

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CONCERNED CITIZENS OF OGLE)	
COUNTY,)	
)	
Petitioner,)	
)	PCB
v.)	
)	(Pollution Control Facility Siting Appeal)
THE CITY OF ROCHELLE, by its City)	
Manager, as Applicant, the CITY COUNCIL)	
OF THE CITY OF ROCHELLE, ILLINOIS,)	
as the decision making unit of local)	
government, and ROCHELLE WASTE)	
DISPOSAL, L.L.C., as Applicant as defined)	
under the Rochelle City Code,)	
)	
Respondents.)	

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE THAT on the 16th day of May, 2007, HASSELBERG, WILLIAMS, GREBE, SNODGRASS & BIRDSALL, attorneys for Petitioner, CONCERNED CITIZENS OF OGLE COUNTY, filed a Petition for Review and Entry of Appearance, via electronic filing as authorized by the Clerk of the Illinois Pollution Control Board.

Respectfully submitted,

CONCERNED CITIZENS OF OGLE
COUNTY

By: /s/ David L. Wentworth II
David L. Wentworth II
One of Their Attorneys

David L. Wentworth II
Emily R. Vivian
Hasselberg, Williams, Grebe,
Snodgrass & Birdsall
124 SW Adams, Suite 360
Peoria, IL 61602
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STATE OF ILLINOIS)
) SS
COUNTY OF PEORIA)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Petition for Review and Entry of Appearance of Petitioner, Concerned Citizens of Ogle County, was served upon the following persons by enclosing such documents in separate envelopes, addressed as follows, and depositing said envelopes in a U.S. Postal Service mail box on the 16th day of May, 2007, before 5:00 p.m., with all fees thereon fully prepaid and addressed as follows:

Mr. Bruce McKinney
City Clerk
420 N. 6th Street
Rochelle, IL 61068

Mr. Donald J. Moran
Pedersen & Houpt
161 North Clark Street
Suite 3100
Chicago, IL 60601

Mr. Alan Cooper
City Attorney
233 East Route 38, Suite 202
P.O. Box 194
Rochelle, IL 61068

Mr. David Tess
Tess & Redington
1090 North 7th Street
Rochelle, IL 61068

Mr. Glenn Sechen
Schain, Burney, Ross & Citron, Ltd.
Suite 1910
222 North LaSalle Street
Chicago, IL 60601-1102

Mr. Charles F. Helsten
Hinshaw & Culbertson
100 Park Avenue
Rockford, IL 61101

Hon. John J. McCarthy
Hearing Officer
45 East Side Square
Suite 301
Canton, IL 61520

/s/ David L. Wentworth II
David L. Wentworth II

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ENTRY OF APPEARANCE

TO: Clerk of the Illinois Pollution Control Board and All Parties of Record

Please enter our appearance as counsel of record in this case for the following:

CONCERNED CITIZENS OF OGLE COUNTY

Dated: May 16, 2007.

Respectfully submitted,

CONCERNED CITIZENS OF OGLE
COUNTY

By: /s/ David L. Wentworth II
David L. Wentworth II

By: /s/ Emily R. Vivian
Emily R. Vivian

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PETITION FOR REVIEW

NOW COMES Concerned Citizens of Ogle County (“CCOC” or “Petitioner”), by and through its attorneys, David L. Wentworth II and Emily R. Vivian of Hasselberg, Williams, Grebe, Snodgrass & Birdsall, pursuant to § 40.1(b) of the Environmental Protection Act (the “Act”) (415 ILCS 4/40.1(b)) and petitions for review of the action of the Rochelle City Council (the “City Council”) on April 11, 2007, in which it passed a Resolution approving the City of Rochelle’s (the “City”) Application for Local Siting Approval of a vertical and horizontal expansion of its existing municipal landfill located in Ogle County, Illinois with special conditions. In support of its Petition, CCOC respectfully states and submits as follows:

1. That on October 16, 2006, the City of Rochelle, by its City Manager, as Applicant, filed an Application with the City Council for site location approval pursuant to § 39.2 of the Act of a pollution control facility (the “Application”), specifically, a vertical and horizontal expansion of the City’s existing municipal landfill located in Ogle County, Illinois.

