

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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SEP 02 2004

STATE OF ILLINOIS
Pollution Control Board

BATAVIA, ILLINOIS RESIDENTS)
OPPOSED TO SITING OF WASTE)
TRANSFER STATION)

Petitioner,)

v.)

PCB 05-1
(Third-Party Pollution Control
Siting Appeal)

APPLICATION OF ONYX WASTE)
SERVICES MIDWEST, INC. FOR)
LOCAL SITING APPROVAL FOR)
A SOLID WASTE TRANSFER)
STATION)

and)

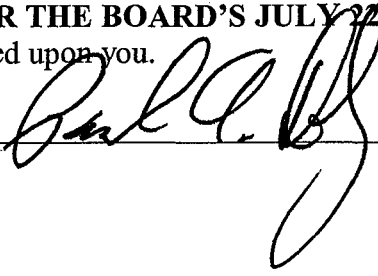
CITY OF BATAVIA, ILLINOIS)

Respondents.)

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on September 2, 2004, we filed with the Office of the Clerk of the Pollution Control Board **ONYX WASTE SERVICES MIDWEST, INC.'S AMENDED MOTION FOR SUMMARY JUDGMENT; OR IN THE ALTERNATIVE ITS MOTION TO RECONSIDER THE BOARD'S JULY 22, 2004 ORDER**, a copy of which is attached and hereby served upon you.

By: 

Gerald P. Callaghan
Paul A. Duffy
Freeborn & Peters LLP
311 South Wacker Drive, Suite 3000
Chicago, IL 60606
312-360-6000

THIS FILING IS SUBMITTED ON RECYCLED PAPER

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SITING APPROVAL FOR A SOLID)
WASTE TRANSFER STATION)

and)

CITY OF BATAVIA, ILLINOIS)

Respondents.)

**ONYX WASTE SERVICES MIDWEST, INC.'S
AMENDED MOTION FOR SUMMARY JUDGMENT; OR IN THE ALTERNATIVE
ITS MOTION TO RECONSIDER THE BOARD'S JULY 22, 2004 ORDER**

Respondent Onyx Waste Services Midwest, Inc. ("Onyx"), by its undersigned attorneys and pursuant to 35 Ill. Adm. Code § 101.516, hereby amends its August 23, 2004 Motion For Summary Judgment Or In The Alternative Its Motion To Reconsider The Board's July 22, 2004 Order to the Illinois Pollution Control Board ("Board"), and in support thereof states as follows:

Onyx initially filed its Motion on the same day that two non-participants in the public hearing filed an "Appeal of Siting Approval" ("Revised Petition") in this action. The Board lacked subject-matter jurisdiction over the original Petition in this action, and for the same reasons lacks jurisdiction over the Revised Petition. There is no genuine issue as to the dispositive fact that neither Petitioner participated in the public hearing in this matter, and Illinois law bars them from challenging the City's decision. The Board has no legal authority to rule on the merits of the original or the Revised Petition, and Onyx is entitled to judgment as a matter of law as to the entire Revised Petition.

In the alternative, Onyx moves the Board pursuant to 35 Ill. Adm. Code §§ 101.520 and 101.904, to reconsider and modify its July 22, 2004 Order (“Order”) to strike the extension it purports to give to the Board’s 120-day statutory decision deadline, to strike the permission it purports to give an individual to file a petition to review Batavia’s local siting approval beyond the 35-day statutory deadline, and for other relief as set forth herein.

INTRODUCTION AND BACKGROUND

1. Onyx filed a request (the “Application”) with the City of Batavia (“City”) on December 19, 2003 for local siting approval to construct a solid waste transfer station at 766 Hunter Drive, Batavia, Illinois, in accordance with the Illinois Environmental Protection Act (“Act”), 415 ILCS 5/39.2 and the City’s Siting Ordinance for Pollution Control Facilities, Ordinance No. 02-10 (the “Ordinance”). *See* Recklaus Affidavit (“Aff.,” Tab A hereto) at ¶ 3.

