

ORIGINAL

APR 23 2003

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS
Pollution Control Board

NORTH SHORE SANITARY DISTRICT,

Petitioner,

v.

**ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,**

Respondent.

**PCB No. 03-146
(Permit Appeal)**

NOTICE OF FILING AND PROOF OF SERVICE

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

Bradley Halloran, Hearing Officer, Illinois Pollution Control Board, 100 West Randolph
Street, James R. Thompson Center, Suite 11-500, Chicago, IL 60601

Robb Layman, Division of Legal Counsel, Illinois Environmental Protection Agency, 101
North Grand Avenue East, P.O. Box 19276, Springfield, IL 62794-9276

PLEASE TAKE NOTICE that on April 21, 2003, I filed with the Office of the Clerk of
the Pollution Control Board an original and four copies of the Petitioner's Motion to Compel
and For Expedited Ruling Directed to Hearing Officer by U.S. Mail.

The undersigned certifies that he served the Petitioner's Motion to Compel and For
Expedited Ruling Directed to Hearing Officer by mailing a copy to the above persons by U.S.
Mail on April 21, 2003.

**NORTH SHORE SANITARY DISTRICT,
Petitioner**

**By its attorneys,
MOHAN, ALEWELT, PRILLAMAN & ADAMI**

By 
Patrick D. Shaw

**Mohan, Alewelt, Prillaman & Adami
1 North Old Capitol Plaza
Suite 325
Springfield, IL 62701-1323
Telephone: 217/528-2517
Facsimile: 217/528-2553**

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

NORTH SHORE SANITARY DISTRICT,)	
)	
Petitioner,)	
)	
vs.)	PCB No. 03-146
)	(Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

**PETITIONER’S MOTION TO COMPEL AND
FOR EXPEDITED RULING DIRECTED TO HEARING OFFICER**

NOW COMES Petitioner, NORTH SHORE SANITARY DISTRICT (hereinafter “NSSD”), by its undersigned counsel, pursuant to Section 101.618(h) of the Board’s procedural rules (35 Ill. Admin. Code § 101.618(h)), and moves the hearing officer to strike the objections of the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (hereinafter “the IEPA”) to Petitioner’s Request to Admit, states as follows:

1. On March 27, 2003, NSSD served Petitioner’s Request to Admit on the IEPA, a true and correct copy of which is attached hereto as Exhibit 1.
2. On April 17, 2003, the IEPA objected to fourteen of those requests. A true and correct copy of the IEPA’s Responses to Petitioner’s Request to Admit are attached hereto as Exhibit 2.
3. The IEPA has objected on grounds of relevancy to those requests pertaining to the litigation between the City of Waukegan, NSSD and the IEPA. Specifically, the IEPA objects to requests pertaining to the circuit court lawsuit in City of Waukegan v. NSSD & IEPA, 01CH1777 (Req. Admit ¶5 -¶8, ¶10 - ¶14), the appellate proceedings in City of Waukegan v.

NSSD & IEPA, No. 2-02-0635 (Req. Admit ¶15 - ¶18), as well as matters preliminary to said litigation. (Req. Admit ¶4)

4. The IEPA claims that the City of Waukegan litigation is “neither relevant nor calculated to lead to relevant information that relates to the subject matter of this proceeding.” (Resp. Req. Admit ¶4 - ¶8, ¶10 - ¶18)

5. The IEPA’s objection is frivolous and entirely without merit. To briefly summarize the background of this permit appeal:

a. NSSD asked the IEPA to revise the expiration date on its existing construction permit due to its inability to proceed with construction in light of the pending litigation.

(Pet. Rev. Ex. B)

b. IEPA responded by requesting nineteen items of additional information, including additional justification as to the pending litigation. (Pet. Rev. Ex. C at 1)

c. NSSD appealed the IEPA’s decision and moved to stay the expiration of the existing construction permit. In granting NSSD’s motion, the Board expressly made, and relied upon, preliminary findings regarding the pending litigation. (Order of March 20, 2003, at 2)

6. The City of Waukegan litigation has been relevant at all stages of this permit appeal, including the Board’s own preliminary evaluation of the issues in dispute.

7. The circuit court and appellate court filings which make up the City of Waukegan litigation are public records of which the Board may take official notice. (35 Ill. Admin. Code § 101.630; e.g., Morton College Board of Trustees v. Town of Cicero, PCB 98-59 (Jan. 12, 1989); Callils v. Norfolk & Western Railway, 195 Ill. 356, 363 (2001)) Instead of filing the thousands of

pages of these public records, NSSD has asked the IEPA to admit the genuineness of a few documents and the accuracy of a few statements which summarize the City of Waukegan litigation. The purpose of requests such admissions is “to separate the wheat from the chaff” by allowing contested issues to be clearly and succinctly presented to the trier of fact. P.R.S. Int’l v. Shred Pax Corp., 184 Ill. 224, 237 (1998).

8. As a party to the City of Waukegan litigation, the IEPA is well aware of the nature of those proceedings and their relevance herein. The Board should likewise be allowed access to this information.

9. Given that the hearing in this matter is scheduled for May 15, 2003, Petitioners request an expedited ruling in this matter to ensure that the discovery issues are resolved prior to hearing.

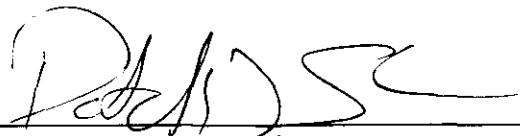
WHEREFORE Petitioner prays for an order striking the objections (§4-§8, §10 -§18) and either deeming the requests admitted or compelling a response thereto at least one week prior to trial, or for such other and further relief as the Hearing Officer deems meet and just.

Submitted by

**NORTH SHORE SANITARY DISTRICT,
Petitioner,**

**By MOHAN, ALEWELT, PRILLAMAN & ADAMI,
Its counsel**

By _____



Patrick D. Shaw

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

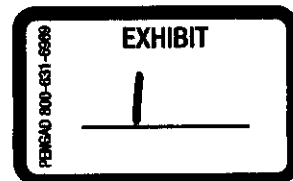
NORTH SHORE SANITARY DISTRICT,)
)
Petitioner,)
)
vs.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

PCB No. 03-146
(Permit Appeal)

PETITIONER'S REQUEST TO ADMIT

Petitioner, NORTH SHORE SANITARY DISTRICT ("NSSD"), hereby requests Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("IEPA"), pursuant to Section 101.618 of the Board's procedural rules (35 Ill. Admin. Code 101.618), to admit the truth of the following facts and/or the genuineness of the following documents. Failure to respond to the following requests to admit within 28 days may have severe consequences. Failure to respond to the following requests will result in all the facts requested being deemed admitted as true for this proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding or an attorney.

1. On April 17, 2001, the IEPA received an application from NSSD for an air emissions construction permit ("air permit application").
2. A true and correct copy of the first nine pages of the technical support document filed with the application for an air permit is attached hereto as **Exhibit A**.
3. On July 27, 2001, the IEPA issued a draft construction permit for a sludge dryer/melter ("draft air permit").



4. On September 25, 2001, the IEPA rejected a demand made by the City of Waukegan that the hearing on the draft air permit be canceled in the absence of a siting approval issued by the Waukegan City Council.

5. On December 6, 2001, the City of Waukegan, its mayor and members of its city council filed a Verified Complaint for Injunctive and Declaratory Relief in the Circuit Court of Lake County against the Illinois Environmental Protection Agency (“IEPA”) and the North Shore Sanitary District (“NSSD”), which was given case number 01CH1777 (“circuit court lawsuit”).

6. Attached as exhibits to the complaint in the circuit court lawsuit were copies of the air permit application and the draft air permit.

7. Counts I through VI of the complaint sought, inter alia, to stop the issuance of any permit by the IEPA without proof of local siting approval and Counts VII through X of the complaint sought, inter alia, to stop the construction of the project without first obtaining building/zoning approvals.

6. On February 27, 2002, the circuit court dismissed the lawsuit on the grounds that the plaintiffs “have no standing to seek a Court intervention on these issues at this time,” namely prior to the issuance of a permit.

7. March 11, 2002, the IEPA issued a construction permit to NSSD, a true and correct copy of which is attached as Exhibit A to the Petition for Permit Review.

8. On April 15, 2002, the City of Waukegan filed a motion for leave to reinstate its lawsuit by filing an amended complaint.

9. The City of Waukegan was subsequently granted leave to file an amended complaint.

10. On May 7, 2002, NSSD filed its Verified Answer and Counterclaims of Defendant

North Shore Sanitary District to Waukegan's Amended Complaint, a true and correct copy of which is attached hereto as **Exhibit B**.

11. On June 18, 2002, the Circuit Court of Lake County dismissed the circuit court lawsuit with respect to local siting approval issues.

12. Furthermore, on June 18, 2002, the Circuit Court of Lake County found that the Des Plaines trilogy of cases relied upon by NSSD for its argument that NSSD is exempt from local zoning had been overruled.

13. The court's June 18, 2002, rulings have been appealed to the Illinois Appellate Court, Second District, where the appeal remains pending.

14. On February 18, 2003, the Circuit Court of Lake County entered a temporary restraining order against NSSD from "beginning any construction activity on the subject site in an effort to construct the facility at issue."

15. On March 5, 2003, the Circuit Court of Lake County converted the temporary restraining order into a preliminary injunction.


16. Attached hereto as **Exhibit C** is a true and correct copy of the Memorandum of Defendant/Counter-Plaintiff/Appellant North Shore Sanitary District in Support of Appeal Pursuant to Rule 307(d) of the Illinois Supreme Court.

Submitted by

NORTH SHORE SANITARY DISTRICT,
Petitioner,

By MOHAN, ALEWELT, PRILLAMAN & ADAMI,
Its counsel


By


Patrick D. Shaw

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the Petitioner's Request to Admit, by U.S. Mail on the 27th of March, 2003, upon the following person:

Robb H. Layman
Special Assistant Attorney General
Illinois Environmental Protection Agency
1021 North Grand Ave. East
P.O. Box 19276
Springfield, IL 62794-9276


Patrick D. Shaw

Fred C. Prillaman
Patrick D. Shaw
MOHAN, ALEWELT, PRILLAMAN & ADAMI
One North Old State Capitol Plaza
Suite 325
Springfield, IL 62701
217/528-2517

1.0 INTRODUCTION

The North Shore Sanitary District (NSSD) is submitting this Technical Support Document and Construction Permit Application forms to the Illinois Environmental Protection Agency (IEPA) for the installation of sludge drying and melting equipment that will allow NSSD to process its wastewater sludge into glass aggregate. This process will eliminate the need for its surface disposal while yielding a valuable, environmentally inert, product.

The new glass aggregate equipment will be built at the existing NSSD Waukegan Sewage Treatment Plant on Dahringer Road, Waukegan Illinois. The construction permit application addresses all air emission sources and operations planned for the new processing equipment. NSSD requests expedited review of this permit application.

Appendix A to this Technical Support Document contains the IEPA Permit Application forms.

2.0 PROJECT DESCRIPTION

The proposed facility will produce glass aggregate from NSSD's wastewater sludge. Glass aggregate is an inert, marketable product which has a broad range of uses in construction. Nationwide, wastewater treatment districts are implementing environmentally beneficial re-uses for wastewater sludge. The proposed project will allow NSSD to eliminate the need to landfill wastewater solids from all three of its facilities.

The project will have numerous environmental benefits, including allowing the closure of the District's sludge landfill, reducing the potential for any soil and groundwater contamination and eliminating it as a potential odor source. Other benefits include eliminating one-third of the sludge truck traffic and associated odor emissions in Lake County.

The process uses an oxygen-rich, closed loop melting system. Pre-dried sludge is subjected to high temperatures in an oxygen-rich atmosphere. The high temperatures will cause the non-combustible sludge material to melt. Quenching the molten material yields the highly inert glass product. By bringing all sludge processing within an enclosed building, the project is able to utilize a state-of-the-art odor control system to virtually eliminate this environmental impact.

The proposed project consists of five major subsystems:

- Sludge receiving and storage

- Sludge dryer and dry granulate storage
- Melter
- Air separation unit
- Auxiliary heater

The equipment will be designed to process approximately 200 tons per day of wet sludge to 35 dry tons per day of granulate, and then 10 tons of glass aggregate. The sludge feedstock will come from NSSD's Waukegan, Gurnee, and Clavey Road facilities. The equipment has a compact footprint and is highly energy efficient. Other than a small amount of natural gas, all the energy required to dry the sludge feedstock and melt the mineral fraction into glass aggregate is supplied by the energy in the sludge's organic matter.

The project will emit a number of air contaminants and generate a small quantity of solid and liquid waste streams. The solids and wastewater streams will be routed back to NSSD for re-processing. The closed-loop melter generates much lower NO_x levels than alternative, combustion-based systems. This is due to its unique oxygen-enriched combustion system. By essentially removing nitrogen from the supply "air", the closed-loop melter reduces the critical ingredient for NO_x formation. SO₂, PM, and odor control will be accomplished using a combination of filtration and scrubbing technology.

The proposed facility will be located in the northeast corner of NSSD's Waukegan Sewage Treatment Plant's property. A site plot plan is provided with the permit application forms in Appendix A.

2.1 Process Descriptions

Air emitting processes and associated equipment are described in the following sub-sections. Figure B-1 (in Appendix B) illustrates the overall process flow for the facility.

2.1.1 Sludge Receiving and Storage

Wet sludge (approx. 83% moisture) will be delivered to the new processing equipment by truck from the Clavey Road and Gurnee sewage treatment plants. There, it will be dumped into one of



two receiving pits within an enclosed building. The Waukegan sewage treatment plant sludge will be pumped directly into the wet sludge silo. The wet sludge will be conveyed from the pit to one of two wet sludge silos (storage capacity of 375 tons, each) for storage until reclaimed for processing.

The wet sludge silo vents will be routed to the plant's odor control system prior to exhausting. The sludge receiving room will be ventilated and treated in the odor control system.

2.1.2 Sludge Dryer/Dry Granulate Silo

The sludge dryer is designed to evaporate up to 13,000 pounds of moisture per hour, yielding a dried granulate of approximately 5% moisture. The dryer is heated indirectly, via a hot oil heat recovery loop from the melter. The dryer exhaust will be routed through a condenser and vented into the dry granulate silo. Dry granulate will be conveyed from the dryer, through a cooler, to a 150 ton capacity silo. The dry granulate silo will be vented through the odor control scrubber prior to exhausting.

2.1.3 Melter

Dry granulate is drawn from the dry granulate silo, through the surge hopper, and into the melter, which is operated at a temperature of 2,400 to 3,000 degrees Fahrenheit. Oxygen is supplied from the air separation unit to support combustion. In the melter, the combustible fraction of the dry granulate burns, while the mineral portion forms molten glass. The glass flows through a drain port where it drops into a quench tank, forming the glass aggregate product. The melter exhaust gas passes through a heat exchanger where recovered energy heats an oil transfer fluid which is used to heat the sludge dryer. After the heat recovery unit, the exhaust passes through particulate and SO₂ emission control devices. It is then split, with most of the flow recirculated to the melter. The remainder of the gas flow is cooled and then vented. The use of an oxygen-rich combustion environment serves as a NO_x control technology, significantly reducing potential emissions relative to using air to support combustion. This process is distinct from the common definition of incineration in that it is specifically designed to yield a commercial product—glass aggregate. In contrast, an incinerator's primary function is to reduce the volume of material, with residual material disposed of as waste.

2.1.4 Air Separation Unit

The use of oxygen rather than air to support melter combustion is a key feature of the closed-loop melter system. Since nitrogen is effectively stripped out, NO_x emissions are greatly reduced—resulting primarily from oxidation of nitrogen compounds contained in the sludge. The air separation unit is electrically-driven, drawing in air and yielding separate streams of oxygen (routed to the melter) and the balance of air constituents (primarily nitrogen). As such it generates no air pollutants, and is not included in the permit application.

2.1.5 Auxiliary Heater

A 20 million Btu/hr natural gas-fired auxiliary heater will be used for unit start-up and back-up if the melter is not in operation. This heater will be equipped with a low-NO_x burner and will be used during startup and periods when the moisture content of the incoming sludge requires additional energy to achieve adequate drying.

2.1.6 Truck Loadout

The dry sludge silo will be equipped with a truck loadout facility to enable diversion of material to an alternate site for use as fertilizer or fuel if the melter is not in operation. This facility will be located inside the building and will incorporate an internally-vented particulate filter.

2.2 Emission Estimates

Applicability of federal and Illinois air permitting and emission control requirements are based on a proposed facility's expected actual emissions and/or its "Potential to Emit" (PTE). The following emission estimates were made to determine regulatory applicability as it pertains to this project.

Criteria pollutants are defined as those for which National Ambient Air Quality Standards have been adopted, or in the case of ozone, precursors such as volatile organic compounds. Table 2-1 presents actual expected and PTE estimates for each criteria pollutant, by emission source. Emissions estimates are also provided for selected substances which the EPA has designated as Hazardous Air Pollutants (HAPs). Table 2-2 presents the same information, categorized by emission stack or vent.

Table 2.1 Pollutant Emissions, By Emission Source

Pollutant	Emission Source	Expected Actual Emissions		Potential to Emit* (PTE)		NSR Major Source Threshold (ton/yr)
		(lb/hr)	(ton/yr)	(lb/hr)	(ton/yr)	
VOC	Wet Sludge Silo	0.00	0.00	0.00	0.00	
	Sludge Dryer/Silo	1.07	4.69	1.65	7.22	
	Melter	0.18	0.81	0.28	1.25	
	Auxiliary Heater	0.01	0.06	0.11	0.48	
	Total	1.27	5.56	2.04	8.95	25 (NAA)
PM/PM-10	Wet Sludge Silo	0	0	0	0	
	Sludge Dryer/Silo	0.02	0.11	0.04	0.17	
	Melter	0.33	1.46	0.51	2.25	
	Auxiliary Heater	0.02	0.08	0.15	0.67	
	Truck Loadout	0.26	0.11	0.26	1.13	
	Total	0.63	1.77	0.96	4.21	250 (PSD)
NO _x	Melter	12.70	55.65	19.54	85.61	
	Auxiliary Heater	0.25	1.10	2.00	8.76	
	Sludge Dryer/Silo	0.11	0.47	0.16	0.72	
	Total	13.06	57.21	21.71	95.09	250 (PSD)
SO ₂	Melter	4.93	21.59	7.58	33.22	
	Auxiliary Heater	0.00	0.01	0.01	0.05	
	Total	4.93	21.60	7.60	33.27	250 (PSD)
CO	Melter	0.32	1.39	0.49	2.15	
	Auxiliary Heater	0.21	0.92	1.68	7.36	
	Sludge Dryer/Silo	0.26	1.13	0.40	1.73	
	Total	0.79	3.44	2.57	11.24	250 (PSD)
Lead	Melter	0.0058	0.0256	0.0090	0.0394	
	Auxiliary Heater	0.0000	0.0000	0.0000	0.0000	
	Sludge Dryer/Silo	0.0000	0.0000	0.0000	0.0000	
	Total	0.0058	0.0256	0.0090	0.0394	0.6**
Beryllium	Melter	0.0001	0.0004	0.0001	0.0006	
	Total	0.0001	0.0004	0.0001	0.0006	0.0004**
Mercury	Melter	0.0068	0.0297	0.0104	0.0437	
	Total	0.0068	0.0297	0.0104	0.0437	0.1**

*Annual PM-10 and SO₂ emissions constrained by proposed federally-enforceable production limits described below.

**Significant increase threshold, subject to major source (>250 ton/yr PTE) facilities.



Table 2.2 Pollutant Emissions, By Stack/Vent

Pollutant	Stack/Vent ID Code*	Expected Actual Emissions		Potential to Emit** (PTE)		NSR Major Source Threshold*** (ton/yr)
		(lb/hr)	(ton/yr)	(lb/hr)	(ton/yr)	
VOC	S-01	1.07	4.69	1.65	7.22	
	S-02	0.18	0.81	0.28	1.25	
	S-03	0.01	0.06	0.11	0.48	
	Total	1.27	5.56	2.04	8.95	25 (NAA)
PM/ PM-10	S-01	0.28	0.22	0.30	1.30	
	S-02	0.33	1.46	0.51	2.25	
	S-03	0.02	0.08	0.15	0.67	
	Total	0.63	1.77	0.96	4.21	250 (PSD)
NO _x	S-02	12.70	55.65	19.55	85.61	
	S-03	0.25	1.10	2.00	8.76	
	S-01	0.11	0.47	0.16	0.72	
	Total	13.06	57.21	21.71	95.09	250 (PSD)
SO ₂	S-02	4.93	21.59	7.58	33.22	
	S-03	0.00	0.01	0.01	0.05	
	Total	4.93	21.60	7.60	33.27	250 (PSD)
CO	S-02	0.32	1.39	0.49	2.15	
	S-03	0.21	0.92	1.68	7.36	
	S-01	0.26	1.13	0.40	1.73	
	Total	0.79	3.44	2.57	11.24	250 (PSD)
Lead	S-02	0.0058	0.0256	0.0090	0.0394	
	S-03	0.0000	0.0000	0.0000	0.0000	
	S-01	0.0000	0.0000	0.0000	0.0000	
	Total	0.0058	0.0256	0.0090	0.0394	0.6**
Beryllium	S-02	0.0001	0.0004	0.0001	0.0006	
Total	0.0001	0.0004	0.0001	0.0006	0.0004***	
Mercury	S-02	0.0068	0.0297	0.0104	0.0457	
	Total	0.0068	0.0297	0.0104	0.0457	0.1**

*Stack ID Code: S-01—Odor Control System Discharge

S-02—Melter Stack

S-03—Auxiliary Heater Stack

**Significant increase threshold subject to major source (>250 ton/yr PTE) facilities.

***Annual PM-10 and SO₂ emissions constrained by proposed federally-enforceable production limits described below.

Emission calculation details are provided in Appendix B.



3.0 REGULATORY REVIEW

Potential air emissions include PM/PM-10, NO_x, SO₂, carbon monoxide (CO), volatile organic compounds (VOC), and a number of trace materials (e.g., lead, mercury). In addition, the sludge receiving and handling operations have the potential for generating objectionable odors. The potential for significant air emissions necessitates obtaining construction and operating air emission permits from the Illinois Environmental Protection Agency (IEPA). In addition to permitting requirements, the project will be subject to a number of regulatory emission limits, and monitoring, recordkeeping, and reporting requirements. The following subsections describe the applicable air regulations and the corresponding elements of the project's compliance strategy.

3.1 Construction Permit

Northern Lake County, Illinois is designated as a severe non-attainment for ozone, and attainment for all other pollutants. Therefore its NO_x and VOC emissions are potentially subject to nonattainment area (NAA) New Source Review (NSR). PM/PM-10, NO_x, SO₂, CO, lead, beryllium, and mercury emissions are potentially subject to Prevention of Significant Deterioration (PSD) NSR. NO_x is regulated under NAA NSR as an ozone precursor, and under PSD for compliance with the NO₂ increment and ambient air quality standard.

