BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FOX MORAINE, LLC	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 07- 146
	)	
UNITED CITY OF YORKVILLE, CITY COUNCIL	)	
	)	
	)	
Respondent.	)	

FOX MORAINE'S RESPONSE TO YORKVILLE'S MOTION *IN LIMINE* No. 1

NOW COMES Fox Moraine, LLC, ("Fox Moraine"), by its attorneys, Charles Helsten and George Mueller and for its response to Yorkville's Motion In Limine #1 states and alleges as follows:

1. This motion seeks to bar any questions, statements, arguments, testimony or other evidence relating to possible bias, predisposition or unfairness of any city council member other than Mayor Valerie Burd and Alderman Rose Spears. The apparent basis for this is a claim that Fox Moraine waived the issue by not raising it as to other council members during the siting hearing. This is essentially a re-working of Yorkville's unsuccessful motion for protective order filed August 23, 2007.

2. As and for its response hereto, Fox Moraine, reiterates, repeats and reincorporates by reference its response filed August 30, 2007 to Yorkville's motion for protective order. It appears that this issue has been completely argued and briefed by both parties, and disposed of against Yorkville by the hearing officer's order of September 2, 2007, denying a protective order.

3. The forgoing notwithstanding, Yorkville now makes some additional arguments based upon discovery in this case since the protective order was denied.

Yorkville attempts to buttress its waiver argument by referencing at page 9 of its motion the testimony of one of Fox Moraine's consultants, Jim Burnham, that he believes that every city council member except for Mr. Besco, was biased. First of all Mr. Burnham's personal beliefs are not necessarily those of Fox Moraine. Secondly, Mr. Burnham's personal belief, developed through discovery in this matter, is completely irrelevant on the issue of waiver, inasmuch as waiver requires actual knowledge of bias at a time when a party could and should have objected based upon such knowledge. The reference in Yorkville's motion that Mr. Burnham's testimony and Fox Moraine's belief "at the time the landfill hearings were being held," is unsupported by an actual review of the transcript of Mr. Burnham's deposition.

4. Similarly paragraph 11 of Yorkville's motion alleging that Fox Moraine conceded that it had opportunities to raise issue of bias as to all council members before, during and after the landfill hearings is not supported by the reference to the record. (Yorkville Exhibit E, page 66, lines 5-24). The specific question relied upon by Yorkville is, "And had Fox Moraine wanted to, it could have moved to disqualify aldermen other than these two; correct?" The answer provided by the witness who is not necessarily speaking on behalf on Fox Moraine was, "I would guess so." This is hardly a definitive statement and in fact demonstrates how Yorkville is reaching and grasping at straws to try to resuscitate an argument it previously lost.

5. Yorkville's reliance on Land and Lake's Company v. Village of Romeoville, PCB 92-25 (June 4, 1992) is misplaced for several reasons. First of all, the trustees to whom objection was allegedly waived were seated on the village board at the

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commencement of the public hearing on the siting application. That would have been the proper time to move for their disqualification. Secondly, even though the PCB found waiver, they also considered the issue of whether these two trustees were biased on the merits. Thirdly, this PCB decision was reversed in the Appellate Court, which found that the applicant did not receive a fundamentally fair hearing and reversed for a full new hearing in order to ensure fundamental fairness. The Appellate Court held that the Pollution Control Board should have made meaningful inquiry into whether fundamental fairness occurred during the local public hearing and that petitioners were denied their right of fundamental fairness during the public hearing held by the village. Land and Lakes Co. vs. Pollution Control Board, 245 Ill. Ap. 3d 631 (3rd Dist. 1993)

6. The other cases cited in Yorkville's motion have already been distinguished and responded to in Fox Moraine's previous response. Fox Moraine would add however, that when the city claims that a decision maker is not biased, and the question is contested, it is difficult for the petitioner to have actual, definitive knowledge of disqualifying bias for purposes of waiver. For example, in the case of Aldermen Galinski, Leslie and Munns, Fox Moraine now believes, based upon information gathered in discovery, particularly information gathered from the depositions of Aldermen Leslie and Munns, that these individuals actually were biased. However, Fox Moraine did not have this information and knowledge at the time of the siting hearing and was therefore unable to make a motion to disqualify those three Aldermen. Yorkville, in effect would have the Board develop a bright line test whereby failure to move at the outset for disqualification of a local decision maker is deemed a conclusive

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waiver of the right to develop information in the future tending to show that that decision maker actually was biased, even if knowledge of such bias did not exist at the time of the local public hearing. Even if there is suspicion of disqualifying bias, to require siting applicants to move to disqualify individuals who are merely suspected is unfair in that such motions have a natural tendency to alienate those against whom they are directed.

