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ILLINOIS POLLUTION CONTROL BOARD

APR 29 2003

STATE OF ILLINOIS
Pollution Control Board

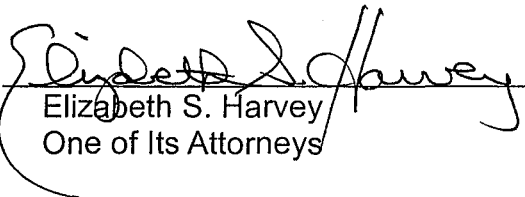
CITY OF KANKAKEE,)	
	)	PCB 03-125
Petitioner,	)	PCB 03-133
	)	PCB 03-134
v.	)	PCB 03-135
	)	(consolidated)
COUNTY OF KANKAKEE, COUNTY	)	(Pollution Control Facility Siting Appeals)
BOARD OF KANKAKEE, and WASTE)	
MANAGEMENT OF ILLINOIS, INC.)	
)	
Respondents.)	

NOTICE OF FILING

To: (See attached Service List.)

PLEASE TAKE NOTICE that on this 29th day of April 2003, the following County's **Response to City's Motion to Reconsider Discovery Rulings** was filed with the Illinois Pollution Control Board, attached and herewith served upon you.

COUNTY OF KANKAKEE and
COUNTY BOARD OF KANKAKEE

By: 
Elizabeth S. Harvey
One of Its Attorneys

Elizabeth S. Harvey
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Telephone: (312) 321-9100
Firm I.D. No. 29558

CERTIFICATE OF SERVICE

I, the undersigned non-attorney, state that I served a copy of the described document in the above-captioned matter via messenger to the hearing officer and via facsimile/U.S.Mail to all counsel of record on April 29, 2003.



Jeanette M. Podlin

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.

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RESPONSE TO CITY'S MOTION TO RECONSIDER DISCOVERY RULINGS

Respondent COUNTY BOARD OF KANKAKEE ("County"), by its attorneys Hinshaw & Culbertson and Swanson, Martin & Bell, hereby responds in opposition to petitioner the CITY OF KANKAKEE's ("City") motion to reconsider discovery rulings.

1. Initially, the County joins in the City's request (made in the City's notice of filing, rather than in the motion itself) that the Board rule on the City's motion at the Board's May 1, 2003 meeting if possible. The motion involves issues regarding who may be deposed during this proceeding, as well as the time limitations imposed on the depositions themselves. Because the Board hearings in these consolidated appeals begin next week, on May 5, 2003, time is of the essence in resolving these issues relating to discovery. Among other things, resolution of the deposition issues by the Board, prior to hearing, will reduce the issues on any appeal of the Board's decision.
2. The City's motion, titled "motion to reconsider discovery rulings", is more appropriately labeled an appeal of the hearing officer's rulings on deposition issues. (See 35 Ill.Adm.Code 101.502.) The City appeals several rulings made by the hearing officer on April 24, 2003, regarding appropriate deponents and the

length of depositions in this matter.

3. The City sought to depose attorneys Mr. Moran and Mr. Wilt (who represent Waste Management of Illinois, Inc. ("WMII"), as well as Kankakee County attorneys Ms. Harvey and Mr. Helsten. The hearing officer upheld objections to those attorney depositions. Attorney depositions are held in disfavor by the Board and by the courts: the practice is disruptive of the adversarial process, and raises concerns regarding preservation of the attorney-client privilege. The deposition of opposing counsel should be allowed only when: (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case. *Citizens Against Regional Landfill v. County Board of Whiteside County*, PCB 92-156 (February 25, 1993). (Also see the County's Objections to Depositions, attached as Exhibit A.)
4. In its motion to reconsider, the City asserts that WMII has "acknowledged" substantive contact between its attorney, Mr. Moran, and County attorneys. The City seeks to depose the attorneys regarding these allegedly improper contacts. However, the City's claims fail.
5. First, the County disputes the City's characterization of the January 2003 contacts between Mr. Moran and Ms. Harvey as "substantive". To the contrary, the sole January 2003 contact between Mr. Moran and Ms. Harvey was non-substantive, and consisted only of Mr. Moran's procedural inquiries of Ms. Harvey. (See Exhibit B, Affidavit of Elizabeth Harvey.) Mr. Moran placed a call to Ms. Harvey, in which he inquired whether WMII would have an opportunity to address the County Board (or the Regional Planning Commission ("RPC"), which, under the County procedures, considered the record of the siting process and prepared a recommendation to the County Board). Ms. Harvey informed Mr. Moran that no such opportunity would exist, as the record had closed. There

was no discussion of substantive issues in that single phone call.