The project is not subject to major source review under either NSR program. It requires a state (minor source) construction permit unless it qualifies for one of the specified exemptions. Table 2.1 compares the controlled emission estimates for these constituents with the corresponding major source permitting thresholds.

A major modification is only subject to NSR if it is associated with an existing major source or if it, by itself, constitutes a major source. "Major source" for PSD purposes is defined as a facility with emissions of any regulated pollutant greater than 250 ton/yr. An ozone NAA NSR major source is one that emits more than 25 ton/yr of NO_x or VOC. VOC emissions associated with the project are less than the 25 ton/yr threshold. Since the Lake County area is covered by an EPA "NO_x waiver", NO_x emissions do not trigger NAA NSR for this project.

Without considering the proposed emission controls, the proposed project would, of itself, constitute a major PSD source for PM/PM-10 and SO₂. Therefore it must either proceed with the PSD permitting process or commit to federally-enforceable limitations that would restrict emissions below the applicable major source thresholds. Since the proposed emission control equipment will maintain emissions well below the major source/significant modification thresholds, a permit including federally enforceable minor source limitations is the basis for the application.

3.2 40 CFR 503

The proposed project is subject to the requirements of 40 CFR 503, "Standards for the Use or Disposal of Sewage Sludge". This regulation establishes emission limits, monitoring, recordkeeping, and reporting requirements. The regulated pollutants are CO, mercury, beryllium, lead, cadmium, arsenic, nickel, chromium, and total hydrocarbons. The control measures planned for the project will comply with these emission limits. Total hydrocarbons and CO are each limited to 100 ppm, monthly average. The lead, cadmium, arsenic, nickel, and chromium are risk-based sludge maximum concentration values that must be computed for each specific site.

3.3 New Source Performance Standards

The auxiliary heater is subject to the Subpart Dc (40CFR60.40c) Industrial-Commercial-Institutional Steam Generating Unit NSPS. Since the heater is exclusively natural gas-fired, the NSPS does not impose additional emission limits or monitoring or reporting obligations.

The other proposed processing equipment does not meet the definition of any source category for which a New Source Performance Standard has been promulgated.

3.4 MACT/NESHAPS.

National NESHAPS limits have been established for beryllium and mercury. The beryllium and mercury limits are 10 and 3200 grams/24 hours, respectively.

The Clean Air Act defines a number of materials as hazardous air pollutants (HAPs). Specified categories of facilities are subject to certain (MACT) emission control requirements if they exceed the major source emission threshold for a compound. The proposed melter and sludge dryer are not in a defined source category, so no MACT or NESHAP standard applies. Even if

the proposed equipment were in a designated MACT source category, MACT would not be applicable since the potential to emit HAPS is well below the major source thresholds (10 ton/year of an individual HAP or 25 ton/year total of all HAPs).

3.5 Operating Permit

The project will require a state operating permit. The operating permit will not impose any emission or operating restrictions beyond those described above and contained in the state's air pollution rules, but will specify all monitoring, recordkeeping, and reporting obligations. The permit will be a non-Part 70 permit, incorporating the federally-enforceable limits. According to Illinois regulations, NSPS applicability does not automatically subject non-major (< 100 ton/year of any criteria pollutant emissions) sources to Title V permitting, so the auxiliary heater's Subpart Dc applicability does not trigger Title V.

3.6 Odor

The state air regulations (Part 245) forbid the release of nuisance odors. Several of the project's emission sources have the potential to generate offensive odors. The plant design calls for routing these gas streams through an odor control system prior to release. This treatment will reduce odors and emissions below levels of concern.

IN THE CIRCUIT COURT OF LAKE COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

CITY OF WAUKEGAN, a municipal corporation, the Waukegan City Council, the governing body of the CITY OF WAUKEGAN, Daniel T. Drew, Mayor of the CITY OF WAUKEGAN and John Balen, Sam Cunningham, J. A. "Tony" Figueroa, Frank Harris, Jr., Richard Hyde, Patrick R. Needham, John Rickerd, and Lawrence TenPas, members of the Waukegan City Council, Russ Tomlin, Director of Planning and Zoning, and Chuck Perkey, Building and Planning Director.

No. 01 CH 1777

Judge Stephen Walter

Plaintiff/Counter-Defendants

v.

THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

Defendant, and the

NORTH SHORE SANITARY DISTRICT,

Defendant/Counter-Plaintiff.

VERIFIED ANSWER AND COUNTERCLAIMS OF DEFENDANT NORTH SHORE SANITARY DISTRICT TO WAUKEGAN'S AMENDED COMPLAINT

Defendant, The North Shore Sanitary District ("NSSD"), by and through its attorneys, Gardner, Carton & Douglas, states as its Verified Answer and Counterclaims to Plaintiffs' Amended Complaint, as follows:

ALLEGATIONS COMMON TO ALL COUNTS

The Parties

1. Waukegan is a municipal corporation located in Lake County, Illinois and an Illinois Home Rule unit of government.



ANSWER:

NSSD admits that Waukegan is a municipal corporation located in Lake County, Illinois. NSSD lacks sufficient knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations in this paragraph, and therefore denies each and every such allegation.

2. Richard H. Hyde is the Mayor of the City of Waukegan and member of the Waukegan City Council, a citizen of the State of Illinois and resident of the City of Waukegan (the "Mayor").

ANSWER:

NSSD admits the allegations contained in this paragraph.

3. John Balen, Sam Cunningham, J. A. "Tony" Figueroa, Frank Harris, Jr., Patrick R. Needham, John Rickerd, and Lawrence TenPas, are members of the Waukegan City Council, citizens of the State of Illinois, and residents of the City of Waukegan (the "City Council" and "Alderman", respectively).

ANSWER:

NSSD admits the allegations contained in this paragraph.

4. The Agency is an agency of the State of Illinois, empowered to consider, issue or deny various applications for permits.

ANSWER:

NSSD admits the allegations contained in this paragraph.

5. NSSD is a special purpose unit of local government established by North Shore Sanitary District Act, 70 ILCS §2305/0.1, et seq.

ANSWER:

NSSD admits that it is a unit of government, established by the North Shore Sanitary District Act, 70 ILCS 2305/0.1, et seq., the North Shore Sanitary District Extension (1st) Act, 70 ILCS 2310/0.1, et seq., and the North Shore Sanitary District Extension (2nd) Act, 70 ILCS

2315/1, et seq. NSSD denies the remaining allegations in this paragraph. Further answering, NSSD affirmatively states that it is charged with disposal of sewage for a population of approximately 350,000 people, within its Facility Planning Area boundary, encompassing the geographic area roughly bordered by Lake Cook road on the south, the Illinois and Wisconsin border on the north, the Tri-State Tollway in the west, and Lake Michigan in the east. See map of boundary, attached as Exhibit 1 to this Verified Answer and Counterclaims of Defendant North Shore Sanitary District to Waukegan's Amended Complaint.

Nature of Action

6. This action relates to the unilateral actions of the NSSD to construct a new pollution control facility (the "Facility") on the Waukegan lakefront, and haul sewage sludge through the City of Waukegan to be stored and burned at the new Facility. The NSSD has refused to comply with state and local laws, requiring it to first obtain a land use decision from the City. For its part, the Agency has said it will not require NSSD to obtain the local siting decision required by state law and has issued permits to NSSD for the construction and development of the Facility. The City asks this Court to declare that the Facility is subject to specific state and local laws requiring NSSD to obtain land use and building permit decisions from the City. In this action, the City seeks declaratory and injunctive relief.

ANSWER:

This paragraph states numerous conclusions of law to which no answer is required. To the extent this paragraph may be interpreted to contain any factual allegation, NSSD denies that it has acted in a unilateral manner. NSSD admits that it intends to replace its current sludge disposal practice with a beneficial biosolids reuse, and has received permits from the Illinois Environmental Protection Agency ("Agency") to construct and operate a beneficial biosolids drying/melting facility (the "biosolids drying/melting facility") at its Waukegan sewage treatment plant. Further answering NSSD affirmatively states that the United States Environmental Protection Agency uses the term "biosolids" to distinguish sewage sludge which is to be beneficially reused, rather than discarded. See Standards for the Use or Disposal of

Sewage Sludge, 58 Fed. Reg. 9248,9251 (Feb 19, 1993)(codified at 40 CFR Part 503). Further answering, NSSD affirmatively states that in order to eliminate the current method of sludge discard and disposal through landfilling, and facilitate this new biosolids reuse process, it intends to cease transporting sludge from its Waukegan sewage treatment plant to its Newport Township Landfill. NSSD affirmatively states that as part of its landfilling activities, it currently transports five truckloads of sludge from its Waukegan sewage treatment plant, five from its Gurnee plant, and two from its Highland Park plant on a daily basis Monday through Friday, to its Newport Township Landfill. Further answering, NSSD affirmatively states that its new processes will eliminate the current practice of transporting these truckloads of sludge from the Waukegan, Gurnee, and Highland Park plants to the Newport Township Landfill. Further answering, NSSD affirmatively states, that rather than discard sludge, it proposes to instead transport five truckloads of beneficially reusable biosolids from the Gurnee plant, and two truckloads from the Highland Park plant, to the Waukegan sewage treatment plant, for processing in the proposed biosolids drying/melting facility, on a daily basis Monday through Friday. NSSD affirmatively states that this will result in a total net gain of two full truckloads per day to be transported through the City of Waukegan. NSSD denies that the biosolids drying/melting facility is a “pollution control facility” or a “new Facility” as alleged in this paragraph, or a new “Pollution Control Facility” as defined in Section 3.32 of the Illinois Environmental Protection Act (“the Act”), 415 ILCS 5/3.32. NSSD denies each and every remaining allegation as it relates to NSSD. To the extent this paragraph may be intended to contain any factual allegation related to any other party, NSSD admits that the Agency has indicated that it deems the local siting provisions contained in Section 39(c) of the Act, 415 ILCS 5/39(c), and Section 39.2 of the Act, 415 ILCS 5/39.2, inapplicable to NSSD’s proposed biosolids drying/melting facility, and has

issued permits to NSSD for the construction and development of the biosolids drying/melting facility. NSSD denies each and every remaining allegation in this paragraph.

The NSSD Processes Materials Discarded by Others

7. The NSSD operates three wastewater treatment plants in Lake County, Illinois located in Highland Park, Gurnee and Waukegan. These plants receive and treat a variety of wastewaters, ranging from human sewage to industrial waste containing toxic substances. Though the physical and chemical properties of the wastewaters may vary widely, the wastewaters share a common characteristic: all the wastewaters have been discarded by the persons generating them. The wastewaters, serving no useful purpose to the persons generating them, are transported by various means to the NSSD treatment plants. Some wastewaters are delivered to the treatment plants by sewer lines. Other wastewaters are delivered to the treatment plants in tanker trucks. Plaintiffs are informed and believe that the wastewaters delivered in tanker trucks have been generated (i.e., discarded) by persons located outside the geographic area of the NSSD established by the North Shore Sanitary District Act.

ANSWER:

This paragraph states numerous conclusions of law to which no answer is required. To the extent this paragraph contains factual allegations, NSSD admits that it operates three permitted wastewater treatment plants in Lake County, Illinois, located in Highland Park, Gurnee, and Waukegan. NSSD admits that these plants treat domestic sewage, and also receive some industrial discharges which are from point sources subject to discharge permits under Section 402 of the Clean Water Act, 33 U.S.C. § 1342. Further answering, NSSD affirmatively states that to the extent required, all industrial discharges have been treated through the permitted pretreatment program prior to receipt by the NSSD plants. NSSD admits that wastewater is delivered to the sewage treatment plants by sewer lines. NSSD further admits that septic haulers deliver septage to the Waukegan sewage treatment plant, and further answering, NSSD affirmatively states that the septic haulers must certify that each septage load originated from within the NSSD's Facility Planning Area. NSSD denies each and every remaining allegation in this paragraph.

8. The NSSD does not manufacture goods for sale to others. It is in the business of processing waste produced by others. The NSSD processes wastes received from others so they can be more easily and safely disposed of. The NSSD subjects wastewaters to various forms of physical, chemical and biological processes. The purpose of these processes is to separate solids in the wastewater from the water itself, reducing the amount of the incoming waste which will have to be disposed. As the wastewater is dewatered, increasing its solids content, it is referred to as Sludge.

ANSWER:

NSSD admits that it is engaged in the activities specified by the North Shore Sanitary District Act, 70 ILCS § 2305/0.1, et seq. NSSD further admits that it does not currently manufacture goods for sale to others, but affirmatively states that it intends to sell the glass aggregate finished product of its biosolids drying/melting facility process as a useful product, thereby eliminating the need for future landfilling of sludge. NSSD further denies each and every remaining allegation in this paragraph.

**The NSSD Proposes To Build The Facility at
a Critical Juncture in the History of the Waukegan Lakefront**

9. The NSSD treatment plant in Waukegan is located on Dahringer Road along the Lake Michigan lakefront ("NSSD Property").

ANSWER:

NSSD admits the allegations contained in this paragraph, and further answering the NSSD affirmatively states that it has operated the Waukegan sewage treatment plant since 1928 on approximately 65 acres of land owned by the NSSD.

10. The NSSD proposes to construct the Facility on the NSSD Property to store, dry and thermally treat Sludge.

ANSWER:

NSSD admits that it intends to replace its current sludge method of landfilling its discarded sludge, with a beneficial biosolids reuse process, and has received permits from the Agency to construct and operate a biosolids drying/melting facility at its Waukegan sewage treatment plant. NSSD denies remaining allegations in this paragraph, and specifically denies that the biosolids drying/melting facility is a "Pollution Control Facility" as defined in Section 3.32 of the Illinois Environmental Protection Act ("the Act"), 415 ILCS 5/3.32.

11. The Facility is proposed to be located on an area of the NSSD Property currently used as a parking lot (the "Facility Boundaries").

ANSWER:

NSSD admits that it intends to replace its current sludge method of landfilling its discarded sludge, with a beneficial biosolids reuse process, and has received permits from the Agency to construct and operate a biosolids drying/melting facility at its Waukegan sewage treatment plant. NSSD admits that the NSSD intends to locate the biosolids drying/melting unit on a portion of NSSD property currently used as a parking lot. NSSD denies remaining allegations in this paragraph, and specifically denies that the biosolids drying/melting facility is a "Pollution Control Facility" as defined in Section 3.32 of the Illinois Environmental Protection Act ("the Act"), 415 ILCS 5/3.32.

12. The Sludge has a strongly offensive and obnoxious odor. The Sludge would be transported year around from the Highland Park and Gurnee sewage treatment plants to the Facility in trucks. The trucks carrying Sludge will travel through Waukegan en route to the Facility. The Sludge will be stored in new pits and "silos". In the event of a malfunction at the Facility, the Sludge may have to be re-loaded and transported by truck back through Waukegan to an alternate disposal facility. The storage and transportation of the Sludge has the potential for emitting a strongly offensive and obnoxious odor in Waukegan beyond the Facility Boundaries.

ANSWER:

NSSD admits that it intends to transport biosolids from its Highland Park and Gurnee sewage treatment plants to its Waukegan sewage treatment plant in trucks Monday through Friday. NSSD denies remaining allegations in this paragraph, and specifically denies that the biosolids drying/melting facility is a "Pollution Control Facility" as defined in Section 3.32 of the Illinois Environmental Protection Act ("the Act"), 415 ILCS 5/3.32. Further answering, NSSD affirmatively states that it has transported sludge through the boundaries of the NSSD Facility Planning Area, including through Waukegan, from the Waukegan sewage treatment plant, for the past 74 years, and for over 30 years to the landfill in Newport Township. NSSD denies that it will store biosolids in pits, and affirmatively states that the biosolids will be contained in silos located inside a covered building, prior to being processed for drying and melting. NSSD denies that all of the biosolids have a strong or obnoxious odor.

13. Sludge will be heated and dried prior to incineration. The drying process itself emits an offensive and obnoxious odor with the potential of escaping the Facility Boundaries.

ANSWER:

NSSD denies the allegations in this paragraph, except for as admitted hereafter. NSSD denies that the potential exists for offensive or obnoxious odors to escape from the Waukegan sewage treatment plant, as a result of operation of the drying process. Further answering, NSSD affirmatively states that the current system uses a drying or dewatering process. The new beneficial reuse biosolids drying/melting process will not increase, and may serve to reduce odor. Further answering, NSSD affirmatively states that less than 88 cfm (cubic feet per minute) of emission will be vented as a result of the drying process, and those emissions will be subject

to odor control treatment, as compared to the average household bathroom vent, which typically emits 100 cfm.

14. The Sludge will be incinerated in a combustion chamber. The Facility will emit various air pollutants into the atmosphere, including Nitrous Oxide, Sulfur Dioxide, Lead, Beryllium, and Mercury, all of which must be controlled by complex pollution control devices.

ANSWER:

NSSD admits that its biosolids drying/melting facility will emit Nitrous Oxide, Sulfur Dioxide, Lead, Beryllium, and Mercury well below levels allowable under permitted limits. NSSD denies remaining allegations in this paragraph, and specifically denies that the biosolids drying/melting facility is a "Pollution Control Facility" as defined in Section 3.32 of the Illinois Environmental Protection Act ("the Act"), 415 ILCS 5/3.32.

15. A visible plume will rise from the Facility's stack. The stack will be at least 65 feet high.

ANSWER:

NSSD denies the allegations in this paragraph, except for admitted hereafter. SSD admits that a stack will rise 15 feet above a roof elevation of approximately 50 feet. NSSD denies remaining allegations in this paragraph, and specifically denies that the biosolids drying/melting facility is a "Pollution Control Facility" as defined in Section 3.32 of the Illinois Environmental Protection Act ("the Act"), 415 ILCS 5/3.32.

16. The NSSD intends to operate the Facility 24 hours a day, 7 days a week and 52 weeks a year.

ANSWER:

NSSD admits that its permit applications were to allow for operation of the biosolids drying/melting facility 24 hours a day, 7 days a week and 52 weeks a year. NSSD denies remaining allegations in this paragraph, and specifically denies that the biosolids drying/melting facility is a "Pollution Control Facility" as defined in Section 3.32 of the Illinois Environmental Protection Act ("the Act"), 415 ILCS 5/3.32.

17. Upon information and belief, on or before December 22, 2000 the NSSD prepared a "fast-track" schedule to design and construct the Facility, which included a review of permits necessary for the construction of the facility.

ANSWER:

NSSD admits that it has prepared a proposal to design and construct the biosolids drying/melting facility, and that it reviewed the permits which may be applicable to such a project. NSSD denies remaining allegations in this paragraph, and specifically denies that the biosolids drying/melting facility is a "Pollution Control Facility" as defined in Section 3.32 of the Illinois Environmental Protection Act ("the Act"), 415 ILCS 5/3.32.

18. On April 16, 2001 the NSSD submitted an application to the Agency for a permit to construct the Facility, an air emission source, within the Facility Boundaries. Thereafter, on November 26, 2001, the NSSD submitted an application to the Agency for a further set of permits to construct and develop the Facility, a waste storage, waste treatment or waste disposal operation, within the Facility Boundaries. On March 11, 2002, the Agency granted Permits to the NSSD authorizing the construction and development of the Facility (the "Agency Permits"). Copies of the Agency Permits are attached hereto as Exhibits A and B, respectively.

ANSWER:

NSSD admits that on April 16, 2001, it submitted an Air Emission Construction Permit Application to construct the biosolids drying/melting facility at its Waukegan facility to the

Agency, and that on November 26, 2001, it submitted an Agency Bureau of Land Permit Application and Technical Support Documents to construct the biosolids drying/melting facility at its Waukegan facility to the Agency. NSSD further admits that on March 11, 2002, the Agency granted Permits to the NSSD authorizing the construction and development of the proposed biosolids drying/melting facility. NSSD denies that the biosolids drying/melting facility is a "Pollution Control Facility" as defined in Section 3.32 of the Illinois Environmental Protection Act ("the Act"), 415 ILCS 5/3.32. The remaining allegations in this paragraph contain a conclusion of law, to which no answer is required.

19. Upon information and belief, the NSSD has signed contracts with various suppliers to fabricate, deliver and assemble the Facility within the Facility Boundaries.

ANSWER:

NSSD denies the allegations contained in this paragraph, except as admitted hereinafter. NSSD admits that it has entered into contracts for the construction of the biosolids drying/melting facility. NSSD denies that the biosolids drying/melting facility is a "Pollution Control Facility" as defined in Section 3.32 of the Illinois Environmental Protection Act ("the Act"), 415 ILCS 5/3.32.

20. Upon information and belief, the NSSD has accepted delivery of components of the Facility at the NSSD Property.

ANSWER:

NSSD admits that it has accepted delivery of a limited number of components for this project. NSSD denies that the biosolids drying/melting facility is a "Pollution Control Facility" as defined in Section 3.32 of the Illinois Environmental Protection Act ("the Act"), 415 ILCS 5/3.32.

21. Waukegan has entered into an agreement with Mesirow Stein Development Services, Inc. ("Mesirow") to assist in the preparation of a comprehensive plan for the redevelopment of the lakefront, including the Outboard Marine Corporation property, located on the lakefront to the south of the NSSD Property.

ANSWER:

NSSD lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore denies each and every such allegation, and demands strict proof thereof.

22. Waukegan, with the assistance of Mesirow, has submitted an application to the Urban Land Institute ("ULI") requesting that ULI assist the City in the development of a comprehensive plan for the lakefront. On February 25, 2002, ULI issued its recommendations for a comprehensive lakefront development plan.

ANSWER:

NSSD lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore denies each and every such allegation, and demands strict proof thereof.

23. On November 19, 2001 the City Council passed a one year moratorium on the approval of building permits and zoning approvals for all development along the lakefront while Waukegan, Mesirow and ULI develop and implement a plan for the lakefront. The Ordinance adopted by the City Council states in relevant part as follows:

The city has determined that it is in the best interests of the citizens of Waukegan to study the possibilities for future development along the city's lakefront area to determine what can harmoniously be developed there.

ANSWER:

This paragraph states numerous conclusions of law to which no answer is required. To the extent this paragraph may be interpreted to contain any factual allegation, NSSD denies each and every such allegation as it relates to NSSD. To the extent that this paragraph may be

interpreted to contain any factual allegation related to any other party, NSSD lacks knowledge or information sufficient to form a belief as to the truth of such allegation, and therefore denies each and every such allegation.:

24. The City Council has not determined whether the proposed Facility is compatible with harmonious future development along the lakefront.

ANSWER:

This paragraph states a conclusion of law to which no answer is required. To the extent this paragraph may be interpreted to contain any factual allegation, NSSD lacks knowledge or information sufficient to form a belief as to the truth of such allegation, and therefore denies each and every such allegation, and demands strict proof thereof. NSSD denies that the biosolids drying/melting facility is a "Pollution Control Facility" as defined in Section 3.32 of the Illinois Environmental Protection Act ("the Act"), 415 ILCS 5/3.32.