7. In the case of Aldermen Werderich, Sutcliffe and Plocher, Yorkville has not responded to the fact that Fox Moraine never had a meaningful opportunity to move to disqualify those individuals. Yorkville points out that these three individuals were elected on April 17th and the public hearing did not end until April 20th. However, these three individuals were not seated as Aldermen until May 8, 2007, long after the end of the public hearing. The May 23 and May 24, 2007, city council meetings were exclusively for the purpose of deliberation and neither members of the public nor the parties were allowed to participate in those meetings. Accordingly, that was not an opportunity to move for disqualification of an alderman. When the City's own ordinance and procedures did not call for Fox Moraine's active participation after the end of the official public hearing, failure to disrupt the subsequent deliberation meeting by yelling "We object," can hardly be construed as a waiver of anything.

WHEREFORE, for the forgoing reasons, Fox Moraine prays that Yorkville's Motion *In Limine* No. 1 be denied.

Respectfully submitted,
FOX MORAINE, LLC

By: _____
One of its attorneys

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FOX MORAINE, LLC,	)	
	)	
Petitioner,	)	
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v.	)	PCB No. 07-146
	)	
UNITED CITY OF YORKVILLE, CITY COUNCIL,	)	
	)	
	)	
Respondent.	)	

FOX MORAINE'S RESPONSE TO YORKVILLE'S MOTION IN LIMINE #2

NOW COMES Fox Moraine Landfill, LLC hereinafter ("Fox Moraine"), by its attorneys, and in opposition to Yorkville's Motion in Limine #2, states as follows:

Introduction

The Illinois Supreme Court declared unequivocally in *People ex rel. Birkett v. City of Chicago,* 184 Ill.2d 521, 705 N.E.2d 48 (1998), that there is no "deliberative process privilege" in Illinois. This holding by the state's highest court has never been abrogated, therefore there is no basis for asserting deliberative process in this case, which is governed by Illinois law. Notably, the Board's rules and regulations do not recognize a deliberative process privilege.

Nevertheless, Respondent Yorkville asserts and seeks to invoke such a privilege, although Yorkville's Motion concedes that an inquiry into the decision-making process would be permissible if there was a strong showing of bad faith or improper behavior. Yorkville asserts that in this case there is "no evidence…to overcome the presumption of impartiality." (Yorkville's Motion in Limine #2, at ¶4). This claim that there is "no evidence" of impropriety or bad faith in this case completely ignores the evidence that Council Members not only prejudged the siting application without hearing the evidence, their election to office was predicated on their apparent promise to vote against it.

Inasmuch as the Rules provide that a hearing officer must admit evidence that is relevant and would be relied upon by prudent persons, unless the evidence is privileged (35 Ill.Adm.Code 101.626), the Hearing Officer should deny Yorkville's Motion in Limine #2 and permit an inquiry into the role personal bias and prejudgment played in the Council Members' decisions to deny siting, so as to determine whether the siting proceedings comport with the Section 39.2 requirements of fundamental fairness.

Argument

I. **The Illinois Supreme Court has declared unequivocally that there is no deliberative process privilege in Illinois.**

In support of its argument that no inquiry into the decision-making process should be permitted here, Yorkville relies upon the Board's holding in *Waste Management of Illinois v. Co. Bd. of Kankakee County*, PCB No. 04-186 (Jan. 24, 2008). Yorkville points to language in that decision concerning the importance of safe-guarding the mental process of decision-makers.

Notwithstanding the Pollution Control Board's periodic reference to the existence of such a protection, in *People ex rel. Birkett v. City of Chicago*, 184 Ill.2d 521, 705 N.E.2d 48 (1998), a case in which the City of Chicago asserted the existence of a "deliberative process privilege," the Illinois Supreme Court declared unequivocally that there is no "deliberative process privilege" in Illinois.

