BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FOX MORAINE, LLC Petitioner, v. UNITED CITY OF YORKVILLE, CITY COUNCIL Respondent.	)	PCB No. 07-146 (Pollution Control Facility Siting Appeal)

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on January 8, 2008, Leo P. Dombrowski, one of the attorneys for Respondent, United City of Yorkville, filed via electronic filing the attached **United City of Yorkville's Response to Petitioner's Amended Motion to Compel and for Sanctions** with the Clerk of the Illinois Pollution Control Board, a copy of which is herewith served upon you.

Respectfully submitted,

UNITED CITY OF YORKVILLE

By: /s/ Leo P. Dombrowski
One of their Attorneys

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BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

FOX MORAINE, LLC Petitioner, v. UNITED CITY OF YORKVILLE, CITY COUNCIL Respondent.	)	PCB No. 07-146 (Pollution Control Facility Siting Appeal)

YORKVILLE'S RESPONSE TO PETITIONER'S
AMENDED MOTION TO COMPEL AND FOR SANCTIONS

In its barebones, three-page Amended Motion, Petitioner claims that: 1) Yorkville waived each, every, and all objections to Petitioner's discovery by not including each, every, and all objections in Yorkville's motion for a protective order (this is Petitioner's sole disagreement with Yorkville's objections); and 2) Yorkville's discovery responses are, in part, insufficient..

Petitioner cites no authority to support its novel claim of waiver, and it is apparently the first party who has ever raised this waiver argument, as its argument finds no support or even passing mention in the statutes, rules, case law, or elsewhere. Petitioner also fails to explain how Yorkville's responses are insufficient. By failing to provide any support for its two arguments, Petitioner has waived these contentions.

Petitioner also suggests that Yorkville does not take seriously its discovery obligations. This is nonsense. Yorkville provided extensive and detailed responses to Petitioner's discovery requests. It provided names, dates, and numerous other details, and identified responsive documents. *See, e.g.*, Yorkville's Answers to Interrogatories 1, 4-5, and 7, which are attached to Petitioner's Amended Motion. Yorkville also produced 75 pages of responsive documents.

I. YORKVILLE DID NOT WAIVE ANY OF ITS OBJECTIONS TO PETITIONER'S DISCOVERY REQUESTS.

A. Petitioner Cites No Authority in Support of Its Novel Waiver Argument, Because There Is None.

Instead of picking up the telephone and attempting to resolve discovery differences, Petitioner filed a Motion to Compel and For Sanctions on December 14, 2007, taking issue with some of Yorkville's responses to Petitioner's interrogatories and document requests. In its Motion, Petitioner claimed, among other things, that Yorkville had produced no documents. Mot. ¶ 6.B.

During the December 18, 2007 telephonic status conference held with the Hearing Officer, Petitioner's counsel, George Mueller and Charles Helsten, admitted that, despite having been served on November 6, 2007 with Yorkville's documents, both attorneys had failed to even look at them.[1] Two days later, Petitioner filed almost the exact motion, with the sole exception of now acknowledging that it had received the documents produced by Yorkville.

The crux of Petitioner's Amended Motion is that Yorkville waived **all** objections, permanently and forever, to Petitioner's interrogatories and document requests "by failure to include them in their original motion for protective order." (Amnd. Mot. ¶¶ 6.A., 7.A.) Significantly, other than its waiver argument, Petitioner does not take issue with any aspect of Yorkville's objections. By failing to do so, Petitioner concedes the legal sufficiency of the objections.

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[1] Although the parties probably would not have been able to resolve their discovery differences given Petitioner's extreme take on discovery matters, at least Petitioner's counsel would have been spared the embarrassment of conceding that they had not bothered to review the documents produced by Yorkville before Petitioner filed its first motion to compel based on, in part, Yorkville's not producing any documents.

Despite the importance of its waiver claim to Petitioner's Amended Motion, Petitioner offers no statute, rule, or case law in support. Petitioner offers nothing because there is nothing—nowhere in the Supreme Court Rules, Code of Civil Procedure, Pollution Control Board Rules, case law, or elsewhere is there anything that lends any credence to Petitioner's novel theory. By failing to offer any authority regarding its theory, Petitioner has waived it. *See, e.g.*, *People v. Gemeny*, 313 Ill. App. 3d 902, 914 (2nd Dist. 2000) ("defendant makes several cursory arguments that are supported by no pertinent authority. These arguments are waived and we need not consider them.").[2]

Section 101.616(d) of the Board Rules provides that a hearing officer may issue protective orders "to prevent unreasonable expense, or harassment, to expedite resolution of the proceeding, or to protect non-disclosable materials from disclosure." Supreme Court Rule 201(c)(1) authorizes courts to issue protective orders "as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression." Neither these rules nor any other authority (including all other Board Rules and Supreme Court Rules) require a party seeking a protective order to include all discovery objections in its motion for a protective order or risk waiving them.