2. That public hearings were held on the Application on January 22, 23, 24, 25 and 26, and February 8, 2007, at which hearings, the Applicant, interested parties, concerned citizens and members of the public were afforded opportunity to present testimony and evidence, cross examine witnesses, present motions and arguments and provide oral and written comments. Specifically, in addition to the Applicant, the Village of Creston, Rochelle Waste Disposal, L.L.C. (“RWD” or the “Operator”), and CCOC took part in and were represented by counsel at the public hearings.

3. Section 40.1(b) of the Act states, in part, as follows:

If the county board or the governing body of the municipality as determined by paragraph (c) of Section 39 of this Act, grants approval under Section 39.2 of this Act, a third party other than the applicant who participated in the public hearing conducted by the county board or governing body of the municipality may, within 35 days after the date on which the local siting authority granted siting approval, petition the Board for a hearing to contest the approval of the county board or the governing body of the municipality. Unless the Board determines that such petition is duplicative or frivolous, or that the petitioner is so located as to not be affected by the proposed facility, the Board shall hear the petition in accordance with the terms of subsection (a) of this Section and its procedural rules governing denial appeals, such hearing to be based exclusively on the record before county board or the governing body of the municipality. The burden of proof shall be on the petitioner. The county board or the governing body of the municipality and the applicant shall be named as co-respondents.

415 ILCS 4/40.1(b).

4. Pursuant to § 40.1(b) of the Act, a decision of a unit of local government to site or deny siting of a new pollution control facility is reviewable by the Board. 35 Ill. Adm. Code 107.106 (2007).

5. Pursuant to § 107.200(b) of Title 35 of the Illinois Administrative Code, “Any person who has participated in the public hearing conducted by the unit of local government and is so located as to be affected by the proposed facility may file a petition for review of the decision to grant siting.” 35 Ill. Adm. Code 107.200(b) (2007).

6. That Petitioner participated actively as a Party Objector in the local pollution control facility hearings. CCOC was the only Objector at said proceedings represented by counsel, CCOC cross-examined witnesses, and CCOC presented affirmative evidence in opposition to the Application for siting approval.

7. That Petitioner is a voluntary association of citizens in and compromised from the community of Rochelle, and they have been adversely affected by the finding of the City Council.

8. That on April 11, 2007, the City Council held a special meeting to consider the Application, and at that time, the City Council passed a motion to approve the Application with thirty-seven (37) special conditions. Attached hereto and made a part hereof as Exhibit A is a true and correct copy of the “City of Rochelle Resolution R07-10.”

9. On April 20, 2007, the Operator filed a Motion for Reconsideration requesting reconsideration of the special conditions imposed by the City Council. Both the City and CCOC filed Responses to such Motion.

10. On May 8, 2007, the City Council held a special meeting to consider the Motion for Reconsideration. At this meeting, the City Council affirmed thirty-six (36) of the thirty-

seven (37) special conditions and amended one of the special conditions. At the time of filing this Petition, Petitioner had not yet received the City of Rochelle Resolution adopting this action. Upon receipt, Petitioner will promptly supplement this Petition with said Resolution.

11. The proceedings of the City Council, including the public hearings, post-hearing procedures and the decision-making process were not fundamentally fair for the following reasons:

A. Improper and Prejudicial Testimony of Applicant. Near the end of the public hearings on February 8, 2007, the Applicant called the City Manager, Ken Alberts (the "City Manager"), as and for its last witness. The sole purpose of the City Manager's testimony was to assure the City Council that any deficiencies in the record of the Operator would be subject to action by the City Manager by implementing the policies of the City Council regarding the landfill. The City Manager is the sole employee of the City Council. As such, the testimony served to dramatically downplay the effect of having an Operator with a bad record.

B. The post-hearing proceedings employed by the City Council were not fundamentally fair. On April 3, 2007, only eight days before the City Council was scheduled to make its decision on the Application, the City Manager went on radio station WRHL (1060 AM) and stated, in part, as follows:

"I believe the recommendations that were made to consider as conditions to the approval by the City Council ... uh, there are a number of them that likely have merit. **There are some that, uh, maybe we, uh, need to revisit and re-evaluate.**"

These comments were broadcast at least two times. Such comments at least give the appearance that the City Manager, as Applicant, was attempting to persuade City Council members, and such comments give the appearance that the City Council prejudged the decision whether to grant or deny the Applicant.