The Supreme Court explained in *Birkett* that even though the evidentiary rules in federal courts protect certain classes of communications associated with the decision-making process, the same is not true in proceedings governed by state law. Moreover, the high court noted in *Birkett* that even in federal court,"[e]xcluded from the privilege are any factual aspects of predecisional communications...[and] the privilege is qualified in that a litigant may obtain access to privileged communications upon a showing of particularized need." (*Id.* at 526-27).

Despite any potential "chilling effect" that the lack of such a privilege might have on "the candor of government staff," the Court explained that privileges are "strongly disfavored because they operate to 'exclude relevant evidence and thus work against the truthseeking function of legal proceedings.'" *Id.* at 527. Most importantly, the Court in *Birkett* declared that:

> We find these principles especially applicable under the circumstances at bar, where the government is a party to the litigation and, more importantly, has been charged with malfeasance.

Id. at 530 (emphasis added).

The Court further explained that privileges are strongly disfavored, and that it is the role of the legislature, not the courts, to declare their existence. Because the Illinois legislature has declined to create a deliberative process privilege, the Court was unwilling to step into the legislature's role and declare such a privilege. This declaration by the Supreme Court that there is no deliberative process privilege under Illinois law has never been abrogated.

Since *Birkett*, the Appellate Court in *Thomas v. Page*, 361 Ill.App.3d 484, 837 N.E.2d 483 (2nd Dist. 2005), was asked to decide whether there is a deliberative process privilege with respect to the judiciary. In deciding *Thomas*, the Appellate Court discussed the Supreme Court's holding in *Birkett* that there is no deliberative process privilege in Illinois. The Appellate Court observed that the Supreme Court in *Birkett* denied the existence of a deliberative process privilege in the context of a municipality. The *Thomas* Court went on to explain that because the matter in *Thomas* pertained exclusively to the court system, not to a municipality, the Appellate Court could was in a position to recognize a narrowly tailored "judicial" deliberative process privilege applying solely to its own branch of government – the judiciary – and applying only to "intra-court communications made in the course of the judicial decision-making process and

concerning the court's official business." *Id.* at 494. The Court was adamant that its ruling did not conflict with *Birkett*, explaining in no uncertain terms that the privilege it was recognizing in *Thomas* applies only to the court system, whereas *Birkett* applied in the context of a municipality. The Court expressly refused to "establish a privilege for another branch of government," deferring to the holding in *Birkett* that this is a job for the legislature. (*Id.* at 491)(emphasis added).

Thus, it is clear that under binding Illinois precedent, there is no basis for asserting a deliberative process privilege in a case such as this. Although the Board has occasionally stated that the mental processes of decision-makers should be safeguarded absent a "strong showing of bad faith or improper behavior," this proposition has never been found to be correct by any court in this state.

Moreover, it should be noted that the Board's rules and regulations do not recognize the existence of a deliberative process privilege, and in fact the rules limit non-disclosable information to:

> information which constitutes a trade secret; information privileged against introduction in judicial proceedings; internal communications of the several agencies; information concerning secret manufacturing processes or confidential data submitted by any person under the Act [415 ILCS 5/7(a)].

35 Ill.Adm.Code 101.202.

Because the Board's procedural rules make no mention of a "deliberative process" privilege, and because the Illinois Supreme Court's holding in *Birkett* remains good law as to municipalities such as Respondent Yorkville, no such privilege exists under Illinois law.

II. **Even if a deliberative process privilege did exist, the bad faith present in this case would justify disregarding the privilege.**

Even if the Supreme Court had not unequivocally held that no deliberative process exists in Illinois, the Board acknowledged in *Waste Management v. Kankakee* that any protection enjoyed by decision-makers must yield where the evidence reveals "bad faith or improper behavior." *Id.* at 27. Here, the record reveals exactly that: evidence of bad faith and improper behavior, in the form of bias and prejudgment.

Yorkville admitted to the Board, in a pleading filed only a week ago in PCB 08-095, that the siting application at issue here, and the applicant, were "the biggest issues in Yorkville in the last 20 years," and were "the primary issue in the last city election and change in administration." (Yorkville's Response in Opposition to Attorney's Fees, PCB 08-095, p. 1)(emphasis added). Thus, Yorkville has conceded that the election for city officials in April 2007 was intensely focused on the proposed landfill, for which hearings were then underway, and that this focus on opposition to the landfill affected the outcome of the election, resulting in a turnover in city administration.