Such a requirement would be absurd, as it would prohibit parties from filing concise motions seeking protective orders on discrete issues, such as the confidentiality of financial information. If Petitioner were correct, a party seeking any kind of protective order—whether it sought to protect trade secrets, guard financial information, or shield the names of minors—would have to include all its objections to pending discovery requests in its motion for a

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[2] Neither Yorkville nor the Hearing Officer should be forced to guess what possible support there could be for Petitioner's novel contention. If Petitioner had any legal support for its contention, it certainly would have included it in its Amended Motion.

protective order or risk waiving them. This would force the hearing officer or trial judge to spend time and effort resolving objections that otherwise might never be challenged. The law does not require or encourage such wasteful motion practice.

B. Petitioner Misrepresents the Substance of Yorkville's Motion for a Protective Order and the Hearing Officer's Ruling.

Contrary to Petitioner's contention (Amnd. Mot. ¶ 3), Yorkville did not seek a protective order finding that Petitioner's discovery requests were overly broad or burdensome. Rather, it filed a motion for a protective order arguing that Petitioner "had waived its discovery requests regarding possible bias or prejudice against petitioner by seven of the nine members of the City Council because it did not object to these members' participation as decision makers at the local siting hearing." (*See* Hearing Officer's Sept. 20, 2007 Order at p. 1, attached as Exhibit A.) Yorkville also sought a stay of discovery pending the Hearing Officer's ruling on its motion for the protective order. *Id.*

The Hearing Officer denied Yorkville's motion for a protective order, ruling that the issue of waiver by Petitioner was ultimately one for the Board, and not the Hearing Officer, to make. *Id.* at p. 4, n. 1. Consequently, at this early stage in the appeal, the Hearing Officer concluded that "discovery may proceed under the circumstances of this case." *Id.* at p. 4. Nowhere did the Hearing Officer rule or even suggest that Yorkville had waived discovery objections by not including them in its motion for the protective order.[3]

Despite the absence of any discussion by the Hearing Officer on this issue of waiver (nor did Petitioner raise the issue in its response to Yorkville's motion for the protective order[4]),

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[3] The Hearing Officer also granted Yorkville's motion for the discovery stay, and Yorkville timely answered Petitioner's discovery within the time allowed.

[4] Under Petitioner's reasoning, by failing to raise the waiver issue in its response to Yorkville's motion for the protective order, Petitioner is precluded from raising it in its Amended Motion.

Petitioner now makes the curious claim that Yorkville's discovery "objections had been preempted to the extent that the Hearing Officer's order of September 20, 2007, found that the requests were not burdensome and onerous." Amnd. Mot. ¶ 6.A. Yet, true to form, Petitioner does not cite to any part of the Order to support its claim, nor does Petitioner attempt to explain to what "extent" the Hearing Officer found that Petitioner's discovery requests were or were not unreasonably burdensome or onerous. In fact, the Hearing Officer found that Yorkville did not base its motion for the protective order on any allegation that Petitioner's discovery "creates an unreasonable expense or engenders harassment." Order at p. 4.

Yorkville did not waive any objections to Petitioner's discovery. As was its right, it filed a motion for a protective order on a discrete issue, namely, Petitioner's failure to raise certain issues of bias and unfairness below. It also sought and received a discovery stay so that Petitioner could not claim that Yorkville's discovery responses were served beyond the time allowed for answering.

Petitioner offers no authority or explanation showing how Yorkville might have waived its discovery objections. Its Amended Motion should be denied.

II. YORKVILLE PROPERLY ANSWERED OR OBJECTED TO PETITIONER'S DISCOVERY REQUESTS.

A. Responses to Document Requests.

Petitioner appears to suggest Yorkville's responses to Requests 1-6 and 13-16 are insufficient for the sole reason that, although Yorkville produced numerous documents in response to these requests, it did not provide a statement that the production was complete. Amnd. Mot. ¶ 6.B. Petitioner does not cite to any rule or case law that such a statement is required, because none is. Nor did Petitioner provide such a statement with its responses to Yorkville's document requests.

As to requests 7-12, Petitioner claims that Yorkville has not produced any responsive documents. Yorkville did not produce any documents because these requests are objectionable for several reasons. Significantly, Petitioner does not take issue with any of Yorkville's objections, and its entire argument regarding these requests and objections consists of one sentence: "With respect to requests 7 through 12, Respondent has not produced anything nor indicated that they would produce any documents without waiving their objections."[5] Amnd. Mot. ¶ 6.C. By not including any authority or explanation in support of its contention that these responses or objections are insufficient, Petitioner has waived it. *Gemeny*, 313 Ill. App. 3d at 914.

Requests 7-8 sought documents "portraying the proposed Fox Moraine landfill or any property located within one (1) mile of the proposed Fox Moraine landfill" that were not included in the record. Yorkville objected for several reasons, including relevance and scope. In its Amended Motion, Petitioner does not explain how documents "portraying" any property located within one mile of the proposed landfill are at all relevant to this appeal (nor did Petitioner define, either in its requests or in its motion, what meaning it is assigning to the word "portray"). Relevant documents regarding the proposed landfill are already contained in the record on appeal.[6]

In Requests 9-10, Petitioner sought "notes, drafts, memoranda, correspondence and transcripts" considered by the Yorkville City Council that are not part of the record. Yorkville

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[5] Here, Petitioner concedes that Yorkville has not waived any of its objections.