25. Section 21(d)(1) of the Illinois Environmental Protection Act (the "Act"), 415 ILCS §5/21(d)(1) provides, in relevant part, as follows:

No person shall ... [c]onduct any waste-storage [or] waste-treatment ... operation without ... a permit granted by the Agency

ANSWER:

NSSD states that Section 21(d)(1) of the Act, 415 ILCS 5/21(d)(1) speaks for itself, and therefore, this paragraph requires no answer. Further answering, NSSD affirmatively states that the statutory Section cited by Plaintiff in this paragraph contains additional language which is relevant, and therefore, NSSD denies that Plaintiff has accurately cited relevant portions of the statute.

26. Waste is defined in Section 3.53 of the Act, 415 ILCS §5/3.53 in relevant part as follows:

"Waste" means any ... sludge from a waste treatment plant ... or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities

ANSWER:

NSSD states that Section 3.53 of the Act, 415 ILCS 5/3.53 speaks for itself, and therefore, this paragraph requires no answer. Further answering, NSSD affirmatively states that the statutory Section cited by Plaintiff in this paragraph contains additional language which is relevant, and therefore, NSSD denies that Plaintiff has accurately cited relevant portions of the statute.

27. Sludge is defined in Section 3.44 of the Act, 415 ILCS §5/3.44 in relevant part as follows:

"Sludge" means any solid, semi-solid, or liquid waste generated from a municipal ... wastewater treatment plant ... or air pollution control facility or any other such waste having similar characteristics and effects.

ANSWER:

NSSD states that Section 3.44 of the Act, 415 ILCS 5/3.44 speaks for itself, and therefore, this paragraph requires no answer. Further answering, NSSD affirmatively states that the statutory Section cited by Plaintiff in this paragraph contains additional language which is relevant, and therefore, NSSD denies that Plaintiff has accurately cited relevant portions of the statute.

28. The Sludge is a waste as defined under Section 3.53 of the Act.

ANSWER:

This paragraph states a conclusion of law to which no answer is required. To the extent this paragraph may be interpreted to contain any factual allegation, NSSD denies each and every

such allegation. Further answering, NSSD affirmatively states that the United States Environmental Protection Agency uses the term “biosolids” to distinguish sewage sludge which is to be beneficially reused, rather than discarded. See Standards for the Use or Disposal of Sewage Sludge, 58 Fed. Reg. 9248,9251 (Feb 19, 1993) (codified at 40 CFR Part 503). As further answer, NSSD affirmatively states that it intends to cease discarding its sludge, and reuse its biosolids in the biosolids drying/melting process, which will beneficially reuse the sludge NSSD produces as a by-product from its own domestic sewage treatment processes, and produce a useful glass aggregate product. NSSD further affirmatively states that with the exception of mercury, all heavy metals contained within the biosolids will be locked within the glass aggregate useful product.

29. Storage is defined in Section 3.46 of the Act, 415 ILCS §5/3.46 in relevant part as follows:

"Storage" means the containment of waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal.

ANSWER:

NSSD states that Section 3.46 of the Act, 415 ILCS 5/3.46 speaks for itself, and therefore, this paragraph requires no answer. As further answer, NSSD affirmatively states that as the biosolids drying/melting process will beneficially reuse the sludge NSSD produces as a by-product from its own domestic sewage treatment processes, and produce a useful glass aggregate product, rather than discard the sludge, and as the biosolids produced at its sewage treatment plants are not discarded, they are not “waste,” as “waste” is defined by Section 3.53 of the Act, 415 ILCS 5/3.53. Further answering, NSSD affirmatively states that activities related to the proposed biosolids drying/melting process do not include waste storage. Further answering, NSSD affirmatively states that the statutory Section cited by Plaintiff in this paragraph contains

additional language which is relevant, and therefore, NSSD denies that Plaintiff has accurately cited relevant portions of the statute.

30. The Facility proposed by the NSSD will include bins and silos used for the storage of Sludge, a waste. The Facility is a waste storage facility.

ANSWER:

This paragraph states numerous conclusions of law to which no answer is required. To the extent this paragraph may be interpreted to contain any factual allegation, NSSD admits that the biosolids drying/melting facility will include silos contained within a covered building. NSSD further denies that it will use pits as part of the biosolids drying/melting facility, and further denies that the facility is a "waste storage facility". NSSD denies that the biosolids drying/melting facility is a "Pollution Control Facility" as defined in Section 3.32 of the Illinois Environmental Protection Act ("the Act"), 415 ILCS 5/3.32. NSSD affirmatively states that as the biosolids produced at its sewage treatment plants are not "waste," as "waste" is defined by Section 3.53 of the Act, 415 ILCS 5/3.53, activities related to the proposed biosolids drying/melting process do not include waste storage.

31. Treatment is defined in Section 3.49 of the Act, 415 ILCS §5/3.49, in relevant part as follows:

"Treatment" means any method, technique or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any waste so as to neutralize it or render it nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume.

ANSWER:

NSSD states that Section 3.49 of the Act, 415 ILCS 5/3.49 speaks for itself, and therefore, this paragraph requires no answer. Further answering, NSSD affirmatively states that

the statutory Section cited by Plaintiff in this paragraph contains additional language which is relevant, and therefore. NSSD denies that Plaintiff has accurately cited relevant portions of the statute. As further answer, NSSD affirmatively states that as the biosolids produced at its sewage treatment plants is not “waste,” as “waste” is defined by Section 3.53 of the Act, 415 ILCS 5/3.53, activities related to the proposed biosolids drying/melting process do not include waste treatment.

32. The Facility will, among other processes, dry and oxidize the Sludge and vitrify the metallic compounds in the Sludge.

ANSWER:

NSSD admits that proposed biosolids drying/melting process will dry and vitrify the biosolids. NSSD denies that the biosolids drying/melting facility is a “Pollution Control Facility” as defined in Section 3.32 of the Illinois Environmental Protection Act (“the Act”), 415 ILCS 5/3.32.

33. The Facility is a waste treatment facility.

ANSWER:

This paragraph states a conclusion of law to which no answer is required. To the extent this paragraph may be interpreted to contain a factual allegation, NSSD denies that the biosolids drying/melting facility is a “Pollution Control Facility” as defined in Section 3.32 of the Illinois Environmental Protection Act (“the Act”), 415 ILCS 5/3.32. NSSD further denies that the proposed biosolids drying/melting facility is a “waste-treatment facility.”

34. Waukegan and the City Council have a protectible interest in ensuring that the site location for the Facility is approved by the City Council. Waukegan and the City Council would be irreparably harmed if the Facility were allowed to be permitted, constructed and operated

without proper siting approval. As such, Waukegan and the City Council have no adequate remedy at law.

ANSWER:

This paragraph states a conclusion of law to which no answer is required. To the extent this paragraph may be interpreted to contain a factual allegation, NSSD denies each and every such allegation. NSSD denies that the biosolids drying/melting facility is a "Pollution Control Facility" as defined in Section 3.32 of the Illinois Environmental Protection Act ("the Act"), 415 ILCS 5/3.32. Further answering, NSSD affirmatively states that Plaintiff has an adequate remedy at law, specifically, it may bring an enforcement action before the Illinois Pollution Control Board pursuant to Section 31(b) of the Act, 415 ILCS 5/31(b). Further answering, NSSD denies that Plaintiff has a protectible interest in ensuring that the site location for the proposed biosolids drying/melting facility is approved by the City Council.

COUNT I

CLAIM FOR DECLARATORY RELIEF THAT THE FACILITY IS A NEW POLLUTION CONTROL FACILITY FOR WHICH NSSD IS REQUIRED TO OBTAIN LOCAL SITING APPROVAL

1 - 34. Plaintiff adopt and reallege paragraphs 1 through 34 of the Allegations Common to All Counts as paragraphs 1 through 34 of this Count I.

ANSWER:

NSSD adopts and restates its answers to paragraphs 1 through 34, as is fully set forth herein.

35. A Pollution Control Facility is defined in Section 3.32 of the Act, 415 ILCS §5/3.32, in relevant part as follows:

"Pollution control facility" is any waste storage site ..., waste transfer station, waste treatment facility, or waste incinerator.

ANSWER:

NSSD states that Section 3.32 of the Act, 415 ILCS 5/3.32 speaks for itself, and therefore, this paragraph requires no answer. Further answering, NSSD affirmatively states that the statutory Section cited by Plaintiff in this paragraph contains additional language and which is relevant, and therefore, NSSD denies that Plaintiff has accurately cited relevant portions of the statute.

36. The Facility is a “waste storage site”, “waste treatment facility” or a “waste incinerator” as those terms are used in Section 3.32 of the Act.

ANSWER:

NSSD states that no answer is required for this paragraph, as it calls for a legal conclusion. To the extent that this paragraph could be interpreted to contain factual allegations, NSSD denies each and every such allegation. Further answering, NSSD affirmatively states that the Agency has determined that the proposed facility should be required to monitor Mercury emissions pursuant to the National Emissions Standards for Hazardous Air Pollutants (“NESHAPS”) for Mercury.

37. The NSSD Property within the Facilities Boundaries is currently used as parking lot.

ANSWER:

NSSD denies the allegations contained in this paragraph, but admits that a portion of the biosolids drying/melting facility, as proposed, will be located on a portion of the Waukegan sewage treatment plant that is currently used a parking lot for the existing facility.

38. Prior to March 11, 2002, the Agency never issued a permit authorizing the storage, treatment or incineration of waste within the Facility Boundaries.

ANSWER:

NSSD denies the allegation contained in this paragraph, and affirmatively states that this paragraph mischaracterizes and distorts the regulatory requirements for wastewater treatment plants. NSSD affirmatively states that at all times, it has been permitted to collect, treat and dispose of sewage, regardless of whether such permits are for "waste". Further answering, NSSD states that it has obtained all necessary permits for its current operation as a sewage treatment plant, and that it has received all necessary permits for construction and development of its proposed biosolids drying/melting facility.

39. Prior to March 11, 2002, the NSSD never received a permit from the Agency to store, treat or incinerate waste within the Facilities Boundaries.

ANSWER:

NSSD denies the allegation contained in this paragraph, and affirmatively states that this paragraph mischaracterizes and distorts the regulatory requirements for wastewater treatment plants. NSSD affirmatively states that at all times, it has been permitted to collect, treat and dispose of sewage, regardless of whether such permits are for "waste". Further answering, NSSD states that it has obtained all necessary permits for its current operation as a sewage treatment plant, and that it has received all necessary permits for development and construction of its proposed biosolids drying/melting facility.

40. A New Pollution Control Facility is defined in Section 3.32(b) of the Act, 415 ILCS §5/3.32(b), in relevant part as follows:

A new pollution control facility is: (1) a pollution control facility initially permitted for development or construction after July 1, 1981; or (2) the area of expansion beyond the boundary of a currently permitted pollution control facility; or (3) a permitted pollution control facility requesting approval to store, dispose of, transfer or incinerate, for the first time, any special or hazardous waste.

ANSWER:

NSSD states that Section 3.32(b) of the Act, 415 ILCS 5/3.32(b) speaks for itself, and therefore, this paragraph requires no answer. Further answering, NSSD affirmatively states that the statutory Section cited by Plaintiff in this paragraph contains additional language and which is relevant, and therefore, NSSD denies that Plaintiff has accurately cited relevant portions of the statute. Further answering, NSSD affirmatively states that neither the Waukegan sewage treatment plant, nor the proposed biosolids drying/melting facility is a “new pollution control facility” as that term is defined by Section 3.32(b) of the Act, 415 ILCS 5/3.32(b).

41. The Facility proposed within the Facility Boundaries is a pollution control facility initially permitted for development or construction after July 1, 1981, and is therefore a new pollution control facility. Alternatively, the Facility proposed within the Facility Boundaries will result in the expansion beyond the boundary of a currently permitted pollution control facility, and is therefore a new pollution control facility. Additionally, the Facility does not fit within any of the exceptions articulated in the definition of a pollution control facility in Section 3.32 of the Act, 415 ILCS §5/3.32.

ANSWER:

This paragraph states numerous conclusions of law to which no answer is required. To the extent this paragraph may be interpreted to contain factual allegations, NSSD denies each and every such allegation. NSSD denies that the biosolids drying/melting facility is a “Pollution Control Facility” as defined in Section 3.32 of the Illinois Environmental Protection Act (“the Act”), 415 ILCS 5/3.32. Further answering, NSSD affirmatively states that neither the Waukegan sewage treatment plant, nor the proposed biosolids drying/melting facility is a “new pollution control facility” as that term is defined by Section 3.32(b) of the Act, 415 ILCS 5/3.32(b), and denies that the proposed biosolids drying/melting facility will be constructed beyond the boundary of a permitted pollution control facility, or that the existing permitted

facility will be expanded beyond its current boundary. NSSD affirmatively states that at all times, it has been permitted to collect, treat and dispose of sewage, regardless of whether such permits are for "waste".

42. Section 39.2 of the Act, 415 ILCS §5/39.2 provides that the governing body of the municipality is to consider specific criteria in reviewing an application for a local siting approval for a new pollution control facility. For example, if the Facility is a new pollution control facility, the City Council would determine whether the proposed Facility is compatible with harmonious future development along the lakefront. Specifically, section 39.2(a) of the Act provides, in relevant part, as follows:

- a. The county board of the county or the governing body of the municipality, as determined by paragraph (c) of Section 39 of this Act [415 ILCS 5/39], shall approve or disapprove the request for local siting approval for each pollution control facility which is subject to such review. An applicant for local siting approval shall submit sufficient details describing the proposed facility to demonstrate compliance, and local siting approval shall be granted only if the proposed facility meets the following criteria:
 1. the facility is necessary to accommodate the waste needs of the area it is intended to serve;
 2. the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;
 3. the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property;
 4. (A) for a facility other than a sanitary landfill or waste disposal site, the facility is located outside the boundary of the 100 year flood plain or the site is flood-proofed; (B) for a facility that is a sanitary landfill or waste disposal site, the facility is located outside the boundary of the 100-year floodplain, or if the facility is a facility described in subsection (b)(3) of Section 22.19a [415 ILCS 5/22.19a], the site is flood-proofed;
 5. the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents;
 6. the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows;
 7. if the facility will be treating, storing or disposing of hazardous waste, an emergency response plan exists for the facility which includes notification, containment and evacuation procedures to be used in case of an accidental release;
 8. if the facility is to be located in a county where the county board has

adopted a solid waste management plan consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act [415 ILCS 10/1 et seq. or 415 ILCS 15/1 et seq.], the facility is consistent with that plan; and

9. if the facility will be located within a regulated recharge area, any applicable requirements specified by the Board for such areas have been met. The county board or the governing body of the municipality may also consider as evidence the previous operating experience and past record of convictions or admissions of violations of the applicant (and any subsidiary or parent corporation) in the field of solid waste management when considering criteria (ii) and (v) under this Section.

ANSWER:

NSSD states that Section 39.2 of the Act, 415 ILCS 5/39.2 speaks for itself, and therefore, this paragraph requires no answer. NSSD further states that this paragraph states numerous conclusions of law to which no answer is required. NSSD denies that the proposed biosolids drying/melting facility is a "Waste Incinerator." NSSD denies that the biosolids drying/melting facility is a "Pollution Control Facility" as defined in Section 3.32 of the Illinois Environmental Protection Act ("the Act"), 415 ILCS 5/3.32. Further answering, NSSD affirmatively states that neither the Waukegan sewage treatment plant, nor the proposed biosolids drying/melting facility is a "new pollution control facility" as that term is defined by Section 3.32(b) of the Act, 415 ILCS 5/3.32(b), and denies that the proposed biosolids drying/melting facility will be constructed beyond the boundary of a permitted pollution control facility, and therefore, Section 39.2 of the Act, 415 ILCS 5/39.2 is inapplicable to the proposed biosolids drying/melting facility.

43. In reviewing the NSSD's application for permits to construct and develop the Facility, the Agency has no authority to consider, and, upon information and belief, the Agency has adopted a policy not to consider, whether "the facility is necessary to accommodate the waste needs of the area it is intended to serve", whether "the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property" or whether "the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows". See Sections 39.2(a) (i), (iii) and

(vi) of the Act, respectively. The Agency is without authority to base a decision regarding the issuance of a permit to the NSSD to construct or operate an air emission source, solid waste treatment operation or solid waste storage operation on the Agency's determination of whether the proposed Facility is compatible with harmonious future development along the lakefront. The Agency is a pollution control, not a site location approval body.

ANSWER:

NSSD states that Section 39.2 of the Act, 415 ILCS 5/39.2 speaks for itself, that the Agency is empowered with the authorities set forth in the Act, 415 ILCS 5/1 et seq., and therefore, this paragraph requires no answer. NSSD further states that this paragraph states numerous conclusions of law to which no answer is required. NSSD denies that the proposed biosolids drying/melting facility will be constructed beyond the boundary of a permitted pollution control facility, and denies that the proposed biosolids drying/melting facility is a "Waste Incinerator." NSSD denies that the biosolids drying/melting facility is a "Pollution Control Facility" as defined in Section 3.32 of the Illinois Environmental Protection Act ("the Act"), 415 ILCS 5/3.32. Further answering, NSSD affirmatively states that neither the Waukegan sewage treatment plant, nor the proposed biosolids drying/melting facility is a "new pollution control facility" as that term is defined by Section 3.32(b) of the Act, 415 ILCS 5/3.32(b), and denies that the proposed biosolids drying/melting facility will be constructed beyond the boundary of a permitted pollution control facility, and therefore, Section 39.2 of the Act, 415 ILCS 5/39.2 is inapplicable to the proposed biosolids drying/melting facility. Further answering, NSSD states that the Agency is empowered with those duties included in the Act, and relevant regulations.

44. Section 39.2 of Act establishes specific requirements for public notice, and actual notice to adjacent property owners, of the fact that a request for siting approval has been submitted to the governing body of a municipality. The notice must describe the right of persons to comment on a request for siting approval. Specifically, section 39.2(b) of the Act provides in relevant part as follows:

- b. No later than 14 days prior to a request for location approval the applicant shall cause written notice of such request to be served either in person or by registered mail, return receipt requested, on the owners of all property within the subject area not solely owned by the applicant, and on the owners of all property within 250 feet in each direction of the lot line of the subject property, said owners being such persons or entities which appear from the authentic tax records of the County in which such facility is to be located; provided, that the number of all feet occupied by all public roads, streets, alleys and other public ways shall be excluded in computing the 250 feet requirement; provided further, that in no event shall this requirement exceed 400 feet, including public streets, alleys and other public ways.

Such written notice shall also be served upon members of the General Assembly from the legislative district in which the proposed facility is located and shall be published in a newspaper of general circulation published in the county in which the site is located.

Such notice shall state the name and address of the applicant, the location of the proposed site, the nature and size of the development, the nature of the activity proposed, the probable life of the proposed activity, the date when the request for site approval will be submitted, and a description of the right of persons to comment on such request as hereafter provided.

ANSWER:

NSSD states that Section 39.2 of the Act, 415 ILCS 5/39.2 speaks for itself, and therefore, this paragraph requires no answer. NSSD further states that this paragraph states numerous conclusions of law to which no answer is required. NSSD denies that the proposed biosolids drying/melting facility will be constructed beyond the boundary of a permitted pollution control facility, and denies that the proposed biosolids drying/melting facility is a "Waste Incinerator." NSSD denies that the biosolids drying/melting facility is a "Pollution Control Facility" as defined in Section 3.32 of the Illinois Environmental Protection Act ("the Act"), 415 ILCS 5/3.32. Further answering, NSSD affirmatively states that neither the Waukegan sewage treatment plant, nor the proposed biosolids drying/melting facility is a "new pollution control facility" as that term is defined by Section 3.32(b) of the Act, 415 ILCS 5/3.32(b), and denies that the proposed biosolids drying/melting facility will be constructed.

beyond the boundary of a permitted pollution control facility, and therefore, Section 39.2 of the Act, 415 ILCS 5/39.2 is inapplicable to the proposed biosolids drying/melting facility.

45. In addition to the notice required by Section 39.2(b) of the Act, Section 39.2(c) of Act requires that notice be given to the general public, and others, of the opportunity to participate in a public hearing to be conducted by the governing body of the municipality. Specifically, section 39.2(c) of the Act provides in relevant part as follows:

- c. An applicant shall file a copy of its request with the county board of the county or the governing body of the municipality in which the proposed site is located. The request shall include (i) the substance of the applicant's proposal and (ii) all documents, if any, submitted as of that date to the Agency pertaining to the proposed facility, except trade secrets as determined under Section 7.1 of this Act [415 ILCS 5/7.1]. All such documents or other materials on file with the county board or governing body of the municipality shall be made available for public inspection at the office of the county board or the governing body of the municipality and may be copied upon payment of the actual cost of reproduction.

Any person may file written comment with the county board or governing body of the municipality concerning the appropriateness of the proposed site for its intended purpose. The county board or governing body of the municipality shall consider any comment received or postmarked not later than 30 days after the date of the last public hearing.

ANSWER:

NSSD states that Section 39.2 of the Act, 415 ILCS 5/39.2 speaks for itself, and therefore, this paragraph requires no answer. NSSD further states that this paragraph states numerous conclusions of law to which no answer is required. NSSD denies that the proposed biosolids drying/melting facility will be constructed beyond the boundary of a permitted pollution control facility, and denies that the proposed biosolids drying/melting facility is a "Waste Incinerator." NSSD denies that the biosolids drying/melting facility is a "Pollution Control Facility" as defined in Section 3.32 of the Illinois Environmental Protection Act ("the Act"), 415 ILCS 5/3.32. Further answering, NSSD affirmatively states that neither the Waukegan sewage treatment plant, nor the proposed biosolids drying/melting facility is a "new

pollution control facility” as that term is defined by Section 3.32(b) of the Act, 415 ILCS 5/3.32(b), and denies that the proposed biosolids drying/melting facility will be constructed beyond the boundary of a permitted pollution control facility, and therefore, Section 39.2 of the Act, 415 ILCS 5/39.2 is inapplicable to the proposed biosolids drying/melting facility.

46. Section 39.2(d) of the Act requires the governing body of the municipality to hold at least one public hearing on the request for local siting approval. Specifically, Section 39.2(d) of the Act provides in relevant part as follows:

- d. At least one public hearing is to be held by the county board or governing body of the municipality no sooner than 90 days but no later than 120 days from receipt of the request for site approval. No later than 14 days prior to such hearing notice shall be published in a newspaper of general circulation published in the county of the proposed site, and delivered by certified mail to all members of the General Assembly from the district in which the proposed site is located, to the governing authority of every municipality contiguous to the proposed site or contiguous to the municipality in which the proposed site is to be located, to the county board of the county where the proposed site is to be located, if the proposed site is located within the boundaries of a municipality, and to the Agency. Members or representatives of the governing authority of a municipality contiguous to the proposed site or contiguous to the municipality in which the proposed site is to be located and, if the proposed site is located in a municipality, members or representatives of the county board of a county in which the proposed site is to be located may appear at and participate in public hearings held pursuant to this Section. The public hearing shall develop a record sufficient to form the basis of appeal of the decision in accordance with Section 40.1 of this Act [415 ILCS 5/40.1]. The fact that a member of the county board or governing body of the municipality has publicly expressed an opinion on an issue related to a site review proceeding shall not preclude the member from taking part in the proceeding and voting on the issue.