Moreover, Yorkville provided, as Exhibit A to its Motion in Limine #3 in this case, a front-page newspaper article quoting the campaigning Council Members as declaring, during the pendency of the siting proceedings, while evidence was still being presented, that, *inter alia*, "I don't think there is any such thing as a safe, state-compliant landfill"; "a landfill would be a negative"; and "it would be a negative addition to the city. I have no question about that." (*Id.*).

In contrast with the clear declarations of prejudgment made by the decision-makers in this case, in *Waste Management v. Kankakee*, the case cited by Respondent, the petitioner had attempted to show bad faith by the decision-makers by pointing to the efforts of landfill objectors to contact and influence the decision-makers. The evidence in that case showed, however, that

the decision-makers repeatedly rebuffed those attempts and declined to discuss or comment on the proposed landfill with the objectors or others. The Board accordingly concluded that the evidence in that case showed "county board members generally tried to limit those *ex parte* contacts when it became apparent that the subject of the discussion would be the proposed landfill expansion." *Id.* The Board found that nothing in the record constituted a showing of bad faith or improper behavior, and there was, therefore, no justification for probing the decision-makers' thought processes in that case. *Id.*

Here, however, as noted above, there is a plethora of evidence showing that the Council Members failed to follow the course of impartiality charted by the decision-makers in *Waste Management v. Kankakee*. The evidence here shows that rather than maintain at least some modicum of impartiality, Council Members publicly and actively campaigned on a platform of defeating the siting of a proposed landfill for which hearings were already underway, which they themselves would vote upon, and that the siting question was "the biggest issue in 20 years" and "the primary issue in the last city election and change in administration." (Yorkville's Response in Opposition to Attorney's Fees, PCB 08-095, p. 1).

This pronounced evidence of decision-maker bias, partiality, and prejudgment clearly implicates fundamental fairness. Because there is already a strong showing of "bad faith or improper behavior," any protection of the deliberative process would yield so as to allow an inquiry into the role that bias played in the decision-making process. *See Waste Management v. Kankakee* at 27.

III. The Council Members waived any possible privilege by discussing their own deliberative process on the record.

Even if a deliberative process privilege existed, the Council Members waived that privilege by deciding to conduct their deliberations publicly, on the record, with a court reporter

present to transcribe. (*See* Transcript of May 23, 2008 meeting, at 5-7; 14-16; 22-111). Inasmuch as the Council Members chose to conduct their deliberations on the record, they waived any right to invoke a privilege as to those deliberations.

IV. **By admitting that their decision was not based on the record, the Council Members opened the door for an inquiry into the basis upon which they made their decision.**

On May 23, 2008, during the meeting in which the Council Members expressed their opinions and conclusions on the siting criteria, the Council Members admitted they had not actually reviewed the record. (Transcript of May 23, 2008 at 9-16). This lack of review of the record begs the question of what the Council did base its decision upon, and opens the door for an inquiry into the basis for their decision.

Conclusion

Under the Act, the Board has a duty to assess the fundamental fairness of the proceedings, 415 ILCS 5/40.1(a), which entails a determination of whether the applicant was judged by an unbiased decision-maker. *See, e.g., Ferguson v. Ryan*, 251 Ill.App.3d 1042, 1049, 623 N.E.2d 1004, 1009, 191 Ill.Dec. 414, 419 (3rd Dist.1993).

Respondent Yorkville's attempt to invoke a so-called "privilege" and thereby shield the bias of the decision-makers from scrutiny is unsupported, inasmuch as the Illinois Supreme Court has declared that there is no deliberative process privilege in Illinois. Moreover, even if such a privilege existed, where, as here, there is a showing of bad faith or improper behavior, any such protection would be overcome. Accordingly, the decision-making process of the Yorkville City Council Members should be examined in order to determine the role played by prejudgment and bias in the decision-making process. Such scrutiny is essential to a determination of whether the decision-making process was fundamentally fair.

Finally, even if a privilege existed, the Council Members waived any privilege

concerning their deliberations by choosing to conduct those deliberations on the record, with a court reporter present to transcribe. Moreover, during that deliberative session Council Members admitted they had not reviewed the record, in large part because they didn't feel they had time to review it, and in so doing, they opened the door for an inquiry into what they relied upon to reach their decision.

WHEREFORE, Fox Moraine respectfully requests that the Board deny Yorkville's Motion in Limine #2.