[6] As noted above, Petitioner's sole disagreement with Yorkville's objections is its novel waiver argument. Because Petitioner does not dispute the legal sufficiency of Yorkville's objections, thereby conceding that the objections are sound, Yorkville has no duty in this response to show that its objections are legally sufficient. However, because Yorkville takes seriously its discovery obligations, it explains herein how they are proper. By discussing its objections as if Petitioner had provided some kind of meaningful argument, Yorkville does not intend to waive them and this response should not be construed as a waiver of any of its objections.

objected, among other reasons, because these Requests "sought information protected from discovery by legislative or deliberative or other privilege." Petitioner offers nothing as to why this is not a proper objection. (The Hearing Officer sustained a similar objection in a different landfill appeal. *See* II.B., below.) Additionally, subject to its objections, Yorkville stated that it was not aware of any documents in its possession responsive to these requests.

In Requests 11-12, Petitioner sought documents relating to the annexation of the landfill property and vacation of a portion of a nearby road. Yorkville objected on several grounds, including relevance. Petitioner fails to show why documents regarding these issues are at all relevant to this appeal.

B. Answers to Interrogatories.

Petitioner contends that Yorkville's answers to Interrogatories 2-5 are either incomplete or not specific enough. Amnd. Mot. ¶ 7.B. Again, by not including any authority or explanation in support of its contention, Petitioner has waived it. *Gemeny*, 313 Ill. App. 3d at 914.

More specifically, Petitioner claims that Yorkville "failed entirely to answer Interrogatories 2 and 3." Amnd. Mot. ¶ 7.B. In Interrogatory No. 2, Petitioner sought information regarding City Council communications regarding annexation of the landfill property and vacation of a portion of a nearby road. As noted above regarding Document Requests 11-12, this is objectionable because, among other reasons, the Interrogatory seeks information not relevant to this appeal. Petitioner does not even attempt to explain how such information might be at all relevant.

In Interrogatory No. 3, Petitioner sought information regarding meetings between City Council members where the landfill application was discussed or considered, excepting official Council meetings. Yorkville objected for several reasons, including on legislative and

deliberative process grounds, because "allowing Fox Moraine to ask about communications between Council Members would lead to the chilling of discussion between elected officials who are charged with evaluating and deciding an application for the siting of a local landfill."[7] Although cited by Yorkville in its response to Interrogatory No. 3, Petitioner does not attempt in any way to distinguish the Hearing Officer's decision in *Waste Mngt. v. County Bd. of Kane County*, nor does it otherwise seek to dispute the validity of Yorkville's objections.

In Interrogatories 4-5, Petitioner sought information regarding campaign contributions and any Council member's association with Friends of Greater Yorkville. Petitioner claims that Yorkville's answers are not specific enough and that they do not address the subparts. However, beyond this simple statement, Petitioner does not explain how these answers are insufficient.

In its answers, Yorkville provided names of Council members receiving campaign contributions, the entity making those contributions, the name of a Council member who was a secretary of Friends of Greater Yorkville, and the time period he held that position. If Petitioner believed that these answers were insufficient, it had a duty to explain, beyond a simple statement that the answers are "not specific," how the answers were inappropriate. *Gemeny*, 313 Ill. App. 3d at 914 ("These arguments are waived and we need not consider them.")

III. CONCLUSION

By filing motions to compel and for sanctions, Petitioner had an obligation to support its arguments with legal authority and explanation. It failed to do so. If any conduct is sanctionable, it is Petitioner's filing unsupported, baseless motions, especially its counsel's failure

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[7] The Hearing Officer sustained the same objection in a Kane County landfill appeal. *See Waste Mngt. v. County Bd. of Kane County*, Mar. 12, 2003. There, Kane County argued that discussions between Board members were shielded from discovery, as Yorkville does here. For ease of reference, the Kane County Board's objections that were at issue are attached as Exhibit B (*see* pp. 3-5) and the Hearing Officer's Mar. 12, 2003 Order sustaining the objection is attached as Exhibit C (*see* p. 2: "the hearing officer sustained the objection premised on the deliberative process privilege.).

to review the documents produced by Yorkville before they filed a motion seeking to compel the production of documents already in their possession. Petitioner's Amended Motion should be denied.

Respectfully submitted,

UNITED CITY OF YORKVILLE, CITY COUNCIL

By: /s/ Leo P. Dombrowski
One of Its Attorneys

Dated: January 8, 2008

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Exhibit A

ILLINOIS POLLUTION CONTROL BOARD
September 20, 2007

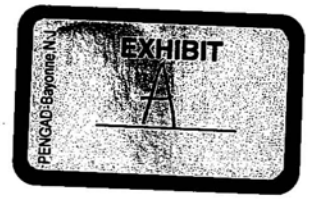
FOX MORAINE, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	PCB 07-146
UNITED CITY OF YORKVILLE, CITY COUNCIL,	)	(Pollution Control Facility Siting Appeal)
	)	
Respondent.	)	
	)	
KENDALL COUNTY,	)	
	)	
Intervenor.	)	

HEARING OFFICER ORDER

On August 2, 2007, petitioner Fox Moraine, LLC, (Fox Moraine) served respondent United City of Yorkville, City Council (Yorkville) with a first set of interrogatories and first set of requests to admit. On August 23, 2007, Yorkville filed a motion for a protective order limiting discovery (Mot.), accompanied by a memorandum of law (Memo.) in support, attaching among other things the discovery requests that are the subject of this motion. (Memo, Ex. C & D). In its argument for the protective order, Yorkville argues that petitioner has waived its discovery requests regarding possible bias or prejudice against petitioner by seven of the nine members of the City Council because it did not object to these members' participation as decision makers at the local siting hearing. Yorkville also filed a motion for stay of discovery pending the hearing officer's ruling on the motion for protective order, noting that otherwise Yorkville's responses would be due today, September 20, 2007. To date, Fox Moraine has not filed a response.

