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AUG 23 2004

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Janis Rosauer, and
Batavia Illinois Residents Opposed
To Siting of Waste Transfer Station,

v.

City of Batavia and Onyx Waste
Services Midwest, Inc.,

PCB No.: 05-1

(Pollution Control Facility
Siting Appeal)

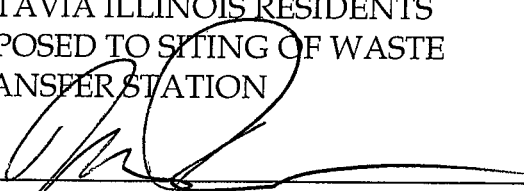
NOTICE OF FILING

TO: John S. Noble, Esq.
Weiler & Noble, P.C.
425 Williamsburg Avenue
Geneva, Illinois 60134

Gerald P. Callaghan
Freeborn & Peters
311 South Wacker Drive, Suite 3000
Chicago, Illinois 60606-6677

Please take notice that on this 23rd day of August, 2004, we have filed with the Illinois Pollution Control Board, **PETITIONERS' APPEAL OF SITING APPROVAL**, the original and nine (9) copies of which are hereby served upon you.

Respectfully submitted,

Matthew M. Klein, Esq. 322 West Burlington LaGrange, Illinois 60525 Ph: (708) 354-8840 Fax: (708) 354-8850	JANIS ROSAUER and BATAVIA ILLINOIS RESIDENTS OPPOSED TO SITING OF WASTE TRANSFER STATION By:  One of Their Attorneys
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PROOF OF SERVICE

I, Matthew M. Klein, an attorney, certify that I served the original and nine (9) copies of the attached **PETITIONERS' APPEAL OF SITING APPROVAL** by First Class Mail to the parties mentioned above on this 23rd day of August, 2004.

Matthew M. Klein

Matthew M. Klein, Esq.
322 West Burlington
LaGrange, Illinois 60525
Ph: (708) 354-8840
Fax: (708) 354-8850

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)	

APPEAL OF SITING APPROVAL

NOW COME the Petitioners, JANIS ROSAUER ("Rosauer") and BATAVIA ILLINOIS RESIDENTS OPPOSED TO SITING OF WASTE TRANSFER STATION ("Batavia Residents") by their attorney, and hereby appeal the decision of the City of Batavia, Illinois granting site location approval under Section 39.2 of the Illinois Environmental Protection Act to Onyx Waste Services Midwest, Inc. ("Onyx") for a solid waste transfer station.

I. JURISDICTION OF THE BOARD

The City of Batavia granted site location approval to Onyx for its solid waste transfer station on June 7, 2004. This appeal was originally filed before this Board pursuant to Section 40.1 of the Illinois Environmental Protection Act on July 12, 2004, within thirty-five (35) days after the date on which the local siting authority approved siting. On July 22, 2004, the Pollution Control Board granted the Petitioners until August 23, 2004 to file an amendment to the appeal.

II. STATUS OF PETITIONERS

A. **Rosauer.** Rosauer is an individual residing within the City of Batavia. Rosauer resides at 1301 Violet Lane, Batavia, approximately one block west of Kirk Road, within the Woodland Hills area of Batavia and within the service area of the proposed transfer station. Rosauer participated in the public hearing conducted by the City of Batavia by submitting a written comment after the close of the public hearing within the time period allowed for submission of written comments.

B. **Batavia Residents.** Batavia Residents is an unincorporated citizens' group of at least 200 residents, various members of which participated in the siting proceeding. At least sixty (60) members of Batavia Residents submitted written

