: I just can't do that
20 until I see it or I know what we're talking about.
21 Go ahead, Ms. Konicki.
22 MS. KONICKI: My train of thought is being
23 interrupted. It's difficult.
24 I want to start off -- let's go back to --

1 I'm trying to put together a train or a series of
2 events that I think shows a conflict of interest and
3 the fundamental unfairness in the process. I have
4 attorneys who are not county board members
5 participating in closed sessions -- I mean, who are
6 not counsel for -- apparently not counsel for the
7 county board participating in our closed sessions.
8 I have myself as a county board member been under
9 one impression and being told something different
10 later, which it's clear that attorney was not on our
11 county board.

12 When Ms. Zeman came on board, I became
13 very concerned about the process, and I wanted to
14 know how Mr. Helsten -- where did we get Helsten
15 from, where did we get Zeman from, what was going on
16 here? And what I was told is that Mr. Olson in our
17 land use department --

18 MR. PORTER: Objection. I would ask that the
19 witness identify who told her this.

20 MS. KONICKI: It would be the state's attorney's
21 office.

22 MR. PORTER: Objection to attorney-client
23 privilege, not to mention hearsay.

24 MS. KONICKI: This is not taking place under

1 confidential circumstances. This is not executive
2 session, closed session, and I certainly don't think
3 that absolutely everything that comes out of an
4 attorney's mouth is an attorney-client privilege.

5 HEARING OFFICER KNITTLE: Mr. Porter, do you
6 have something else?

7 MR. PORTER: It is when it's told to his client
8 and she was a member of the county board.

9 HEARING OFFICER KNITTLE: I'm going to sustain
10 that one. I think that qualifies as attorney-client
11 privilege. I ask you to move on.

12 MS. KONICKI: Where were we even at on it?

13 HEARING OFFICER KNITTLE: No idea, Ms. Konicki.
14 You were talking about a communication made by the
15 state's attorney's office, and I upheld an objection
16 that was made on the attorney-client privilege
17 because you don't have -- I don't think that the
18 attorney-client privilege has been waived by the
19 county board. That's all -- that's -- it's not my
20 job, Ms. Konicki, to keep track of your arguments or
21 testimony for you.

22 MS. KONICKI: I'm not sure that the
23 attorney-client privilege is being used properly
24 here. This is something the Appellate Court is

1 going to rule on. This might be a reason why a
2 continuance is necessary. I've never seen it used
3 as a sword. There is no case law --

4 MR. PORTER: Mr. Hearing Officer, is this
5 witness making a legal argument now?

6 HEARING OFFICER KNITTLE: It seems like it.

7 MS. KONICKI: I'm making factual. This is an
8 issue before the Appellate Court. It has never been
9 decided. Counsel for the county board has admitted
10 that it's never been decided. There is no case law
11 supporting using the attorney-client privilege as a
12 sword to stop allowing a citizen from testifying.
13 It's usually a shield.

14 HEARING OFFICER KNITTLE: Let's halt this for
15 one second here. It's already 6:30 p.m. Let's go
16 off the record.

17 (Whereupon, a discussion was
18 held off the record.)

19 HEARING OFFICER KNITTLE: We have had some
20 off-the-record discussions. Ms. Harvey, I'm going
21 to summarize what you stated. We're talking about
22 we're not going to finish tonight obviously, and
23 Ms. Harvey suggested that we do not continue
24 tomorrow but that we continue on Friday morning,

1 which we also have scheduled for this hearing to
2 continue, and Mr. Porter was about to say something
3 when we decided to go back on the record.

4 MR. PORTER: I guess I would like to make it
5 clear that I would prefer -- I realize that this has
6 been an arduous process, but I prefer that we go
7 forward, and I want my position to be clear that I'm
8 objecting to this witness filing a motion in this
9 case. If there was a motion filed for a continuance,
10 I would not have had an objection to it pursuant to
11 an agreement with the Circuit Court.

12 HEARING OFFICER KNITTLE: Okay. Go ahead,
13 Mr. Helsten.

14 MR. HELSTEN: May I, Mr. Knittle?

15 I don't know how waiting -- I appreciate
16 Ms. Harvey's comments, and I think that's the next
17 best solution to this situation, but I'm not sure
18 how waiting until Friday resolves any issue
19 concerning what Ms. Konicki wants to testify to now
20 on fundamental fairness that she thinks is outside
21 the scope of the TRO. Maybe to avoid the arduous
22 process of her saying one word and us objecting and
23 you sustaining every word she says -- every
24 objection that we make, she could make her offer,

1 this may speed things up, so long as we reserve the
2 right at the end of her offer to object, state then
3 our objections to everything she said after she's
4 been crossed and essentially voir dired on each one
5 of these statements well, I was told. Once she's
6 crossed, who told you; the state's attorneys office;
7 who told you; my attorneys; who told you; my
8 attorneys. Then we reserve the right at that point
9 to move to object to the testimony on a number of
10 bases and move to strike it. That may speed it up,
11 and we may be able to get out of here at a
12 reasonable time because I'm not sure what delaying --
13 although I think the next best solution is
14 Ms. Harvey's -- what delaying until Friday the
15 inevitable does for us, although it's been a long
16 and arduous process.