On August 30, 2007, Fox Moraine filed its response, asserting that discovery was necessary and that it had not waived issues of bias or prejudice (Resp.). On September 13, 2007, Yorkville filed a motion for leave to file a reply and its reply in favor of issuance of a protective order. (Reply).

Yorkville's motion for leave to file a reply is granted. For the reasons set forth below, Yorkville's motion for a protective order is denied. As a practical matter, Yorkville's motion for a discovery stay has in essence been granted. Yorkville's responses are now due to be filed on or before September 28, 2007.



Procedural Status of the Case

On June 27, 2007, Fox Moraine filed a petition for review asking the Board to review the May 24, 2007, decision of Yorkville's decision on petitioner's proposed siting of a pollution control facility in Yorkville, Kendall County. Petitioner appealed to the Board on the grounds that 1) Yorkville's decision was fundamentally unfair, alleging bias and prejudice on the part of various and unnamed council members, and 2)Yorkville 's findings regarding certain criteria were against the manifest weight of the evidence.

Kendall County was granted intervenor's status by the Board on August 23, 2007. The County has not participated in the briefing of this discovery issue.

Pursuant to Fox Moraine's waiver, the statutory decision deadline in this case is now due January 24, 2008. Hearing has yet to be scheduled. In the hearing officer order entered August 20, 2007 after the telephonic status conference entered that day, Yorkville's time to respond to outstanding discovery requests was extended to September 20, 2007.

Yorkville 's Motion For A Protective Order

In its memorandum supporting its motion for a protective order, Yorkville relates that it held 23 days of public hearings concerning Fox Moraine's application for siting. Yorkville also noted that the hearing process fell in the middle of the campaign process for the City Council, with a new mayor and three new council members being elected on April 17, 2007. Yorkville acknowledges Fox Moraine objected to two of the nine council members at the local siting hearing alleging bias, predisposition and unfairness in its motion to disqualify at the March 7, 2007 hearing. Memo. at 2. Yorkville argues that because Fox Moraine failed to object at the local siting hearing concerning the other seven members of the City Council on those grounds, Fox Moraine waived its right to raise these issues in the proceedings before the Board. Yorkville accordingly objects to providing discovery concerning, the remaining seven council members Memo. at 2. In support of its waiver argument, Yorkville cites various siting cases, finding especially relevant Waste Management of Illinois v. Pollution Control Board, 175 Ill. App. 3d 1023 (2d Dist. 1988). *See* Memo. at 3-4, and cases cited therein. Yorkville argues that Fox Moraine's "discovery requests to the unchallenged seven Council members are unreasonably burdensome and unduly onerous attempt to uncover some evidence perhaps relevant to its unsupported claims of unfairness, bias and prejudice". Memo. at 4.

Petitioner's Response

On August 30, 2007, Fox Moraine filed a response in opposition (Resp.) to Yorkville's motion for a protective order. Fox Moraine argues, in summary, that Yorkville's motion "ignores the fact that the Petitioner also seeks evidence of *ex parte contacts*, as well as evidence of the Council's consideration of materials outside the record in reaching its decision, and similarly ignores the time of the post-hearing seating of three members of the Council." (Resp. at 3). The petitioner agrees that at the local siting hearing, it only moved to disqualify two of the

council members alleged to be biased, but argues that it has not waived its right to discovery requests concerning the other council members, including the three newly elected Council members.. Resp. at 1-2. Fox Moraine states that it asked the City to disclose " the *ex parte* communications; the gifts and/or transfers between Council members and the Participant/Objectors; the Council members' affiliations with the Objector organizations; and the materials and information outside the record of proceedings which were considered by the Council in reaching its decision". Resp. at 2. Fox Moraine characterizes its discovery requests as "narrowly tailored to result in disclosure of the evidence establishing violations of fundamental fairness which lie at the heart of the instant appeal. Id. Petitioner argues that case law and the Board's procedural rules require disclosure, and that the Waste Management case cited by respondent is distinguishable on its facts. Resp. at 3-6.

Finally, Fox Moraine argues that the respondent does not allege that the issuance of a protective order motion would prevent unreasonable expense, or harassment, or to expedite resolution of the proceeding pursuant to Section 101.616 (d) of the Board's procedural rules.

Respondent's Reply

On September 13, 2007, Yorkville filed a motion for leave to file a reply and its reply. Yorkville takes issue with Fox Moraine's allegation that due to the timing of the newly elected Council members, it could not timely object or move to disqualify the new members. Yorkville argues that Fox Moraine could have objected below because the three new Council members were elected on April 17, 2007, and the public hearing did not close until April 20, 2007. Additionally, Yorkville argues that petitioner could have moved for disqualification at any time during the post-hearing comment period. Reply at 2.

