

** New*

ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
Pollution Control Board

CITY OF KANKAKEE,)
)
) Petitioner,)
 vs.)
)
 COUNTY OF KANKAKEE, COUNTY BOARD OF)
 KANKAKEE, and WASTE MANAGEMENT OF)
 ILLINOIS, INC.)
) Respondents.)

PCB 03-125
 (Third-Party Pollution Control
 Facility Siting Appeal)

MERLIN KARLOCK,)
)
) Petitioner,)
 vs.)
)
 COUNTY OF KANKAKEE, COUNTY BOARD OF)
 KANKAKEE, and WASTE MANAGEMENT OF)
 ILLINOIS, INC.)
) Respondents.)

PCB 03-133
 (Third-Party Pollution Control
 Facility Siting Appeal)

MICHAEL WATSON,)
)
) Petitioner,)
 vs.)
)
 COUNTY OF KANKAKEE, COUNTY BOARD OF)
 KANKAKEE, and WASTE MANAGEMENT OF)
 ILLINOIS, INC.)
) Respondents.)

PCB 03-134
 (Third-Party Pollution Control
 Facility Siting Appeal)

KEITH RUNYON,)
)
) Petitioner,)
 vs.)
)
 COUNTY OF KANKAKEE, COUNTY BOARD OF)
 KANKAKEE, and WASTE MANAGEMENT OF)
 ILLINOIS, INC.)
) Respondents.)

PCB 03-135
 (Third-Party Pollution Control
 Facility Siting Appeal)

WASTE MANAGEMENT OF ILLINOIS, INC.,)
)
) Petitioner,)
 vs.)
)
 COUNTY OF KANKAKEE,)
) Respondent.)

PCB 03-144
 (Pollution Control Facility
 Siting Appeal)

NOTICE OF FILING AND REQUEST FOR HEARING

TO:

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601-3218

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Hearing Officer
Illinois Pollution Control Board
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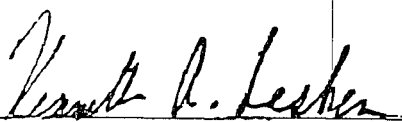
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FAX 312/321-0990

PLEASE TAKE NOTICE that I have on the 25th day of April, 2003, mailed for filing the original and nine (9) copies of the following document:

MOTION TO RECONSIDER DISCOVERY RULINGS

to Dorothy M. Gunn, Clerk, Illinois Pollution Control Board, James R. Thompson Center, 100 West Randolph Street, Suite 11-500, Chicago, IL 60601-3218, and a true and correct copy thereof was served upon you on April 25, 2003, by depositing a copy thereof, enclosed in an envelope in the U. S. Mail at Kankakee, Illinois, proper postage prepaid, before the hour of 5:00 p.m., addressed as above, and by facsimile to those parties with facsimile numbers listed and asking that the same be heard by the Illinois Pollution Control Board at its meeting of May 1, 2003.



Kenneth A. Leshen
Assistant City Attorney
City of Kankakee

Kenneth A. Leshen
Assistant City Attorney
One Dearborn Square, Suite 550
Kankakee, IL 60901
815/933-3385
Reg. No. 03127454

ILLINOIS POLLUTION CONTROL BOARD

CITY OF KANKAKEE,

Petitioner,

vs.

COUNTY OF KANKAKEE, COUNTY BOARD OF
KANKAKEE, and WASTE MANAGEMENT OF
ILLINOIS, INC.

Respondents.

PCB 03-125

(Third-Party Pollution Control
Facility Siting Appeal)

MERLIN KARLOCK,

Petitioner,

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PCB 03-134

(Third-Party Pollution Control
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KANKAKEE, and WASTE MANAGEMENT OF
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Respondents.

PCB 03-135

(Third-Party Pollution Control
Facility Siting Appeal)

WASTE MANAGEMENT OF ILLINOIS, INC.,

Petitioner,

vs.

COUNTY OF KANKAKEE,

Respondent.