A disinterested person, who listened to the City Manager's radio broadcast after the City Council's vote, would think that the City Manager actually influenced some of the City Council members or that other communications were happening between the Applicant and the decision-makers. The fact that the City Council failed to fully incorporate all thirty-seven (37) recommended special conditions leads us to believe that the City Manager, as Applicant, was attempting to, and did in fact, compel the City Council to loosen the restrictions. Such conduct made the post-hearing proceedings fundamentally unfair.

C. Counsel for the Operator had an inherent disqualifying conflict of interest.
The fundamental unfairness of the proceedings was compounded by the fact that in 2003, the City Council was represented by the law firm of Hinshaw & Culbertson, LLP. Charles Helsten, Esq. is a partner in said firm and currently represents the Operator. In the 2003 proceeding, an attorney/client relationship was formed between the attorneys of Hinshaw & Culbertson, LLP and the City Council. Under the rules of professional conduct, when an attorney formerly represented a client in substantially the same or similar matter in which the attorney now represents a new client, the former client is required to waive any potential or actual conflict of interest regarding that representation in the former matter.

The Application did not contain an express reference to waiving this conflict of interest, nor was there a waiver presented throughout the hearings. Even though the City is identified as the Applicant, under the Ordinance, the "Applicant" includes the fee owner of the site, the proposed operator and any other party with an interest. Thus, the Operator is included as the Applicant.

In the prior case, Mr. Helsten may have recommended findings or given advice to the City Council, and he certainly represented that party in the prior proceeding. To the public as a whole, this situation is indicative of, or at least gives the appearance of prejudgment and implicates fundamental fairness.

D. The Application submitted was incomplete. Under § 78-109, 5E of the Rochelle Ordinance (the "Ordinance"), the Application must be complete with answers provided for each question on the application form. The form was correctly used except for Item 1E. Item 1E of the Application required both the Applicant and the proposed Operator to provide the following information:

- (i) If a partnership, submit names and addresses of all partners. If a corporation, submit names and addresses of all Officers and Directors, and the names and addresses of all shareholders owning ten percent (10%) or more of the capital stock of said corporation.
- (ii) If a corporation, submit a copy of the Articles of Incorporation as an exhibit. If the corporation is more than fifty percent (50%) owned by another corporation, the requirements of this part shall be applicable to said corporation.
- (iii) Submit audited financial statements of the applicant and operator for the five (5) preceding years. If new corporation, provide statements for years available.

In response, the Applicant stated "See Appendix U in Volume VI for applicable information." However, Volume VI, Appendix U does not include any financial

statements of the Applicant or the Operator. In fact, the Application did not even disclose the names of the entities that own the Operator, a limited liability company. Thus, we do not have the financial statements for anyone who may own ten percent (10%) or fifty percent (50%) of the Operator. This omission becomes highly relevant in the context of Criterion ii, which addresses the public health, safety and welfare, and in consideration of the numerous violations of the Operator. There are apparent guarantees referenced throughout the Application that substantially relate to whether the health, safety and welfare are protected and all of that information is severely lacking. A guarantee is only worth as much as the financial integrity of the guarantor. Consciously omitting this relevant information dictates that the Application is incomplete and the decision makers cannot fairly determine whether the criteria have been met without this information. During the hearings, the Operator submitted audited financial statements for 2001 and 2002, and stated that no other audited financial statements exist for the most recent years. However, the Application does not specify, "Submit audited financial statements, if available." Thus, the Application is incomplete as the Operator failed to submit audited financial statements for 2003, 2004, 2005 and 2006, and as such, the proceedings were fundamentally unfair.

E. The Hearing procedures employed by the City Council were not fundamentally fair.

F. The decision making procedures employed by the City Council were not fundamentally fair.

12. In addition to or in the alternative to the aforementioned arguments, and without waiving any of the allegations set forth above, the purported findings of the City Council that the

Applicant had proven siting criteria i, ii, iii and vi were against the manifest weight of the evidence.

WHEREFORE, Concerned Citizens of Ogle County prays that the City of Rochelle's Application for Site Location Approval be denied pursuant to 415 ILCS 5/39.2(e).

Respectfully submitted,

CONCERNED CITIZENS OF OGLE
COUNTY

By: /s/ David L. Wentworth II
David L. Wentworth II
One of Their Attorneys

By: /s/ Emily R. Vivian
Emily R. Vivian
One of Their Attorneys

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