ANSWER:

NSSD states that Section 39.2 of the Act, 415 ILCS 5/39.2 speaks for itself, and therefore, this paragraph requires no answer. NSSD further states that this paragraph states numerous conclusions of law to which no answer is required. NSSD denies that the proposed biosolids drying/melting facility will be constructed beyond the boundary of a permitted

pollution control facility, and denies that the proposed biosolids drying/melting facility is a “Waste Incinerator.” NSSD denies that the biosolids drying/melting facility is a “Pollution Control Facility” as defined in Section 3.32 of the Illinois Environmental Protection Act (“the Act”), 415 ILCS 5/3.32. Further answering, NSSD affirmatively states that neither the Waukegan sewage treatment plant, nor the proposed biosolids drying/melting facility is a “new pollution control facility” as that term is defined by Section 3.32(b) of the Act, 415 ILCS 5/3.32(b), and denies that the proposed biosolids drying/melting facility will be constructed beyond the boundary of a permitted pollution control facility, and therefore, Section 39.2 of the Act, 415 ILCS 5/39.2 is inapplicable to the proposed biosolids drying/melting facility.

47. Section 39.2(e) provides that the governing body of the municipality may impose conditions upon its approval of a request for siting approval. Those conditions may address matters not provided for in the State’s pollution control regulations, as long as they are reasonable and necessary, and not inconsistent with the State’s regulations. By way of example only, these conditions may address traffic impact and landscaping.

ANSWER:

NSSD states that Section 39.2 of the Act, 415 ILCS 5/39.2 speaks for itself, and therefore, this paragraph requires no answer. NSSD further states that this paragraph states numerous conclusions of law to which no answer is required. NSSD denies that the proposed biosolids drying/melting facility will be constructed beyond the boundary of a permitted pollution control facility, and denies that the proposed biosolids drying/melting facility is a “Waste Incinerator.” NSSD denies that the biosolids drying/melting facility is a “Pollution Control Facility” as defined in Section 3.32 of the Illinois Environmental Protection Act (“the Act”), 415 ILCS 5/3.32. Further answering, NSSD affirmatively states that neither the Waukegan sewage treatment plant, nor the proposed biosolids drying/melting facility is a “new pollution control facility” as that term is defined by Section 3.32(b) of the Act, 415 ILCS

5/3.32(b), and denies that the proposed biosolids drying/melting facility will be constructed beyond the boundary of a permitted pollution control facility, and therefore, Section 39.2 of the Act, 415 ILCS 5/39.2 is inapplicable to the proposed biosolids drying/melting facility.

48. Specifically, section 39.2(e) of the Act provides in relevant part as follows:

- e. Decisions of the county board or governing body of the municipality are to be in writing, specifying the reasons for the decision, such reasons to be in conformance with subsection (a) of this Section. In granting approval for a site the county board or governing body of the municipality may impose such conditions as may be reasonable and necessary to accomplish the purposes of this Section and as are not inconsistent with regulations promulgated by the Board. Such decision shall be available for public inspection at the office of the county board or governing body of the municipality and may be copied upon payment of the actual cost of reproduction. If there is no final action by the county board or governing body of the municipality within 180 days after the filing of the request for site approval the applicant may deem the request approved (emphasis added).

ANSWER:

NSSD states that Section 39.2 of the Act, 415 ILCS 5/39.2 speaks for itself, and therefore, this paragraph requires no answer. NSSD further states that this paragraph states numerous conclusions of law to which no answer is required. NSSD denies that the proposed biosolids drying/melting facility will be constructed beyond the boundary of a permitted pollution control facility, and denies that the proposed biosolids drying/melting facility is a "Waste Incinerator." NSSD denies that the biosolids drying/melting facility is a "Pollution Control Facility" as defined in Section 3.32 of the Illinois Environmental Protection Act ("the Act"), 415 ILCS 5/3.32. Further answering, NSSD affirmatively states that neither the Waukegan sewage treatment plant, nor the proposed biosolids drying/melting facility is a "new pollution control facility" as that term is defined by Section 3.32(b) of the Act, 415 ILCS 5/3.32(b), and denies that the proposed biosolids drying/melting facility will be constructed

beyond the boundary of a permitted pollution control facility, and therefore, Section 39.2 of the Act, 415 ILCS 5/39.2 is inapplicable to the proposed biosolids drying/melting facility.

49. Section 39.2(g) of the Act, 415 ILCS §5/39.2(g), provides in relevant part as follows:

The siting approval procedures, criteria and appeal procedures provided for in this Act for new pollution control facilities shall be the exclusive siting procedures and rules and appeal procedures for facilities subject to such procedures. Local zoning or other local land use requirements shall not be applicable to such siting decisions.

ANSWER:

NSSD states that Section 39.2 of the Act, 415 ILCS 5/39.2 speaks for itself, and therefore, this paragraph requires no answer. NSSD further states that this paragraph states numerous conclusions of law to which no answer is required. NSSD denies that the proposed biosolids drying/melting facility will be constructed beyond the boundary of a permitted pollution control facility, and denies that the proposed biosolids drying/melting facility is a "Waste Incinerator." NSSD denies that the biosolids drying/melting facility is a "Pollution Control Facility" as defined in Section 3.32 of the Illinois Environmental Protection Act ("the Act"), 415 ILCS 5/3.32. Further answering, NSSD affirmatively states that neither the Waukegan sewage treatment plant, nor the proposed biosolids drying/melting facility is a "new pollution control facility" as that term is defined by Section 3.32(b) of the Act, 415 ILCS 5/3.32(b), and denies that the proposed biosolids drying/melting facility will be constructed beyond the boundary of a permitted pollution control facility, and therefore, Section 39.2 of the Act, 415 ILCS 5/39.2 is inapplicable to the proposed biosolids drying/melting facility.

50. The City Council is the governing body of Waukegan.

ANSWER:

NSSD admits the allegations contained in this paragraph.

51. The NSSD has not filed a request for siting approval for the Facility with the City Council. The City Council has not issued a siting approval for the Facility.

ANSWER:

NSSD admits that it has not submitted a request for siting approval for its proposed biosolids drying/melting facility, and that the Waukegan City Council has not issued siting approval for such unit. Further answering, NSSD affirmatively states that this is consistent with past practice with respect to the relationship between the NSSD and the City of Waukegan, since 1941, in that the City of Waukegan has not previously sought to require siting approval for activities of the NSSD. NSSD denies that it proposes to construct a "Waste Incinerator." NSSD denies that the biosolids drying/melting facility is a "Pollution Control Facility" as defined in Section 3.32 of the Illinois Environmental Protection Act ("the Act"), 415 ILCS 5/3.32. Further answering, NSSD affirmatively states that neither the Waukegan sewage treatment plant, nor the proposed biosolids drying/melting facility is a "new pollution control facility" as that term is defined by Section 3.32(b) of the Act, 415 ILCS 5/3.32(b), and denies that the proposed biosolids drying/melting facility will be constructed beyond the boundary of a permitted pollution control facility, and therefore, Section 39.2 of the Act, 415 ILCS 5/39.2 is inapplicable to the proposed biosolids drying/melting facility.

52. Section 39(c) of the Act, 415 ILCS §5/3.39(c), provides in relevant part as follows:

[N]o permit for the development or construction of a new pollution control facility may be granted by the Agency unless the applicant submits proof to the Agency that the location of the facility has been approved by the County Board of the county if in an unincorporated area, or the governing body of the municipality when in an incorporated area, in which the facility is to be located in accordance with Section 39.2 of this Act.

ANSWER:

NSSD states that Section 39.2 of the Act, 415 ILCS 5/39.2 speaks for itself, and therefore, this paragraph requires no answer. NSSD denies that the proposed biosolids drying/melting facility will be constructed beyond the boundary of a permitted pollution control facility, and denies that the proposed biosolids drying/melting facility is a "Waste Incinerator." NSSD denies that the biosolids drying/melting facility is a "Pollution Control Facility" as defined in Section 3.32 of the Illinois Environmental Protection Act ("the Act"), 415 ILCS 5/3.32. Further answering, NSSD affirmatively states that neither the Waukegan sewage treatment plant, nor the proposed biosolids drying/melting facility is a "new pollution control facility" as that term is defined by Section 3.32(b) of the Act, 415 ILCS 5/3.32(b), and denies that the proposed biosolids drying/melting facility will be constructed beyond the boundary of a permitted pollution control facility, and therefore, Section 39.2 of the Act, 415 ILCS 5/39.2 is inapplicable to the proposed biosolids drying/melting facility.

53. The NSSD has not submitted proof to the Agency that the City Council has issued, in accordance with Section 39.2 of the Act, a local siting approval for the Facility Boundaries or the Facility ("Local Siting Approval").

ANSWER:

NSSD admits that it has not submitted local siting approval under to Section 39.2 of the Act, 415 ILCS 5/39.2. NSSD denies that the proposed biosolids drying/melting facility will be constructed beyond the boundary of a permitted pollution control facility, and denies that the

proposed biosolids drying/melting facility is a “Waste Incinerator.” NSSD denies that the biosolids drying/melting facility is a “Pollution Control Facility” as defined in Section 3.32 of the Illinois Environmental Protection Act (“the Act”), 415 ILCS 5/3.32. Further answering, NSSD affirmatively states that neither the Waukegan sewage treatment plant, nor the proposed biosolids drying/melting facility is a “new pollution control facility” as that term is defined by Section 3.32(b) of the Act, 415 ILCS 5/3.32(b), and denies that the proposed biosolids drying/melting facility will be constructed beyond the boundary of a permitted pollution control facility, and therefore, Section 39.2 of the Act, 415 ILCS 5/39.2 is inapplicable to the proposed biosolids drying/melting facility, and further denies that it intends to construct a Waste Incinerator.

54. The NSSD’s failure to obtain and provide valid proof of a Local Siting Approval in accordance with Section 39.2 of the Act renders the Agency Permits void.

ANSWER:

NSSD states that this paragraph contains a legal conclusion which requires no response. NSSD denies that the proposed biosolids drying/melting facility will be constructed beyond the boundary of a permitted pollution control facility, and denies that the proposed biosolids drying/melting facility is a “Waste Incinerator.” NSSD denies that the biosolids drying/melting facility is a “Pollution Control Facility” as defined in Section 3.32 of the Illinois Environmental Protection Act (“the Act”), 415 ILCS 5/3.32. Further answering, NSSD affirmatively states that neither the Waukegan sewage treatment plant, nor the proposed biosolids drying/melting facility is a “new pollution control facility” as that term is defined by Section 3.32(b) of the Act, 415 ILCS 5/3.32(b), and denies that the proposed biosolids drying/melting facility will be constructed beyond the boundary of a permitted pollution control facility, and therefore, Section 39.2 of the

Act, 415 ILCS 5/39.2 is inapplicable to the proposed biosolids drying/melting facility, and further denies that failure to obtain siting approval from the City of Waukegan renders the lawfully issued Agency Permits void.

55. The Agency's issuance of the Agency Permits contravenes Section 39(c) of the Act, which prohibits the Agency from granting a permit for a new pollution control facility absent proof of a local siting approval. The Agency thus lacked jurisdiction to grant the Agency Permits.

ANSWER:

NSSD denies each and every allegation contained in this paragraph. Further answering, NSSD affirmatively states that neither the Waukegan sewage treatment plant, nor the proposed biosolids drying/melting facility is a "new pollution control facility" as that term is defined by Section 3.32(b) of the Act, 415 ILCS 5/3.32(b), and denies that the proposed biosolids drying/melting facility will be constructed beyond the boundary of a permitted pollution control facility, and therefore, Section 39.2 of the Act, 415 ILCS 5/39.2 is inapplicable to the proposed biosolids drying/melting facility, and further denies that it intends to construct a Waste Incinerator. NSSD denies that the biosolids drying/melting facility is a "Pollution Control Facility" as defined in Section 3.32 of the Illinois Environmental Protection Act ("the Act"), 415 ILCS 5/3.32.

56. An actual controversy exists between the parties as to whether the Facility is a new pollution control facility requiring Local Siting Approval.

ANSWER:

This paragraph states a conclusion of law to which no answer is required. To the extent this paragraph may be interpreted to contain a factual allegation, NSSD denies each and every such allegation, including the allegation that the proposed biosolids drying/melting facility is a

“new pollution control facility” as that term is defined by Section 3.32(b) of the Act, 415 ILCS 5/3.32(b). Further answering, NSSD affirmatively states that Plaintiff has an adequate remedy at law, specifically, it may bring an enforcement action before the Illinois Pollution Control Board pursuant to Section 31(b) of the Act, 415 ILCS 5/31(b).

COUNT II
CLAIM FOR INJUNCTION PRECLUDING THE NSSD FROM CONSTRUCTING OR
OPERATING THE FACILITY WITHOUT LOCAL SITING APPROVAL

1 - 55. Plaintiffs adopt and reallege paragraphs 1 through 55 of Count I as paragraphs 1 through 55 of this Count II.

ANSWER:

NSSD adopts and restates its answers to paragraphs 1 through 55, as is fully set forth herein.

56. Waukegan and the City Council have a protectible interest in ensuring that the site location for the Facility is approved by the City Council. Waukegan and the City Council would be irreparably harmed if the Facility were allowed to be permitted, constructed and operated without proper siting approval. As such, Waukegan and the City Council have no adequate remedy at law.

ANSWER:

This paragraph states a conclusion of law to which no answer is required. To the extent this paragraph may be interpreted to contain a factual allegation, NSSD denies each and every such allegation. Further answering, NSSD affirmatively states that Plaintiff has an adequate remedy at law, specifically, it may bring an enforcement action before the Illinois Pollution Control Board pursuant to Section 31(b) of the Act, 415 ILCS 5/31(b). Further answering,

NSSD denies that Plaintiff has a protectible interest in ensuring that the site location for the proposed biosolids drying/melting facility is approved by the City Council.

COUNT III
CLAIM FOR DECLARATORY RELIEF THAT NSSD IS REQUIRED TO COMPLY
WITH THE WAUKEGAN ZONING ORDINANCE

1 - 55. Plaintiffs adopt and reallege paragraphs 1 through 55 of Count I as paragraphs 1 through 55 of this Count III.

ANSWER:

NSSD adopts and restates its answers to paragraphs 1 through 55, as is fully set forth herein.

56. In the alternative, if the Facility does not meet the definition of a pollution control facility under Section 3.32 of the Act or is otherwise exempt from the requirement of obtaining Local Siting Approval, the City retains its authority to regulate the siting of the Facility under the Waukegan Zoning Ordinance (the "Zoning Ordinance"), pursuant to the sixth paragraph of Section 39(c) of the Act.

ANSWER:

This paragraph states a conclusion of law to which no answer is required. Further answering, NSSD denies the legal conclusions contained in this paragraph. To the extent this paragraph may be interpreted to contain factual allegations, NSSD denies each and every such allegation. NSSD denies that the biosolids drying/melting facility is a "Pollution Control Facility" as defined in Section 3.32 of the Illinois Environmental Protection Act ("the Act"), 415 ILCS 5/3.32. Further answering, NSSD affirmatively states that neither the Waukegan sewage treatment plant, nor the proposed biosolids drying/melting facility is a "new pollution control facility" as that term is defined by Section 3.32(b) of the Act, 415 ILCS 5/3.32(b).

57. The NSSD Property is located in an I-2 District, as such District is established under Article 10 of the Zoning Ordinance.

ANSWER:

This paragraph states a conclusion of law to which no answer is required. To the extent this paragraph may be interpreted to contain a factual allegation, NSSD admits the allegation.

58. A waste storage operation, waste treatment operation and waste incinerator are not permitted uses under §10.4-3, Permitted Uses, I2 General Industrial District, of the Zoning Ordinance.

ANSWER:

This paragraph states a conclusion of law to which no answer is required. Further answering, NSSD affirmatively states that the operation of the proposed biosolids drying/melting facility will not constitute waste storage or treatment operation or waste incineration. Further answering, NSSD affirmatively states that under Section 6.3.2 of the Zoning Ordinance, essential services such as disposal systems are exempt from zoning.

59. Section 10.4-4(26), Conditional Uses, I2 General Industrial District, of the Zoning Ordinance provides in relevant part as follows:

The following conditional uses may be allowed in the I2 District, subject to the provisions of Section 3.11:

Other manufacturing, processing, storage, or commercial uses determined by the Zoning Administrator to be of the same general character as the use permitted in Section 10.4-3, above, and found not be obnoxious, unhealthful, or offensive by reason of the potential emission or transmission of noise, vibration, smoke, dust, odors, toxic or noxious matter or glare or heat.

ANSWER:

NSSD states that the ordinance cited in this paragraph speaks for itself, and therefore, this paragraph requires no answer. Further answering, NSSD affirmatively states that the operation of the proposed biosolids drying/melting facility will not constitute waste storage or treatment operation or waste incineration.

60. A waste storage and waste treatment operation is a Conditional Use under §10.4-4(26), Conditional Uses, I2 General Industrial District, of the Zoning Ordinance.

ANSWER:

This paragraph states a conclusion of law to which no answer is required. Further answering, NSSD affirmatively states that the operation of the proposed biosolids drying/melting facility will not constitute waste storage, or treatment or waste incineration.

61. On April 12, 2002, NSSD submitted what it claimed to be Applications for a Conditional Use Permit and a Zoning Variance with Waukegan's Department of Planning and Zoning. A copy of this submittal is attached hereto as Exhibit C. Thereafter, on April 17, 2002, NSSD submitted an amendment or supplement to the above submittal. A copy of this subsequent submittal is attached hereto as Exhibit D. These submittals were tendered under a reservation of rights, with the NSSD taking the position that Waukegan has no jurisdiction to impose zoning or building permit requirements or fees on the NSSD. Waukegan has not issued zoning approval for the construction and operation of the NSSD Facility on the NSSD Property within the Facility Boundaries.

ANSWER:

NSSD admits that it filed an application for zoning approval and building permits with the City of Waukegan on March 12, 2002. NSSD admits that it also filed a separate Conditional Use Permit and Variance application with the City of Waukegan on April 12, as well as a supplement to those applications on April 17, 2002. Further answering, NSSD states that

Exhibits C and D to Plaintiff's Amended Complaint, which NSSD admits are true and accurate copies of NSSD's April 12th, 2002, and April 17th 2002 submissions to the City of Waukegan, speak for themselves. NSSD admits that the City of Waukegan has to date failed to render a decision on those submittals.

COUNT IV
CLAIM FOR INJUNCTION PRECLUDING THE NSSD FROM CONSTRUCTING THE FACILITY ABSENT COMPLIANCE WITH THE WAUKEGAN ZONING ORDINANCE

1 - 61. Plaintiffs adopt and reallege paragraphs 1 through 61 of Count III as paragraphs 1 through 61 of this Count IV.

ANSWER:

NSSD adopts and restates its answers to paragraphs 1 through 61, as is fully set forth herein.

62. Waukegan and the City Council have a protectible interest in ensuring that the Waukegan Zoning Ordinance is complied with and the site location for the Facility is approved by the City Council. Waukegan and the City Council would be irreparably harmed if the Facility were allowed to be permitted, constructed and operated without proper zoning approval. As such, Waukegan and the City Council have no adequate remedy at law.

ANSWER:

This paragraph states a conclusion of law to which no answer is required, but is in any event denied by NSSD. To the extent this paragraph may be interpreted to contain a factual allegation, NSSD denies each and every such allegation. Further answering, NSSD affirmatively states that Plaintiff has an adequate remedy at law, specifically, it may bring an enforcement action before the Illinois Pollution Control Board pursuant to Section 31(b) of the Act, 415 ILCS 5/31(b). Further answering, NSSD denies that Plaintiff has a protectible interest in ensuring that

the site location for the proposed biosolids drying/melting facility is approved by the City Council, or that the Waukegan Zoning Ordinance is complied with, as it relates to the proposed biosolids drying/melting facility, which is exempt from the Ordinance.

COUNT V
CLAIM FOR DECLARATION THAT NSSD IS REQUIRED TO COMPLY WITH THE
WAUKEGAN BUILDING CODE

1 - 33. Plaintiffs adopt and reallege paragraphs 1 through 33 of Count I as paragraphs 1 through 33 of this Count V.

ANSWER:

NSSD adopts and restates its answers to paragraphs 1 through 33, as is fully set forth herein.

34. Section 6-26 of the Waukegan Code of Ordinances, Chapter 6, BUILDINGS AND BUILDING REGULATIONS (the "Building Code"), adopts "The BOCA National Building Code, Twelfth Edition, 1993" (the "BOCA Code") as part of the Building Code.

ANSWER:

NSSD states that the ordinance cited in this paragraph speaks for itself, and therefore, this paragraph requires no answer. Further answering, NSSD affirmatively states that its design for the proposed biosolids drying/melting facility, is in accordance with the BOCA Code, but denies that the proposed biosolids drying/melting facility, is subject to the BOCA Code.

35. Section 107.1 of the BOCA Code provides in relevant part as follows:
An application shall be submitted to the code official for the following activities, and these activities shall not commence without a permit being issued in accordance with Section 108.0:

1. Construct or alter a structure

ANSWER:

NSSD states that Section 107.1 of the BOCA Code speaks for itself, and therefore, this paragraph requires no answer. Further answering, NSSD affirmatively states that its design for the proposed biosolids drying/melting facility, is in accordance with the BOCA Code, but denies that the proposed biosolids drying/melting facility, is subject to the BOCA Code.

36. Section 202.0 of the BOCA Code, General Definitions, defines a “structure” as “that which is built or constructed or a portion thereof.” The proposed Facility is a structure within the meaning of the Building Code.

ANSWER:

NSSD states that Section 202.0 of the BOCA Code speaks for itself, and therefore, this paragraph requires no answer. Further answering, NSSD affirmatively states that its design for the proposed biosolids drying/melting facility, is in accordance with the BOCA Code, but denies that the proposed biosolids drying/melting facility, is subject to the BOCA Code. Further answering, this paragraph states a conclusion of law to which no answer is required.

37. Section 116.1 of the BOCA Code, Unlawful acts, provides in relevant part as follows:

It shall be unlawful for any person, firm or corporation to erect, construct, alter, extend, repair, remove, demolish or occupy any building, structure or equipment regulated by this code, or cause same to be done, in conflict with or in violation of any of the provisions of this code.

ANSWER:

NSSD states that Section 116.1 of the BOCA Code speaks for itself, and therefore, this paragraph requires no answer. Further answering, NSSD affirmatively states that its design for

the proposed biosolids drying/melting facility, is in accordance with the BOCA Code, but denies that the proposed biosolids drying/melting facility, is subject to the BOCA Code.