comments opposed to the siting approval after the close of the public hearing but within the time period allowed for the submission of written comments. Eleven (11) members of Batavia Residents appeared personally at the public hearings and offered questions and/or comments. Each of the members of Batavia Residents is a resident of the City of Batavia within the service area for the proposed transfer station. At least one hundred (100) members of Batavia Residents reside in the Woodland Hills area of the City of Batavia. Woodland Hills Road is a north-south running residential street located approximately one (1) block west of Kirk Road, between Wilson Street and Giese Road in the City of Batavia. Many of the other members of Batavia Residents reside in the Breton Manor, Cherry Park, and Johnson's Woods subdivisions in Batavia, within four (4) blocks west of Kirk Road. Kirk Road is a major north-south arterial that runs in part within City of Batavia limits and will provide the main access road for the proposed transfer station. Members of Batavia Residents regularly use Kirk Road as a primary means of access to or from Wilson Street or Pine Street. Kirk Road has a full interchange with the Ronald Reagan Memorial Tollway (I-88) south of the City of Batavia limits and provides access to major east-west arterials north of the City of Batavia, including regional shopping services. Between Fabyan Parkway and the I-88 interchange, Kirk Road has a documented history of serious automobile accidents and high traffic volumes. The traffic conditions on Kirk Road and other City of Batavia streets will be exacerbated by the truck traffic proposed to serve the transfer station. Residing just west of the main access road for the transfer station, members of Batavia Residents will also be subjected to the visual blight of litter being released from the garbage and transfer trucks serving the transfer station, and regularly be subjected to the odors, noise and leaking liquid from the garbage trucks serving the proposed transfer facility as well as the same impacts from the facility itself. As such, Batavia Residents is a citizens' group that is so located as to be affected by the proposed facility.

III. BASES FOR APPEAL

A. Fundamental Fairness. The siting approval process is not fundamentally fair. Prior to entertaining the siting approval application, the City of Batavia took certain steps which created a conflict of interest and rendered the City one-sided and biased in favor of the siting application. Beginning in approximately 1999, the City initiated the idea and began to explore the possibility of creating and siting its own waste transfer station. In that examination process, the City entertained proposals from independent waste companies to create and operate a transfer station for the City.

On March 25, 2003, the City of Batavia entered into a contract with Onyx pursuant to which Batavia would receive approximately Five Hundred Thousand Dollars (\$500,000.00) annually if the Onyx siting application were approved and the transfer station constructed. The prospect of a multiple six-figure income from the transfer station impermissibly altered the objectivity of the Batavia City Council members, who act in a quasi-judicial capacity in reviewing siting requests. The host agreement created an impermissible pecuniary interest in the City of Batavia, which impermissibly impaired its objectivity. The City of Batavia Pollution Control Facilities Siting Ordinance requires that a Host Agreement be executed prior to any application for site location approval, thereby assuring the financial incentive to the City be

guaranteed before an application is submitted. Such Host Agreements are not required by any provision of Illinois statute or administrative rule.

The lack of objectivity on the part of the City of Batavia was manifested throughout the siting application process, during which time the City took little or no additional steps to notify affected and/or interested members of the public of the pendency of the public hearings and their rights to comment and participate in the siting approval process. On some occasions, City Staff provided inaccurate information regarding public participation which impaired the public's access to information and ability to meaningfully participate in the siting process. For example, one of Batavia Residents' members, Yvonne Dinwiddie (who is also a member of the Batavia Citizens' Advisory Board, which was appointed by the City Council to evaluate siting a transfer station within the City), was told by Assistant City Administrator Randall Recklaus that she would need to engage an attorney to participate in the public hearing, that an appearance for her would need to be filed by March 31, 2004, and any written documents she might rely upon at the hearing would also need to be filed with the City. Ms. Dinwiddie interpreted that conversation as meaning that she would have to have an attorney both file an appearance for her and submit all of her written documentation by March 31, 2004. When Ms. Dinwiddie told Mr. Recklaus that she would not be able to meet the March 31 deadline, he suggested that she submit written questions to the City Attorney, Mr. John Noble, who could then ask those questions during the public hearing. Ms. Dinwiddie did in fact submit a list of questions to Attorney Noble, most of which went unasked by him at the hearing.

The hearing date of April 16, 2004 ultimately was reserved for public comment without advising all interested residents that no participation or responses to residents' questions by Onyx would occur. Members of Batavia Residents, including Yvonne Dinwiddie, attended the April 16, 2004 hearing with the expectation of receiving answers to their questions, which answers were not provided.

The lack of objectivity by the City of Batavia was further manifested by the City's prohibiting its Staff from communicating with City residents, including members of Batavia Residents, on any substantive issue regarding the siting application. See, for example, the April 27, 2004 letter from Assistant City Administrator Recklaus to Mr. and Ms. Voreis, a copy of which is attached as Exhibit A.