2. The City established a Pollution Control Facility Committee (“PCF Committee”) comprised of seven City Council members, which held a public hearing (“Public Hearing”) from April 12 through 16, 2004 regarding the Application. *Id.* at ¶¶ 3-4.

3. After the public hearing and subsequent public comment period required under the Act and the Ordinance, the PCF Committee recommended approval of the Request. *Id.* at ¶ 6. The City Council followed the PCF Committee’s recommendations and approved the Application on June 7, 2004. *Id.* The PCF Committee and City Council each specifically concluded that Onyx and the PCF Committee complied with all applicable requirements of both the Act and the Ordinance. *Id.*

4. No “unincorporated citizens’ group” or other entity calling itself “Batavia Illinois Residents Opposed To Siting Of Waste Transfer Station” participated in the City’s Public Hearing on the Application. *Id.* at ¶¶ 8, 10. Janis Rosauer likewise did not participate in the Public Hearing. *Id.* at ¶¶ 9-10.

5. The Petition offered no valid basis for the Board to exercise subject matter jurisdiction. The Board nevertheless issued a July 22, 2004 Order in which it purported to (a) allow two non-participants in the Public Hearing (“Batavia Illinois Residents Opposed To Siting Of Waste Transfer Station” and Janis Rosauer) leave to file a petition challenging siting approval; and (b) allow them to file the petition after the statutory deadline. Petitioners filed the Amended Petition on August 23, 2004.

ARGUMENT

ONYX IS ENTITLED TO SUMMARY JUDGMENT BECAUSE THE BOARD LACKS SUBJECT-MATTER JURISDICTION OVER THE REVISED PETITION

6. The Petitioners’ failure to participate in the April 12-16, 2004 Public Hearing bars the Board from exercising subject-matter jurisdiction over the Amended Petition under 415 ILCS 5/40.1, and Onyx is entitled to summary judgment.

Legal Standard

7. A party may move the Board for summary judgment at any time after the opposing party has appeared (or after the expiration of time within which any party was required to appear) for all or any part of the relief sought. 35 Ill. Adm. Code § 101.516. The Board must enter summary judgment if the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. *Id.*; *see also Dowd v. Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party, and grant summary judgment when the movant’s right to it is free and clear from doubt. Additionally, a party opposing a motion for summary judgment may not rest on its pleadings, but must present a factual basis which would arguably

entitle it to judgment. *Gauthier v. Westfall*, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994); *see also United Disposal of Bradley, Inc. v. IEPA*, PCB No. 03-235, 2004 Ill. ENV LEXIS 337 (Jun. 17, 2004).

8. The Board is a creation of statute and as such any power or authority it claims must be expressly stated in the Act. *Granite City Steel v. IPCB*, 155 Ill.2d 149, 613 N.E.2d 719 (1993); *Shepard et al v. IPCB*, 272 Ill.App.3d 764, 651 N.E.2d 555 (2nd Dist. 1995). The Board has no greater powers than those the legislature confers upon it. *Village of Lombard v. Pollution Control Board*, 66 Ill.2d 503, 506, 363 N.E.2d 814 (1977). The Board lacks subject-matter jurisdiction to act outside of the express grant of authority. *Ogle County Board v. Pollution Control Bd.*, 272 Ill. App. 3d 184, 649 N.E.2d 545 (2d Dist. 1995); *Business and Professional People for the Public Interest v. Illinois Commerce Comm'n.*, 136 Ill. 2d 192, 243, 555 N.E.2d 693 (1989).

9. Section 40.1(b) only allows a third party to challenge a local siting decisions if it “participated in the public hearing conducted by the ... governing body...” 415 ILCS 5/40.1(b). The Act does not confer subject-matter jurisdiction for the Board to evaluate a petition from a anyone who failed to participate in the public hearing. 415 ILCS 5/40.1(b).