38. Section 6-47 of the Building Code establishes a schedule of fees for the issuance of building permits.

ANSWER:

NSSD states that Section 6-47 of the Building Code speaks for itself, and therefore, this paragraph requires no answer.

39. On March 12, 2002, the NSSD submitted what it claimed to be an application for a Building Permit to the Waukegan Building Department. This application was submitted under a reservation of rights, with the NSSD taking the position that Waukegan has no jurisdiction to impose zoning or building permit requirements or fees on the NSSD. Copies of the NSSD's transmittal letter and Building Permit Application are attached hereto as Group Exhibit E. No building permit has to date been issued by Waukegan.

ANSWER:

NSSD admits that it filed an application for zoning approval and building permits with the City of Waukegan on March 12, 2002. Further answering, NSSD states that Group Exhibit E to Plaintiff's Amended Complaint, which NSSD admits contains true and accurate copies of NSSD's application and transmittal letter to the City of Waukegan, speak for themselves. NSSD admits that the City of Waukegan has to date failed to render a decision on its application.

40. An actual controversy exists between the parties regarding the NSSD's obligation to secure a building permit from Waukegan.

ANSWER:

This paragraph states a conclusion of law to which no answer is required. To the extent this paragraph may be interpreted to contain a factual allegation, NSSD denies each and every such allegation.

COUNT VI
CLAIM FOR INJUNCTION PRECLUDING THE NSSD FROM CONSTRUCTING THE
FACILITY ABSENT COMPLIANCE WITH THE WAUKEGAN BUILDING CODE

1 - 40. Plaintiffs adopt and reallege paragraphs 1 through 40 of Count V as paragraphs 1 through 40 of this Count VI.

ANSWER:

NSSD adopts and restates its answers to paragraphs 1 through 40, as is fully set forth herein.

41. Waukegan and the City Council have a protectible interest in ensuring that the Waukegan Building Code is complied with. Waukegan and the City Council would be irreparably harmed if the Facility were allowed to be permitted, constructed and operated without proper permits. As such, Waukegan and the City Council have no adequate remedy at law.

ANSWER:

This paragraph states a conclusion of law to which no answer is required, but is in any event denied by NSSD. To the extent this paragraph may be interpreted to contain a factual allegation, NSSD denies each and every such allegation. Further answering, NSSD affirmatively states that Plaintiff has an adequate remedy at law, specifically, it may bring an enforcement action before the Illinois Pollution Control Board pursuant to Section 31(b) of the Act, 415 ILCS 5/31(b). Further answering, NSSD denies that Plaintiff has a protectible interest in ensuring that

the Waukegan Building Code is complied with, as it relates to the proposed biosolids drying/melting facility, which is exempt from the Code.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Amended Complaint, and each of the Counts thereof, fails to state a claim against NSSD upon which the requested relief may be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff lacks standing to assert the claims alleged in the Amended Complaint for declaratory and injunctive relief.

THIRD AFFIRMATIVE DEFENSE

Plaintiff has failed to exhaust all administrative remedies, as required prior to initiating this judicial action for declaratory and injunctive relief.

FOURTH AFFIRMATIVE DEFENSE

The matters alleged in the Amended Complaint are not ripe for adjudication.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff cannot seek to enjoin the lawful actions of public officials and agencies.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff has an adequate remedy at law, and therefore is not entitled to the declaratory and injunctive relief sought in the Amended Complaint. Specifically, Plaintiff may bring an enforcement action before the Illinois Pollution Control Board pursuant to Section 31(b) of the Act, 415 ILCS 5/31(b).

SEVENTH AFFIRMATIVE DEFENSE

The proposed biosolids drying/melting facility, is exempt from the siting requirements of Section 39.2 of the Act, 415 ILCS 5/39.2.

EIGHTH AFFIRMATIVE DEFENSE

The proposed biosolids drying/melting facility, is exempt from the requirements of the City of Waukegan Building Code, the City of Waukegan Zoning Ordinance, and the BOCA Code.

NINTH AFFIRMATIVE DEFENSE

The City of Waukegan, by virtue of its past practices, is estopped from asserting that the proposed biosolids drying/melting facility, is subject to the siting requirements of Section 39.2 of the Act, 415 ILCS 5/39.2, or the City of Waukegan Building Code, or the City of Waukegan Zoning Ordinance, or the BOCA Code.

TENTH AFFIRMATIVE DEFENSE

As set forth in NSSD's verified counterclaim, and in the alternative, NSSD has a vested right to issuance of any zoning and building permits which it may be required to obtain prior to construction of its proposed biosolids drying/melting facility.

**VERIFIED COUNTERCLAIM OF THE NORTH SHORE SANITARY DISTRICT FOR
DECLARATORY AND INJUNCTIVE RELIEF AND MANDAMUS**

Defendant/Counter-Plaintiff North Shore Sanitary District (“NSSD”), by and through its attorneys, Gardner, Carton & Douglas, as its Verified Counterclaim for Declaratory and Temporary, Preliminary and Permanent Injunctive Relief and Mandamus against Plaintiffs/Counter-Defendants City of Waukegan, Daniel T. Drew, Mayor of the City of Waukegan, and John Balen, Sam Cunningham, J. A. “Tony” Figueroa, Frank Harris, Jr., Richard Hyde, Patrick R. Needham, John Rickerd, and Lawrence TenPas, members of the Waukegan City Council, Russ Tomlin, Director of Planning and Zoning, and Chuck Perkey, Building and Planning Director (collectively, “Defendants”), states as follows:

GENERAL ALLEGATIONS

1. NSSD is a unit of government, established by the North Shore Sanitary District Act, 70 ILCS § 2305/0.1, *et seq.* (“NSSD Act”), the North Shore Sanitary District Extension (1st) Act, 70 ILCS § 2310/0.01, *et seq.*, and the North Shore Sanitary District Extension (2nd) Act, 70 ILCS § 2315/1, *et seq.*

2. The Board of Trustees of the NSSD is obliged under the NSSD Act to fulfill its duties to the public as follows:

Such board shall provide suitable and modernly equipped sewage disposal works or plants for the separation and disposal of all solids and deleterious matter from the liquids, and shall treat and purify the residue of such sewage so that when it flows into any lake, it will not injuriously contaminate the waters thereof. *The board shall adopt any feasible method to accomplish the object for which such sanitary district may be created.*

70 ILCS § 2305/7 (emphasis added).

3. NSSD is charged with the disposal of sewage for a population of approximately 350,000 people within its Facility Planning Area boundary, which encompasses the geographic

area roughly bordered by Lake Cook Road on the south, the Illinois and Wisconsin border on the north, the Tri-State Tollway on the west, and Lake Michigan on the east. (See Map of Boundary, attached hereto as Exhibit 1.)

4. There are 11 individual municipal governments within the Facility Planning Area, including Beach Park, Highland Park, Highwood, Knollwood, Lake Bluff, Lake Forest, North Chicago, Waukegan, Winthrop Harbor, Zion, and Lake County.

5. Defendant Waukegan is a municipal corporation located in Lake County, Illinois.

6. Defendant Richard H. Hyde is the Mayor of the City of Waukegan, a citizen of the State of Illinois and resident of the City of Waukegan (the "Mayor").

7. Defendants John Balen, Sam Cunningham, J. A. "Tony" Figueroa, Frank Harris, Jr., Richard Hyde, Patrick R. Needham, John Rickerd, and Lawrence TenPas are members of the Waukegan City Council, citizens of the State of Illinois, and residents of the City of Waukegan (the "City Council" or "Aldermen", respectively).

8. Defendant Russ Tomlin is the Director of Planning and Zoning for the City of Waukegan and an agent for the City of Waukegan.

9. Defendant Chuck Perkey is the Director of Building and Planning for the City of Waukegan and an agent for the City of Waukegan.

10. This action relates to the unreasonable efforts of Waukegan to thwart or frustrate the NSSD in its efforts to fulfill its statutory duties to its constituents. The NSSD operates three wastewater treatment plants in Lake County, Illinois located in Highland Park, Gurnee and Waukegan. These plants receive and treat domestic sewage, as well as some industrial discharges which are from point sources subject to discharge permits under Section 402 of the Clean Water Act, 33 U.S.C. § 1342. To the extent required, all industrial discharges are treated

through the permitted pre-treatment program prior to receipt by the NSSD plants. Wastewater is delivered to the aforementioned sewage treatment plants by sewer lines.

11. The NSSD treatment plant in Waukegan is located on Dahringer Road along the Lake Michigan lakefront. NSSD has operated the Waukegan sewage treatment plant since 1928 on approximately 72 acres of land owned by the NSSD.

12. NSSD has transported sludge through the boundaries of the NSSD Facility Planning Area, including through Waukegan, from the Waukegan sewage treatment plant, for the past 74 years, and for over 30 years to a landfill it owns and operates in Newport Township.

CURRENT METHOD OF SLUDGE DISPOSAL

13. The NSSD for several years has been a leader in researching, developing and implementing a more environmentally responsible and economical means of waste disposal. This has entailed utilization of state of the art wastewater sewage treatment processes. It has also involved the NSSD's diligence in researching and developing the most optimal disposal methods of sludge created from its wastewater treatment processes.

14. In its continuing efforts to improve its service to its constituents, the NSSD over a decade ago developed a process of combining fly ash and sludge to make "fludge." This was a revolutionary breakthrough in waste disposal because fludge had environmentally remarkable attributes: the smell was locked into the new structure and the propensity of the hazardous materials contained in the sludge to leach out over time was markedly decreased. Moreover, when a volume of sludge was mixed with an equal volume of fly ash the resulting fludge was only 160% of the prior volumes. The landfill's life was extended from 7 to 40 years with the fludge process.

15. However, "fludge" still requires disposal by landfilling, which takes place at the landfill at Newport Township. The NSSD currently disposes of approximately 52,600 tons of sludge each year. The current disposal process results in approximately 200,000 cubic yards of fludge being disposed of in the landfill each year. The NSSD's only existing and available permitted landfill is located on property owned by NSSD in Newport Township in the City of Zion, and its available capacity in Cell A will be exhausted within two and one-half years.

16. The NSSD also owns land adjacent to Cell A on which it has obtained a development permit for a landfill, which would add only another five years of capacity for sludge disposal via landfill. To open and operate the new landfill would require the issuance by the Agency of a construction and operating permit for the site as well as site development that would conservatively cost the NSSD \$4,670,000 before the site would be available for landfill.

17. If the NSSD started immediately to make this additional land available to accept fludge, it would take at least twenty-three months before it could be ready to accept the fludge, assuming no unforeseen delays or obstacles. There is a material risk that the NSSD would not be able to bring the new land fill space on-line before its current land fill is filled by its current fludge disposal.

18. While until now landfilling fludge has been the only viable method to NSSD, it is not an environmentally desirable disposal method as compared to the Biosolids Reuse project.

BENEFICIAL BIOSOLIDS REUSE PROPOSAL

19. The United States Environmental Protection Agency uses the term "biosolids" to distinguish sewage sludge which is to be beneficially reused, rather than discarded. *See Standards for the Use or Disposal of Sewage Sludge*, 58 Fed. Reg. 9248, 9251 (Feb 19, 1993) (codified at 40 CFR Part 503).

20. For the past few years, the NSSD has been researching alternatives to sludge disposal involving biosolids reuse. This research has included examining proven processes common in Europe and elsewhere where beneficial reuse is promoted. The process the NSSD has discovered and developed is the state of the art method of biosolids reuse in the most environmentally responsible method developed to date. In this process, the biosolids are dried and used as the fuel for melting itself into a glass product with innumerable commercial applications ("Biosolids Reuse Project"). Moreover, in this process, the hydrocarbons are completely used up in the melting process, and all inorganic materials, including all heavy metals except a small amount of mercury, become locked into the glass structure.

21. The NSSD will then sell this glass for commercial uses. One of the commercial uses for this glass product is as a replacement for sand in concrete, which renders the resultant concrete even stronger than if sand were used. On September 26, 2001, the NSSD entered into a Glass Aggregate Purchase Agreement ("Agreement") with Minergy Corp. (A copy of the Agreement is attached hereto as Exhibit 2). Under the terms of the Agreement, NSSD has agreed to sell, and Minergy has agreed to buy, all of the Glass Aggregate produced from the Biosolids Reuse Project. The Glass Aggregate is "the product made in the GlassPack process..." which is the "closed-loop process invention for the conversion of sludge from municipal wastewater treatment plants into Glass Aggregate..." The Agreement provides for a minimum purchase price by Minergy for the Glass Aggregate of 5.00 per ton F.O.B. the plant.

22. NSSD's Biosolids Reuse Project is environmentally beneficial in that it eliminates the need for scarce landfill space and turns what otherwise would be a waste product into something reusable. Environmentally beneficial recycling and reuse of materials is encouraged by the Illinois Environmental Protection Act. 415 ILCS § 5/20(a)(b).

23. In accordance with its statutory obligations under the NSSD Act, the NSSD intends to implement the beneficial Biosolids Reuse Project at its Waukegan sewage treatment plant on the land it has owned in Waukegan since the early 1900's, when the NSSD was created by the legislature.

24. In operation of the Biosolids Reuse Project, the biosolids will be contained in silos located inside a covered building, prior to being processed for drying and melting.

25. Of the wastewater and sewage treated by NSSD, approximately twenty-five percent originates from the residents of the City of Waukegan. Similarly, approximately twenty-five percent of the biosolids to be recycled into glass will originate from the residents of the City of Waukegan.

26. NSSD's current waste disposal system already uses a drying or dewatering process. The new drying/melting process of the Biosolids Reuse Project will not increase, and may serve to reduce, odor. In the Biosolids Reuse Project, less than 88 cfm (cubic feet per minute) of emission will be vented as a result of the drying process, as compared to the average household bathroom vent, which typically emits 100 cfm, and emissions from the proposed Biosolids Reuse Project will be subject to odor control treatment.

ALTERNATIVES TO CONSTRUCTION OF PROJECT IN WAUKEGAN

27. The NSSD has agreed to sell land it owns that is adjacent to the Newport Township landfill to the City of Zion, under an agreement entered into October 8, 2001 ("NSSD-Zion Agreement"). Under the NSSD-Zion Agreement, as a contingency in case NSSD was prevented from constructing and operating the Biosolids Reuse Project on NSSD's property in Waukegan, the NSSD reserved the right to use the part of the property on which NSSD currently has a landfill development permit to construct and operate the Biosolids Reuse Project and

related facilities so long as it complies with the Environmental Protection Act and Illinois Environmental Protection Act requirements.

28. In order for NSSD to construct the beneficial Biosolids Reuse Project on the Zion property, the NSSD would have to do the following: (a) build roads, sewers, water supply piping, and other preliminary infrastructure planning and construction that would conservatively cost the NSSD \$ 18,000,000 over the next twenty years, more than the project at the Waukegan location and take, conservatively, 60 months to complete; (b) develop new plans that will be more complicated due to the current undeveloped nature of the Zion property; (c) apply for and obtain Air and Land permits from the Agency; and (d) face the possibility of defending a suit by the Lake County State's Attorney, since the IEPA siting issue would be no different in Zion than in Waukegan for Biosolids Reuse Project.

29. The Biosolids Reuse Project requires approximately 275,000 gallons of water each day for cooling and other purposes. This water must be disposed of daily. There is no water or sewer capacity currently at NSSD's Zion property for this purpose. Therefore, construction and development of the Biosolids Reuse Project in Zion would require NSSD to construct piping to secure approximately 100,000,000 gallons of fresh water from the City of Zion at an annual cost of \$197,000.00. Because there is currently no sewer system available to that land, NSSD would be required to construct miles of new sewers to remove the cooling water and other discharges. In contrast, in constructing and operating the Biosolids Reuse Project on NSSD's Waukegan site, NSSD can utilize the residual water from its treatment plant before pumping it to the DesPlaines River through the NSSD's existing sewers and pumps at that location. This also saves another material resource from being wasted.

30. It is estimated that it will cost the NSSD more than \$11,000,000.00 initially and more than \$360,000.00 annually over what it will cost NSSD to construct and operate the Biosolids Reuse Project at NSSD's Waukegan property.

31. NSSD currently transports five truckloads of sludge from its Waukegan sewage treatment plant, five from its Gurnee plant, and two from its Highland Park plant on a daily basis Monday through Friday, to its Newport Township landfill. In order to eliminate the current method of sludge discard and disposal through landfilling, and facilitate this new biosolids reuse process, the NSSD intends to cease transporting sludge from its Waukegan sewage treatment plant to the NSSD's Newport Township landfill.

AUTHORIZATION TO PROCEED

Project Permits from the Illinois Environmental Protection Agency

32. On April 16, 2001, NSSD submitted an Air Emission Construction Permit Application to the Illinois Environmental Protection Agency ("IEPA") to construct and operate a biosolids drying/melting facility (the "biosolids drying/melting facility") at its Waukegan sewage treatment plant.

33. On August 19, 2001, IEPA published a public notice ("Notice") requesting public comments on a draft permit authorizing the construction of a "sludge processing facility, consisting of sludge receiving and storage area drying process, and a melting process on Dahringer Road in Waukegan", an air emission source ("Air Permit"). (The Notice and Air Permit are attached hereto as Exhibits 3 and 4, respectively.) A Public Hearing was held on this application by the IEPA. The IEPA did not issue the Air Permit for the Biosolids Reuse Project until March 11, 2002, some eleven months after NSSD's application.

34. In addition to the Air Permit, the IEPA also requested the NSSD to submit an Agency Bureau of Land Permit Application and Technical Support Documents to construct the biosolids drying/melting facility at its Waukegan facility. The NSSD did so on November 26, 2001. IEPA also published a public notice for this permit and a public hearing was held on January 24, 2002. On March 11, 2002, the IEPA issued a land permit for the NSSD's proposed beneficial Biosolids Reuse Process at its Waukegan sewage treatment plant. (The notice and land permit are attached hereto as Exhibits 5 and 6, respectively). The IEPA found that the "ceramic" material produced from the sludge is not a waste in at least two applications for which NSSD had submitted data.

35. The Illinois Environmental Protection Act requires siting only for the construction or development of a "new pollution control facility." 415 ILCS 5/39(c).

36. 415 ILCS § 5/3.32 of the Illinois Environmental Protection Act provides, in pertinent part, the following:

Sec. 3.32. Pollution control facility. (a) "Pollution control facility" is any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility, or waste incinerator. This includes sewers, sewage treatment plants, and any other facilities owned or operated by sanitary districts organized under the Metropolitan Water Reclamation District Act [70 ILCS 2605/1 et seq.]. *The following are not pollution control facilities:*

* * *

(3) sites or facilities used by any person conducting a waste storage, waste treatment, waste disposal, waste transfer or waste incineration operation, or a combination thereof, for wastes generated by such person's own activities, when such wastes are stored, treated, disposed of, transferred or incinerated within the site or facility owned, controlled or operated by such person, or when such wastes are transported within or between sites or facilities owned, controlled or operated by such person....

415 ILCS 5/3.32 (emphasis added).

37. The permits requested by NSSD are for processing sludge/biosolids generated from NSSD's own activities within the meaning of the Illinois Environmental Protection Act. The Illinois Environmental Protection Act's definition of "sludge" is as follows:

Sec. 3.44. "Sludge" means any solid, semi-solid, or liquid *waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility or any other such waste having similar characteristics and effects.*

415 ILCS § 5/3.44 (emphasis added).

38. Defendants do not and never wanted the NSSD's project to be constructed in Waukegan and have made numerous attempts to stop the NSSD's Biosolids Reuse Project, including causing written and oral protests to the project to be made before the IEPA in person and at public hearings.

39. On September 10, 2001, one of Waukegan's attorneys, Jeffrey Jeep, wrote a letter to IEPA stating that IEPA is without authority to issue any permit for the development of a new pollution control facility in the absence of a Local Siting Approval issued by the Waukegan City Council, and that the IEPA should accordingly terminate its review of the Application and cancel the October 3, 2001 public hearing relating to the Air Permit. (The September 10, 2001 letter is attached hereto as Exhibit 7.) Waukegan claimed the Biosolids Reuse Project would be a pollution control facility and would thus require siting under Section 39.2 of the Illinois Environmental Protection Act.

40. Also on September 10, 2001, Robert J. Masini, one of the attorneys for Waukegan, sent NSSD a letter, stating that Waukegan expects a "host community agreement" from the NSSD before the NSSD could proceed with the Biosolids Reuse Project, and also stating that: "[a]dditionally, the proposed sludge facility is subject to the City's Zoning

Ordinance and Building Code requirements and fees.” (A copy of the September 10, 2001 letter from Mr. Masini is attached as Exhibit 8.)

41. The NSSD filed a response with the IEPA to Mr. Jeep’s protest, demonstrating to the satisfaction of the IEPA that the proposed Biosolids Reuse Project was not a pollution control facility requiring local siting because of one or more exclusions from the definition of Pollution Control Facility under the Illinois Environmental Protection Act.

42. By letter dated September 25, 2001, the IEPA informed Waukegan that the public hearing scheduled for October 3, 2001 would proceed and that the IEPA would continue with its review of the Application even in the absence of proof of a Local Siting Approval. (A copy of the IEPA’s September 25, 2001 letter is attached hereto as Exhibit 9.)

43. The IEPA agreed with the NSSD that “sludge” is a defined term in the Illinois Environmental Protection Act, that the only sludge that would be processed in the new facility would be sludge generated from the NSSD’s own waste water treatment processes, and that the facility was therefore excluded from the definition of Pollution Control Facility and not subject to the local siting requirements of Section 39.2 of the Illinois Environmental Protection Act.

44. The process recycles the NSSD’s sludge into a commercially viable product, so it should not be considered waste.

45. During the October 3, 2001 public hearing on the proposed Air Permit, Robert Masini restated Waukegan’s position that the IEPA is without authority to continue its review of the Application or issue the Air Permit absent proof of a Local Siting Approval.

46. By a letter dated November 15, 2001 to the IEPA, Waukegan again stated that the IEPA is without authority to issue any permit for the development of a new pollution control

facility on the NSSD property absent a Local Siting Approval. (The November 15, 2001 letter is attached as Exhibit 10.)

47. Waukegan was not successful in attempting to impede the lawful issuance of all permits deemed necessary by IEPA to allow NSSD to proceed with construction of its Biosolids Reuse Project.

Independence of NSSD from Local Zoning

48. The NSSD is a unit of regional government, established by state statute, and in constructing the biosolids reuse facility, NSSD is exercising its statutory authority to fulfill a need, wastewater treatment and disposal, that can only be met on a regional basis.