6. The non-substantive nature of the phone call between Mr. Moran and Ms. Harvey was discussed with counsel for the City, Mr. Power, by Ms. Harvey during a phone call on or about April 22, 2003. Thus, the City is well aware that the conversation was non-substantive, and cannot support its allegations that the phone call was improper.
7. The Harvey affidavit demonstrates that the single conversation between Mr. Moran and Ms. Harvey was procedural in nature, and thus not improper. The City cannot meet its burden of showing that no other means, except deposition, exist to obtain the information.
8. Second, as to the requested deposition of Mr. Helsten: it is important to recognize that, during the siting proceeding, Mr. Helsten represented the County staff, not the RPC or the County Board. (See Exhibit C, Affidavit of Charles Helsten.) Mr. Helsten did not represent the decisionmaker, so it is difficult to see how contacts with Mr. Helsten could have been *ex parte* contacts at all. Prohibited *ex parte* contacts occur between decisionmakers and proponents of a certain position during a siting proceeding.¹
9. In any event, Mr. Helsten's affidavit makes clear that there were no substantive contacts between Mr. Moran and Mr. Helsten. Mr. Helsten received a voice mail message from Mr. Moran. Mr. Helsten returned Mr. Moran's call, but did not speak to him, instead leaving a voice mail message. Mr. Helsten's voice mail message to Mr. Moran simply stated that he (Mr. Helsten) did not feel it was appropriate to discuss the matter with Mr. Moran.
10. Again, the "non-contact" between Mr. Helsten and Mr. Moran was non-substantive, as demonstrated by Mr. Helsten's affidavit. There is no showing of

¹ The County does not concede that contacts with Ms. Harvey, who represented the decisionmaker but was not a decisionmaker, could have been improper.

any improper contact, and the City cannot show that the information it seeks is available only through Mr. Helsten's deposition.

11. In sum, as to the depositions of Ms. Harvey and Mr. Helsten, the hearing officer appropriately precluded those depositions. That ruling should be upheld.

12. In the alternative, and without prejudice to its position that the depositions of Ms. Harvey and Mr. Helsten are inappropriate, the County seeks limitations on the subject matter of the attorney depositions, should the Board reverse the hearing officer's ruling. If allowed, the depositions of Ms. Harvey and Mr. Helsten should be limited only to the January 2003 phone contacts (or non-contacts) with Mr. Moran. Any inquiry beyond that issue exceeds the City's stated basis for seeking the depositions, and could violate attorney-client privilege.

13. As to the City's appeal of the one-hour time limitation, the County states that it believes that the depositions can be completed within the time limits imposed by the hearing officer. Given the extremely short time frames available for depositions (less than one week), and the large number of depositions sought by the City², the time limitation is reasonable. Although the City states that depositions of certain witnesses should be allowed to proceed for three hours, the City fails to explain why that additional time is needed for those witnesses.

14. Finally, as to the proposed deposition of Mr. Addleman, the County sees no need for a physician's affidavit, but believes that WMII's representation by counsel that Mr. Addleman is medically unable to be deposed is sufficient to exclude Mr. Addleman as a deponent.

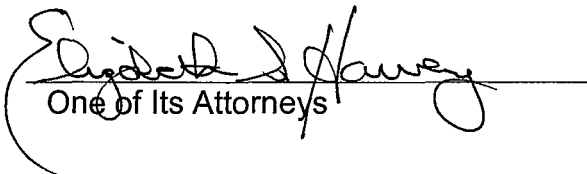
15. In sum, the County asks the Board to uphold the challenged rulings of the hearing officer in their entirety. In the alternative, if the Board reverses the hearing officer's ruling on the depositions of Ms. Harvey and Mr. Helsten, the

² The hearing officer has allowed the depositions of seventeen witnesses.

County asks the Board to limit the subject matter of those depositions to the January 2003 phone contacts with Mr. Moran, and to impose the same one-hour time limit on those depositions.

