

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
Pollution Control Board

PEORIA DISPOSAL COMPANY,

Petitioner,

v.

PEORIA COUNTY BOARD,

Respondent.

PCB 06-184

(Pollution Control Facility Siting Appeal)

**RESPONSE OF PEORIA DISPOSAL COMPANY TO PEORIA COUNTY BOARD'S
MOTION FOR LEAVE TO SUPPLEMENT RECORD ON APPEAL
AND FILE SECOND AMENDED INDEX**

NOW COMES Peoria Disposal Company ("PDC"), by its attorneys, Brian J. Meginnnes and George Mueller, and as and for its Response to the Motion for Leave to Supplement Record on Appeal and File Second Amended Index (the "Motion"), filed by the Peoria County Board (the "County Board"), states as follows:

Introduction

PDC has no objection to supplementing the Record with the "Supplemental Staff Report," tendered by the County Board with the Motion (C139554-602).

The County Board also seeks to supplement the Record with "[t]he Proposed Findings of Fact prepared by County Staff for consideration by and distributed to the County Board prior to the April 6, 2006, committee meeting at which the Proposed Findings of Fact were reviewed and discussed" (the "April 6 Proposed Findings") and "[t]he one (1) page sheet of findings of fact generated by County Staff at the May 3, 2006, County Board meeting incorporating the one change decided and made by the County Board at that meeting" (the "Findings Page"). (Motion, pg. 2, ¶6). The April 6 Proposed Findings are identified in the Second Amended Index attached

to the Motion as C139603-C139658. However, pages C139653-58 do not appear to be proposed findings of fact; rather, these pages contain charts and calculations.

PDC objects to supplementing the Record with the April 6 Proposed Findings and the unauthenticated single Findings Page for the following reasons:

1. The April 6 Proposed Findings and the unauthenticated single Findings Page are not properly included in the Record pursuant to Section 107.304(a) of the Illinois Administrative Code. The April 6 Proposed Findings were purportedly “reviewed and discussed” by the Peoria County Pollution Control Facility Siting Committee (“Siting Committee”), not the County Board. The County Board admits that the unauthenticated single Findings Page was not presented to or relied upon by the County Board. There is no proper basis for inclusion of the April 6 Proposed Findings or the unauthenticated single Findings Page in the Record.

2. The April 6 Proposed Findings and the unauthenticated single Findings Page were never placed in the Record in the County Clerk’s office and, as such, the documents were never available to PDC or the public at any time prior to PDC’s filing of its Petition for Review with the Pollution Control Board. For this additional reason, the April 6 Proposed Findings and the Findings Page should not be filed with the Record in this appeal.

3. The submission of the April 6 Proposed Findings and the Findings Page is grossly untimely, as PDC has already conducted depositions of County Board members and County Staff members and has essentially completed its discovery in this case. The April 6 Proposed Findings and the Findings Page are not authenticated or explained in the Motion. It is likely that if leave is granted to file the April 6 Proposed Findings and the Findings Page, PDC will be forced to re-depose some County Board members and County Staff members, and possibly depose additional

persons. It would be unjust and prejudicial to permit filing of the April 6 Proposed Findings and the Findings Page at this late date.

Argument

1. The April 6 Proposed Findings and the Findings Page are not properly included in the Record pursuant to Ill. Adm. Code §107.304.

The Record on appeal to the Pollution Control Board is to contain certain categories of documents pursuant to Section 107.304 of the Illinois Administrative Code. Of the categories of documents included in the Record pursuant to Section 107.304(a), the only categories plausibly relevant to the Motion are the following:

The record must contain all information or evidence presented to the local siting authority or relied upon by the local siting authority during its hearing process including:

- * * *
- 4) All exhibits relied upon by the local siting authority in making its decision;
- * * *
- 6) Minutes of all relevant open meetings of the siting authority;
- * * *
- 8) The written decision of the siting authority made pursuant to Section 39.2 of the Act; * * *.