Finally, Yorkville argues that it "should not be put to the time and expense in responding to pointless discovery". Reply at 1.

Discussion

On appeal of a municipality's decision to grant or deny a siting application, the Board generally confines itself to the record developed by the municipality. 415 ILCS 5/40.1 (b) (2006). However, the Board will hear new evidence relevant to the fundamental fairness of the proceedings where such evidence lies outside the record. Land and Lakes Co. v. PCB , 319 Ill. App. 3d 41, 48, 743 N.E. 2d 188, 194 (3d Dist. 2000). Public hearing before a local governing body is the most critical stage of the site approval process. Land and Lakes Co. v. PCB, 245 Ill. App. 3d 631, 616 N.E.2d 349, 356 (1993). The manner in which the hearing is conducted, the opportunity to be heard, whether *ex parte* contacts existed, prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness. American Bottom Conservancy v. Village of Fairmont City, PCB 00-200 (Oct. 19, 2000). The Board must consider the fundamental fairness of the procedures used by the respondent in reaching its decision. 415 ILCS 5/40.1 (a) (2006). Additional evidence outside the record that may be considered include pre-filing contacts. *See* County of Kankakee v. City of Kankakee, Town and County Utilities, Inc., and Kankakee Regional Landfill, LLC., PCB 03-31,

03-33, 03-35 (cons.) (Jan. 23, 2003).

The purpose of discovery is to uncover all relevant information and information calculated to lead to relevant information. 35 Ill. Adm. Code 101.616(a). The Board's rules also allow issuance of a protective order that deny, limit, condition or regulate discovery to prevent unreasonable expense, or harassment, or to expedite resolution of the proceeding. 35 Ill. Adm. Code 101.616(d).

Yorkville's motion for a protective order is denied. When a fundamental fairness issue is raised before the Board, the whole purpose of discovery is to attempt to uncover relevant evidence or evidence calculated to lead to relevant evidence that is outside the record, evidence that is presumably unknown to the party propounding the discovery. Fox Moraine has persuasively argued that it seeks discovery of information concerning fundamental unfairness that extends beyond issues of alleged bias and prejudice of Council Members. Fox Moraine has cited case law and distinguished that cited by Yorkville sufficient for the hearing officer to conclude that discovery may proceed under the circumstances of this case. This is particularly so since, as Fox Moraine alleges, Yorkville does not allege that the requested discovery creates an unreasonable expense or engenders harassment as set forth in 35 Ill. Adm. Code 616(d). Yorkville states only that it "should not be put to the time and expense in responding to pointless discovery. Reply at 1. For all of these reasons, Yorkville's motion for a protective order is denied. Yorkville must file its responses to the requested discovery on or before September 28, 2007.

Finally, the procedural rules provide that parties may seek Board review of discovery rulings pursuant to 35 Ill. Adm. Code 101.616(e). The hearing officer reminds the parties that the filing of any such appeal of a hearing officer ruling does not stay the proceeding. In a deadline date case, the hearing officer must manage the case to insure that discovery, hearing, and briefing schedules allow for timely Board deliberation and decision of the case as a whole.

IT IS SO ORDERED

Bradley P. Halloran

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
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312.814.8917

[1] The ultimate determination as to whether the petitioner has waived any issues as to one or more Council Members is a decision for the Board, and not the hearing officer, to make.

Exhibit B

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, INC. **Petitioner,** **vs.** **COUNTY BOARD OF KANE COUNTY, ILLINOIS,** **Respondent.**	**No. PCB 03-104** **(Pollution Control Facility Siting Application)**

RESPONDENT'S OBJECTIONS TO PETITIONER'S INTERROGATORIES

NOW COMES Respondent, COUNTY BOARD OF KANE COUNTY, ILLINOIS, by its attorney, Jennifer J. Sackett Pohlenz of Querrey & Harrow, Ltd, and in objection to Petitioner's Interrogatories stated by Petitioner to have been mailed on February 13, 2003, states as follows:

OBJECTIONS TO DEFINITIONS

D. "Siting Application" means Petitioner's request for site location approval of the Woodland Transfer Facility located in unincorporated Kane County, Illinois, including the Site Location Application filed February 13, 2002, and June 14, 2002.

OBJECTION: Subject to and without waiving any additional objections made with respect to the individual Interrogatories, below, Respondent has the following objections to Definition D. Respondent objects to Definition "D," to the extent it includes in its definition a "siting application" filed on or about February 13, 2002, as such application is not part of the public record in this matter, is not the application on which public hearings were held or on which the Respondent made its decision pursuant to Section 39.2 of the Illinois Environmental Protection Act. The siting application on which public hearings were held and a decision rendered by the

Respondent was filed on June 14, 2002, and is referenced in the Record on Appeal as Bates C000001–C001159, including full-sized drawings, C001160–C001171. Therefore, this definition is overly broad, not relevant, not calculated to lead to admissible evidence in this matter, and seeks discovery concerning and relating to an application (*i.e.,* the February 13, 2002 application) for which the Illinois Pollution Control Board has no jurisdiction and on which a decision was not rendered by the Respondent.

