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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD JAN - 9 2004

STATE OF ILLINOIS
POLLUTION CONTROL BOARD

BYRON SANDBERG,)
)
Petitioner,)
)
vs.)
)
CITY OF KANKAKEE, ILLINOIS, THE)
CITY OF KANKAKEE, ILLINOIS CITY)
COUNCIL, TOWN AND COUNTRY)
UTILITIES, INC., and KANKAKEE)
REGIONAL LANDFILL, LLC.,)
)
Respondents)

Case No. PCB 04-33

WASTE MANAGEMENT OF ILLINOIS,)
INC.,)
Petitioner,)
)
vs.)
)
THE CITY OF KANKAKEE, ILLINOIS)
CITY COUNCIL, TOWN AND COUNTRY)
UTILITIES, INC. and KANKAKEE)
REGIONAL LANDFILL, LLC.,)
)
Respondents)

Case No. PCB 04-34

COUNTY OF KANKAKEE, ILLINOIS)
And EDWARD D. SMITH, KANKAKEE)
COUNTY STATE'S ATTORNEY,)
)
Petitioners,)
)
vs.)
)

CITY OF KANKAKEE, ILLINOIS, THE)
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COUNCIL, TOWN AND COUNTRY)
UTILITIES, INC., and KANKAKEE)
REGIONAL LANDFILL, LLC.,)
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Case No. PCB 04-35

NOTICE OF FILING

To: See Attached Service List

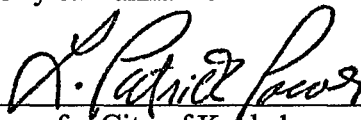
PLEASE TAKE NOTICE that on January 8, 2004 there caused to be filed via Federal Express-Overnight Delivery with the Illinois Pollution Control Board an original and 9 copies of the following document, a copy of which is attached hereto:

**BRIEF OF THE CITY OF KANKAKEE, ILLINOIS IN
RESPONSE TO THE BRIEFS OF THE COUNTY OF KANKAKEE AND
WASTE MANAGEMENT OF ILLINIOS, INC. OPPOSING THE DECISION
OF THE CITY OF KANKAKEE GRANTING SITE LOCATION APPROVAL FOR THE
KANKAKEE REGIONAL LANDFILL**

Respectfully submitted,

The City of Kankakee

By:



Attorney for City of Kankakee

Prepared by:
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Corporate Counsel
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AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on January 8, 2004, a copy of the foregoing **City of Kankakee's Response Brief** was served upon:

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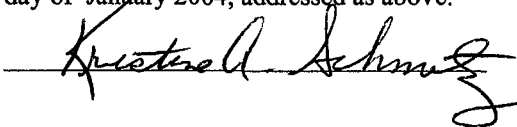
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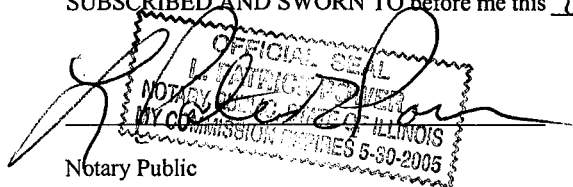
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By depositing a copy thereof, enclosed in an envelope in the United States Mail at Kankakee, Illinois, proper postage prepaid, before the hour of 6:00 p.m., on 8th day of January 2004, addressed as above.



SUBSCRIBED AND SWORN TO before me this 8th day of January 2004.


Notary Public

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WASTE MANAGEMENT OF ILLINIOS, INC. OPPOSING THE DECISION
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FOR THE KANKAKEE REGIONAL LANDFILL**

Respondent, CITY OF KANKAKEE, Illinois, a municipal corporation, (hereinafter, City) by its attorneys, Christopher Bohlen, Kenneth Leshen and L. Patrick Power, submits the following as and for its response to the brief filed by the County of Kankakee (hereinafter, County) and Waste Management of Illinois, Inc. opposing the decision of the City granting site location approval for the Kankakee Regional Landfill on August 18, 2003.

On December 23, 2003, Petitioners, County, and Edward D. Smith as Kankakee County State's Attorney, filed a brief in the above captioned matter seeking a reversal of the August 18, 2003 decision granting site location approval. Waste Management of Illinois, Inc., adopted the brief of the County and all of the arguments and analyses contained therein as its own. Since the briefs of the two parties are identical, this reply brief will make reference to the brief filed by the County and any reference made thereto should be considered as relating to the brief of Waste Management of Illinois, Inc. as well.