49. The NSSD serves several other municipalities, some of which are themselves home rule units. NSSD is an independent government body and the performance of its statutory duties may not be frustrated by local land use or zoning controls, even those of home rule units of government, such as Waukegan. NSSD's statutory regional powers are not subordinate to those of Waukegan, and as a result, under *City of Des Plaines v. Metropolitan Sanitary District of Greater Chicago*, 48 Ill. 2d 11, 268 N.E.2d 428 (1971); *City of Des Plaines v. Metropolitan Sanitary District of Greater Chicago*, 59 Ill. 2d 29, 31, 32, 319 N.E.2d 9 (1974); *Metropolitan Sanitary District of Greater Chicago v. City of Des Plaines*, 63 Ill. 2d 256, 347 N.E.2d 716 (1976) (collectively, the "*Des Plaines Trilogy*"), and under *In The Village of Swansea v. The County of St. Clair*, 45 Ill. App. 3d 184 (5th Dist. 1977), NSSD's Biosolids Reuse Project is exempt from Zoning.

50. On September 26, 2001, Murray Conzelman, the attorney for the NSSD, met with Jeffery D. Jeep and Robert J. Masini, attorneys for Waukegan, to discuss the proposed NSSD project in an attempt through intergovernmental cooperation to explore whether Waukegan had

any reasonable requirements relative to the project that the NSSD could meet consistent with the NSSD's statutory duty to its constituents.

51. In that September 26th meeting, Mr. Conzelman informed the Waukegan attorneys of the NSSD's understanding that the NSSD is not required to obtain local siting because the Biosolids Reuse Project is not a New Pollution Control Facility. Mr. Conzelman also advised the Waukegan's attorneys that the NSSD did not believe its construction of the Biosolids Reuse Project would be subject to Waukegan's Zoning Ordinance, so there would be no requirements for variances or any conditional use permits or approvals from the City for the Biosolids Reuse Project. Mr. Conzelman also advised the Waukegan attorneys that he did not believe the NSSD could be required to obtain a building permit for the Biosolids Reuse Project.

WAUKEGAN'S ATTEMPT TO IMPEDE NSSD THROUGH ZONING

The Previous Zoning Ordinance

52. At the time of the September 26th meeting, Waukegan was aware that NSSD was exempt from its zoning ordinance under Section 6.3.2 of the Waukegan Zoning Ordinance, which exempted Public Utilities providing essential services such as disposal systems, which includes the NSSD and its current facility in Waukegan and its proposed new Biosolids Reuse Project. Under the then-current Waukegan Zoning Ordinance, Subsection 2 of Section 6.3 MUNICIPAL OR PUBLIC USE AND ESSENTIAL SERVICES EXEMPTED, provided:

The erection, construction, alteration, or maintenance by public utilities or municipal departments or commissions, of overhead, surface or underground gas, electrical, steam, or water distribution or transmission systems, collection, communication, supply or disposal systems, including mains, drains, sewers, pipes, conduits, tunnels, wires, cables, fire alarm boxes, police call boxes, traffic signals, hydrants, towers, poles, electrical substations, gas regulator stations and other similar equipment and accessories in connection therewith, reasonably necessary for the furnishing of adequate service by such public health, safety, or general welfare, shall be exempt from the regulations of this ordinance. Provided, however, that the installation shall conform to Federal

Communications Commission and Federal Aviation Agency rules and regulations, and those of other authorities having jurisdiction.”

53. At the time of the September 26th meeting, Section 10.4-3(46) of the Zoning Ordinance also classified “public utility and service uses” as a permitted use in the I2 District, which applied to NSSD. (A copy of that ordinance is attached as Exhibit 11.)

54. At the time of the September 26th meeting, the Defendants knew that NSSD believed that it was important to NSSD and its constituents that the Biosolids Reuse Project should be commenced as soon as the IEPA permits were issued. At that time, Defendants also knew that NSSD intended to have the project bid out immediately upon issuance of permits from the IEPA.

Amendment of the Zoning Ordinance to Thwart NSSD

55. Defendants were aware that NSSD’s Biosolids Reuse Project was either exempt from zoning or was a permitted use in an I2 General Industrial District. On November 19, 2002, Defendants passed *special legislation* aimed at taking away the exemption in the zoning ordinance that applied to NSSD and its Biosolids Reuse Project. Defendants and their counsel were mindful of the fact that NSSD was not under the terms of the then zoning ordinance required to obtain a special use permit under the terms of the Ordinance. Therefore, Defendants and their counsel decided to change the Zoning Ordinance in an obvious attempt to make it more difficult or impossible for NSSD to construct its Biosolids Reuse Project in Waukegan. In pursuit of their objective, on November 19, 2001, the Defendants passed an ordinance 01-0-125, amending Section 6.3.2. of Waukegan’s zoning ordinance to more narrowly define “Public Utilities” in such a way as to remove the NSSD and its Biosolids Reuse Project from the exemption. At the same time, Defendants also amended the Zoning Ordinance to reclassify

“public utility and service uses” from a permitted use to a conditional use in the I2 District under Section 10.4-3(46) of the Zoning Ordinance. Finally, on November 19, 2001, the City Council also adopted 01-R-126, imposing a one-year moratorium on the approval of building permits and zoning approvals for all development along the lakefront. (The Moratorium is attached as Exhibit 12.)

56. On and before November 19, 2001, NSSD had a vested right in pursuing the project under the zoning then in force, which Defendants sought to frustrate and take away through these ordinances. These ordinances are special legislation aimed at either blocking NSSD from constructing its Biosolids Reuse Project outright, or with the object of materially delaying NSSD in constructing its Biosolids Reuse Project for a long enough time so that it would become infeasible for the NSSD to build the proposed facility in Waukegan. These ordinances violate the Bill of Attainder Clause of the United States Constitution, (U.S. Const. Art. I, Section 10), and the prohibition against special legislation set forth in Article IV, Section 13 of the Illinois Constitution of 1970 (Ill. Const. 1970, Art. IV, Section 3), and finally constitutes an unconstitutional taking of property, in violation of the Fifth Amendment of the United States Constitution, and should therefore be invalidated.

57. As of the September 26, 2001 meeting and as of the date of NSSD’s property sale agreement with the City of Zion, neither Waukegan nor any of its agents and representatives ever communicated in any manner whatsoever to NSSD or its agents and representatives that NSSD was considering re-zoning NSSD’s Waukegan property.

58. At all times, NSSD acted in good faith in reliance on the zoning ordinance in effect prior to November 19, 2001, which did permit NSSD to construct the Biosolids Reuse Project on the NSSD’s proposed site.

The Zoning and Building Code Applications

59. Assuming NSSD is not exempt from Zoning, NSSD's Biosolids Reuse Project falls within a permitted use of the zoning classification in which the project will be built. NSSD's land on which the project will be built is located in an I2 General Industrial District under Waukegan's Zoning Ordinance. Such I2 District is established under Article 10.4 of the Zoning Ordinance. Section 10.4-3 establishes "Permitted Uses" in the I2 district, in relevant part as follows:

"(26) Glass products production"

* * *

"(44) Pottery and ceramic manufacture"

* * *

60. The manufacture of Glass Aggregate is a permitted use in the I2 General Industrial District because it falls within either or both of Glass products production or Pottery and ceramic manufacture.

61. Assuming NSSD is not exempt from Zoning and not within a permitted I2 use, NSSD's Biosolids Reuse Project falls within a conditional use for which a conditional use permit should be granted. Otherwise, NSSD's ability to fulfill its statutory obligation to its constituents would be frustrated.

62. Section 10.4-4(26), Conditional Uses, I2 General Industrial District, of the Zoning Ordinance provides in relevant part as follows:

The following conditional uses may be allowed in the I2 District, subject to the provisions of Section 3.11:

Other manufacturing, processing, storage, or commercial uses determined by the Zoning Administrator to be of the same general character as the use permitted in Section 10.4-3, above, and found not be obnoxious, unhealthful, or offensive by

reason of the potential emission or transmission of noise, vibration, smoke, dust, odors, toxic or noxious matter or glare or heat.

63. All but two of the Defendants filed suit against NSSD and the IEPA on December 6, 2001, in this Court, claiming violations by the NSSD of the Illinois Environmental Protection Act and certain Waukegan ordinances pertaining to zoning and building permits. The IEPA moved to dismiss the counts under the Illinois Environmental Protection Act, and the NSSD moved for judgment on the pleadings on those counts as well. These motions were granted with prejudice by the Court on March 5, 2002. The NSSD also moved for judgment on the pleadings on the remaining counts relating to zoning and building permits and the Court granted that motion without prejudice.

64. Since the IEPA had not yet issued permits, NSSD could not file an application for building permits or any zoning materials. Because of the above facts, it was unclear what Waukegan would require of it. Therefore, on March 6, 2002, one of NSSD's counsel wrote Michael Blazer, one of the attorneys for Waukegan, asking what Waukegan would require by way of zoning and building permits of the NSSD. NSSD hoped to avoid unnecessary delay over zoning and building permit issues, because of the substantial and irreparable harm that would result to the NSSD's constituents from delay in constructing the Biosolids Reuse Project. (A copy of the letter is attached as Exhibit 13.)

65. Counsel for Waukegan's response to that letter was made in writing by Mr. Blazer on March 8, 2002. (A copy is attached as Exhibit 14.) A copy of the ordinance was not attached, contrary to what Mr. Blazer stated in his letter. Mr. Blazer's response evidences an intention on the part of Waukegan to not engage in a good faith interaction with NSSD in addressing Waukegan's reasonable zoning and building permit requirements in the spirit of

intergovernmental cooperation. He failed to answer the NSSD's specific zoning and building permit and building permit fees inquiries, except to partially respond to the inquiries on the Moratorium Ordinance. Notably, Mr. Blazer stated the obvious, that the Ordinance does not even address a moratorium on processing any application made by NSSD. But, he offered no hope of any relief from the effect of the Moratorium Ordinance, that is, absolutely no permits will issue until after November 17, 2002 for NSSD, regardless. This is the theme continued by Waukegan on the Zoning Moratorium to date.

66. After the permits were issued by the IEPA, Robert Masini, Waukegan's attorney, was contacted on behalf of NSSD about to whom NSSD should make its application. Mr. Masini advised that the NSSD should direct the application and inquiries to Mr. Chuck Perkey, Building and Planning Departments of the City of Waukegan, who would then make sure the appropriate persons received the application.

67. On March 12, 2002, the day after the permits were issued by the IEPA, Brian Jensen, General Manager of NSSD, sent to Mr. Perkey the NSSD's application for a building permit, under a cover letter reserving NSSD's rights. In the letter, Mr. Jensen also requested Waukegan's views on zoning requirements and approvals that Waukegan would require and what building permit fees, if any would be required. (A copy of the letter is attached as Exhibit 15.) The submission also included a set of Plans.

68. On March 13, 2002, Mr. Perkey requested the NSSD to provide four additional complete sets of Plans, which were delivered to him on March 15, 2002.

69. NSSD must start fabrication of the silos and certain other structures included within the Biosolids Reuse Project before construction can commence. NSSD notified Defendants of this fact in writing on March 28, 2002. In his March 28, 2002 letter to Messrs

Perkey and Tomlin, Mr. Jensen not only inquired about the status of the NSSD's application, but reiterated the importance of moving as quickly as possible and of the necessity of certain pre-construction fabrication on site. (See letter attached as Exhibit 16) In relevant part, the letter states:

As I previously mentioned, it is very important that we resolve any zoning and permit issues as soon as possible. We have advertised the project for bids and expect to select a general contractor within a few weeks. We expect to commence construction on the project at the beginning of June. However, as you will note, there are certain structures that will be incorporated within the facility that will require prefabrication before construction commences. This prefabrication will have to occur on site because of the size and weight of these structures. Specifically, these are the sludge storage silo and the sludge receiving bins. You can locate these structures on pages 43-47 in Volume 1 of the specifications.

These structures are required to have these essential dimensions and design characteristics for proper operation of the facility. It is not feasible to our knowledge to change their nature, design, dimensions or characteristics. Therefore, unless you intend to refuse to grant zoning approvals and/or variances and issue permits to build the facility at the location shown on the plans and specifications, you should have no objection to our starting prefabrication of the sludge storage silo and the sludge receiving bins on site. It is important to the NSSD's constituents that the fabrication of these be started very soon, so as to not materially delay the start of the construction of this facility. Therefore, unless you advise us of some reasonable objection we intend to start prefabrication of the sludge storage silo and the sludge receiving bins on location the first week of May. Of course, if you want to discuss this or any other aspects of our application for permits and zoning approvals and/or variances, we are prepared to discuss the matter at your convenience.

There should be more than enough time for you to complete whatever it is you reasonably need to accomplish so that all requirements you intend to impose for issuance of zoning approvals and permits for this project can be accomplished in sufficient time for our anticipated construction commencement date.

70. After Mr. Jensen submitted the additional requested sets of Plans, NSSD heard nothing from the City until a letter from Robert Masini was received April 1, 2002, promising a response no later than April 4, 2002. (A copy of his letter is attached as Exhibit 17.)

71. Hearing nothing, on April 4, 2002, one of NSSD's attorneys wrote Mr. Masini inquiring when a response could be expected. (A copy of this letter is attached hereto as Exhibit 18.)

72. On April 5, 2002, NSSD received a letter from Defendant Russ Tomlin dated April 4, 2002. In it he indicated that NSSD's application would follow the Waukegan's "routine process." He also opined that NSSD's Biosolids Reuse Project required a special use permit, thus taking the position that NSSD met none of the I2 District permitted uses, nor was it exempt under Section 6.3.2. He claimed the November 19, 2002 Ordinance prevented NSSD from falling within the utility exemption and from falling under a permitted use as a "Public utility and service uses." He mentioned that the performance standards the NSSD had to meet "are those set forth in the General Requirements section of Article 10 (i.e. 10.1)" (A copy of his letter is attached as Exhibit 19.)

73. Mr. Tomlin also in that letter advised NSSD that it would need to request a variance from the height restrictions in the I2 zone. Mr. Tomlin enclosed with his letter the forms for special use and variances to which he referred.

74. The height limitation in the I2 district is 60 feet. The Biosolids Reuse Project will at its highest point be 85 feet, although most of the proposed facility will be under the 60 feet. The proposed structure as to height is materially less than the existing structures surrounding the Biosolids Reuse Project, including a bluff that extends along the entire area on the West, a Commonwealth Edison Plant on the North, with two enormous smoke stacks hovering 440 feet in the air together with building structure up to 185 feet tall, and a cement plant and a gypsum plant on the South with five silos between 145 and 160 feet tall. (A copy of the site map showing these structures and physical features is attached as Exhibit 20.)

75. The project was contracted for and designed prior to the November 19, 2001 Ordinances and was submitted to the IEPA together with the applications for permits. The manufacturer's optimal design is the one designed into the NSSD project, and a different project redesign solely to produce a lower project height, if it could be accomplished at all, is not recommended by the manufacturer and patent holders of this highly complex system and equipment. Years of research and development have resulted in this design as optimal in terms of safety and operational efficiency. The height of the Biosolids Reuse Project is a result of the measurements of the required equipment necessary to operate the process safely and efficiently. The tanks and system operate largely through gravity, and must under the equipment design requirements be higher than they are narrow, thus producing the project height for the required project volume. Any change in height would also require a total and material redesign of the project and resubmission of the project for amended permits.

76. In addition, in order to meet the imminent deadlines associated with the limited remaining available landfill, NSSD ordered this equipment prior to November 19, 2001, entering into contracts on September 26, 2001, March 21, 2001, and an additional contract on February 27, 2002. Equipment has already been shipped and manufactured according to the project design specifications at a cost of in excess of \$10,000,000. Even if the project could be redesigned so that the tanks and other equipment could be made wider and shorter to meet the 60 feet height requirement, most of the existing equipment would have to be scrapped, costing \$10,000,000 for equipment that has already been specifically designed for this project.

77. In his April 4th letter, Tomlin also mentioned the Moratorium Ordinance, stating: "The moratorium is on the *issuance* of any conditional use permits or variations, however, the District can certainly make its application at any time. Additionally, in the interests of

intergovernmental cooperation, I will recommend to the City Council that it receive and consider the District's request in the ordinary course of business when those requests are referred to the City Council by the Development Commission."

78. On April 12, 2002, Mr. Jensen responded and delivered to Mr. Tomlin, under reservation of rights, the NSSD's applications for a special use permit and a variance with a check for the required fee of \$650. (A copy of this letter is attached as Exhibit 21.) In his letter, Mr. Jensen reiterated the importance to the NSSD and its constituents that this project must proceed without undue delay, stating "While we recognize the City's interest in conducting its review of these materials, as previously indicated, it is important to the constituents of NSSD and to the NSSD that this project proceed without undue delay. We look forward to working in cooperation with the city to achieve resolution of these matters in a manner that achieves our respective objectives."

79. On April 17, 2002, Mr. Tomlin notified Mr. Jensen that the application for conditional use permit was incomplete. Mr. Jensen promptly corrected them and submitted the revised application on April 17, 2002. (Copies of these revised applications are attached as Exhibit 22.)

80. On April 10, 2002, the NSSD received a letter from Mr. Masini addressed to Mr. Jensen raising several issues not relevant to the zoning and building permit issues for NSSD's Biosolids Reuse Project. (A copy of his letter is attached as Exhibit 23) Mr. Murray Conzelman responded to Mr. Masini's letter on April 15, 2002. (A copy of that letter is attached as Exhibit 24.)

The Building Code

81. Section 6-26 of the Waukegan Code of Ordinances, Chapter 6, BUILDINGS AND BUILDING REGULATIONS (the "Building Code"), adopts the "The BOCA National Building Code, Twelfth Edition, 1993" (the "BOCA Code") as part of the Building Code. Section 107.1 of the BOCA Code provides in relevant part as follows:

An application shall be submitted to the code official for the following activities, and these activities shall not commence without a permit being issued in accordance with Section 108.0:

1. Construct or alter a structure.

82. Under the *Des Plaines Trilogy*, NSSD is exempt from the requirement of Waukegan's Ordinance and the Boca Code of obtaining a building permit and paying related fees.

83. However, in an effort to avoid delay in the project and to attempt to pursue intergovernmental cooperation with Defendants, NSSD submitted a completed Application for Building Permits to Waukegan on March 12, 2002, under a reservation of rights. NSSD has supplied all information Waukegan has requested of it in order to process that application.

84. Section 6-47 of the Waukegan Building Code establishes a schedule of fees to be paid *upon issuance* of building permits. Those building permit fees are not due in advance under the Ordinance.

85. NSSD has requested Defendants determine what fees it would require for building permit fees. Counsel for Waukegan advised NSSD that Defendants would consider the request, but Waukegan has said nothing further about the amount of building permit fees, if any, it would require. Since submitting its Building Permit Application the NSSD has not refused to pay fees. In fact, when it submitted its application, NSSD stated that in order to obtain a building permit

for the project, as a practical matter it may pay the fees. If NSSD concludes the building permit fees Defendants ultimately decide to assess are unreasonable, NSSD, nevertheless, intends to pay Defendants such building permit fees imposed under Waukegan's ordinances, although such fees may be paid under a reservation of rights.

86. NSSD's Biosolids Reuse Project is in full compliance with the BOCA code.

87. On April 26, 2002, NSSD received a letter from Tomlin acknowledging receipt of the NSSD's petition for conditional use permit and height variation. (A copy is attached as Exhibit 25.) His letter demonstrates the bad faith with which Waukegan has dealt with the NSSD. Starting with the November 19, 2001 ordinances and the manner in which Defendants are dealing with NSSD's Biosolids Reuse Project, it is clear that Waukegan and Defendants intend to drag out the proceedings and have no intention of granting a building permit. Tomlin advises in his letter that his staff had not even begun its review of the NSSD's submittals. He also evidences a callous disregard for the importance of commencing this project as soon as possible by scheduling it for a Public Hearing before the City's Development Commission on June 11, 2002, *three months* after the IEPA issued permits to NSSD. This was also one day shy of three months from the time when NSSD applied for a building permit, which but for the November 19, 2001 Ordinances, Waukegan would have been required to promptly grant.

NSSD'S NEED TO COMMENCE CONSTRUCTION IMMEDIATELY

88. NSSD must commence fabrication of certain structures in the project on site immediately if the project is to be completed before the available landfill is full. See Affidavit of David Speth, attached.

89. Following the issuance of the permits by the IEPA, NSSD put the project out for competitive bids to prospective contractors, which will be received by the NSSD on May 9,

2002. The NSSD Board is scheduled to consider the bids and select a contractor on May 22, 2002 and issue its notice of award to the successful bidder on May 23, 2003. To comply with legal requirements, the Construction contract is scheduled to be submitted to the NSSD Board on June 26, 2002 with issuance of Notice to Proceed to Successful Contractor on June 27, 2002.

90. From the time the notice to proceed is issued and construction is able to commence, assuming no unforeseen delays, it will take approximately fifteen months to complete the project to the point where system testing may commence under the IEPA's permit requirements, preliminary to full operation of the system.

91. If Waukegan does not issue a building permit until after the Moratorium ends on November 19, 2002, construction of the project would not commence until the Winter months starting in late November, thus almost guaranteeing delay in the project and probable cost increases. This would place the probable completion of the project dangerously close to the point at which the NSSD's present land fill capacity is exhausted, with almost no room for error. This delay caused by Waukegan's intentional efforts to block the NSSD project will mean that the landfill in Zion will be at capacity, leaving the NSSD with no facility to receive the area's solids. The public health and safety of the region will be endangered and NSSD will be forced to incur significant expenses to resolve this problem.

92. If NSSD were required to build the biosolids reuse project on the Zion site, the bidding and construction process could not commence until permits were issued by the IEPA, and it would be sometime in 2003 before any bid could even be awarded to a contractor to start construction of the project. Any such project at the Zion property could almost certainly not be completed before the NSSD's present landfill capacity is exhausted.

93. The cost of the Biosolids Reuse Project is expected to be approximately \$26,000,000, including about \$16,000,000 for construction of the facility and another \$10,000,000 for the equipment required to operate the process. Under Waukegan's building code the fee that Waukegan would assess on this project is unclear and Defendants have refused to clarify the amount of fees they would require. If the one percent of cost is applied for the entire project the building permit fee would be approximately \$260,000. Such a fee would be unreasonable and not related to any legitimate interest of Waukegan in promoting public health or public safety.

COUNT I

DECLARATORY JUDGMENT THAT NSSD IS NOT SUBJECT TO WAUKEGAN'S ZONING ORDINANCE

94. NSSD adopts and realleges paragraphs 1 through 93 as paragraphs 1 through 93 of this Count I.

95. As a regional entity created by state statute and serving its statutory purpose, NSSD may not be compelled to obtain Waukegan's approval, lest it be thwarted in fulfilling its statutory duties to dispose of wastewater within its region. Defendants have no authority or jurisdiction to require NSSD to comply with Waukegan's zoning ordinance for this project.

96. As a regional entity fulfilling its statutory purpose by constructing and developing the Biosolids Reuse Project, NSSD is not subject to the Waukegan Building Code and is not subject to paying the fees demanded of it for such project under said building code.

97. A case or controversy exists between the parties and pursuant to the provisions of §2-701 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-701, it is desirable and feasible that the Court declare the rights of the parties.