17 HEARING OFFICER KNITTLE: You're intending and
18 proposing, I take it, to take her testimony as an
19 offer of proof while reserving the right of the
20 Respondents to object afterwards?

21 MR. HELSTEN: Object and move to strike it on
22 any bases that are objectionable afterwards.

23 HEARING OFFICER KNITTLE: And you would still
24 want to cross examine Ms. Konicki on any testimony

1 that was contained in that offer of proof?

2 MR. HELSTEN: Possibly if it wasn't evident
3 from her offer of proof that the information was
4 objectionable. Say one or two questions needed to
5 be answered -- needed to be asked and answered to
6 clarify where she got the information from, then we
7 get it out of the way. We're done subject to her
8 getting a ruling from the Appellate Court. If she
9 can come back in time, so be it.

10 MS. KONICKI: The thing is they could rule
11 Friday. I'm just saying they have to rule by the
12 end of Monday. They will have all pleadings from
13 both myself and opposing counsel Thursday, so we
14 very well could have a ruling Friday morning.

15 HEARING OFFICER KNITTLE: Mr. Ettinger, you
16 were about to say something in regards to
17 Mr. Helsten's proposal?

18 MR. ETTINGER: I guess my concern -- I'm all
19 for creative solutions to take care of this problem
20 now. I just don't think -- that may not do it
21 because of the TRO. I'm not sure --

22 HEARING OFFICER KNITTLE: The TRO is not -- we
23 can't assume that it's going to be resolved by
24 tomorrow or Friday.

1 MR. ETTINGER: I appreciate that. I don't know
2 what offer of proof she could make consistent with
3 the TRO that couldn't be -- that couldn't be argued
4 to violate the temporary restraining order so we
5 still might wind up with the same situation later
6 anyway.

7 HEARING OFFICER KNITTLE: That's going to be
8 her choice whether she wants to proceed under that
9 condition or not as it was before.

10 I'm inclined, Mr. Helsten, to go with
11 that. I would like to get this over with tonight.
12 We've had no public comments. We've sat around for
13 three hours today waiting for public comments.
14 Everybody has closed their case-in-chief, and all we
15 have left to deal with is Ms. Konicki and her
16 comments that she's wishing to provide to the
17 board. So if the Respondents and the Petitioners
18 agree to the proposal, I'm inclined to do it.

19 What do you think, Mr. Moran?

20 MR. MORAN: Well, I'm all for doing anything to
21 move this process along and finish it up. I suspect
22 that if that can be done, I'm certainly willing to
23 stick around as long as possible, although I guess
24 the only thing that I would say is I don't think

1 continuing this to Friday accomplishes anything.
2 And the only thing I'm concerned about is I don't
3 want this matter continued until Friday. There's
4 another hearing scheduled for Friday. I don't want
5 this kind of presentation such as it is to end up
6 being more prolonged than even we anticipated and
7 then having to be moved around with the hearing we
8 have scheduled. So if there's anything to be done,
9 do it tonight or do it tomorrow, and let's be done
10 with it.

11 HEARING OFFICER KNITTLE: Ms. Harvey?

12 MS. HARVEY: I don't have any objections to
13 staying for some period of time tonight. I do -- if
14 we're going to be here until 9:00 o'clock, I do have
15 a problem with that. I'm certainly willing to give
16 Mr. Helsten's suggestion a try and see how that
17 goes. And my suggestion to continue until Friday
18 was only in the hopes of getting the question of the
19 request for a continuance resolved, not that we
20 would have a written ruling on the TRO.

21 HEARING OFFICER KNITTLE: Understood.

22 Mr. Ettinger, do you have anything else?

23 MR. ETTINGER: I'm frankly confused as to how
24 we're proceeding here. I gather --

1 HEARING OFFICER KNITTLE: This may be moot.

2 Hold on a second.

3 (Whereupon, a discussion was

4 held off the record.)

5 HEARING OFFICER KNITTLE: Did you have a

6 response to Mr. Holsten's proposal?

7 MR. ETTINGER: Well, I guess I just want to

8 make sure what it is so that I know what's resolved

9 and what isn't resolved. You're going to let her

10 make an offer of proof as to whatever she feels

11 won't violate the TRO, and then later if the TRO is

12 modified or reversed in some way, we'll argue at

13 that time whether she can come back or not.