Neither Petitioner Participated In The Public Hearing

10. Neither Petitioner participated in any phase the Public Hearing. *See* Aff. at ¶¶ 8, 10. In particular, neither Petitioner filed an appearance for the hearing; questioned or cross-examined any witness; or offered any comment during the Public Hearing. *Id.* There was also no attorney or other entity representing either Petitioner in any aspect of the Public Hearing. *Id.* The Public Hearing transcripts confirm that neither the Petitioners, nor any entity representing them, participated in any aspect of the Public Hearing. *Id.* at ¶ 10.

The Revised Petition Establishes That Janis Rosauer Lacks Standing

11. The original Petition in this matter did not even mention Ms. Rosauer's name much less identify her as a petitioner, and thus the Board erred when it granted leave for Ms. Rosauer to file an Amended Petition.

12. The Revised Petition points to no information in the public record for this matter suggesting that Ms. Rosauer participated in the Public Hearing held from April 12 through April 16, 2004.

13. To the contrary, the Revised Petition clearly establishes that Janis Rosauer failed to participate in the Public Hearing because her only involvement was to "submit[] a written comment **after the close of the public hearing,**" *see* Revised Application at II.A (emphasis added). Section 39.2 makes it clear that such written comments are not part of the public hearing process, because it authorizes their submittal for up to "30 days **after the date of the last public hearing,**" 415 ILCS 5/39.2(c)(emphasis added). The clear language of the Act demonstrates that Ms. Rosauer did not participate in the Public Hearing.

14. Submitting a written comment after the close of a public hearing does not confer standing to challenge a local siting decision. *See* 415 ILCS 5/39.2(c), 5/40.1(b). The only right that comes with submitting such comments is that the governing body must consider them if they are timely. 415 ILCS 5/39.2(c). The Revised Petition admits that Ms. Rosauer did not participate in the Public Hearing; at most she submitted a comment after the Public Hearing ended, and as a matter of law she has failed to allege facts establishing a right to challenge the City's siting approval.

15. The Illinois Legislature clearly intended to have local siting decisions proceed along a strict but well-defined time schedule. The Act thus includes a detailed series of clear, discrete time limitations for every major step in the local siting approval process. For instance

after an application is filed the public hearing may not begin for 90 days; it must be completed within 120 days; and a decision rendered within 180 days. 415 ILCS 5/39.2. The time for any entity to act in order to preserve their right to challenge the siting decision ended on April 16, 2004, the last day of the Public Hearing; public comments Ms. Rosauer submitted after the Public Hearing cannot create standing to challenge the City's decision.

**The Revised Petition Lacks Any Factual Basis To Establish Standing
For The Batavia Citizens' Group**

16. The Revised Petition likewise lacks reference to any valid support in the public record to establish that an entity called "Batavia Illinois Residents Opposed To Siting of Waste Transfer Station" (the "Group") participated in the Public Hearing.

17. The Petitioners seek to make an end-run around this defect by alleging for the first time in the Revised Petition that certain of its members participated in the Public Hearing. *See* Revised Petition at II.B. The attempt fails because the Petitioners have pointed to nothing suggesting that any Group member represented or acted on behalf of the Group at the Public Hearing. In fact, there is nothing in the Amended Petition demonstrating that the Group even existed at the time of the Public Hearing. The Amended Petition's attempt to claim that the Group can challenge the decision has no factual support in the record for this proceeding. *See* Aff. at ¶¶ 8-10.

18. The standing of any person to appeal an administrative review proceeding such as local siting approval must appear as a factual matter in the record made before the administrative body. *See, e.g., Allender v. Chicago Zoning Bd. of Appeals*, 63 Ill. App. 3d 204, 210, 381 N.E.2d 4, 8 (1st Dist. 1978). The Act precludes the introduction before the Board of any "new or additional evidence in support of or in opposition to" the governing body's decision, 415 ILCS 5/40.1(a), and directs the Board to evaluate a petition "based exclusively on the record" before

the City. 415 ILCS 5/40.1(b). The Amended Petition's allegations about the Group and its members is nothing more than an attempt to boot-strap information completely absent from the record, nearly four months after the Public Hearing closed and nearly two months after the time to challenge the decision ended. *See* Aff. at ¶¶ 8, 10. The Board should thus strike each reference in the Amended Petition to the nature of the Group and its membership.