WHEREFORE, NSSD requests that

A. The Court enter an order declaring that NSSD is not subject to the Waukegan Zoning Ordinance.

B. The Court declare that NSSD is not subject to the Waukegan Building Code and is not subject to paying the fees demanded of it for such project under said building code; and

C. For such other relief as the court deems appropriate.

COUNT II

PRELIMINARY AND PERMANENT INJUNCTION ENJOINING DEFENDANTS FROM IMPOSING WAUKEGAN'S ZONING ORDINANCE ON THE NSSD'S BIOSOLIDS REUSE PROJECT

98. NSSD adopts and realleges paragraphs 1 through 98 of the Allegations of Count III as paragraphs 1 through 112 of this Count IV.

99. NSSD has a protectible interest in proceeding with its Biosolids Reuse Project without acceding to the Zoning Ordinance of Waukegan and Defendants, in that NSSD has a statutory obligation handle the wastewater needs of the region it serves and dispose of the solids generated by the wastewater treatment processes.

100. NSSD would be irreparably harmed if NSSD is required to accede to Waukegan's Zoning Ordinance, in that it may be thwarted or delayed in fulfillment of its statutory mandate and required to expend money to comply with Waukegan's demands that would otherwise be available to serve the needs of its constituents. In addition, NSSD may be required to make alternative arrangements for disposal of sludge at great expense to NSSD and its constituents if it is delayed from proceeding in accordance with its time schedule.

101. NSSD has no adequate remedy at law in that it must proceed with the Biosolids Reuse Project in a timely manner for it to remain viable.

WHEREFORE, Plaintiff NSSD respectfully requests that:

A. Enter orders temporarily, preliminarily, and permanently enjoining Waukegan and the other Defendants from seeking to impose on NSSD, or otherwise attempting to impose on NSSD, any zoning requirements under the Waukegan Zoning Ordinance or otherwise, relating to the Biosolids Reuse Project on the property; and

B. For such other relief as the court deems appropriate.

COUNT III

DECLARATORY JUDGMENT — VESTED RIGHT

102. NSSD adopts and realleges paragraphs 1 through 101 of the Allegations of Count II as paragraphs 1 through 101 of this Count III.

103. At all times before November 19, 2001, the NSSD's status under the Waukegan Zoning Ordinance and the zoning applicable to the property permitted the development and construction of the Biosolids Reuse Project. NSSD possesses a clear legal right to issuance of a building permit for the Biosolids Reuse Project.

104. In the alternative, NSSD possesses a clear legal right to issuance of a building permit for the Biosolids Reuse Project on the Waukegan property based on the fact that even under the Waukegan Zoning Ordinance as amended on November 19, 2001, the Biosolids Reuse Project is a Permitted Use under the Waukegan Zoning Ordinance, and based on the fact that NSSD incurred substantial expenditures regarding developing the Biosolids Reuse Project in good faith reliance on the Zoning Ordinance as in effect both before and after November 19, 2001.

105. Defendants have also asserted that NSSD is required to obtain a variance for building height, even though prior to November 19, 2001, that requirement did not apply to NSSD as to this Biosolids Reuse Project on the property.

106. Defendants have also asserted that the Moratorium prevents them from issuing any permits until November 19, 2002.

107. NSSD, in good faith reliance on the zoning relating to NSSD and the zoning classification of the property made substantial expenditures in reliance on NSSD's rights to develop and build the Biosolids Reuse Project as it was proposed and permitted by the Agency.

108. NSSD has also entered contracts with Minergy, contractors, and the City of Zion in reliance on the zoning classification.

109. To date, Waukegan has refused to complete its review of NSSD's application for a building permit for the Biosolids Reuse Project and has failed to issue NSSD a building permit for the Biosolids Reuse Project. Waukegan and Defendants have no legal justification for refusing to complete the review of NSSD's Application for a Building Permit for the Biosolids Reuse Project or for failing to issue NSSD a building permit for the Biosolids Reuse Project.

110. NSSD has substantially changed its position, in good faith, and has incurred substantial expenditures in reliance upon the probability of the issuance of a building permit.

111. NSSD has complied with all lawful requirements for issuance of the applied for building permit by Defendants, or has offered to do so, and stands ready and willing to do so.

112. A case or controversy exists between the parties and pursuant to the provisions of §2-701 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-701, it is desirable and feasible that the Court declare the rights of the parties.

WHEREFORE, NSSD requests that:

A. The Court declare that NSSD has a vested property right in the issuance of a building permit to develop the Biosolids Reuse Project on the Property;

B. The Court declare that by virtue of the positions of the parties and the Waukegan Zoning Ordinance in effect prior to November 19, 2001, NSSD is exempt from the application of the Zoning Ordinance for the Biosolids Reuse Project;

C. In the alternative, the Court should declare that by virtue of the positions of the parties and the Waukegan Zoning Ordinance in effect prior to November 19, 2001, NSSD's Biosolids Reuse Project on the property is a permitted use;

D. In the alternative, the Court should declare that by virtue of the Waukegan Zoning Ordinance as it exists currently, NSSD's Biosolids Reuse Project on the property is a permitted use; and

E. Grant such other and further relief as this Court shall consider appropriate.

COUNT IV

PRELIMINARY AND PERMANENT INJUNCTION ENJOINING DEFENDANTS FROM REFUSING TO GRANT NSSD APPROVAL OF THE BIOSOLIDS REUSE PROJECT FOR WHICH NSSD HAS A VESTED RIGHT

113. NSSD adopts and realleges paragraphs 1 through 112 of the Allegations of Count III as paragraphs 1 through 112 of this Count IV.

114. NSSD has a protectible interest in proceeding with its Biosolids Reuse Project without acceding to the Zoning Ordinance of Waukegan and Defendants, in that NSSD has a statutory requirement to handle the wastewater needs of the region it serves.

115. NSSD would be irreparably harmed if Waukegan is not enjoined from refusing to permit the NSSD's Biosolids Reuse Project or if it delays issuance of permits beyond NSSD's schedule for commencement of the Biosolids Reuse Project, in that NSSD will be required to make alternative arrangements for disposal of solids from wastewater treatment at great expense to NSSD and its constituents.

116. Granting the injunction will not adversely affect the public interest and will protect the public health and safety of the residents within NSSD's service area.

117. NSSD has no adequate remedy at law in that it must proceed with the Biosolids Reuse Project in a timely manner for it to remain viable.

WHEREFORE, Plaintiff NSSD respectfully requests that:

A. Enter orders temporarily, preliminarily, and permanently enjoining Waukegan and the other Defendants from refusing to permit, or delaying issuance of permits under the Waukegan Zoning Ordinance or otherwise, relating to the Biosolids Reuse Project; and

B. For such other relief as the court deems appropriate.

COUNT V

DECLARATORY JUDGMENT — IMPAIRMENT OF CONTRACT

118. NSSD adopts and realleges paragraphs 1 through 117 of the Allegations of Count IV as paragraphs 1 through 117 of this Count V.

119. NSSD entered into contracts with various parties, including its contract with Minergy for the Biosolids Reuse Project for production of glass aggregate, in reliance on the Zoning Ordinance prior to November 19, 2001.

120. The legislation passed by Defendants is an unconstitutional impairment of these contracts, in violation of the federal and state constitutional prohibitions on impairment of contract.

WHEREFORE, NSSD requests that:

A. The Court declare that the actions of Defendants have impaired the contracts of NSSD, in violation of the federal and state constitutional prohibitions on impairment of contracts;

B. Grant such other and further relief as this Court shall consider appropriate.

COUNT VI

WRIT OF MANDAMUS REQUIRING DEFENDANTS TO ISSUE NSSD
ANY ZONING APPROVALS AND BUILDING PERMITS
THAT MAY BE REQUIRED FOR THE PROJECT

121. NSSD adopts and realleges paragraphs 1 through 120 of the Allegations of Count V as paragraphs 1 through 120 of this Count VI.

122. Defendants have a clear legal duty and are required to issue approvals of the beneficial Biosolids Reuse Project and do not have discretion to refuse to issue the permits.

123. Defendants have refused to complete their review and issue the permits to Waukegan, despite repeated demands.

WHEREFORE, NSSD requests that:

A. The Court declare that NSSD has a vested property right in the issuance of a building permit to develop the Biosolids Reuse Project;

B. The Court enter a writ of mandamus directing Waukegan to complete its site review and to issue permits for the development and construction of the Biosolids Reuse Project; and

C. The Court declare such other and further rights of the parties and grant such other and further relief as this Court shall consider appropriate.

COUNT VII

DECLARATORY JUDGMENT – THE BIOSOLIDS REUSE PROJECT IS A
PERMITTED USE UNDER THE ZONING ORDINANCE AND NSSD IS NOT
REQUIRED TO OBTAIN A SPECIAL USE PERMIT

124. NSSD adopts and realleges paragraphs 1 through 123 of the Allegations of Count VI as paragraphs 1 through 124 of this Count VII.

125. A case or controversy exists between the parties regarding whether NSSD's Biosolids Reuse Project is a permitted use in the I2 District under the Zoning Ordinance and

pursuant to the provisions of §2-701 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-701, it is desirable and feasible that the Court declare the rights of the parties.

WHEREFORE, Plaintiff NSSD respectfully requests that:

A. The Court declare that NSSD's propose project is a permitted use in the I2 District under the Zoning Ordinance, and NSSD is not required to obtain a special use permit under Waukegan Zoning ordinance; and

B. The Court declare such other and further rights of the parties and grant such other and further relief as this Court shall consider appropriate.

COUNT VIII

PRELIMINARY AND PERMANENT INJUNCTION ENJOINING DEFENDANTS FROM REQUIRING NSSD TO OBTAIN A SPECIAL USE PERMIT UNDER WAUKEGAN'S ZONING ORDINANCE

126. NSSD adopts and realleges paragraphs 1 through 123 of the Allegations of Count VII as paragraphs 1 through 123 of this Count VIII.

127. NSSD has a protectible interest in proceeding with its Biosolids Reuse Project with timely approval by Waukegan and Defendants, in that NSSD has a statutory requirement to handle the wastewater needs of the region it serves.

128. NSSD would be irreparably harmed if Waukegan were allowed to require a special use permit under its Zoning Ordinance for the Biosolids Reuse Project, in that NSSD will be delayed or prevented from implementing its construction schedule and required to make alternative arrangements for disposal of solids from wastewater treatment at great expense to NSSD and its constituents.

129. Granting the injunction will not adversely affect the public interest and will protect the public health and safety of the residents within NSSD's service area.

130. NSSD has no adequate remedy at law in that it must proceed with the Biosolids Reuse Project in a timely manner for it to remain viable.

WHEREFORE, Plaintiff NSSD respectfully requests that:

A. Enter orders temporarily, preliminarily, and permanently enjoining Waukegan and the other Defendants from seeking to impose on NSSD, or otherwise attempting to impose on NSSD, any zoning requirements under the Waukegan Zoning Ordinance or otherwise, relating to the Biosolids Reuse Project on the Waukegan property; and

B. For such other relief as the court deems appropriate.

Dated: May 6, 2002

Respectfully submitted,

THE NORTH SHORE SANITARY DISTRICT

By:


One of Its Attorneys

Mark E. Furlane (ARDC No. 0897175)
Michael J. Hayes (ARDC No. 01161725)
Francis X. Lyons (ARDC No. 6199617)
Sheila H. Deely (ARDC No. 6236949)
Gardner, Carton & Douglas
321 N. Clark Street
Suite 3400
Chicago, IL 60610-4795
Telephone: (312) 644-3000
Facsimile: (312) 644-3381

CH02/22186410.1

before the Contractor's Notice to Proceed. For this reason, it is critical that the bin and silo fabrication begin again immediately.

7. Any further delay in immediate commencement of bin and sludge silo fabrication will potentially result in a corresponding delay in completion of the Sludge Drying/Melting Project.

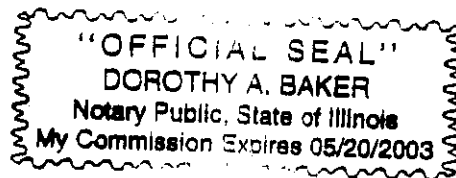
FURTHER AFFLIANT SAYETH NOT.

D. L. Speth

Subscribed and sworn
to before me this 3rd day
of May, 2002


Dorothy A. Baker
NOTARY PUBLIC

CH02/22186607.1



CERTIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that he is General Manager of The North Shore Sanitary District, a Defendant herein, and its duly authorized agent in this regard; that he has read the above and foregoing **Verified Answer To Plaintiffs Amended Complaint And Counterclaim** and that he has knowledge of the relevant facts related to foregoing, and that statements set forth in the foregoing instrument are true and correct, to the best of his knowledge, information and belief.



Brian Jensen, P.E.
General Manager
NORTHSHORE SANITARY DISTRICT

2/20/03

No.

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

CITY OF WAUKEGAN, a municipal corporation, et al.,))	
Plaintiffs/Appellees,)	
v.)	Appeal from Circuit Court for
)	the Nineteenth Judicial Circuit,
)	Lake County, Illinois
THE ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	Circuit Number 01 CH 1777
Defendant, and)	
)	
THE NORTH SHORE SANITARY DISTRICT,)	Hon. Stephen Walter,
)	Judge Presiding
Defendant/Appellant.)	

THE NORTH SHORE SANITARY DISTRICT,)
Counter-Plaintiff/Appellant,)
v.)
)
CITY OF WAUKEGAN, a municipal corporation, et al.,))
Counter-Defendants/Appellees.)

**MEMORANDUM OF DEFENDANT/COUNTER-PLAINTIFF/APPELLANT
NORTH SHORE SANITARY DISTRICT IN SUPPORT OF APPEAL PURSUANT TO
RULE 307(d) OF THE ILLINOIS SUPREME COURT**

North Shore Sanitary District ("NSSD") files this Memorandum of Law pursuant to S. Ct. Rule 307(d), allowing immediate review of an order granting or denying a temporary restraining order. NSSD appeals an order of the Circuit Court of the Nineteenth Judicial Circuit, Lake County entered on February 18, 2003, granting the Plaintiffs/Counter-Defendants/Appellees' motion for temporary restraining order and denying NSSD's Motion for



Temporary Restraining Order. The motions and appeal arise from Waukegan's refusal to allow approval under its zoning and building codes for NSSD's Project to proceed.

Introduction

NSSD is a unit of government created by the North Shore Sanitary District Act, 70 ILCS § 2305/0.1, *et seq.* ("NSSD Act"), the North Shore Sanitary District Extension (1st) Act, 70 ILCS § 2310/0.01, *et seq.*, and the North Shore Sanitary District Extension (2nd) Act, 70 ILCS § 2315/1, *et seq.* NSSD is charged with disposal of sewage for a population of approximately 350,000 people within its Facility Planning Area boundary, encompassing the geographic area roughly bordered by Lake Cook Road on the south, the Illinois and Wisconsin border on the north, the Tri-State Tollway in the west, and Lake Michigan on the east. NSSD's enabling legislation grants the District specific powers and authority in order to fulfill its duty to protect the public health of the region it serves through proper wastewater treatment and disposal. The NSSD currently disposes of sludge by transporting it to a landfill located within the District, and mixing its sludge with flyash to create a mixture called "fludge." The landfill, however, is quickly reaching capacity and will be fully used up within seven years.

There are 11 individual municipal governments within the Facility Planning Area, including Beach Park, Highland Park, Highwood, Knollwood, Lake Bluff, Lake Forest, North Chicago, Waukegan, Winthrop Harbor, Zion, and Lake County. NSSD operates three wastewater treatment plants in Lake County, Illinois, located in Highland Park, Gurnee, and Waukegan, all of which serve the people of the District and all of which are permitted by the IEPA. NSSD's three wastewater treatment plants all generate solids, called sludge, from wastewater handled by NSSD. NSSD must dispose of 52,600 tons of sludge per year.

To replace the method of landfill disposal, the NSSD seeks to construct on its own property the Project. The District's property at issue is located within the City of Waukegan. That same property already houses a wastewater treatment and processing plant that serves the entire sanitary district region. NSSD's Board of Trustees authorized the Project, having concluded it is the most environmentally responsible method for the NSSD to meet its sludge disposal needs given the less than seven year life of its available landfill.

The Project is also designed to serve the entire region, including Waukegan. The Project is designed to create a usable by-product from the sludge currently landfilled in another municipality within the District Service Area, and the District has elected to pursue the Project in order to greatly reduce or eliminate the need to landfill the sludge. This new process applies the technologic advances to produce an environmentally sound method of disposing of NSSD's sludge for the foreseeable future, and produces a saleable by-product, which the IEPA recognizes is no longer a waste. In this Project, the sludge will be dried and then used as both the fuel and the raw material to manufacture a commercially viable glass or ceramic product, all hydrocarbons in the sludge will be eliminated, and all inorganic materials, including all heavy metals except mercury, will be locked into the glass structure of the glass aggregate end product, although the mercury will be reduced to below quantifiable levels. The sludge will be contained in silos located on the NSSD's own site, inside the Project building, which is a covered building, prior to being processed for drying and melting in the same proposed facility building.

This case was brought by the City of Waukegan against the NSSD and the Illinois Environmental Protection Agency ("Agency" or "IEPA") to prevent the NSSD from constructing a beneficial biosolids drying/melting facility ("the Project") on the NSSD's property within Waukegan's boundaries. Plaintiff/Counter-Defendant Waukegan is a municipal corporation

located in Lake County, Illinois and an Illinois Home Rule unit of government. The other Plaintiffs/Counter-Defendants also include members of the Waukegan City Council, except that Russ Tomlin is the Director of Planning and Zoning for the City of Waukegan and Chuck Perkey is the Director of Building and Planning for the City of Waukegan, and an agent of the City of Waukegan. The City alleged that the local siting provision of the Illinois Environmental Protection Act, 415 ILCS §5/1 *et seq.* ("the Act"), required NSSD to obtain siting approval from Waukegan prior to IEPA's issuance of permits for the Project to NSSD. The City also alleged that the NSSD's construction of the Project violated the City's zoning and building codes and sought injunctive relief to prevent construction.

The NSSD filed a counter-claim against Waukegan seeking both declaratory and injunctive relief. The NSSD's action asked the court to declare that the City's zoning and building codes do not apply to a regional governmental entity, like the NSSD, in the fulfillment of its statutory duty to provide regional public health services. The NSSD argued that the *City of Des Plaines Trilogy* of cases controlled and mandated both preliminary and permanent injunctive relief. *See City of Des Plaines v. Metropolitan Sanitary District of Greater Chicago*, 48 Ill. 2d 11, 268 N.E.2d 428 (1971) (*Des Plaines I*); *City of Des Plaines v. Metropolitan Sanitary District of Greater Chicago*, 59 Ill. 2d 29, 31, 32, 319 N.E.2d 9 (1974) (*Des Plaines II*); *Metropolitan Sanitary District of Greater Chicago v. City of Des Plaines*, 63 Ill. 2d 256, 347 N.E.2d 716 (1976) (*Des Plaines III*) (collectively "*Des Plaines Trilogy*").

After several motions were filed by the NSSD and the City, the court entered an order on June 18, 2002 that granted NSSD's Motion for Judgment on the Pleadings as to Counts I and II of the Amended Complaint (applicability of local siting under the Act) and denied this motion as to Counts III through VI of the Amended Complaint (applicability of Waukegan's building and

zoning codes). That order also denied NSSD's Motion for Summary Judgment on Counts I and II of NSSD's counter-claim for injunctive and declaratory relief. The court's order also granted the IEPA's Motion to Strike and Dismiss Counts I and II against as applicable to IEPA. In each instance, the Court's order also found that as to those rulings there was no just reason for delaying either the enforcement or appeal or both as provided under Rule 304 of the Illinois Supreme Court Rules. The court also certified two questions for interlocutory appeal under Rule 308 of the Illinois Supreme Court Rules.

In paragraph 12 of the June 18, 2002 Order the Court found:

Pursuant to Supreme Court Rule 308 the Court expressly finds that this order involves a question of law as to which there is substantial ground for difference of opinion and that the immediate appeal from that part of the order as to that question may materially advance the ultimate termination of the litigation. Those questions are the following:

- (1) Whether under the *Des Plaines* trilogy line of authority, if the North Shore Sanitary District is exercising power within its statutory grant, such exercise is subject to zoning restrictions imposed by Waukegan, a host home rule municipality?
- (2) Whether the amendments to the Environmental Protection Act have over ruled the *Des Plaines Trilogy* line of authority under the facts of this case?

Both the NSSD and the City of Waukegan filed appeals to this Court, which are pending before this Court under Appellate Court No. 02-02-0635, pursuant to Illinois Supreme Court Rules 304, 307 and 308.

This appeal comes before this Court pursuant to an order of the Circuit Court of the Nineteenth Judicial Circuit, Lake County entered on February 18, 2003, granting the Plaintiffs/Counter-Defendants/Appellees' motion for temporary restraining order and denying NSSD's Motion for Temporary Restraining Order. The motions and appeal arise from

Waukegan's refusal to allow approval under its zoning and building codes for NSSD's Project to proceed.

The NSSD applied to the IEPA for those permits the Agency deemed necessary to construct the Project. The IEPA, after a thorough review, issued all necessary permits to the NSSD. These included permits from the IEPA's Bureau of Air, issued on March 11, 2002, and Bureau of Land, also issued on March 11, 2002. Public hearings were held on both permit applications by the IEPA. On March 11, 2002, the IEPA issued air and land permits to NSSD to build a sludge dryer/melter facility on NSSD's Wastewater Treatment Plant property in Waukegan.

NSSD promptly filed applications with Waukegan under reservation of rights for a building permit and thereafter for conditional uses and variation. NSSD submitted a completed Application for Building Permits to Waukegan on March 12, 2002, stating that NSSD did not believe that it was subject either to Waukegan's Zoning or Building Ordinances and reserving its rights. On April 11, 2002 NSSD filed applications with Waukegan under reservation of rights for conditional uses and variation as direct by Waukegan and also paid the applicable fee. In these applications NSSD sought zoning approval and a building permit for the Project. Thereafter, NSSD participated in Public Hearings on its applications before the Waukegan Development Commission ("WDC") under Waukegan's Zoning Ordinance. The WDC closed the Public Hearing September 10, 2002, voting at the time to deny/recommend denial of NSSD's applications. On October 18, 2002 the WDC gave its Findings and Recommendations on the applications to the Waukegan City Council. On October 21, 2002, the Waukegan City Council voted to deny outright NSSD's applications for zoning approvals to proceed with the Project.