(Ill. Adm. Code §107.304(a); emphasis added).

First, regarding the April 6 Proposed Findings, pursuant to Section 39.2(a) of the Illinois Environmental Protection Act, it is the County Board itself that is the “local siting authority,” not any committee created by the County Board. (415 ILCS §5/39.2(a)). The April 6 Proposed Findings were purportedly “reviewed and discussed” by the Peoria County Pollution Control Facility Siting Committee, not the County Board. The April 6 Proposed Findings purportedly considered by the committee are not properly filed in the Record.

Second, as for the single Findings Page, the County Board admits that the Findings Page was not presented to or relied upon by the County Board, instead asserting that it “documents the one change made to the Proposed Findings of Fact at the May 3, 2006, County Board meeting....” (Motion, pg. 3, ¶9). The County Board has not contended that the page is somehow “minutes” of the County Board meeting,¹ or the County Board’s “written decision.” (Any contention that the single Findings Page is part of a “written decision” would be ludicrous; if this were the case, how could the County Board justify “inadvertently” failing to file the Findings Page with the Pollution Control Board?) Therefore, there is no proper basis for inclusion of the Findings Page in the Record.

For the foregoing reasons, the County Board should, respectfully, not be permitted to supplement the Record in this appeal with either the April 6 Proposed Findings or the Findings Page.

¹ Assuming, *arguendo*, that Karen Raithel authored the Findings Page, the Findings Page would not, in any case, satisfy the statutory minutes requirement under 55 ILCS §5/3-2013. The Illinois Attorney General has summarized the requirements of the Clerk’s statutory duties as follows:

The county clerk is charged by statute with the duty to keep the record of the proceedings of the county board, and, because that duty is one imposed by statute, the county board cannot alter it. The record kept by the clerk is the only competent proof of the official acts of the board. People v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. (1915), 271 Ill. 226, 228-29.

* * *

Although it might be suggested that the duty to “keep an accurate record of the proceedings” of the board could be satisfied by the preservation of records created by others, a mere custodian generally cannot assure the accuracy of such records. Section 3-2013 of the Counties Code clearly contemplates that the clerk is not charged merely with the preservation of the records of proceedings, but is responsible for creating them.

(Illinois Attorney General Opinion, No. 2000-004; emphasis added).

2. The April 6 Proposed Findings and the Findings Page were not public records in this case.

The April 6 Proposed Findings and the Findings Page were never placed in the Record in the County Clerk's office and, as such, the documents were never available to PDC or the public at any time prior to PDC's filing of its Petition for Review with the Pollution Control Board. In the Motion, the County Board does not, in fact, argue that the April 6 Proposed Findings and the Findings Page were filed properly with the County Clerk's office. (Notably, the April 6 Proposed Findings and the Findings Page are not file-stamped by the County Clerk). If the County Board does later argue that the April 6 Proposed Findings and the Findings Page were included in the Record maintained by the County Board or the County Clerk, PDC will be forced to reopen discovery on this issue, which would be grossly prejudicial, as discussed below.

Possible placement of the April 6 Proposed Findings and the Findings Page in some other file, such as a County Board folder kept in a the County Clerk's office, does not satisfy the requirement that the County maintain a Record of materials related to the Application, and that such Record be made available to the public. The County Board's own siting ordinance is specific about the responsibility of the County Clerk to maintain a Record and about what goes in that Record. Section 7.5-43(a) of the Peoria County Code provides that a copy of the Siting Application "shall be made available for public inspection in the offices of the County Clerk." Additionally, Section 7.5-43(b) provides that "the County Clerk shall receive written comments from any person concerning the appropriateness of the proposed site," and Section 7.5-43(c) provides that "copies of the written comments shall be made available for public inspection in the offices of the County Clerk." Section 7.5-44(f) of the Peoria County Code requires that "the transcript of the public hearings to date shall be typed and copy filed with the County Clerk. Lastly, Section 7.5-45 identifies the items that together comprise the "record" of the siting case

and requires that “the County Clerk shall be responsible for keeping the record.” (Copies of the relevant sections of the Peoria County Code are attached herewith as Appendix A for the convenience of the Board and the Hearing Officer). Secret, internal documents used by the County Board, but never shared with or made available to any participant or any member of the public, may represent evidence of the improper decision-making process that occurred in this case, but such documents do not represent evidence of any decision made by the County Board.