19. The Petitioners' attempt to claim that the mere presence of a Group member at the Public Hearing somehow confers standing to the entire Group is likewise unsupported in Illinois law and must fail.

The Board Lacks Subject-Matter Jurisdiction Over The Revised Petition

20. There is no genuine issue of the material fact that the Petitioners failed to participate in the Public Hearing. This failure is a complete bar to challenging the City's siting approval under 415 ILCS 5/40.1(b).

21. The Act thus does not grant the Board subject-matter jurisdiction over the Revised Petition.

WHEREFORE, Onyx requests the Board to enter an Order granting Onyx's Motion for Summary Judgment and entering judgment on Onyx's behalf with respect to the entire Amended Petition, and for such other relief as the Board deems to be reasonable and appropriate.

**IN THE ALTERNATIVE, ONYX REQUESTS THE BOARD
TO RECONSIDER ITS JULY 22, 2004 ORDER**

22. In the alternative, Onyx requests that the Board reconsider its July 22, 2004 Order and modify it to (a) strike the Order's extension of the 120-day decision deadline regarding the Amended Petition, (b) strike the Order's references to Janis Rosauer as the "petitioner" in this action, and (c) strike the Order's authorization for Janis Rosauer to file a petition in this action beyond the 35-day statutory deadline.

23. A motion for reconsideration brings to the Board's attention "errors in the [Board's] application of the law," among other things. *Continental Casualty Co. v. Security Ins. Co.*, 665 N.E.2d 374, 377 (1st Dist. 1996); *see also Koroghlyan v. Chicago Title & Trust Co.*, 572 N.E.2d 1154, 1158 (1st Dist. 1991); *Citizens Against Regional Landfill v. County Board of Whiteside County*, PCB 93-156, 1993 Ill. ENV LEXIS 235 (Ill. Pol. Control Bd., March 11, 1993). In ruling on a motion for reconsideration, the Board may correct errors arising from oversight or omission. 35 Ill. Adm. Code § 101.904. The Board must also consider factors including new evidence to conclude that the Board's decision was in error. 35 Ill. Adm. Code § 101.902.

**THE BOARD HAS NO AUTHORITY TO UNILATERALLY EXTEND THE
STATUTORY 120-DAY DECISION DEADLINE**

24. The Board should revise its Order and strike the extension it purports to give to the 120-day deadline it has to decide challenges to the City's siting approval.

25. The Act requires the Board to render any decision on a challenge to local siting approval within 120 days after the petition is filed. 415 ILCS 5/40.1(a),(b). The Act does not grant the Board authority to ignore or unilaterally extend the deadline.

26. The Board's own regulations acknowledge that in accordance with Act Section 40.1, "only the applicant for siting may waive the decision deadline," and that unless the

applicant does so “the Board will issue its decision within 120 days after the proper filing and service of a petition for review.” 35 Ill. Adm. Code § 107.504; *see, e.g. Alliance for a Safe Environment v. Akron Land Corp.*, No. PCB 80-184, 1980 Ill. ENV LEXIS 237 (Oct. 30, 1980)

27. Onyx, the applicant in this matter, has not agreed to waive the Board’s decision deadline and there is no support in the record for an extension of the 120-day deadline.

28. The Board exceeded its statutory authority when it agreed to “restart” a 120-day decision deadline period once an amended petition to review the City’s siting approval is filed.