Respectfully submitted,

COUNTY OF KANKAKEE and
COUNTY BOARD OF KANKAKEE

By: 
One of Its Attorneys

Charles F. Helsten
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ILLINOIS POLLUTION CONTROL BOARD

CITY OF KANKAKEE,)	PCB 03-125
)	(Third-Party Pollution Control Facility
Petitioner,	)	Siting Appeal)

vs.

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

Respondents.

MERLIN KARLOCK,	)	PCB 03-133
	)	(Third-Party Pollution Control Facility
Petitioner,	)	Siting Appeal)

vs.

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

Respondents.

MICHAEL WATSON,	)	PCB 03-134
	)	(Third-Party Pollution Control Facility
Petitioner,	)	Siting Appeal)

vs.

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

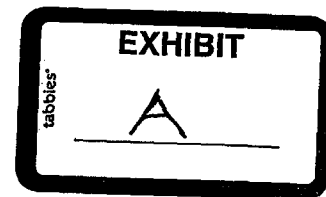
Respondents.

KEITH RUNYON,	)	PCB 03-135
	)	(Third-Party Pollution Control Facility
Petitioner,	)	Siting Appeal)

vs.

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

Respondents.



OBJECTION TO DEPOSITIONS

NOW COMES The County of Kankakee, by and through its Attorneys, HINSHAW & CULBERTSON, and files its Objections to the list of Deponents proposed by the City of Kankakee, and in support thereof, states as follows:¹

1. On March 22, 2003 the City of Kankakee served its list of deponents (attached hereto as Exhibit A). Included in the list are State's Attorney for County of Kankakee, Edward D. Smith, Assistant State's Attorney Brenda Gorski and Special Assistant State's Attorney Charles Helsten, and Elizabeth Harvey.
2. Upon receipt of a previous Notice of Deposition of State's Attorney Smith the undersigned attorney on behalf of Kankakee County spoke with counsel for the City, Mr. Kenneth Leschen, to determine the purpose of the proposed deposition. Attorney Leschen, on behalf of the City, only offered an explanation that he wanted to inquire into the passage of the Kankakee County Solid Waste Management Plan which designates that only the current Kankakee County landfill shall be expanded, which is operated by Waste Management of Illinois. It is Mr. Leschen's position that somehow the passing of the Solid Waste Management Plan is relevant to an alleged pre-adjudication of the merits of application by the Kankakee County Board.
3. The depositions of the State's Attorneys should not be allowed as they are an obvious attempt at harassment and seek irrelevant inadmissible evidence.
4. The Hearing Officer in its April 17, 2003 ruling held that discovery shall not be allowed regarding passage of a solid waste management plan or its amendments.
5. It is well established that evidence concerning the passage of a Solid Waste Management Plan is not admissible in a Section 39.2 hearing, and that discovery on how the Plan

¹ Mr. Watson agreed to accept the production response of the County of Kankakee by receiving the documents by overnight mail on April 22, 2003. Therefore, the County agreed to service of Mr. Watson's deponent list on April 23, 2003 and the County will file its objections to that list upon its receipt.

was passed is not allowed. *Residents Against Polluted Environment v. County of LaSalle*, PCB 26-243, pg. 2 (1996).

6. Furthermore, the Illinois Pollution Control Board has already ruled that it is improper to seek a deposition of a State's Attorney, even if that State's Attorney voices an opinion on an application. *ESG Watts Incorporated v. Sangamon County Board*, Respondent, PCB 98-2 (December 3, 1998). The only issue is the alleged bias or conflict of interest of the decision maker or hearing officer, not their advisors. *Id.*

7. If the purpose of the attorney depositions is to determine whether or not the Attorneys had any non-privileged communications with the decision-makers after the application was filed, such can be accomplished by written interrogatory which the City has already propounded. Attorney Leschen has indicated that perhaps there may be some evidence of pre-adjudication of the merits by the decision maker before the application was filed. First, this is complete conjecture and there is absolutely no evidence of such pre-adjudication. Second, the State's Attorneys Smith, Gorski, Helsten, and Harvey, were not the applicant at issue, and therefore even if they had any communications with the decision-makers, before the application was filed, such is irrelevant to the instant proceeding.