PCB 03-144

(Pollution Control Facility
Siting Appeal)

MOTION TO RECONSIDER
DISCOVERY RULINGS

NOW COMES the CITY OF KANKAKEE (hereinafter the "City"), by and through its attorneys, Assistant City Attorneys L. PATRICK POWER and KENNETH A. LESHEN, and moving the Illinois Pollution Control Board (hereinafter the "Board"), to reconsider the decision of its Hearing Officer, Bradley P. Halloran, concerning certain discovery issues. In support thereof, the City alleges as follows:

1. In a conference call held on April 24, 2003, Hearing Officer Bradley Halloran ruled that the City would be precluded from taking the depositions of Waste Management of Illinois, Inc.'s (hereinafter "WMII") attorneys Moran and Wilt as well as Kankakee County attorneys Harvey and Helsten. Hearing Officer Halloran further ruled that the depositions would each be limited to a duration of one hour.

2. In its responses to the City's interrogatories, WMII acknowledged telephone contact between attorneys Moran, Harvey and Helsten regarding substantive issues, namely, conditions to any County Board approval of the siting application, and that said conversation was held between the close of the hearing and the decision of the Kankakee County Board regarding siting. Consequently, said contacts were per se improper and the City should be allowed to depose said attorneys regarding their per

se improper contact. See, Response to Waste Management of Illinois, Inc.'s Objections to the City's List of Deponents and Response to the County of Kankakee's Objections to the City's List of Deponents attached hereto and incorporated herein as Exhibit A.

3. Hearing Officer Halloran also restricted each deposition to one hour. Hearing Officer Halloran did not entertain oral argument on this issue during the conference call.

4. Hearing Officer Halloran was appropriately concerned about the time issues in this case, given the fact that the hearing is scheduled to begin on May 5, 2003. However, it is apparent that the information to be provided by certain deponents will be much more voluminous and lengthy than the information to be provided by other deponents. Consequently, the City suggests that the duration of the depositions of the following deponents be extended to three hours in accordance with the rules of the Supreme Court of the State of Illinois governing depositions: Dale Hoekstra, Mike VanMill, Effraim Gill, Mike Quigley, Bruce Clark, and Karl Kruse.

5. Hearing Officer Halloran sustained WMII's objection to the taking of the deposition of Lee Addleman, asserting that Mr. Addleman had a liver transplant in February, 2003. The City sympathizes with the health difficulties of Mr. Addleman;

however, the applicable discovery rules of the State of Illinois require that a physician's affidavit be submitted to support the non-appearance of Mr. Addleman. Mr. Addleman is a key witness. Consequently, the City requests that the Board require that a physician's affidavit be submitted to support WMII's contention that Mr. Addleman is unavailable due to his health issues.

WHEREFORE, the City prays that this Board reconsider the discovery rulings of Hearing Officer Bradley Halloran and enter its order as follows:

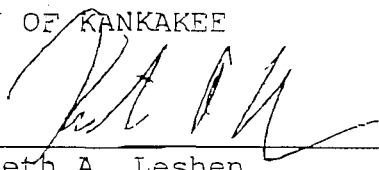
- A. ordering WMII to present attorneys Moran and Wilt for depositions;
- B. ordering Kankakee County to present attorneys Harvey and Helsten for depositions;
- C. extending the duration of the depositions of Dale Hoekstra, Mike VanMill, Effraim Gill, Mike Quigley, Bruce Clark, and Karl Kruse to a time period of three hours;
- D. ordering WMII to submit a physician's affidavit regarding Lee Addleman's unavailability as a deponent; and

E. providing for such other and further relief as this Board deems just, necessary and proper.

Respectfully submitted,

CITY OF KANKAKEE

BY:



Kenneth A. Leshen
Assistant City Attorney

Kenneth A. Leshen
Assistant City Attorney
One Dearborn Square, Suite 550
Kankakee, IL 60901
815/933-3385
Reg. No. 03127454

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

THE CITY OF KANKAKEE, an Illinois
Municipal Corporation)

Petitioner)

v.)