The notices required under Section 39.2 of the Act during the siting approval process are inadequate to apprise members of the public regarding the pending siting process and their rights of participation in same. Specifically, under Section 39.2, the only notices required for the public are two (2) legal publications in a newspaper of general circulation published in the county in which the site is located. These notices are insufficient to comport with procedural due process and fundamental fairness.

B. Failure to Satisfy Criteria for Siting Approval. The application of Onyx was substantively deficient in that the record will demonstrate that Onyx failed to demonstrate compliance with the following site location criteria under Section 39.2 of the Act, and the City's finding of compliance was against the manifest weight of the

evidence. Specifically:

1. The Onyx facility is not necessary to accommodate the waste needs of the area it is intended to serve. (Siting Criterion (i)).
2. The Onyx facility is not so designed, located and proposed to be operated that the public health, safety and welfare will be protected. (Siting Criterion (ii)).
3. The Onyx facility is not 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. (Siting Criterion (iii)).
4. The traffic patterns to and from the Onyx facility are not so designed as to minimize the impact on existing traffic flow. (Siting Criterion (vi)).

C. Compliance With the Notice Requirements Under Section 39.2. At this time Petitioners have not identified specific failures of Onyx to comply with the notice requirements under Section 39.2. However, as such notice requirements are jurisdictional, Petitioners will continue to investigate these issues prior to the hearing in this cause.

RELIEF REQUESTED

Petitioners respectfully request that the Pollution Control Board find that this Petition is not duplicative or frivolous, that the Petitioners are located so as to be affected by the proposed facility and set this matter for hearing in accordance with Section 40.1 of the Act and other applicable provisions of Illinois Compiled Statutes as well as this Board's procedural rules. After such hearing, the Petitioners respectfully request that this Board invalidate the siting approval for the Onyx facility granted by the City of Batavia and grant such other relief as may be appropriate.

Respectfully submitted,

JANIS ROSAUER and BATAVIA ILLINOIS
RESIDENTS OPPOSED TO SITING OF
WASTE TRANSFER STATION

By: 

Their Attorney

Date: 8/23/04

Matthew M. Klein, Esq.
322 West Burlington
LaGrange, Illinois 60525
Ph: (708) 354-8840
Fax: (708) 354-8850

JANIS ROSAUER:

Janis Rosauer

Date:

8/20/04

CITY OF BATAVIA

100 North Island Avenue, Batavia, Illinois 60510
Phone: (630) 879-1424 Fax: (630) 879-0710

JEFFERY D. SCHIELKE
Mayor

M. HANNAH VOLK
City Clerk



WILLIAM R. McGRATH
City Administrator

RANDALL R. RECKLAUS
Assistant City Administrator

JOHN S. NOBLE
City Attorney

April 27, 2004

Mr. and Ms. Voreis
628 Sylvan Place
Batavia, IL 60510

RECEIVED
CITY OF BATAVIA
DATE April 27, 2004

Dear Mr. and Ms. Voreis,

I am writing in response to your April 21, 2004 letter regarding the Proposed Onyx Waste Transfer Station. Unfortunately, the City Attorney has informed me that I cannot respond directly to the questions you have raised at this time. Until the City Council approves or denies the siting application, and until the subsequent appeal period has passed, myself and other members of the City's Staff are unable to engage in one-on-one discussions on the application and the project in general. The City is legally required by statute to limit discussion and questions and answers to the public hearing process that occurred during the week of April 12th and before. As was stated at each of the Public Hearings, and in the Public Input Process Guidelines made public prior to the hearings, questions had to be made in the presence of the entire Pollution Facilities Committee, all of the interested parties, and at the designated time and place of the public hearing as published in the local newspapers. Once the City Council has approved or denied the siting application, and the appeal period has passed, City staff will be able to engage in discussions with individual members of the public and the press as we have for the past four years. I anticipate at this time, the appeal period will pass sometime in July of this year. I would be happy to discuss each of your questions as well as any other issues with you at that time.

However, I will make your letter and this response part of the public record of the siting application proceedings. I appreciate and understand that you are concerned about the rigidity of this process. Indeed, this process is very different than the City's normal manner of doing business. However, we are limited to the processes and procedures allowable under law.

Thank you for your interest in this project.

Sincerely,

Randall R. Recklaus
Assistant City Administrator

CC: John Noble