H. The relevant time period for answering the interrogatories is from January 1, 2002 to January 13, 2003.

OBJECTION: Subject to and without waiving any additional objections made with respect to the individual Interrogatories, below, Respondent has the following objections to Definition H. The siting application which is the subject of this matter was not filed until June 14, 2002 and, a decision on it was rendered by Respondent on December 10, 2002; therefore, the time frame provided by the Petitioner is overly broad, not relevant, burdensome and not calculated to lead to admissible evidence in this matter. As respects that portion of the time frame prior to June 14, 2002, essentially six months, is overly broad and burdensome, particularly given the fact that any discussions pre-filing of the siting application were not *ex parte*. Additionally, that portion of the time frame after December 10, 2002 (*i.e.*, the date on which Respondent made its decision on the siting application), is not relevant, not calculated to lead to admissible evidence, is overly broad and burdensome. After Respondent renders its decision on a siting application, the siting process before it is complete and its post-decision communications to the public, Petitioner, and others, are not *ex parte*. Further, no fundamental fairness issues related

to the siting process can occur after the Respondent makes a siting decision.

Additionally, Respondent objects to this time frame to the extent a County Board member was a citizen and not an elected, appointed or sworn as a County Board member during the subject timeframe, as not relevant, overly broad and burdensome.

OBJECTIONS TO INTERROGATORIES

INTERROGATORY NO. 2: Identify all communications of each County Board member that refer or relate to the Siting Application or the Facility with the following persons:

(a) Jennifer Sackett-Pohlenz [sic].
(b) John Hoscheit.
(c) Dan Walter.
(d) Any citizen or member of the public.
(e) Any municipal official, representative or agent.
(f) Any state official, representative or agent.

OBJECTION: Respondent repeats and incorporates its objections to Definitions "D" and "H" as and for the first part of its objections to Interrogatory No. 2. Additionally, Respondent objects to Interrogatory No. 2, and its respective subparts, as follows.

As respects subpart (a), any communication with or between Ms. Sackett Pohlenz and a County Board member before June 14, 2002, and after December 10, 2002, is attorney-client privileged communication, as during that period of time, Ms. Sackett Pohlenz was a Special Assistant State's Attorney, and this siting application was not pending before the Respondent. To the extent there were such communications, without waiving said objections and subject to ruling on the remainder of these objections, a privilege log will be provided in answer to this Interrogatory.

As respects subparts (b) and (c), this portion of the Interrogatory seeks communications between members of Respondent, as both Mr. Walter and Mr. Hoscheit were members of the Kane County Board during the stated period of time applicable to this Interrogatory. As such, any communications between Kane County Board members, either before, during or after the subject siting application was filed and was decided by Respondent, are and can not be *ex parte* communications, and this Interrogatory is overly broad, burdensome, not relevant, and not calculated to lead to admissible evidence. Further, from a public policy standpoint, allowing a siting applicant to inquire into County Board member-only discussions, when such discussions have no relevancy to potential fundamental fairness issues raised by the Petitioner, is a burdensome process, which, if allowed, can result in the future "chilling" of discussion between the decision makers of a local government who are presented with a siting application.

As respects (a) through (f), to the extent this Interrogatory seeks to inquire as to communications of current County Board members of Kane County, who were not County Board members during the entire time frame outlined in Petitioner's Definition "H," this Interrogatory is objectionable, as prior to election as a Board Member, such persons were citizens of Kane County and had no obligations regarding *ex parte* communication. Therefore, this Interrogatory is overly broad, burdensome, not relevant, and not calculated to lead to admissible evidence in this matter. Therefore, the timeframe as respects such persons should be limited to the date on which they were sworn into office.

Finally and moreover, as respects this entire Interrogatory, Respondent objects as no claim of *ex parte* communications is being alleged by Petitioner in this appeal, and thus, this

Interrogatory amounts to nor more than a "fishing expedition" with no relevancy to this appeal. (*See*, "Waste Management of Illinois, Inc.'s Answers to Interrogatories Propounded by Respondent, County Board of Kane County, Illinois" attached as Exhibit A).

Dated: February 26, 2003

Respectfully Submitted,

RESPONDENT, COUNTY BOARD OF KANE COUNTY, ILLINOIS

By: _____
One of its Attorneys

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Document #: 806647

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, INC.,	)	
	)	
Petitioner,	)	No. PCB 03-104
	)	
vs.	)	(Pollution Control Facility Siting Application)
	)	
COUNTY BOARD OF KANE COUNTY, ILLINOIS,	)	
	)	
	)	
Respondent.	)	

WASTE MANAGEMENT OF ILLINOIS, INC.'S ANSWERS TO INTERROGATORIES PROPOUNDED BY RESPONDENT, COUNTY BOARD OF KANE COUNTY, ILLINOIS

Now comes Petitioner, WASTE MANAGEMENT OF ILLINOIS, INC. ("WMII") and for their Answers to Interrogatories propounded by Respondent, County Board of Kane County, Illinois, states as follows:

1. Identify the Person(s) answering these Interrogatories, by providing their name, address, phone number, and the name of the current employer.

ANSWER: Donald J. Moran
Pedersen & Houpt
161 North Clark Street, Suite 3100
Chicago, IL 60601
(312) 641-6888

2. Identify the Person(s) who provided information to answer or to aid in answering these Interrogatories, by providing their name, address, phone number, the name of their current employer, and the Interrogatory number(s) on which the person provided information.