Moreover, the transcript of the Siting Committee hearing on April 6, 2006, reflects that Siting Committee members at that meeting were in possession of color-coded documents not distributed to the public purporting to be proposed Findings of Fact in alternate forms, which the Siting Committee considered in its discussions and debates. However, with regard to siting criteria ii, iii and v, a careful reading of the transcript reveals that the Siting Committee took no binding action to recommend any specific findings to the County Board.

The County Board also seeks to supplement the Record with some tables and calculations (C139653-58). These documents clearly are not properly included with the April 6 Proposed Findings. PDC has not seen these documents included with the April 6 Proposed Findings before, does not know what they purportedly represent or where they came from or when, if ever, they were considered by the County Board or any of its committees. PDC knows only that these documents were not part of the Record available to it and the general public in the County Clerk’s Office at any time prior to PDC filing its Petition for Review with the Pollution Control Board. The foundation for supplementation of the Record with these documents is totally absent. The County does not offer any explanation of these mysterious new documents in its motion.

The April 6 Proposed Findings and the Findings Page were never public documents; they saw the light of day for the first time during this appeal before the Pollution Control Board. At

no time prior to filing its appeal did PDC or the public have access to the April 6 Proposed Findings or the Findings Page.

3. The submission of the April 6 Proposed Findings and the Findings Page is grossly untimely and prejudicial to PDC.

The submission of the April 6 Proposed Findings and the Findings Page is grossly untimely, as PDC has already conducted depositions of twelve (12) County Board members and three (3) County Staff members, and has essentially completed its discovery in this case.

PDC deposed the following County Staff members during the months of August and September:

1. Megan Fulara, Deputy County Clerk, August 18, 2006
2. Russell Hauptert, County Information Technology Director, September 13, 2006
3. Karen Raithel, County Recycling and Resource Conservation Manager, September 28, 2006

PDC also deposed the following twelve (12) County Board members during the month of September:

1. Michael Phelan, September 12, 2006
2. James Thomas, September 12, 2006
3. Lynn Scott Pearson, September 13, 2006
4. Carol Trumpe, September 13, 2006
5. Brian Elsasser, September 14, 2006
6. G. Allen Mayer, September 14, 2006
7. Philip Salzer, September 14, 2006
8. Eldon Polhemus, September 15, 2006
9. Junion Watkins, September 15, 2006
10. David Williams, September 15, 2006
11. Thomas O'Neill, September 27, 2006
12. Jeffrey Joyce, September 27, 2006

During the telephonic status hearing on September 18, 2006, PDC and the County Board informed the Hearing Officer that the depositions of County Board members and County Staff members would be completed in September, and that "[t]he parties hope to complete discovery

by the end of October.” (Order, September 18, 2006). PDC served its First Set of Requests to Admit on the County Board on September 21, 2006, and its Second Set of Requests to Admit on October 12, 2006. At the telephonic status hearing on October 31, 2006, the parties stated that they had completed discovery (other than filing of the County Board’s responses to PDC’s First and Second Sets of Requests to Admit), and agreed to a summary judgment deadline of November 29, 2006. (*See* Order, October 31, 2006).

More than a month after the last of the County Board depositions, the County Board now seeks leave to supplement the Record:

3. During the course of discovery in this matter, Respondent has learned that certain documents that should have been included in the Record on Appeal were not contained in either the first or supplemental filings.

* * *

10. Respondent believes it is fair, appropriate and necessary to a complete and thorough review of the issues on appeal to include the above referenced items into the Record on Appeal.

11. The failure to include said documents in the initial filings was due to inadvertence, and was not intended to cause delay or prejudice to any party.