Dated: _____

Respectfully submitted,

On behalf of FOX MORAINE, LLC

/s/_____
George Mueller
One of Its 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

FOX MORAINE'S RESPONSE TO YORKVILLE'S MOTION IN LIMINE #3

NOW COMES Fox Moraine Landfill, LLC hereinafter ("Fox Moraine"), by its attorneys, George Mueller and Charles Helsten, and in opposition to Yorkville's Motion in Limine #3, states as follows:

Introduction

Yorkville's Motion #3 seeks to prevent the introduction of evidence concerning bias and lack of fundamental fairness by barring the public statements of Council Members made during their campaigns. Yorkville's motion is predicated on the theory that anything an official says during his or her candidacy is "inadmissible" in Board proceedings, even where, as here, those proceedings turn on the question of fundamental fairness arising from bias and prejudgment. Yorkville further asserts that the statements should be barred because public officials have a supposed constitutional right to be protected from having to respond to questions about their public statements.

Argument

The Act mandates that the Board consider the fundamental fairness of the procedures used by the respondent in reaching its decision. 415 ILCS 5/40.1(a) (2006). In that regard, it is axiomatic that a party appearing before an administrative tribunal has the right to be judged by

an unbiased decision maker. *See, e.g., Ferguson v. Ryan*, 251 Ill.App.3d 1042, 1049, 623 N.E.2d 1004, 1009, 191 Ill.Dec. 414, 419 (3rd Dist.1993). Here, Fox Moraine was denied that right.

Although, as argued by Yorkville, there is a presumption that administrative decision makers are persons of "conscience and intellectual discipline" who are able to fairly and objectively judge a matter based on its own facts, and may be presumed to set aside their own personal views, a claimant may nevertheless show bias or prejudice if the evidence "might lead a disinterested observer to conclude that the administrative body, or its members, had in some measure adjudged the facts as well as the law of the case in advance of hearing it." *Danko v. Board of Trustees of City of Harvey Pension Bd.*, 240 Ill.App.3d 633, 642, 608 N.E.2d 333, 339, 181 Ill.Dec. 260, 266 (1st Dist. 1992); *see also Waste Management of Illinois, Inc. v. Pollution Control Bd.*, 175 Ill.App.3d 1023, 1040, 530 N.E.2d 682, 696, 125 Ill.Dec. 524, 538 (2 Dist. 1988)(citing *E & E Hauling, Inc. v. Pollution Control Bd.*, 116 Ill.App.3d 586, 598, , 451 N.E.2d 555, 71 Ill.Dec. 587 (2nd Dist. 1983), *aff'd* 107 Ill.2d 33, 481 N.E.2d 664, 89 Ill.Dec. 821 (1985)).

As the Appellate Court explained in *E & E Hauling*, "unequivocal public pronouncements in favor of [a particular outcome] amount[s] to a sufficient prejudgment of the merits of the case to warrant the finding of disqualifying bias. *E & E Hauling, Inc. v. Pollution Control Bd.*, 116 Ill.App.3d 586, 599, 451 N.E.2d 555, 566, 71 Ill.Dec. 587, 598 (2nd Dist. 1983).

Yorkville argues that Council Members' statements made in advance of the proceedings should be barred because statements made during their campaigns concerning the Landfill "[do] not overcome the presumption that, as administrative officials, they were objective in judging the siting application." Yorkville's brief at ¶5. Yorkville points to *Waste Management of Illinois v. PCB*, 175 Ill.App.3d 1023 (2nd Dist. 1988) in support of its argument, however Yorkville has cut short the appellate court's statement of the law in *Waste Management*, by failing to include the

court's admonition that in spite of the presumption of impartiality, that presumption will be overcome if "a disinterested observer might conclude that the administrative body, or its members, had in some measure adjudged the facts as well as the law of the case in advance of hearing it." *Id.* at 1040 (*citing E & E Hauling*). In other words, the court in *Waste Management* held that the taking of a public position with respect to the proceedings does not overcome the presumption of impartiality unless a disinterested observer might conclude that the individuals had "adjudged the facts as well as the law" in advance of the hearing. *Id.*

Here, by its motion, Yorkville attempts to prevent the Board from hearing the evidence necessary to determine whether the Council Members' statements opposing the landfill were such that they would lead a disinterested person to conclude that the decision-makers adjudged the matter in advance of the hearing. Without presentment of that evidence, there is no way to answer this pivotal question. As a result, the evidence is not only not "inadmissible," as argued by Yorkville, it is, in fact, vital to a determination of the core issue in this appeal.