I. The County argues in its brief in paragraph I. that the City did not have jurisdiction to hold a landfill siting hearing. It sets forth specific arguments in support of its opposition to the City's jurisdiction to hear the application. The City adopts and incorporates by reference the reply brief filed by Town & County Utilities, Inc. and Kankakee Regional Landfill, L.L.C., by and through its attorney, George Mueller, and the

arguments and analyses contained therein, for its own, as well as all of the arguments and analyses therein.

II. The County argues in its brief that the City Council decision that the Applicant met the Section 39.2(A) criteria, is against the manifest weight of the evidence. The brief specifically argues that the City Council's findings that the proposed landfill met Criterion ii is against the manifest weight of the evidence and that the City Council's finding that the proposed landfill met Criterion viii is against the manifest weight of the evidence. The County further argues that there is no evidence that an independent entity prepared the proper value protection program contained within the application or that the County approved it. Further, the County argues that there is no evidence that any environmental damage fund or insurance was accepted, or even offered to the County, for approval, nor was a domestic water well protection program submitted to be approved by the County.

In response to these arguments, the City adopts and incorporates by reference the reply brief filed by Town & County Utilities, Inc. and Kankakee Regional Landfill, L.L.C., by and through its attorney, George Mueller, and the arguments and analyses contained therein, for its own.

III. The County argues that the City Council's proceedings conducted as part of the site approval procedure was fundamentally unfair. The County's attorneys weave a tangled web of character assassination, innuendo, paranoia and half truths in their continuing two year quest to convince this Board of the existence of an unholy cabal consisting of the City and Town & Country plotting to cheat the County out of its right to a fair and open hearing. The County's distortion of the facts poisons the roots of its

position. The County and its attorneys avert their gaze from the fact that this Board in PCB case # 03-31, 03-33, and 03-35 has already determined that the earlier contacts between the City and the applicant were permissible and did not contravene the tenets of fundamental fairness and due process.

The County attacks Corporation Counsel Christopher W. Bohlen, asking this Board to infer improper conduct based on his claims of privilege and his innocuous and limited contacts with Ronald Yarborough, Tom Vollini and Hearing Officer Robert Boyd. The evidence, in fact, establishes the following:

- a. The City, a home rule unit, filed a lawsuit against the County to enjoin the illegal expenditure of its solid waste funds;
- b. The City, a home rule unit, filed a lawsuit against the County seeking a declaration that the County's solid waste plan is an illegal and unconstitutional infringement upon the City's home rule powers.
- c. The City never sought to bar the County from participation at the City's siting hearing. (Bohlen Deposition of 12/1/03, hereinafter, Bohlen Dep., pgs, 11-12).
- d. Richard Simms, Superintendent of the Kankakee Municipal Utility obtained a list of consulting experts to help him in providing assistance to the City Council. He obtained the list from the Illinois Environmental Protection Agency and others and reviewed the list with Bohlen. (Bohlen Dep., p.14)
- e. Bohlen and the City Council had no knowledge that Volini had ever spoken with Yarborough regarding this potential assignment or that

Yarborough had worked on a project with Vollini nearly two decades prior. (Bohlen's Dep.pgs.15-16 and Yarborough's Dep. pgs. 9-15).

- f. Yarborough billed the City for his consulting and did not bill Volini for his work. (Yarborough Dep. p.16.)
- g. In the City Council meeting of February, 2003, the Council went into executive session to discuss litigation. Corporation Counsel Bohlen refused to testify at his deposition regarding the substance of that meeting, being constrained from doing so by the mandates of the attorney- client privilege and by the mandates of 5 ILCS 120/2 (c) (21) which provides that the minutes of executive sessions are not public record and therefore not disclosable under the Open Meetings Act. (Bohlen Dep., p. 6.) That the County's attorneys seek to draw negative inferences from the assertion of these privileges is reprehensible.
- h. Hearing Office Robert Boyd prepared proposed findings of fact based upon what he heard at the hearing, his review of the transcripts, his notes and his review of the proposed findings of facts by all parties to this siting hearing. He asked for and received the findings of fact prepared in connection with the prior hearings, made the changes he felt appropriate based on what he heard and sent his proposed findings back to the City. (Boyd Deposition of November 14, 2003, hereinafter, Boyd Dep. pgs 20-21 & 35. and Bohlen's dep., pgs. 19-20). Bohlen drafted the additional condition recommended by

Yarborough concerning grouting, a condition not present in the original application of Town & Country. (Bohlen Dep., p. 21). Once again, contrary to the County's Machiavellian view of these proceedings, the facts are simpler and less tangled. All of the parties submitted proposed facts. The hearing officer asked for a template to assist in crafting his document and reviewed all of the proposed findings from whatever source prior to making his recommended findings.