8. Another obvious basis for quashing the proposed depositions is the attorney-client privilege. "Courts have looked with disfavor on the practice of deposing opposing counsel, and find that such practice is disruptive of the adversarial process and lowers the standards of the legal profession." *Citizens of Regional Landfill v. County Board of Whiteside County and Waste Management of Illinois Inc.*, PCB 92-156(1993). Not only is there a concern of the right of a client to have unfettered representation by his attorney, but "[e]xperience teaches that countenancing unbridled depositions of attorneys constitutes an invitation to delay, disruption of the case, harassment, and perhaps disqualification of the attorney to be deposed." *Id.* The IPCB has acknowledged that "[i]t is appropriate to require the party seeking to depose an attorney to

establish a legitimate basis for the request and demonstrate that the deposition will not otherwise prove only disruptive or burdensome." *Id.* (emphasis added).

9. The Illinois Pollution Control Board has held that the deposition of opposing counsel should only be allowed when: "(1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case." *Id.*

10. In this case the City of Kankakee has provided none of these three elements. If the purpose is to determine the nature of the communications of the Applicant with the State's Attorney and then determine whether the State's Attorney relayed these communications to the County Board, such can, and has been, addressed by Kankakee County's responses to interrogatories. (There were no such communications). Second, there has been no attempt by the City to show that the information sought is non-privileged. Third, there has been no explanation as to how this deposition is crucial to the City's case.

11. The remaining depositions requested by the City should also be quashed because there is no good faith basis for taking the depositions. Illinois courts have held that "A plaintiff must possess a minimal level of information indicating defendant is liable to him to commence his litigation and force the dependant to undergo discovery. Otherwise Plaintiff is engaged in a 'fishing expedition' a recognized form of litigation abuse." *Yuretich v. Sole*, 259 Il. App. 3d 311, 631 NE 2d 767, 772 (4th Dist. 1993). "It is no justification that a fishing expedition might result in worthwhile information; the possibility of success must be sufficient to justify the inconvenience or expense to the opponent." *Id.* The City has provided no explanation for the proposed depositions other than an attempt to inquire into how the solid waste management plan was passed, which this Hearing Officer and the IPCB has already held is inadmissible and not discoverable.

12. It is anticipated that the City of Kankakee might argue that in a recent PCB action involving the application of Town & Country, Inc. to site a landfill in the City of Kankakee, the County of Kankakee conducted discovery of the hearing officer and the Mayor of the City about pre-filing contacts with the decision makers. That discovery is distinguished from the depositions requested in this case because in *Town & Country* there was evidence of a specific and direct communication that the applicant had in front of the decision makers a mere two weeks before the application was filed wherein the applicant presented evidence on the Section 39.2 criteria and impeached potential objectors witnesses. There is no evidence of such a communication in this case and therefore no reason to conduct this fishing expedition.

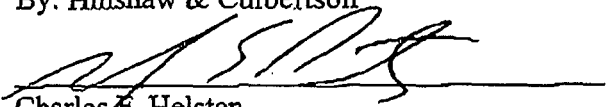
WHEREFORE, the County of Kankakee prays that the request of the City to take the Depositions of those individuals identified on Exhibit A, be denied.

Dated: April 23, 2003

Respectfully Submitted,

On behalf of the COUNTY OF KANKAKEE

By: Hinshaw & Culbertson



Charles F. Helsten
Richard S. Porter

HINSHAW AND CULBERTSON
100 Park Avenue
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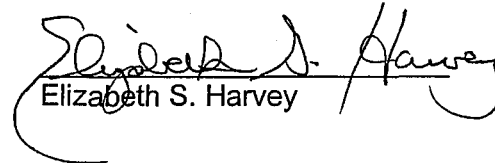
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AFFIDAVIT OF ELIZABETH HARVEY

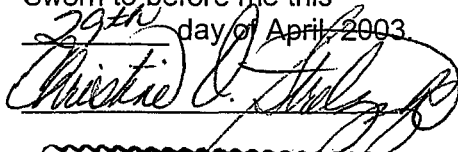
I, Elizabeth S. Harvey, being over the age of 21 and having been sworn, hereby states the following, based on personal knowledge:

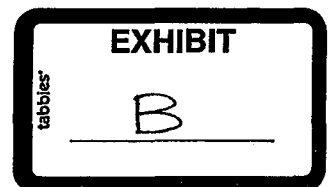
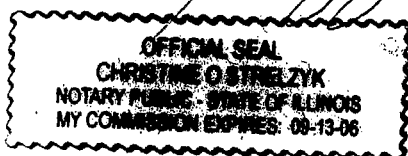
1. I am a licensed attorney in the State of Illinois. I was retained by the Kankakee County Board to provide legal representation to the County Board and to the Regional Planning Commission during the local siting proceeding on the application for site expansion approval filed by Waste Management of Illinois, Inc. (WMII). I currently represent the County in this appeal before the Pollution Control Board.
2. In January 2003, I received a phone call from Mr. Moran, counsel to WMII. This call occurred after the January 16, 2003 meeting of the Regional Planning Commission (RPC) and before the January 31, 2003 meeting of the County Board. The call consisted only of Mr. Moran's questions regarding procedure.
3. Mr. Moran inquired whether there would be any opportunity to address either the RPC (which was preparing a recommendation to the County Board regarding the siting application) or the County Board. Mr. Moran stated that he believed that WMII could clarify certain issues for the RPC or the County Board, regarding special conditions which the RPC had discussed at its meeting regarding the siting application. Mr. Moran did not specify which conditions WMII wished to address, nor did he indicate the subject matter of WMII's desired discussion.
4. I informed Mr. Moran that there would be no opportunity for WMII to address the RPC or the County Board, as the record was closed and no further information was allowable.
5. Mr. Moran indicated that he understood that neither WMII nor any other party could address the RPC or the County Board, and the phone call ended.
6. There was no discussion regarding any substantive issue in that January 2003 phone call with Mr. Moran.
7. I had no substantive discussions with Mr. Moran, or any other person other than my clients, at any time during the siting proceeding.
8. I related the above information, during a phone conversation, to Mr. L. Patrick Power, counsel for the City, on or about April 22, 2003.

Further affiant sayeth naught.


Elizabeth S. Harvey

Sworn to before me this
29th day of April, 2003



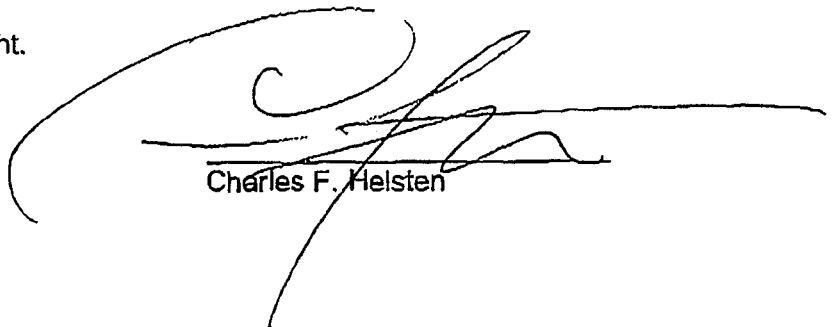


AFFIDAVIT OF CHARLES HELSTEN

I, Charles F. Helsten, having been sworn, hereby states the following:

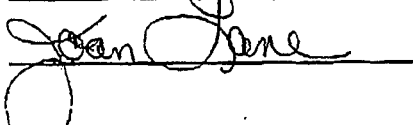
1. I am a licensed attorney in the State of Illinois. I was retained to provide legal representation to the County staff during the local siting proceeding on the application for site expansion approval filed by Waste Management of Illinois, Inc. (WMII). I currently serve as co-counsel for the County in this appeal before the Pollution Control Board.
2. As part of my representation of the County staff, I provided legal advice and representation regarding the preparation of the staff's summary and report on the application. That summary and report was filed, in the public record with the County Clerk, on January 6, 2003.
3. During my representation of the County staff, while the application was pending before the County Board (August 16, 2002 to January 31, 2003), I had no substantive contact with the County Board or the Regional Planning Commission (RPC) regarding the application, nor did I provide legal representation to either entity.
4. In January 2003, I received a voice mail message from Mr. Moran, counsel for WMII. Mr. Moran's message made only a general statement that the subject of his inquiry was certain of the special conditions being recommended by County staff in the summary and report which had been filed for the record on January 6, 2003.
5. I returned Mr. Moran's call, but did not speak to him. I left a voice mail message indicating that notwithstanding the fact I only represented County staff on this matter and nor the Regional Planning Commission or the County Board, nonetheless, I did not feel it was appropriate to discuss this matter with him.
6. I had no substantive conversations with Mr. Moran at any time while WMII's application was pending.

Further affiant sayeth naught.



Charles F. Helsten

Sworn to before me this 29 day of April, 2003.



"OFFICIAL SEAL"
 JOAN LANE
 Notary Public, State Of Illinois
 My Commission Expires 4/23/2005

EXHIBIT
 C