With respect to Yorkville's "free speech" argument, Yorkville cites the First Amendment to the Constitution and 5 U.S.C. § 7323(c) (the "Hatch Act" - which applies only to federal employees, and guarantees certain federal employees the right to engage in political activity). Fox Moraine agrees that the Council Members had a constitutional right to state their personal opinions and to respond to questions during their campaigns. However, neither the First Amendment nor the Hatch Act affords public officials (state or federal) the right to avoid being asked about their public statements. More importantly, the constitutional right to make public statements does not equate with a constitutional right to sit in judgment over a matter on which the would-be decision-maker has made up his or her mind prior to hearing the evidence. Indeed, such conduct is the very hallmark of bias, and is an anathema to the concept of fundamental

fairness. *See E & E Hauling*, 116 Ill.App.3d at 599.[1]

Conclusion

Under the Act, the Board has a duty to assess the fundamental fairness of the proceedings, and Council Members' statements evidencing their prejudgment of the siting application is therefore inherently at issue in a case such as this. As a result, the Board should deny Motion in Limine #3 and allow the admission of evidence and argument concerning statements by Council Members revealing their prejudgment of the Petitioner's siting application.

WHEREFORE, Fox Moraine respectfully requests that the Board deny Yorkville's Motion in Limine #3.

Dated: _____

Respectfully submitted,
On behalf of FOX MORAINE, LLC

_____
One of Its Attorneys

[1] As noted in Yorkville's brief, Counsel for the Petitioner did, indeed, argue in PCB 04-186 against the introduction of statements made during a political campaign, however the statements at issue in that case had been made by a candidate running for state legislature, not for a seat on the body that would adjudicate the pending siting application. (Tr. 22-23). Interestingly enough, Counsel for Respondent argued in that case (PCB 04-186) that the intent of the legislature in 39.2(d) was to allow candidates to express their general opinions on the subject of landfills, but not to allow decisionmakers to declare judgment as to a particular, pending siting application on which they would vote – the very scenario presented here. (*See* Tr. 23-25).

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FOX MORAINE, LLC, Petitioner, v. UNITED CITY OF YORKVILLE, CITY COUNCIL, Respondent.	)	PCB No. PCB 07-146

NOTICE OF FILING

TO: All counsel of Record (see attached Service List)

Please take notice that on September 29, 2008, the undersigned filed with the Illinois Pollution Control Board, 100 West Randolph Street, Chicago, Illinois 60601, Fox Moraine's Response to Yorkville's Motions in Limine #1, #2, and #3.

Dated: September 29, 2008

Respectfully submitted,

On behalf of FOX MORAINE, LLC

/s/
George Mueller
One of Its Attorneys

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NOTICE OF FILING

TO: All counsel of Record (see attached Service List)

Please take notice that on September 29, 2008, the undersigned filed with the Illinois Pollution Control Board, 100 West Randolph Street, Chicago, Illinois 60601, Fox Moraine's Response to Yorkville's Motion in Limine #1.

Dated: September 29, 2008

Respectfully submitted,

On behalf of FOX MORAINE, LLC

/s/
George Mueller
One of Its Attorneys

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NOTICE OF FILING

TO: All counsel of Record (see attached Service List)

Please take notice that on September 29, 2008, the undersigned filed with the Illinois Pollution Control Board, 100 West Randolph Street, Chicago, Illinois 60601, Fox Moraine's Response to Yorkville's Motion in Limine #2.

Dated: September 29, 2008

Respectfully submitted,

On behalf of FOX MORAINE, LLC

/s/
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One of Its Attorneys

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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NOTICE OF FILING

TO: All counsel of Record (see attached Service List)

Please take notice that on September 29, 2008, the undersigned filed with the Illinois Pollution Control Board, 100 West Randolph Street, Chicago, Illinois 60601, Fox Moraine's Response to Yorkville's Motion in Limine #3.

Dated: September 29, 2008

Respectfully submitted,

On behalf of FOX MORAINE, LLC

/s/
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One of Its Attorneys

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AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on September 29, 2008, she served a copy of the foregoing upon:

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