- i. Corporation Counsel Bohlen further acknowledged that he may have drafted the paragraph of the proposed findings relating to the attempt of Kankakee County to deny the City of Kankakee the ability to site a solid waste facility in the City of Kankakee. (Bohlen Dep.p.22.) It is instructive to note how the County through its attorney distorts this testimony in its brief. The County distorts Bohlen's testimony by stating in its brief that Bohlen admitted that he may have drafted other sections of the report, including the references to the improper infringement of the home rule authority of the City of Kankakee. In fact Bohlen's deposition contains no such testimony. Bohlen is absolutely clear that he drafted the portion of the proposed findings relating to the grouting requirement to be imposed on Town & Country and that he may have drafted the portion concerning the County's illegal activities, although he had no specific recollection of having done so. The distortion of the County is a flat out lie.

j. Bohlen testified that his practice was to delete e-mail communications on a daily basis. He further testified that his computer had been infected by a virus and ultimately needed to be replaced. He further testified that he had searched computers both at his private office and at City Hall and that “. . . there is no reference to the Boyd documents on any computer I have. There is also no record of any proposed findings of the landfill on any documents I have, not even the 2002 landfill proposed findings that I drafted on that same computer. Those documents no longer, they may exist somewhere, but they don’t exist anywhere I can find them.” (Bohlen Dep., p.43.) The County seeks to have this Board draw the inference that these documents were destroyed to conceal wrongdoing. Again, the reality is much simpler. Pursuant to policy and practice Bohlen deleted e-mails on a daily basis. He suffered the inconvenience of a crashed computer system. The County through its attorneys wants to persuade this Board that because documents are missing the City has violated the standard of fundamental fairness. As stated by Sigmund Freud, sometimes a cigar is just a cigar.

IV. In addition thereto, the City of Kankakee states and argues the following, to wit:

1. All of the contacts referred to by Kankakee County in paragraph III. A. 1. of its Brief, refer to, “pre-filing contacts”. Such contacts are not prohibited by the procedural requirements of Section 39.2. The Pollution Control Board has already

decided that these contacts did not violate fundamental fairness in its decision in cases no. PCB 03-31, 03-33 and 03-35.

2. The County's argument kicks up a lot of dust in an effort to obfuscate the issues in this case. However, the County makes no claim that hearing Officer Boyd was unfair in his rulings or that he did not allow objectors to fully and fairly present their case. Nonetheless, despite the dearth of evidence, the County plunges blindly forward and seeks to have this Board conclude that Boyd was not only tainted but that his taint somehow reached into the City Council, the ultimate fact finder and decision maker in this case. There is no evidence to support that conclusion. There is no evidence to support the conclusion that any statements made in the executive session of the City Council in February, 2003 in anyway related to the yet to be filed siting application or in anyway belittled the reputation of the objectors or enhanced the reputation of the applicant's witnesses.

Public officials should be considered to act without bias. E&E Hauling, Inc. v. PCB, 107 Ill.2d 33, 42 (1985). There is no inherent bias shown by the City's use of Yarborough as an investigatory consultant. (Id at 43.) Where a municipal board "operates in an adjudicatory capacity, bias or prejudice may only be shown if a disinterested observer might conclude that the administrative body, or its members, had in some measures adjudged the facts as well as the law of the case in advance of hearing it." Concerned Adjoining Owners v. PCB, 288 Ill. App. 3d 565, 573 (1997). The facts of the instant case do not reveal that the Council had made any prejudgments about the criteria for siting approval. On the contrary, the record shows that the Council and Richard Simms, one of its advisors, asked relevant questions of all the witnesses about

each of the criteria. The questions did not demonstrate any bias for or against the approval. The objectors have not produced any evidence to establish that the Council was biased. Rather, through the use of smoke and mirrors, the County takes innocent actions and innocuous communications and continues to weave its web.

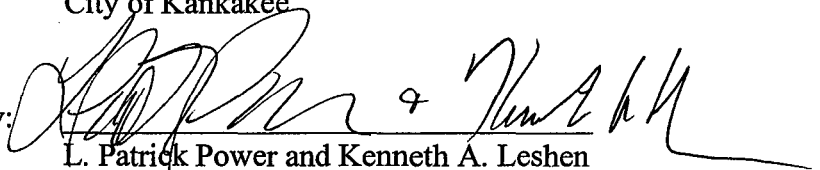
Wherefore, the City of Kankakee prays that this Board ratify the decision of the City Council granting site approval to the applicant, Town & Country.

Dated: January 8, 2004.

Respectfully submitted,

City of Kankakee

By:


L. Patrick Power and Kenneth A. Leshen
It's Attorneys

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