14 MR. PORTER: Yes.

15 MR. ETTINGER: And she's here -- she can make

16 her best guess now as to what violates the TRO or

17 not.

18 HEARING OFFICER KNITTLE: Let me just be

19 perfectly clear. She has the option to do whatever

20 she wants. She can testify. She cannot testify.

21 She can file a written public comment which will be

22 due after the TRO is ruled. There's all sorts of

23 options for her. I'm not pressuring her to testify

24 now. This is totally her choice. If she wants to

1 testify, I'm inclined to let Mr. Helsten's proposed
2 method of testimony go forward. That's where I
3 stand. But I want to be perfectly clear that nobody
4 here, especially myself as hearing officer, is in
5 any way insinuating or pressuring Ms. Konicki to do
6 anything. This is all Ms. Konicki's choice, and it
7 is her decision and her responsibilities and her
8 results that she's going to have to bear.

9 MR. MORAN: I just want to be clear what the
10 alternative of proceeding is.

11 HEARING OFFICER KNITTLE: Proceeding today?
12 Well, if she wants to testify and she doesn't want
13 to proceed under these conditions tonight, we're
14 going to do it tomorrow morning because the hearing
15 is scheduled to proceed tomorrow morning. It's
16 perfectly legitimate for us to just move it until
17 9:30 tomorrow morning and resume from this point
18 forward, but if we want to try to get it done
19 tonight, I would allow that to go forward.

20 MS. KONICKI: My preference would be to come
21 back in the morning so the Sierra Club could have a
22 written motion. I think the county board would be
23 obliged at that point to agree to a continuance to a
24 date where I would know what liabilities and

1 freedoms I face in terms of what I could say here.

2 HEARING OFFICER KNITTLE: Well, regardless of
3 whether he files a written motion and I accept the
4 written motion and then grant the written motion and
5 regardless of whether Will County objects or Waste
6 Management objects, I don't know what agreement
7 there is outstanding as to whether you stated that
8 you won't object or --

9 MS. KONICKI: They will not object to a
10 continuance.

11 HEARING OFFICER KNITTLE: But they're not the
12 only party. We've got other parties here.

13 MS. KONICKI: All others have agreed. I think
14 it's a technicality, and it's an unfortunate one
15 you've raised, and I don't think it was the spirit
16 and intent of the representations made to the trial
17 court. You've put me in a very uncomfortable
18 position.

19 HEARING OFFICER KNITTLE: I just want to state --
20 I'll let you go in a second, Mr. Porter.

21 I just want to state that I'm not -- like
22 I said before, regardless of whether he files a
23 written motion to continue or not, whether or not
24 it's granted or accepted is something else entirely,

1 and I don't want you to base your decision on the
2 fact that a written motion will be filed and then
3 there will be a continuance in this case.

4 MS. KONICKI: I'm anticipating that there will
5 be a written motion and consent by all parties.

6 HEARING OFFICER KNITTLE: And I'm telling you
7 that that anticipation is not entirely warranted.

8 Mr. Porter?

9 MR. PORTER: I was just concerned about that
10 speech going on the record. Thank you.

11 MS. KONICKI: My understanding here today is
12 that all parties have agreed to a continuance except
13 for the county board, and I believe that once a
14 written --

15 MR. PORTER: I object to this particular
16 speech. This is not in the realm of the public
17 comment period.

18 MS. KONICKI: Once a written motion is filed,
19 their representations require them to --

20 HEARING OFFICER KNITTLE: I agree. I'll
21 sustain the objection.

22 MR. PORTER: I move to strike that in the
23 record.

24 HEARING OFFICER KNITTLE: Granted.

1 Ms. Konicki, are you going to want to
2 testify tonight?

3 MS. KONICKI: I would prefer to come back in
4 the morning.

5 HEARING OFFICER KNITTLE: Well, that's what
6 we're going to do. We'll see you all here tomorrow
7 morning at 9:30.

8 (Whereupon, the proceedings were
9 continued until Wednesday, June 2,
10 1999, at 9:30 a.m.)

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1 STATE OF ILLINOIS)
) SS.
2 COUNTY OF COOK)

3

4 I, CARYL L. HARDY, a Certified Shorthand
5 Reporter doing business in the County of Cook and
6 State of Illinois, do hereby certify that I reported
7 in machine shorthand the proceedings at the hearing
8 of the above-entitled cause.

9 I further certify that the foregoing is a
10 true and correct transcript of said proceedings as
11 appears from the stenographic notes so taken and
12 transcribed by me.

13

14

15

16

17 CSR No. 084-003896

18

19 SUBSCRIBED AND SWORN TO
before me this ____ day
20 of _____, A.D., 1999.

21 _____
Notary Public

22

23

24