* * *

13. There will be no prejudice to either party or the public caused by allowing the County to supplement the Record on Appeal in this matter.

(Motion, pgs. 1, 3). Clearly, the Motion is untimely, and PDC would be prejudiced if the County Board were granted leave to supplement the Record with the April 6 Proposed Findings and the Findings Page.

The April 6 Proposed Findings and the Findings Page tendered by the County Board are not authenticated as to when, where or by whom such documents were produced or as to how, if at all, such documents were circulated among the County Board members. The phrase used by

the County Board in its Motion, that these documents were “prepared by County staff,” is an attempt to avoid disclosing true authorship. It is quite possible that the April 6 Proposed Findings and/or the Findings Page were authored by Karen Raithel, County Recycling and Resource Conservation Manager (deposed September 28, 2006), though Megan Fulara, Deputy County Clerk in charge of maintaining the Record in the County Clerk’s office (deposed August 18, 2006) would presumably be the person to ask questions regarding authorship. Furthermore, it is PDC’s belief that at least one of the documents included with the April 6 Proposed Findings and the Findings Page may have been authored by a County Board member, namely, G. Allen Mayer (deposed September 14, 2006).

The April 6 Proposed Findings and the charts and calculations included therewith include hand-written notations (comments, additions and deletions), without identification as to when or by whom those notations were made. If the April 6 Proposed Findings were filed in the Record on appeal, the County Board would be required to explain the source and meaning of every hand-written notation in the April 6 Proposed Findings, again mandating a re-opening of discovery.

The Findings Page purportedly “documents the one change made to the Proposed Findings of Fact at the May 3, 2006, County Board meeting....” (Motion, pg. 3, ¶9; emphasis added). It is not at all clear what the “Proposed Findings of Fact” are, as the transcript of the County Board meeting on May 3, 2006, suggests that the County Board may have considered a different document called “Recommended Findings of Fact” at that meeting. Moreover, “The record kept by the clerk is the only competent proof of the official acts of the board. People v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. (1915), 271 Ill. 226, 228-29.” (Illinois

Attorney General Opinion, No. 2000-004; emphasis added). The Findings Page cannot be used as a stand-in for minutes that were never prepared.

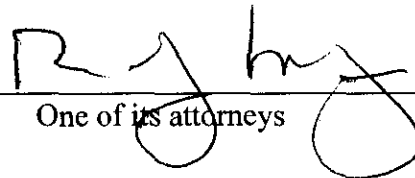
Finally, as above, insofar as the County Board argues that the April 6 Proposed Findings and the Findings Page were included in the Record maintained by the County Board or Clerk, PDC would be forced to depose and re-depose members of the County Staff to determine when, if ever, the documents were properly filed. Clearly, the County Board is precluded from supplementing the Record with the April 6 Proposed Findings and the Findings Page at this late date.

Conclusion

For all the foregoing reasons, the Motion for Leave to Supplement Record on Appeal and File Second Amended Index should be denied with regard to all documents tendered other than the Supplemental Staff Report (C139554-602).

WHEREFORE, Peoria Disposal Company prays that the Motion for Leave to Supplement Record on Appeal and File Second Amended Index, filed by the Peoria County Board be denied with regard to all documents tendered other than the Supplemental Staff Report (C139554-602).

Respectfully submitted,
PEORIA DISPOSAL COMPANY

By: 
One of its attorneys

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906-1479

Exhibit A

it is determined that the application complies with the requirements of this resolution. Within a reasonable period of time after delivery of an application to him, the county clerk shall advise the applicant:

- (1) Either that the application is complete and that it has been accepted for filing, designating the date of filing; or
- (2) That the application is not complete, specifying wherein it is deficient.

(b) Upon determining the application is complete, the county clerk shall date stamp the same and immediately deliver one copy of the request to the chairman of the county board; one copy to the county planning and zoning administrator; two (2) copies to the county solid waste management director; two (2) copies to the director of the Peoria City/County Health Department; two (2) copies to the state's attorney; and, two (2) copies to the county engineer. The county clerk, in addition, shall mail one copy of the request to the clerk of each municipality whose geographic political borders are within one and one-half (1½) miles or less of the proposed facility.