COUNTY OF KANKAKEE, a body politic and
Corporate; KANKAKEE COUNTY BOARD;
And WASTE MANAGEMENT OF ILLINOIS,
INC.,)

Respondent)

No. PCB 03-125

(Third-Party Pollution Control Facility
Siting Appeal)

MERLIN KARLOCK,)

Petitioner)

v.)

COUNTY OF KANKAKEE, a body politic and
Corporate; KANKAKEE COUNTY BOARD;
And WASTE MANAGEMENT OF ILLINOIS,
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Respondent)

No. PCB 03-133

(Third-Party Pollution Control Facility
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MICHAEL WATSON,)

Petitioner)

v.)

COUNTY OF KANKAKEE, a body politic and
Corporate; KANKAKEE COUNTY BOARD;
And WASTE MANAGEMENT OF ILLINOIS,
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Respondent)

No. PCB 03-134

(Third-Party Pollution Control Facility
Siting Appeal)

KEITH RUNYON,)

Petitioner)

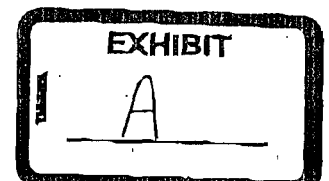
v.)

COUNTY OF KANKAKEE, a body politic and
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(Third-Party Pollution Control Facility
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WASTE MANAGEMENT OF ILLINOIS)	
INC.,)	
)	
Petitioner)	
)	
v.)	No. PCB 03-144
)	(Pollution Control Facility
COUNTY OF KANKAKEE,)	Siting Appeal Consolidated)
)	
Respondent)	

**RESPONSE TO WASTE MANAGEMENT OF ILLINOIS, INC.'S
OBJECTIONS TO THE CITY'S LIST OF DEPONENTS**

Now comes the City of Kankakee, (hereinafter, the "City"), by and through its attorneys, Assistant City Attorneys L. Patrick Power and Kenneth A. Leshen, and responding to the Waste Management of Illinois, Inc., (hereinafter, the "WMII") objections to its list of deponents, states as follows:

1. The City alleges, on information and belief and based on the documents produced in response to the City's discovery requests that there have been ongoing and massive pre-filing and post-filing contacts between these attorneys. Waste Management of Illinois, Inc. (hereinafter "WMII"), disclosed in its answers to the City's interrogatories that its attorney and agent, Donald Moran, after the end of the hearing and prior to the decision, communicated with Charles Helston and Elizabeth Harvey concerning the substance of the hearing. Each of these attorneys, pursuant to their own declarations and the declarations of Edward D. Smith, State's Attorney of Kankakee, represented separate and distinct entities. Donald Moran's importuning of the County can only be viewed as an improper ex parte effort to influence the decision-maker through communications with its agent, Elizabeth Harvey. Rather than acting as advocates and advisors in a legal forum, these attorneys acted as negotiating agents for their respective clients. The fact that they can each put the initials J.D. behind their names does not allow them to conceal their doings.

2. The City acknowledges that the hearing Officer has precluded inquiry into the legislative process concerning the adoption of the County's Solid Waster Plan. However, Hearing officer Halloran did not ask the parties or the Board to put on blinders and ignore the fact that the County's Solid Waste Management Plan designates WMII as the sole provider, a fact buttressed in its relevance and as evidence of pre-judgment by the fact that documents produced trumpet the fact that WMII committed to the County that it would fund the defense of the Plan in any litigation concerning its legitimacy.

