BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on this 12th day of June, 2009, George Mueller, one of the attorneys for Petitioner, Fox Moraine, LLC, filed via electronic filing of the attached ***Motion to File Supplemental Brief Instantor and Supplemental Brief of Fox Moraine*** with the Clerk of the Illinois Pollution Control Board, a copy of which is herewith served upon you.

Respectfully submitted,

FOX MORAINE, LLC

By: /s/ George Mueller
One of its Attorneys

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

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CERTIFICATE OF SERVICE

I, Sharon Twardowski, a non-attorney, certify that I served a copy of the foregoing ***Notice of Filing, Motion to File Supplemental Brief Instantor and Supplemental Brief of Fox Moraine*** to the Hearing Officer and all Counsel of Record listed on the attached Service list, by sending it via Electronic Mail on June 12, 2009 before 5:00 p.m.

/s/ Sharon Twardowski

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

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MOTION TO FILE SUPPLEMENTAL BRIEF INSTANTOR

Now Comes Fox Moraine, LLC, ("Fox Moraine") by one of its attorneys, George Mueller, and moves to file the attached Supplemental Brief, Instantor, and in support thereof states as follows:

1. The briefing schedule set by the hearing officer herein requires Fox Moraine's brief to be filed on or before June 12, 2009. Fox Moraine's brief has been filed this date and this motion is also being timely brought on June 12, 2009.

2. The record in this case is substantial and includes, but is not limited to, the record filed by the City of Yorkville, which is over 19,000 pages. That includes approximately 5,000 pages of transcripts of the actual public hearing conducted by the City of Yorkville. The record developed before this Board consisted of three days of testimony with 12 witnesses being called, 39 exhibits being received and over 1,000 pages of transcripts of City Council meetings prior to the start of the actual siting hearing.

3. Not only is the record in this case massive, but the issues are complex and voluminous. The City purportedly found against Fox Moraine on seven of ten siting criteria, and the decision on all seven of those is challenged as being against the manifest weight of the evidence. The proceedings before the City Council are alleged to be fundamentally unfair for multiple reasons, as evidenced partly by multiple previous motions before this Board regarding matters related to fundamental fairness, said motions including, but not limited to, the Wildman invoice, the Roth report, and claims of deliberative process privilege.

4. Based upon the foregoing, preparation and assembly of the brief herein within the 35 days allowed has been an enormous task. Additionally, that task has been complicated by the fact that three attorneys at two different law firms have been principally responsible for preparation of this brief. Coordination between those attorneys and law firms has been complex.

5. In the rush to complete preparation and filing of Fox Moraine's brief on time, a portion of the argument relating to siting criterion viii was inadvertently omitted from the brief that was filed. The supplemental brief herein represents that portion of the argument which was inadvertently omitted and which Fox Moraine seeks to have this Board consider with all other arguments previously made.

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WHEREFORE, Fox Moraine, prays for leave to file the attached Supplemental Brief instantor, and to have the Board consider the same as if it had been filed as part of the principal brief filed herein earlier this same date.

Respectfully submitted,

FOX MORAINE, LLC

By: /s/George Mueller
One of its attorneys

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SUPPLEMENTAL BRIEF OF FOX MORAINE

Now Comes, Fox Moraine, LLC, by George Mueller, one of its attorneys, and submits this supplemental brief.

The Environmental Protection Act is clear and unambiguous on the authority and jurisdiction of municipalities to site pollution control facilities.

The County's misguided insistence that the May 2006 amendment to the Solid Waste Management Plan deprived all municipalities of the right to act as local siting authorities is contrary to law and creates a more fundamental problem for the County. The evidence at the hearing showed that if construed to unilaterally and unconditionally deprive local municipalities of siting jurisdiction, the County Plan is then inconsistent with the Local Solid Waste Disposal Act and the Solid Waste Planning and Recycling Act.

With respect to the Amendatory Act of 1992 to the Solid Waste Planning and Recycling Act, Mr. Willis explained that the Act states that solid waste planning should be encouraged to take place on a multi-county regional basis, and through intergovernmental cooperation agreements, whereby all affected units of local government determine the best method and location for solid waste disposal within their regions. Notably, the Act provides that "This amendatory act of 1992 *shall not be construed to impact the authority of units of local*

government in siting of solid waste disposal facilities." (March 23rd, page 64-65) (emphasis added).

Notwithstanding the Act's deference to the right of local governments with respect to siting, on May 4, 2006, the County Board passed Resolution No. 06-11, which purports to deny municipalities the right to act as local siting authorities, which Mr. Willis noted was in direct conflict with the Act and with the planning principles that have guided the County since at least 1995. (March 23rd, page 67). The May 4th Resolution constituted a completely unilateral action by the County which was undertaken without any input from any municipalities. (March 23rd, page 67). Mr. Willis went on to note that the County interprets the May 4th Resolution as effectively stripping municipalities of their right to act as local siting authorities, notwithstanding the fact that the legislature has clearly and expressly authorized both counties and municipalities to act as local siting authorities for solid waste facilities. (*See* March 23rd, page 179; see also 415 ILCS 5/39.2(a)). As Mr. Willis explained, the May 4, 2006 meeting at which the County Board passed the Resolution was a hastily-called, ten minute special meeting held for solely that purpose, and was expressly designed to cut off any opportunity for the City (or indeed any municipality) to obtain revenue from hosting a landfill and to instead seize and channel that revenue stream, in perpetuity, into the County's coffers. (*See* March 23rd, page 180, 184, and testimony of Church below).