(c) At any time prior to completion by the applicant of the presentation of the applicant's factual evidence and an opportunity for cross-questioning by the county board and any hearing participants, the applicant may file not more than one amended application. In the event that an amended application is filed, the time limitation for final action set forth in section 7.5-47(b) shall be extended for an additional period of ninety (90) days.

(Res. of 2-14-84, § 11; Amend. of 3-9-93; Amend. of 7-8-97; Amend. of 8-12-97)

Sec. 7.5-42. Filing fee.

(a) There shall be paid to the county clerk for delivery to the county treasurer for deposit in a special fund at the time of the filing of an application for site approval a fee of fifty thousand dollars (\$50,000.00).

(b) The fee paid hereunder with any application shall be used only to defray the costs incurred by the county in connection with the application for site approval to which the fee is applicable. The county board may use the fee to pay any costs incurred by the county in reviewing the application, employing qualified professional persons to evaluate the information contained in the application, to pay the costs involved in any hearing, including the fees of court reporters and expert witnesses employed by the county to clarify or refute any information contained in the application, to pay any costs incurred in the appeal of any decision of the county board as to the application and to pay any other costs or expense in any way connected with the application.

(c) The county clerk shall accept no application for filing unless said fee has been paid.
(Res. of 2-14-84, § 12; Amend. of 3-9-93)

Sec. 7.5-43. Public comment.

(a) A copy of the request shall be made available for public inspection in the offices of the county clerk and members of the public shall be allowed to obtain a copy of the request or any part thereof upon payment of actual cost of reproduction to the county clerk. All copying requests shall be fulfilled by the county clerk within a reasonable time from the time of the request.

(b) The county clerk shall receive written comment from any person concerning the appropriateness of the proposed site. Upon receipt of any such written comment the county clerk shall date stamp same and file the written comment with the postmarked envelope in which the comment is received.

(c) Copies of the written comments shall be made available for public inspection in the offices of the county clerk, and members of the public shall be allowed to obtain a copy of any written comment upon payment of actual cost of reproduction.

(d) Any written comment received by the county clerk or postmarked not later than thirty (30) days after the date of the last public hearing shall be made part of the record as hereinafter described and the county board shall consider any such timely written comments in making its final determination. In the event that the 30th day falls on a Saturday, Sunday or any holiday when the Peoria County Courthouse is closed, the next day on which mail is received by the Peoria County Clerk shall be considered the 30th day for purposes of this paragraph.

(Res. of 2-14-84, § 13; Amend. of 3-9-93; Amend. of 10-11-94)

Sec. 7.5-44. Staff review.

(a) Upon receipt of a copy of a request for site location approval, the solid waste management director shall be responsible for coordinating the review of the request with the following:

- (1) City of Peoria/County of Peoria Health Department.
- (2) Peoria County Engineer.
- (3) Peoria County Administrator.
- (4) Peoria County State's Attorney.
- (5) Peoria County Planning and Zoning Administrator.
- (6) Other such persons as may be designated by the site hearing committee chairman.

(b) The solid waste management director is authorized to call interdepartmental meetings and set deadlines for the submittal of reports and recommendations.

(c) A representative of the aforementioned departments/officials shall attend the public hearings and may ask such questions as are needed to assist it in reaching their recommendations.

(d) The aforementioned departments/officials are authorized to prepare and submit reports and recommendations in connection with the application. Interim reports prepared by the staff, summarizing and analyzing the proposed site application, the written comments, reports, studies and exhibits concerning the appropriateness of the proposed site shall be filed with the county clerk no later than ten (10) days in advance of the public hearing. Copies of

departmental reports shall be available for public inspection in the office of the county clerk and members of the public shall be allowed to obtain a copy of said documents upon payment of the actual cost of reproduction.