ANSWER: See answer to Interrogatory number 1.

3. Identify all Person(s) who Waste Management of Illinois, Inc. intends to call as a witness at the hearing in this matter, by providing their name, address, phone number, the name of their current employer, and a description of their expected testimony.

ANSWER: WMII has not identified any persons it may intend to call as a witness at the hearing in this appeal. WMII will disclose such persons if and when they are identified.

4. Identify and describe each and every basis for Waste Management of Illinois, Inc.'s assertion, allegation and/or argument that the siting proceedings which are a subject of this appeal were fundamentally unfair, by providing, at a minimum, the following information:

a. a statement describing each individual basis for Waste Management of Illinois, Inc.'s assertion, argument and/or allegation of fundamental unfairness;

b. an explanation as to why Waste Management of Illinois, Inc. believes such basis (*i.e.*, each individual statement identified in 4.a., above) to be fundamentally unfair;

c. the date(s) and time(s) wherein such alleged fundamental unfairness occurred; and

d. a description of what, if any, prejudice Waste Management of Illinois, Inc. asserts it suffered as a result of such alleged unfairness.

ANSWER: The decision of the Kane County Board on WMII's Site Location Application for Woodland Transfer Facility, is set forth in Resolution No. 02-431 dated December 10, 2002, was fundamentally unfair because it was a legislative decision not based on the evidence presented of record. In addition, the decision misapplied the correct legal standard in determining whether the statutory criteria were met. As a result of this fundamental unfairness, Kane County denied the Site Location Application. WMII reserves the right to supplement this response as facts are disclosed in discovery.

5. Identify each and every transcript by date which Waste Management of Illinois, Inc. alleges was not timely; identify what time (by date and hour, as applicable), Waste Management of Illinois, Inc. asserts such transcript should have been available, the location of its availability, and when it was available to Waste Management of Illinois, Inc. or others, as applicable; and identify what, if any, prejudice Waste Management of Illinois, Inc. asserts it suffered as a result of such transcripts which are alleged by it to have been untimely.

ANSWER: WMII is unable to respond to Interrogatory No. 5 because it has not yet received information from Kane County regarding the availability of the hearing transcripts. WMII will supplement its response as necessary after completion of discovery.

Date: February 24, 2003

Respectfully Submitted,

WASTE MANAGEMENT OF ILLINOIS, INC.

By: _____
Donald J. Moran
One of Its Attorneys

PEDERSEN & HOUPT
161 North Clark, Suite 3100
Chicago, IL 60601
(312) 641-6888

CERTIFICATION

I, Donald J. Moran, being first duly sworn on oath, state that I have read the foregoing Answer to Interrogatories propounded by respondent, County Board of Kane County, Illinois, and that the answers are complete, true and correct to the best of my knowledge and belief.

Dated this 24th day of February, 2003.

Donald J. Moran

SUBSCRIBED and SWORN to
before me this 24th day of February, 2003.

Notary Public

"OFFICIAL SEAL"
Victoria Kennedy
Notary Public, State of Illinois
My Commission Expires March 9, 2005

PROOF OF SERVICE

Victoria L. Kennedy, a non-attorney, on oath states that she served the foregoing **WASTE MANAGEMENT OF ILLINOIS, INC'S ANSWERS TO INTERROGATORIES PROPOUNDED BY RESPONDENT, COUNTY BOARD OF KANE COUNTY, ILLINOIS** on the following parties by facsimile to Jennifer J. Sackett Pohlenz and by depositing same to all parties in the U.S. mail at 161 N. Clark St., Chicago, Illinois 60601, at 5:00 p.m. on this 24th day of February, 2003:

Jennifer J. Sackett Pohlenz
Querrey & Harrow, Ltd.
175 W. Jackson, Suite 1600
Chicago, IL 60604
Via Facsimile - (312) 540-0578

Mr. Michael W. McCoy
Chairman - Kane County Board
Kane County Government Center
719 S. Batavia Avenue, Building A
Geneva, IL 60134

John A. Cunningham
Kane County Clerk
Kane County Government Center
719 S. Batavia Avenue, Building A
Geneva, IL 60134

Victoria L. Kennedy

Exhibit C

ILLINOIS POLLUTION CONTROL BOARD
March 12, 2003

WASTE MANAGEMENT OF ILLINOIS, INC.,	)	
Petitioner,	)	
v.	)	PCB 03-104 (Pollution Control Facility Siting Appeal)
COUNTY BOARD OF KANE COUNTY, ILLINOIS,	)	
Respondent.	)	

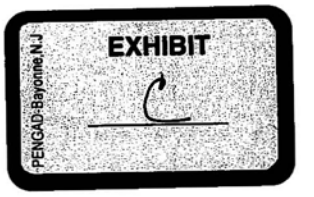
HEARING OFFICER ORDER

On March 11, 2003, all parties participated in a telephonic hearing with the hearing officer. At the conference, the hearing officer addressed respondent's objections to petitioner's interrogatories. Specifically, respondent objected to petitioner's definition (d), defining siting application and definition (h), defining the relevant time period for answering the interrogatories. Respondent also objected to petitioner's interrogatory no. 2, which requests respondent to identify all communications of each county board member that refer or relate to the siting application or the facility with the following persons: (a) Jennifer Sackett Pohlenz; (b) John Hoscheit; (c) Dan Walter; (d) any citizen or member of the public; (e) any municipal official, representative or agent; (f) any state official, representative or agent. Based on the pleadings that were submitted by the respective parties, the hearing officer made rulings as summarized below.