29. The Board should reconsider its Order and strike the provision purporting to “restart” the 120-day decision period.

**THE BOARD CANNOT ALLOW A BATAVIA RESIDENT
TO FILE A PETITION AFTER THE STATUTORY FILING DEADLINE**

30. The Order’s mistaken identification of “one Batavia resident, Janis Rosauer” as a Petitioner lacks any support in the record, and the Board should strike from the Order both any reference identifying Ms. Rosauer as the petitioner, and the Order’s allowance of time for her to file a petition beyond the 35-day time limit in the Act.

31. The Act requires eligible third-party petitioners to file a challenge to any local siting approval no later than 35 days after a final decision. 415 ILCS 5/40.1(b).

32. One Petitioner clearly identifies itself as “Batavia, Illinois Residents Opposed To Siting Of Waste Transfer Station” in the Petition. While Ms. Rosauer signed the notice of filing, she did not sign the Petition and her name does not appear anywhere in it. There is no support for a conclusion that a person who merely signs a notice of filing for an unincorporated group may be deemed to be a petitioner for purposes of cleaning up defects in a petition.

33. Ms. Rosauer, in her individual capacity, did not file any petition to review the City’s decision within the 35-day time limit. *Aff.* at ¶¶ 9-10.

34. Because Ms. Rosauer did not participate in the Public Hearing held from April 12 through 16, 2004 she is barred from filing a petition at any time, and the Board lacks jurisdiction over any petition Ms. Rosauer files in this matter.

35. Additionally, since Ms. Rosauer did not file a petition within 35 days of the City's June 7, 2004 decision, Section 40.1(b) bars her from filing the Revised Petition on August 23. Section 40.1(b) likewise does not authorize the Board to review a petition filed more than 35 days after the decision, and the Board will therefore lack subject-matter jurisdiction over any petition Ms. Rosauer files in the future.

36. It was therefore futile for the Board to authorize Ms. Rosauer to file a petition to review the City's siting approval, because the Board cannot have subject-matter jurisdiction over it regardless of when it was filed.

37. The Board should reconsider its Order and strike any reference to Ms. Rosauer as the petitioner, and the permission it purports to give Ms. Rosauer to file an untimely petition to review the City's decision.

38. Additionally, there is nothing in the record or the Amended Petition as to the Group's form, membership or even its existence at the time of the Public Hearing. No new or additional evidence in support of or in opposition the City's decision may be considered at point (415 ILCS 5/40.1(a)), and the Board should strike all such allegations about the Group in the Amended Petition.

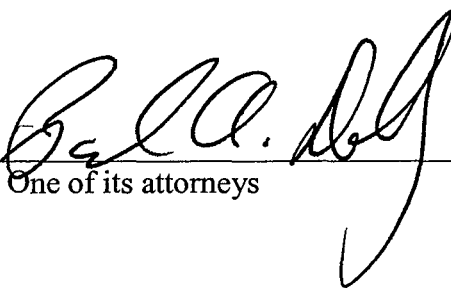
WHEREFORE, Respondent Onyx Waste Services Midwest, Inc. respectfully requests that the Board grant Onyx's Motion For Summary Judgment, and enter judgment in Onyx's favor as to the entire Amended Petition. In the alternative, Respondent respectfully requests the Board to reconsider its July 22, 2004 Order and (a) strike its purported extension of its statutory 120-day decision deadline; (b) strike any reference identifying Janis Rosauer as the Petitioner;

(c) strike the permission it seeks to give Janis Rosauer to file a petition following expiration of the 35-day deadline to challenge local siting decisions, and dismiss the Revised Petition to the extent it refers to Ms. Rosauer as a Petitioner; and (d) for such other relief as the Board deems to be reasonable and appropriate.

Respectfully submitted,

ONYX WASTE SERVICES MIDWEST,
INC.

By:



One of its attorneys

Gerald P. Callaghan
Paul A. Duffy
Freeborn & Peters LLP
311 S. Wacker Drive
Chicago, IL 60611

Date: September 2, 2004

629575

Exhibit A

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

**BATAVIA, ILLINOIS RESIDENTS)
OPPOSED TO SITING OF WASTE)
TRANSFER STATION)**

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and)

CITY OF BATAVIA, ILLINOIS)

Respondents.)