NSSD filed its Verified Answer and Second Amended Counterclaim against Waukegan on December 10, 2002, both declaratory and injunctive relief as well as judicial review of the administrative record and Waukegan's zoning decisions. The NSSD's action asked the court to declare that the City's outright refusal to allow NSSD to proceed with the Project under any circumstances exceeded Waukegan's Home Rule Power under *The City of Highland Park v. The County of Cook*, 37 Ill. App. 3d 15 (2d Dist. 1975); followed by *The Village of Oak Brook v. The County of Du Page*, 173 Ill. App. 3d 490 (2d Dist. 1988); *Schillerstrom Homes, Inc. v. The City of Naperville*, 198 Ill. 2d 281; 762 N.E.2d 494; 260 Ill. Dec. 835 (2001); *Village of Bolingbrook v. Citizens Utilities Co. of Illinois*, 158 Ill. 2d 133, 138 (1994); and *Kalodimos v. Village of Morton Grove*, 103 Ill. 2d 483, 501 (1984); and *the Des Plaines Trilogy*. The legislative history of the Illinois Constitution states:

If a home rule unit attempts to exercise a power or to perform a function which is not within the scope of the grant contained in Subsection 6(a)—i.e., if the action does not pertain to the government and affairs of the home rule unit—Dillon's Rule would continue to apply, and the exercise or performance would be void unless authorized by statute or by another provision of the 1970 Constitution.

Constitutional Commentary to Ill. Const., Art. 7. Sec. 6.

The air permit for the Project issued by the Illinois EPA is a permit to construct only, and is *inter alia* subject to Standard Condition No. 1, which states:

The following conditions are applicable unless superceded by special condition(s).

1. Unless this permit has been extended or it has been voided by a newly issued permit, this permit will expire one year from the date of issuance, unless a continuous program of construction or development on this project has started by such time.

To avoid the lapse of its Air Permit, NSSD attempted to start construction on the Project until such time as the legal status of the Project was decided. Waukegan physically prevented this by impeding access to NSSD's facility by its contractors and threatening them with arrest, and the parties filed cross motions for temporary restraining orders. Waukegan sought to enjoin

construction and NSSD sought to restrain Waukegan from interfering with construction until such time as the Circuit Court could reach the merits. As it stands, NSSD's air permit issued by the IEPA expires on March 11, 2003, unless NSSD can establish "a continuous program of construction or development on this project has started by" March 11, 2003. If the air permit lapses, NSSD would then need to reapply for a new air permit. On February 18, 2003 the Circuit Court heard the parties cross motions for temporary restraining order and granted Waukegan's motion and denied NSSD's motion. The court's decision was based on its ruling of June 18, 2002, on appeal before this Court, which found that NSSD was subject to Waukegan's zoning. NSSD now appeals the denial of the Court's order granting Waukegan's motion for temporary restraining order and the denial of NSSD's motion for temporary restraining order.

The parties then filed the cross motions for temporary restraining orders that led to the Court's February 18, 2003 order that is the subject of this appeal.

STANDARD OF REVIEW

This appeal presents questions of law. The trial court decided the cross motions for temporary injunctive relief on the papers without taking evidence. Questions of law are reviewed *de novo*. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 189, 223 Ill. Dec. 532, 680 N.E.2d 265 (1997); *Morris v. Margulis*, 197 Ill. 2d 28, 35, 257 Ill. Dec. 656, 754 N.E.2d 314 (2001); *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 30-31, 241 Ill. Dec. 627, 719 N.E.2d 756 (1999).

ARGUMENT

A. Waukegan's Regulation of NSSD and prohibition of this Project is beyond Waukegan's Home Rule Power

NSSD is a unit of regional government that is established by statute for the purpose of serving NSSD's regional needs for wastewater treatment and disposal. The North Shore Sanitary

District Act ("NSSD Act"), 70 ILCS § 2305/1, *et seq.*, specifically grants the Board of Trustees of NSSD the power and authority to fulfill its duties to the public:

Such board shall provide suitable and modernly equipped sewage disposal works or plants for the separation and disposal of all solids and deleterious matter from the liquids, and shall treat and purify the residue of such sewage so that when it flows into any lake, it will not injuriously contaminate the waters thereof. *The board shall adopt any feasible method to accomplish the object for which such sanitary district may be created.*

70 ILCS § 2305/7 (emphasis added). NSSD is meant by its enabling legislation to be the exclusive provider of wastewater treatment services within its territory ("*and no territory shall be included within more than one sanitary district under this act.*" 70 ILCS 2305/1.) The NSSD board of trustees alone has the power and authority to provide those services under the Act within the territory (the Trustees "shall exercise all powers and manage and control all the affairs of the district, and *shall exercise all the powers and manage and control all the affairs and property of the district.*" 70 ILCS 2305/4(emphasis added).)

The Circuit Court failed to follow this Court's holding in *City of Highland Park v. County of Cook*, 37 Ill.App.3d 15, 26 (1975), where this Court examined the limits of this home rule authority. The court held that Highland Park had exceeded its home rule power in the application of its ordinance to the County and therefore the County would be doing nothing illegal by ignoring the ordinance. The City claimed it had authority to enact the challenged ordinance governing construction of a highway under the City's Home Rule Power. The Court did not agree with the City's claim, stating: "It seems obvious to us that this only expanded home rule units power over strictly local affairs, not those involving other municipalities or the county or State." This Court also stated: "We hold therefore that the City's second contention - that, under its "Home Rule" powers under the 1970 Constitution, it has the power to and did enact ordinances requiring its approval before the County or any other "unit of local

government' could construct, alter or maintain a highway within its corporate limits which approval has not been obtained, is without merit." *Id.* This Court quoted favorably from an Illinois Municipal Law Treatise: "A home rule unit may exercise any power and perform any function 'pertaining to its government and affairs.' The government and affairs language was clearly intended as a limit on home rule powers." *Id. at 24.* The Court then noted that:

These ordinances, in effect, require not only persons and corporations but "any unit of local government" other than itself, to obtain the approval of the City Council before commencing any "installation"...If held valid and applied to the factual situation present in the case at bar, they are intended to and will affect the affairs of the County, the State and other municipalities and, in our opinion, therefore are not, as they must be, limited to the City's own affairs.

Id. at 25.

In *Highland Park*, this Court recognized that the analysis of the Home Rule Power must be considered before injunctive relief can lie for enforcement of a municipality's ordinance against another governmental entity. The determinative issue is whether as applied to the case at hand, the municipal entity regulated only strictly local affairs or whether predominantly regional interests were involved.

Ignoring *Highland Park*, the Circuit Court held that the Municipal Code gave the City a presumption of harm that required no further legal analysis. The court rejected NSSD's argument that the court needed to first determine whether Waukegan's actions in stopping NSSD from proceeding with construction of the Project were beyond and an abuse of Waukegan's Home Rule Power under Section 6(a) of Article VII of the Illinois Constitution.

The trial court erred by not determining whether NSSD would be doing something illegal if it proceeded with construction of the Project in Waukegan over Waukegan's objection. See *The City of Highland Park v. The County of Cook*, 37 Ill. App. 3d 15 (2d Dist. 1975); followed by

The Village of Oak Brook v. The County of Du Page, 173 Ill. App. 3d 490 (2d Dist. 1988). The legislative history of the Illinois Constitution states:

If a home rule unit attempts to exercise a power or to perform a function which is not within the scope of the grant contained in Subsection 6(a)—i.e., if the action does not pertain to the government and affairs of the home rule unit—Dillon's Rule would continue to apply, and the exercise or performance would be void unless authorized by statute or by another provision of the 1970 Constitution.

Constitutional Commentary to Ill. Const., Art. 7. Sec. 6.

Under the Illinois Constitution the drafters viewed **sewage treatment** as requiring regional rather than local regulation, and it is one of only three examples identified. NSSD's statutory purpose and authority derives from the constitutionally recognized regional importance of sewage treatment in the minds of the committee responsible for the home rule power and its limits in the Constitution.

The Local Government Committee of the constitutional convention reported, in apparent agreement, that '**Control of air and water pollution, flood plains and sewage treatment are often cited as important examples of areas requiring regional or statewide standards and controls.** (7 Record of Proceedings, Sixth Illinois Constitutional Convention 1642(hereafter cited as Proceedings).) Similar sentiment was expressed, without disagreement, in debates on the convention floor." (emphasis added.)

Des Plaines III, 63 Ill. 2d 256, at 260-61. NSSD serves eleven home rule municipalities, including Waukegan, and over 350,000 constituents, all of whom are impacted by Waukegan's actions. While some 42% of NSSD's sludge is produced at NSSD's existing Waukegan plant, the rest originates from other municipalities within the NSSD territory. Every home rule municipality and every constituent within the NSSD, and every one affected by the NSSD landfill, is directly impacted by Waukegan's actions prohibiting NSSD from building the Project.

The Circuit Court also ignored the Illinois Supreme Court's holdings that have further developed this Court's Home Rule analysis under *Highland Park In Schillerstrom Homes, Inc. v. The City of Naperville*, 198 Ill. 2d 281; 762 N.E.2d 494; 260 Ill. Dec. 835 (2001), the Court

outlined the test for determining the limits of a municipality's exercise of its home rule power, stating:

This court has formulated a three-part inquiry for evaluating the constitutionality of exercise of home rule power. First, we must determine whether the disputed exercise of local government power falls within section 6(a)-that is, whether the local government's activity is a function pertaining to its government and affairs. *John Sexton Contractors Co.*, 75 Ill. 2d at 508. If so, we must determine whether the General Assembly has preempted the use of home rule powers in this area. *John Sexton Contractors Co.*, 75 Ill. 2d at 508. If not, we then must determine "the proper relationship" between the local ordinance and the state statute. *John Sexton Contractors Co.*, 75 Ill. 2d at 508. 762 N.E.2d 494, 498.

Waukegan has stopped NSSD from pursuing the Project under any conditions. To determine the limit of Waukegan's exercise of home rule power against NSSD in this case, the first two *Schillerstrom Homes, Inc.* inquiries are to be made before proceeding to the third inquiry. The first *Schillerstrom Homes, Inc* inquiry requires the court to determine whether the dispute addresses local, rather than state or national problems. In *Kalodimos v. Village of Morton Grove*, 103 Ill. 2d 483, 501 (1984), the court adopted this test addressing that inquiry, stating as follows:

Whether a particular problem is of statewide rather than local dimension must be decided not on the basis of a specific formula or listing set forth in the Constitution but with regard for the nature and extent of the problem, the units of government which have the most vital interest in solution, and the role traditionally played by local and statewide authorities in dealing with it.

The analysis is not just of the Ordinance facially, but also as to its application in a given case.

See also Village of Bolingbrook v. Citizens Utilities Co. of Illinois, 158 Ill. 2d 133, 138 (1994).

All of these cases recognize that a Home Rule Municipality does not have unbridled authority to regulate another governmental entity serving regional interests within and pursuant to its express statutory authority.

B. The 1981 Amendment of the Illinois Environmental Protection Act by S.B. 172 Did Not Overrule Applicable Supreme Court Authority or the *Highland Park* case

Waukegan claims that the amendment to Section 39(c) of the Environmental Protection

Act mandates that NSSD must obtain zoning approvals from Waukegan without regard to any Home Rule Power analysis because it claims there now exists a special rule and analysis for cases in which a permit has been issued by the IEPA, such as in this case, citing *The Village of Carpentersville v. PCB*, 135 Ill. 2d 463, 469 (1990). The Circuit Court not only relied on that argument to hold that the *Des Plaines Trilogy* has been overruled by the Legislature in the amendment of Section 39(c) in the prior pending appeal, but in the instant order the Circuit Court now applies the same conclusion to overrule the requirement of conducting a Home Rule Analysis under *Highland Park, Bolingbrook, Kalodimos or Schilerstrom Homes*. The *Des Plaines Trilogy* cases were not decided based on preemption of the Act. Rather, they were decided at step one of the analysis used in these more recent cases, *i.e.*, whether the local entity was engaged in a valid exercise of Home Rule power pertaining to its government and affairs.

The Circuit Court's holding and reasoning is flawed. The amendment to Section 39(c) was aimed at prior case law that had held that the Environmental Protection Act had preempted zoning by non home rule municipalities. It neither addressed the *Des Plaines Trilogy*, which was not based on preemption by the Act, nor is there any indication the amendments to Section 39(c) were meant to create an IEPA permit exception to the analysis required under *Bolingbrook, Kalodimos, or Schilerstrom Homes*. No case has ever suggested such a distinction in the Home Rule analysis simply because it concerned issuance of an IEPA permit holder. Rather, in *Village of Carpentersville*, the Court confirmed the case was about preemption, stating: "At the core of this appeal is the question of whether a village zoning ordinance is preempted by a requirement set forth in a permit issued by the Environmental Protection Agency (Agency) under the provisions of the Environmental Protection Act..." 135 Ill. 2d 463, 465.

Significantly, in *The Village of Carpentersville v. PCB*, 135 Ill. 2d 463, 469 (1990), the Court noted that the Illinois Environmental Protection Act was amended between 1981 and 1987 to remove the burden from the applicant to show zoning compliance. After the amendment the Act simply eliminated preemption, by stating that any permit issued did not “relieve an applicant from meeting and securing all necessary zoning approvals from the unit of government having zoning jurisdiction over the proposed facility.” In comparing the respective language of Section 39(c) before and after the amendment, it can be seen that the Legislature removed the burden from the applicant of showing zoning compliance (“unless an applicant submits proof to the Agency that the Applicant has secured all necessary zoning approvals.”) 415 ILCS § 5/39(c).

Waukegan’s actions stop NSSD’s attempt to dispose of its sludge in a more modern and environmentally responsible manner dead in its tracks. Waukegan not only denied NSSD use of its property for the Minergy Project, but advises NSSD that it should be “built at its plant in Gurnee,” or Waukegan wants NSSD to “build the incinerator in Zion” or simply wants the NSSD to continue to dump sludge in “its own landfill and substantially available other landfill space.” In short, Waukegan is attempting to manage the NSSD Board’s disposal of its sludge, and not simply use Waukegan’s zoning process to reconcile any purely local interests

This case is the classic example of a *Highland Park* situation involving governmental entities where it is appropriate for the court to proceed immediately to the Home Rule analysis before enforcing an Ordinance based on merely a presumption of validity. This is especially true, where as here, The North Shore Sanitary District Act authorizes the general manager of the NSSD to seek an injunction if in his opinion the lack of such an injunction will result in harm to the sewer system of the NSSD, which opinion was averred to and filed with the Court in this case. Under the applicable law and the proper legal analysis, the Circuit Court acted

eroneously when it granted Waukegan's motion for temporary injunctive relief and denied NSSD's motion for injunctive relief. The Court's order of February 18, 2003 should be reversed.

CONCLUSION

For all of the foregoing reasons, NSSD respectfully requests that this Court overturn the February 18, 2003 Order of the Circuit Court, denying NSSD's Motion for Temporary Restraining Order and granting Waukegan's Motion for Temporary Restraining Order.

Respectfully submitted,

NORTH SHORE SANITARY DISTRICT

By: Mark E. Furlane
One of its attorneys

Michael J. Hayes, Sr. (ARDC No. 01161725)
Francis X. Lyons (ARDC No. 6199617)
Mark E. Furlane (ARDC No. 896165)
Sheila H. Deely (ARDC No. 6236949)
Gardner Carton & Douglas LLC
191 N. Wacker Drive, - Suite 3700
Chicago, IL 60610-4795
Telephone: (312) 569-1000
Facsimile: (312) 569-3000

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

NORTH SHORE SANITARY DISTRICT,)
)
Petitioner,)
)
v.) PCB No. 03-146
) (Permit Appeal)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)


NOTICE

To: Fred C. Prillaman
Mohan, Alewelt, Prillaman & Adami
1 North Old Capital Plaza, Suite 325
Springfield, Illinois 62701-1323

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

PLEASE TAKE NOTICE that I have today served the **RESPONSES TO PETITIONER'S REQUEST TO ADMIT** of the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, a copy of which is herewith served upon the attorney for the Petitioner, NORTH SHORE SANITARY DISTRICT.

Respectfully submitted by,


Robb H. Layman
Special Assistant Attorney General

Dated: April 17, 2003
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217)524-9137



BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

NORTH SHORE SANITARY DISTRICT,)
)
Petitioner,)
)
v.) PCB No. 03-146
) (Permit Appeal)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

**RESPONSES TO PETITIONER'S
REQUEST TO ADMIT**

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by and through its attorneys, and pursuant to 35 Ill. Adm. Code 101.618, hereby responds to the Petitioner's, NORTH SHORE SANITARY DISTRICT ("NSSD"), Request to Admit, as follows:

Statement 1:

On April 17, 2001, the IEPA received an application from NSSD for an air emissions construction permit ("air permit application").

Answer:

The Illinois EPA admits this statement.

Statement 2:

A true and correct copy of the first nine pages of the technical support document filed with the application for an air permit is attached hereto as **Exhibit A**.

Answer:

The Illinois EPA admits this statement.

Statement 3:

On July 27, 2001, the IEPA issued a draft construction permit for a sludge dryer/melter ("draft air permit").

Answer:

The Illinois EPA denies that any kind of draft construction permit was formally issued, but admits that a draft construction permit was proposed for issuance on July 27, 2001.

Statement 4:

On September 25, 2001, the IEPA rejected a demand made by the City of Waukegan that the hearing on the draft air permit be canceled in the absence of a siting approval issued by the Waukegan City Council.

Answer:

The Illinois EPA objects to this request on the grounds that the information is neither relevant nor calculated to lead to relevant information that relates to the subject matter of this proceeding.

Statement 5:

On December 6, 2001, the City of Waukegan, its mayor and members of its city council filed a Verified Complaint for Injunctive and Declaratory Relief in the Circuit Court of Lake County against the Illinois Environmental Protection Agency ("IEPA") and the North Shore Sanitary District ("NSSD"), which was given case number 01CH1777 ("circuit court lawsuit").

Answer:

The Illinois EPA objects to this request on the grounds that the information is neither relevant nor calculated to lead to relevant information that relates to the subject matter of this proceeding.

Statement 6:

Attached as exhibits to the complaint in the circuit court lawsuit were copies of the air permit application and the draft air permit.

Answer:

The Illinois EPA objects to this request on the grounds that the information is neither relevant nor calculated to lead to relevant information that relates to the subject matter of this proceeding.

Statement 7:

Counts I through VI of the complaint sought, inter alia, to stop the issuance of any permit by the IEPA without proof of local siting approval and Counts VII through X of the complaint sought, inter alia, to stop the construction of the project without first obtaining building/zoning approvals.

Answer:

The Illinois EPA objects to this request on the grounds that the information is neither relevant nor calculated to lead to relevant information that relates to the subject matter of this proceeding.

Statement [8]:

On February 27, 2002, the circuit court dismissed the lawsuit on the grounds that the plaintiffs "have no standing to seek a Court intervention on these issues at this time," namely prior to the issuance of a permit.

Answer:

The Illinois EPA objects to this request on the grounds that the information is neither relevant nor calculated to lead to relevant information that relates to the subject matter of this proceeding.

Statement [9]:

[On] March 11, 2002, the IEPA issued a construction permit to NSSD, a true and correct copy of which is attached as Exhibit A to the Petition for Permit Review.

Answer:

The Illinois EPA admits that a construction permit was issued to NSSD on March 11, 2002 and that the copy of the construction permit referenced as Exhibit A in the Petition for Permit Review is a true and accurate copy of said permit.

Statement [10]:

On April 15, 2002, the City of Waukegan filed a motion for leave to reinstate its lawsuit by filing an amended complaint.

Answer:

The Illinois EPA objects to this request on the grounds that the information is neither relevant nor calculated to lead to relevant information that relates to the subject matter of this proceeding.

Statement [11]:

The City of Waukegan was subsequently granted leave to file an amended complaint.

Answer:

The Illinois EPA objects to this request on the grounds that the information is neither relevant nor calculated to lead to relevant information that relates to the subject matter of this proceeding.

Statement [12]:

On May 7, 2002, NSSD filed its Verified Answer and Counterclaims of Defendant North Shore Sanitary District to Waukegan's Amended Complaint, a true and correct copy of which is attached hereto as **Exhibit B**.

Answer:

The Illinois EPA objects to this request on the grounds that the information is neither relevant nor calculated to lead to relevant information that relates to the subject matter of this proceeding.

Statement [13]:

On June 18, 2002, the Circuit Court of Lake County dismissed the circuit court lawsuit with respect to local siting approval issues.

Answer:

The Illinois EPA objects to this request on the grounds that the information is neither relevant nor calculated to lead to relevant information that relates to the subject matter of this proceeding.

Statement [14]:

Furthermore, on June 18, 2002, the Circuit Court of Lake County found that the Des Plaines trilogy of cases relied upon by NSSD for its argument that NSSD is exempt from local zoning had been overruled.

Answer:

The Illinois EPA objects to this request on the grounds that the information is neither relevant nor calculated to lead to relevant information that relates to the subject matter of this proceeding.

Statement [15]:

The court's June 18, 2002, rulings have been appealed to the Illinois Appellate Court, Second District, where the appeal remains pending.

Answer:

The Illinois EPA objects to this request on the grounds that the information is neither relevant nor calculated to lead to relevant information that relates to the subject matter of this proceeding.

Statement [16]:

On February 18, 2003, the Circuit Court of Lake County entered a temporary restraining order against NSSD from "beginning any construction activity on the subject site in an effort to construct the facility at issue."

Answer:

The Illinois EPA objects to this request on the grounds that the information is neither relevant nor calculated to lead to relevant information that relates to the subject matter of this proceeding.

Statement [17]:

On March 5, 2003, the Circuit Court of Lake County converted the temporary restraining order into a preliminary injunction.

Answer:

The Illinois EPA objects to this request on the grounds that the information is neither relevant nor calculated to lead to relevant information that relates to the subject matter of this proceeding.

Statement [18]:

Attached hereto as **Exhibit C** is a true and correct copy of the Memorandum of Defendant/Counter-Plaintiff/Appellant North Shore Sanitary District in Support of Appeal Pursuant to Rule 307(d) of the Illinois Supreme Court.

Answer:

The Illinois EPA objects to this request on the grounds that the information is neither relevant nor calculated to lead to relevant information that relates to the subject matter of this proceeding.

Respectfully submitted by,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY



Robb H. Layman

Special Assistant Attorney General

Dated: April 17, 2003
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217)524-9137

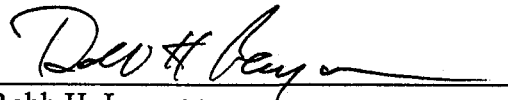
CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of April, 2003, I did send, by First Class Mail with postage thereon fully paid and deposited into the possession of the United States Postal Service, the **RESPONSES TO PETITIONER'S REQUEST TO ADMIT** of the Respondent, **ILLINOIS ENVIRONMENTAL PROTECTION AGENCY**, a copy of which is herewith served upon the following persons:

Fred C. Prillaman
Mohan, Alewelt, Prillaman & Adami
1 North Old Capital Plaza, Suite 325
Springfield, Illinois 62701-1323

Bradley P. Halloran
Hearing Officer
James R. Thompson Center
100 West Randolph Street,
Suite 11-500
Chicago, Illinois 60601

The Respondent has also faxed a true and correct copy of the same instrument on this date to the Petitioner's attorney.



Robb H. Layman
Special Assistant Attorney General

This filing is submitted on recycled paper.