Respondent's objections to petitioner's definition (d), regarding the siting application definition, which includes the site location application filed February 13, 2002, and June 14, 2002, is denied. The parties represented that an application was filed on February 13, 2002, but later withdrawn on or about May 10, 2002. A second application was filed on June 14, 2002. In its petition filed with the Board, petitioner alleges that the procedures used by the Kane County Board were fundamentally unfair. The hearing officer found that pre-filing contacts may be probative of prejudgment of adjudicative facts, which is an element the Board considers in assessing fundamental fairness. This necessarily includes the February 13, 2002 filing and the June 14, 2002 filing.

Likewise, and for the same reasons, the hearing officer denied respondent's objection to petitioner's definition(h), which defined the relevant time period for answering the interrogatories was from January 1, 2002, to January 13, 2003. The hearing officer concluded that information concerning this time frame may be relevant or lead to relevant information.

Respondent's objection to petitioner's interrogatory no. 2 was granted in part and denied in part. First, respondent objected to the discovery of communications between her and the County Board members during the relevant time period on the grounds of attorney-client



privilege. Sackett Pohlenz states that she was a Special Assistant State's Attorney representing Kane County and the Kane County staff prior to the filing of the February 13, 2002, application and through and subsequent to the decision rendered on December 10, 2002. However, the Kane County Rules of Procedure for New Regional Pollution Control Facility Site Approval Applications prohibit any communication between Sackett Pohlenz and the hearing officer and the director of the County Department of Environmental Management, both of who advised the Kane County Board commencing when an application or petition is filed. Therefore, the hearing officer found that Sackett Pohlenz could not have represented the Kane County Board and that the attorney-client privilege did not attach between February 13, 2002, to on or about May 10, 2002, when the first application was withdrawn, and commencing again June 14, 2002, when the second application was filed to and including December 10, 2002, when the decision was rendered. The hearing officer found that any communication between Sackett Pohlenz and Kane County after the December 10, 2002 decision was privileged.

Regarding respondent's objection to the discovery of communications between County Board members and Hosheit and Walter, also Board members, the hearing officer sustained the objection premised on the deliberative process privilege. Respondent's objection to interrogatory no. 2 (d), (e) and (f) was denied.

Respondent's motion to strike petitioner's reference to matters outside the record found in its response filed March 3, 2002, was denied. Respondent argued that petitioner waived its argument that members who appear at the last moment to vote on a siting request are not excused from fundamental fairness issues because petitioner did not raise it at the County Board level. The hearing officer found that the petitioner did not waive its argument and, in any event, failure of the Board to consider this issue might otherwise result in an injustice.

Finally, petitioner represented that it has withdrawn the 23 subpoenas that it issued to the respondent. To that end, respondent's emergency motion to quash, filed March 5, 2003, is moot.

The parties are directed to participate in a telephonic status conference with the hearing officer on March 19, 2003, at 2:30 p.m. The status conference must be initiated by the petitioner, but each party is nonetheless responsible for its own appearance. At the status conference, the parties must be prepared to discuss the status of the above-captioned matter and their readiness for hearing.

IT IS SO ORDERED.

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601
312.814.8917

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were mailed, first class, to each of the following on March 12, 2003:

Donald J. Moran
Pedersen & Houpt
161 N. Clark Street
Suite 3100
Chicago, IL 60601-3224

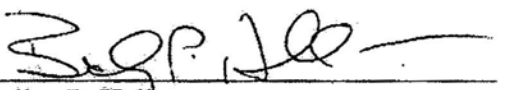
John A. Cunningham, County Clerk
Michael W. McCoy, Chairman
Kane County
719 South Batavia
Geneva, IL 60134

Carol Hecht
FRESH
754 E. Middle Street
South Elgin, IL 61077

Jennifer J. Sackett Pohlenz, Attorney
Querrey & Harrow, Ltd.
175 W. Jackson
Suite 1600
Chicago, IL 60604

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on March 12, 2003:

Dorothy M. Gunn
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph St., Ste. 11-500
Chicago, Illinois 60601



Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph Street, Suite 11-500
Chicago, Illinois 60601
312/814-6929

CERTIFICATE OF SERVICE

I, Susan Hardt, a non-attorney, certify that I caused a copy of the foregoing **Notice of Filing and United City of Yorkville's Response to Petitioner's Amended Motion to Compel and for Sanctions** to be served upon the Hearing Officer and all Counsel of Record listed on the attached Service list by sending it via Electronic Mail on January 8, 2008.

/s/ Susan Hardt

[x] Under penalties as provided by law pursuant to ILL. REV. STAT. CHAP. 110 – SEC 1-109, I certify that the statements set forth herein are true and correct.

Fox Moraine, LLC v. United City of Yorkville
PCB No. 07-146

SERVICE LIST

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