3. The salient facts are as follows:

- a. The County and WMII agreed years ago that the current County waste facility was nearing its capacity, a fact evidenced by much correspondence between the County and WMII.
- b. The County, recognizing its need and the financial benefits that would inure to it, then designated WMII as the sole provider that would be able to operate a landfill in Kankakee County.
- c. The only way the County would be able to satisfy its needs, according to its own plan and prejudgment, was to approve the siting proposal of WMII. The City of Kankakee was, at the same time as this prejudgment occurred, seeking to site its own facility, a fact that made the County's complicity with WMII all the more urgent.
- d. WMII, through Dale Hoekstra, Division Vice-President, Illinois Landfill Division, in correspondence January 7, 2002, addressed to Karl Kruse and copied to the Kankakee County Board Members, Lee Addleman, Chuck Helsten, Ed Smith, and **Dennis Wilt** (emphasis added) pledge the resources of WMII to provide a full and complete defense for the County in the event of a legal challenge to the Plan.
- e. Dennis Wilt prepared and spearheaded WMII's proposed host agreement with the County and participated in negotiations with Chuck Helsten and representatives of the County.

4. The issue is whether the communications between the parties amongst themselves and with the applicant, show or tend to show prejudgment and fundamental unfairness. It is disingenuous in the extreme for WMII to try to hide its complicity with the County in the prejudgment of its siting application by claiming that depositions of its attorneys somehow

disrupts these proceedings. These are issues that perhaps would have been best considered by WMII prior to its improper conduct.

5. According to WMII's theory, each of the attorneys who engaged in improper communications outside of the hearing process would be protected from cross-examination, the great engine of truth seeking in the adversarial process. Shielding improper conduct, if any occurred, would indeed lower the standards of the legal profession.

6. WMII objects to the City identification of Lee Addleman as a deponent, arguing that this identification was made solely to harass. WMII's assertion that the City's action was made solely to harass conveniently avoids the applicable rules. It is incumbent on WMII to provide a physician's affidavit substantiating Mr. Addleman's unavailability rather than rancorously attacking the City.

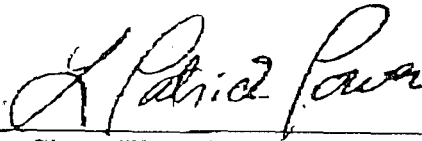
7. The WMII concludes its argument with the catchall phrase that the City is engaged in a fishing expedition. If the City is fishing, it is only because the County and WMII have filled the pond with such a rich array of fish. The issue in discovery is whether the discovery regarding pre-filing contacts may be probative of prejudgment of adjudicative facts, which is an element to be considered in assessing fundamental fairness. See County of Kankakee v. City of Kankakee, Town and Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C., PCB 03-31, PCB 03-33, PCB, 03-35 (cons.) (Jan. 23, 2003).

8. Lastly, WMII argues that the City has identified an excessive number of deponents and impliedly queries whether the depositions can be timely conducted. The truncated time limits are solely the responsibility of WMII. The inconvenience to attorneys and deponents is minimal as compared to the rights of the citizenry of Kankakee County to have a full and complete airing of the issues presented to the Board for its consideration and decision.

9. The City adopts and ratifies in full Petitioner Michael Watson's Response to WMII's Objections to Watson's Request for Depositions.

Wherefore, the City of Kankakee respectfully requests the IPCB Hearing officer to overrule the WMII's objections, so wrongfully brought, and require the County to produce the requested persons for their depositions.

Respectfully submitted,



The City of Kankakee
By its attorneys, L. Patrick
Power and Kenneth A.
Leshen, Assistant City
Attorneys

Prepared by:
L. Patrick Power and
Kenneth A. Leshen, Assistant
City Attorneys
956 N. Fifth
Kankakee, IL 60901
937- 6937
Reg. No. 03127454
Reg. No. 2244357

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Petitioner)

v.)

No. PCB 03-125

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And WASTE MANAGEMENT OF ILLINOIS,
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Respondent)

(Third-Party Pollution Control Facility
Siting Appeal)

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Petitioner)

v.)