AFFIDAVIT OF RANDY RECKLAUS

1. My name is Randy Recklaus. I am Assistant City Administrator of the City of Batavia ("Batavia" or the "City"). I have personal knowledge of the matters set forth herein.

2. In connection with my position as Assistant City Administrator, I was involved in the City's handling of Onyx Waste Services Midwest, Inc.'s ("Onyx") "Application for Local Siting Approval" ("Application") seeking approval to construct a solid waste transfer station ("Site") in Batavia.

3. Onyx filed its Application on December 19, 2003. Pursuant to Section 6(A) of the City's Siting Ordinance for Pollution Control Facilities, Ordinance No. 02-10, as amended ("Siting Ordinance"), the Mayor of Batavia appointed a Pollution Control Facility Committee

("PCF Committee") to conduct a public hearing (the "Public Hearing") for the Application. The PCF Committee consisted of seven City Council members.

4. The PCF Committee held the Public Hearing regarding the Application from April 12 through April 16, 2004.

5. I attended the entire Public Hearing from beginning to end and on each day from April 12 through April 16, 2004, with the exception of a brief 15- to 20-minute period during which an individual named Greg Popovich was commenting.

6. After the Public Hearing and subsequent public comment period, the PCF Committee recommended approval of the Request. The City Council followed the PCF Committee's recommendations and approved the Application with conditions on June 7, 2004. The PCF Committee and City Council each specifically concluded that Onyx and the PCF Committee complied with all applicable requirements of both the Act and the Siting Ordinance.

7. With the exception of a portion of the remarks of Greg Popovich, I saw and listened to each member of the public who made any statement during the Public Hearing.

8. No individual who participated in the Public Hearing identified him- or herself as a member or representative of an entity called "Batavia, Illinois Residents Opposed To Siting Of Waste Transfer Station."

9. No individual who participated in the Public Hearing identified herself as Janis Rosauer or as a representative of Janis Rosauer.

10. In connection with my preparation of this affidavit, I reviewed the transcript of the Public Hearing. The transcript confirms the fact that no member or representative of "Batavia, Illinois Residents Opposed To Siting Of Waste Transfer Station" participated in the Public Hearing. The transcript also confirms the fact that neither Janis Rosauer nor any person

identifying him- or herself as a representative of Janis Rosauer participated in the Public Hearing.

AFFIANT SAYS NOTHING FURTHER.

By: Randy R. Recklaus
Randy Recklaus,
Assistant City Administrator

Date: 8/13/04

SUBSCRIBED and SWORN to
before me this 13 day of August, 2004.

Jeanette Armbrust
Notary Public



623956

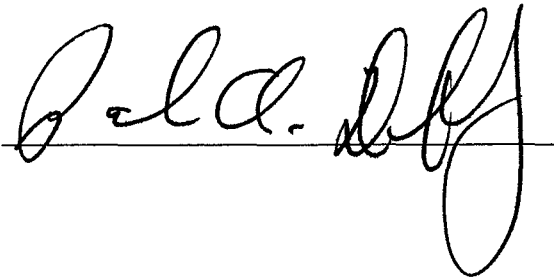
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on September 2, 2004, he caused a copy of Respondent **ONYX WASTE SERVICES MIDWEST, INC.'S AMENDED MOTION FOR SUMMARY JUDGMENT; OR IN THE ALTERNATIVE ITS MOTION TO RECONSIDER THE BOARD'S JULY 22 2004 ORDER** to be delivered by hand delivery to:

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

and by U.S. Mail, postage prepaid, to

Matthew M. Klein
322 W. Burlington
LaGrange, Illinois 60525

A handwritten signature in black ink, appearing to read "M.M. Klein", is written over a horizontal line. The signature is stylized and cursive.