(e) Upon completion of the testimony by the applicant, members of the general public, or intervening parties, and the aforementioned officials and departments, shall have a reasonable time to file their final reports and recommendations with the county clerk. Copies of the final reports shall be available for public inspection in the office of the county clerk for three (3) working days prior to reconvening the hearing and members of the public shall be allowed to obtain a copy of said documents upon payment of the actual cost of reproduction.

(f) The transcript of the public hearings to date shall be typed and a copy filed with the county clerk.

(Res. of 2-14-84, § 14; Amend. of 3-9-93; Amend. of 7-8-97)

Sec. 7.5-45. Record.

(a) The county clerk shall be responsible for keeping the record.

(b) The record shall consist of the following:

(1) The request for site location approval as described in sections 7.5-32 through 7.5-40.

(2) Proof of notice as described in section 7.5-46(b)(3), hereof.

(3) Proof of notice given by applicant pursuant to section 39.2(b) of said Act (415 ILCS 5/39.2(b)).

(4) Written comments filed by the public and received by the county clerk or postmarked within thirty (30) days after the date of the last public hearing.

(5) All reports and recommendations as described in section 7.5-44(d).

(6) All reports, studies, exhibits or documents admitted into evidence at the public hearing.

(7) A complete transcript of the public hearing(s).

(8) The findings of fact and recommendations of the regional pollution control hearing committee.

(9) A copy of the resolution containing the final decision of the county board.

(c) The county clerk shall be responsible for certifying all copies of the record.

(Res. of 2-14-84, § 15; Amend. of 3-9-93; Amend. of 10-11-94)

Sec. 7.5-46. Peoria County Regional Pollution Control Site Hearing Committee; public hearing.

(a) *Committee.*

(1) *Generally.* The Peoria County Pollution Control Site Hearing Committee shall be comprised of one county board member from each district. The Peoria County Pollution

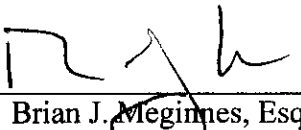
AFFIDAVIT OF SERVICE

The undersigned, being first duly sworn upon oath, states that copies of the Response to the Motion for Leave to Supplement Record on Appeal and File Second Amended Index of Petitioner, Peoria Disposal Company, were served upon the following persons on the 15th day of November, 2006, before 5:00 p.m., sent and addressed as follows:

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Assistant State's Attorney
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(via Hand Delivery)

Ms. Carol Webb, Hearing Officer
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(via Facsimile and U.S. Mail)


Brian J. Meginnes, Esq.

Subscribed and sworn to before me, a Notary Public, in the County and State as aforesaid, this 15th day of November, 2006.



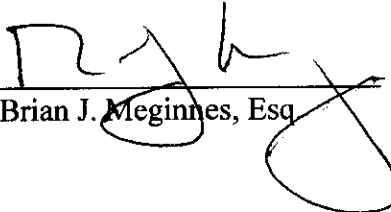

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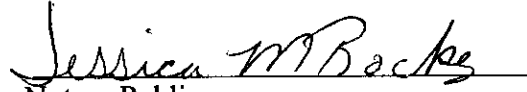
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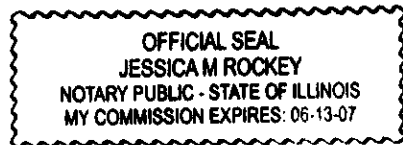
AFFIDAVIT OF FILING

The undersigned, being first duly sworn upon oath, states that ten (10) copies of the Response to the Motion for Leave to Supplement Record on Appeal and File Second Amended Index of Petitioner, Peoria Disposal Company, were filed with the Illinois Pollution Control Board by sending same via **Federal Express**, on the 15th day of November, 2006, sent before 5:00 p.m.


Brian J. Meginnes, Esq.

Subscribed and sworn to before me, a Notary Public, in the Peoria County, Illinois, this 15th day of November, 2006.


Notary Public



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