No. PCB 03-133

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COUNTY OF KANKAKEE,)	Siting Appeal Consolidated)
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**RESPONSE TO THE COUNTY OF KANKAKEE'S
OBJECTIONS TO THE CITY'S LIST OF DEONENTS**

Now comes the City of Kankakee, (hereinafter, the "City"), by and through its attorneys, Assistant City Attorneys L. Patrick Power and Kenneth A. Leshen, and responding to the County of Kankakee's (hereinafter, the "County") objections to its list of deponents, states as follows:

1. The County brandishes the concept of attorney-client privilege in an effort to thwart the truth seeking process. Consequently, it is first important to delineate which attorney represented which entity or persons.

2. The record of proceedings of the siting hearing, Volume I, pages 2 and 3, recite the appearances of counsel. (See attached hereto and incorporated herein, pages 2 and three of Volume I). Charles Helston of Hinshaw and Culbertson represented the Kankakee County Staff. Elizabeth Harvey, accompanied by Edward d. Smith, the duly elected State's Attorney of Kankakee County, represented the Kankakee County Regional Planning Commission and the Kankakee County Board.

3. As a result of the foregoing, any communications between Charles Helston and any other attorneys from the firm of Hinshaw and Culbertson on the one hand and Edward D. Smith, duly elected State's Attorney of Kankakee County and Elizabeth Harvey on the other hand, are not privileged.

4. The City alleges, on information and belief and based on the documents produced in response to the City's discovery requests that there have been ongoing and massive pre-filing and post-filing contacts between these attorneys. Waste Management of Illinois, Inc. (hereinafter "WMII"), disclosed in its answers to the City's interrogatories that its attorney and agent, Donald Moran, after the end of the hearing and prior to the decision, communicated with Charles Helston and Elizabeth Harvey concerning the substance of the hearing. Each of these attorneys, pursuant to their own declarations and the declarations of Edward D. Smith, State's Attorney of Kankakee, represented separate and distinct entities. Donald Moran's importuning of the County can only be viewed as an improper ex parte effort to influence the decision-maker through communications with its agent, Elizabeth Harvey. Rather than acting as advocates and advisors in a legal forum, these attorneys acted as negotiating agents for their respective clients. The fact that they can each put the initials J.D. behind their names does not allow them to conceal their doings.

5. The City acknowledges that the hearing Officer has precluded inquiry into the legislative process concerning the adoption of the County's Solid Waste Plan. However, Hearing officer Halloran did not ask the parties or the Board to put on blinders and ignore the fact that the County's Solid Waste Management Plan designates WMII as the sole provider, a fact buttressed in its relevance and as evidence of pre-judgment by the fact that documents produced trumpet the fact that WMII committed to the County that it would fund the defense of the Plan in any litigation concerning its legitimacy.

6. The salient facts are as follows:

- a. The County and WMII agreed years ago that the current County waste facility was nearing its capacity, a fact evidenced by much correspondence between the County and WMII.
- b. The County, recognizing its need and the financial benefits that would inure to it, then designated WMII as the sole provider that would be able to operate a landfill in Kankakee County.

- c. The only way the County would be able to satisfy its needs, according to its own plan and prejudgment, was to approve the siting proposal of WMII. The City of Kankakee was, at the same time as this prejudgment occurred, seeking to site its own facility, a fact that made the County's complicity with WMII all the more urgent.

7. Contrary to the assertions of the County, the issue is not whether Smith, Gorski, Helston and Harvey were the applicant. The issue is whether the communications between the parties amongst themselves and with the applicant, show or tend to show prejudgment and fundamental unfairness.

8. The County alleges that depositions of these attorneys would somehow be disruptive of the adversarial process and lower the standards of the legal profession. According to this theory, each of the attorneys who engaged in improper ex parte communications outside of the hearing process would be protected from cross-examination, the great engine of truth seeking in the adversarial process. Shielding improper conduct, if any occurred, would indeed lower the standards of the legal profession.