Section 39.2 of the Act requires that an applicant for local siting approval must demonstrate compliance with nine siting criteria. Criterion viii is, "If the facility is to be located in a County where the County Board has adopted a Solid Waste Management Plan consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste

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Planning and Recycling Act, the facility is consistent with that plan." (415 ILCS 5/39.2(a)(viii)). With respect to this criterion the City finding completely ignores the controlling fact that Kendall County had not adopted a Solid Waste Management Plan which is consistent with the planning requirements of the Solid Waste Planning and Recycling Act, therefore making compliance with this criterion inapplicable. Counties do not have the primary overall responsibility for management of municipal solid waste, since the legislature has unambiguously decided that question in the context of pollution control facility siting by designating shared responsibility.

Kendall County appeared at the siting hearing and essentially argued that the City of Yorkville did not have the authority to site a landfill within its jurisdiction, when the County had amended its Solid Waste Management Plan for the express purpose of depriving all municipalities within the county of such authority. This argument seems to fly in the face of the policy expressed by the Supreme Court in *City of Elgin v. County of Cook*, 169 Ill2d 53, 660 NE2d 875 (1995), condemning the attempts of municipalities to interfere with the siting authority of their neighbors, "Where the appropriate unit of local government approves the siting of a pollution control facility pursuant to §39(c) and that facility is contained solely within that unit's own geographic boundaries, we hold that extraterritorial third party challenges to these siting decisions to the Courts of this state are incompatible with the purposes of the Act" (at 169 Ill2d 70)

415 ILCS 5/39(c) vests jurisdiction to conduct a pollution control facility siting hearing on either a county or a municipality based upon where the facility "is to be located." Section 39.2 of the Act sets forth the procedures for local siting and again consistently makes clear that these are available to both counties and municipalities.

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The Solid Waste Planning and Recycling Act mandates the adoption by counties of solid waste management plans and admittedly does give to counties "The primary responsibility to plan for the management of municipal waste within their boundaries." 415 ILCS 15/2(a)(2) This primary responsibility is, however, to plan and not necessarily to manage. It is also subject to a critical and controlling caveat contained in the same statute, "This Amendatory Act of 1992 shall not be construed to impact the authority of units of local government in the siting of solid waste disposal facilities." (415 ILCS 15/2(a)(5), emphasis added) Therefore, the ability of municipalities to site pollution control facilities within their boundaries is expressly acknowledged and reserved by the legislature, and the lead given to counties in planning only cannot be the basis for a county infringing on or limiting that municipal jurisdiction. Kendall County has made no secret of arguing that it amended its Solid Waste Management Plan for the sole purpose of preventing the City of Yorkville from siting a landfill. Even though the amendment was so inartful that it failed to achieve its purpose, allowing Fox Moraine to establish consistency anyway, the fact of Fox Moraine's consistency with that Plan is purely academic, because the County's Solid Waste Management Plan is rightfully deemed as not being consistent with the planning requirements of the Solid Waste Planning and Recycling Act.

Similarly, the Local Solid Waste Disposal Act makes clear the legislative intent to empower municipalities as well as counties to site pollution control facilities free of interference from their neighbors. "It is the purpose of this Act and the policy of this State to protect the public health, safety and welfare and the quality of the environment by providing local governments with the ability to properly dispose of solid waste within their jurisdictions by preparing and implementing, either individually or jointly, solid waste management plans..."

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(415 ILCS 10/1.1). Section 2(2) of the Local Solid Waste Disposal Act defines a unit of local government to specifically include a municipality and §2(4) specifically defines jurisdiction in the case of a municipality to be "The territory within the corporate limits of the municipality."

To the extent that the County's Solid Waste Management Plan in this case attempts to limit the City's exercise of siting jurisdiction the County's Solid Waste Management Plan is not consistent with the planning requirements of either the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act, and siting Criterion viii is therefore inapplicable to Fox Moraine's application.

It is somewhat ironic that the County bases its incorrect conclusions on a Plan amendment centered around the word "located." While Mr. Willis offered a common dictionary definition for the word which makes the application consistent, the word "located" is used in the Act is jurisdictional and would appear to make criterion viii inapplicable to all siting cases within municipal boundaries. This siting criterion is best read as applying only to facilities proposed "to be located" in a county rather than in a municipality. 415 ILCS 5/39(c), referenced in §39.2(a), states in pertinent part "No permit for the development or construction of a new pollution control facility may be granted by the Agency unless the applicant submits proof to the Agency that the location of the facility has been approved by the County Board of the county if in an unincorporated area or the governing body of the municipality when in an incorporated area, in which the facility is to be located in accordance with §39.2 of this Act. " (emphasis added). 415 ILCS 39.2(a)(viii) requires "If the facility is to be located in a county where the county has adopted a Solid Waste Plan consistent with the planning requirements of the Local Solid Waste

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Disposal Act or the Solid Waste Planning and Recycling Act, the facility is consistent with that plan." (emphasis added).

The phrase "is to be located" as used in the foregoing related statutory sections is clearly jurisdictional, requiring that if a proposed facility is to be located in a county and subject to siting jurisdiction by that county, it must be consistent with that county's Solid Waste Management Plan. Conversely, if a facility "is to be located" in a city, it need not be consistent with a county's Solid Waste Management Plan, because it is not to be located in an unincorporated area of a county.

This interpretation is harmonious with the quoted statutory language and also with other provisions of the Solid Waste Planning and Recycling Act as well as the Local Solid Waste Disposal Act as set forth hereinabove. It is also consistent with previous pronouncements by the Supreme Court that all units of local government have concurrent jurisdiction with the Agency (IEPA) in approving pollution control facility siting. *City of Elgin v. County of Cook*, 169 Ill2d 53, 660 NE2d 875 (1995); *Town & Country Utilities, Inc. v. Pollution Control Board*, 225 Ill2d 103, 866 NE2d 227 (2007).

Respectfully submitted,

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