9. The County concludes its argument with the catchall phrase that the City is engaged in a fishing expedition. If the City is fishing, it is only because the County and WMII have filled the pond with such a rich array of fish. The issue in discovery is whether the discovery regarding pre-filing contacts may be probative of prejudgment of adjudicative facts, which is an element to be considered in assessing fundamental fairness. See County of Kankakee v. City of Kankakee, Town and Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C., PCB 03-31, PCB 03-33, PCB, 03-35 (cons.) (Jan. 23, 2003).

10. The City adopts and ratifies in full Petitioner Michael Watson's Response to County of Kankakee's Objections to Watson's Request for Depositions.

Wherefore, the City of Kankakee respectfully requests the IPCB Hearing officer to overrule the County's objections, so wrongfully brought, and require the County to produce the requested persons for their depositions.

Respectfully submitted,



The City of Kankakee
By its attorneys, L. Patrick
Power and Kenneth A.
Leshen, Assistant City
Attorneys

Prepared by:
L. Patrick Power and
Kenneth A. Leshen, Assistant
City Attorneys
956 N. Fifth
Kankakee, IL 60901
937- 6937
Reg. No. 03127454
Reg. No. 2244357

1 KANKAKEE COUNTY REGIONAL PLANNING COMMISSIONERS

2 Mr. George Washington, Jr.
3 Ms. Loretto Cowhig
4 Mr. Craig Bayston
5 Mr. Michael Spilsbury
6 Mr. James Tripp
7 Mr. Ralph Paarlberg
8 Mr. Curt Saindon
9 Mr. Dennis Peters
10 Mr. Mike Finnegan
11 Mr. John Meyer
12 Mr. David Bergdahl
13 Mr. Barry Jaffe

14 KANKAKEE COUNTY BOARD MEMBERS

15 Mr. Wes Wiseman
16 Mr. Duane Bertrand
17 Mr. Red Marcotte
18 Mr. Leonard Martin
19 Ms. Ann Bernard
20 Mr. Leo Whitten
21 Mr. George Hoffman
22 Mr. Bill Olthoff
23 Mr. Sam Nicholas
24 Ms. Karen Hertzberger

25 APPEARANCES:

26 MR. DONALD MORAN,
27 Appeared on behalf of Waste Management,
28 Applicant;

29 MR. CHARLES HELSTEN,
30 Appeared on behalf of the Kankakee County Staff;

31 MS. ELIZABETH S. HARVEY,
32 Appeared on behalf of the Kankakee County
33 Regional Planning Commission and the Kankakee
34 County Board;

35

1 APPEARANCES CONTINUED:

2 MR. EDWARD SMITH,
3 Kankakee County State's Attorney,
4 Appeared on behalf of the Kankakee County
5 Regional Planning Commission;

6 MR. L. PATRICK POWER,
7 Appeared on behalf of the City of Kankakee;

8 MR. GEORGE MUELLER,
9 Appeared on behalf of Mr. Merlin Karlock;

10 MS. JENNIFER J. SACKETT POHLENZ,
11 Appeared on behalf Mr. Michael Watson;

12 MR. DAVID FLYNN,
13 Appeared on behalf of Mr. Michael Watson;

14 MR. KENNETH BLEYER,
15 Appeared on behalf of Mr. Richard Murray;

16 MR. LEE MILK, Individually;

17 MS. PATRICIA O'DELL, Individually;

18 MR. KEITH RUNYON, Individually.

KENNETH A. LESHEN, P.C.

ATTORNEY AT LAW

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(815) 933-3385

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APR 25 2003
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STATE OF ILLINOIS
Pollution Control Board

FACSIMILE TRANSMITTAL COVER LETTER

DATE: April 25, 2003

RECEIVED
CLERK'S OFFICE

APR 25 2003

Please deliver the following pages to:

STATE OF ILLINOIS
Pollution Control Board

NAME OF RECIPIENT: See following service list

FROM: Kenneth A. Leshen

RE: City of Kankakee vs. County of Kankakee, et al.
PCB 03-125, et al.

THERE WILL BE (21) PAGES INCLUDING THIS PAGE