

**Electronic Filing - Received, Clerk's Office, March 11, 2008**

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

ROCHELLE WASTE DISPOSAL, L.L.C.,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	PCB 07-113
THE CITY OF ROCHELLE, an Illinois	)	(Third-Party Pollution Control Facility
municipal corporation, and THE	)	Siting Appeal)
ROCHELLE CITY COUNCIL,	)	
	)	
Respondents.	)	

**NOTICE OF FILING**

TO: See Attached Service List

**PLEASE TAKE NOTICE THAT** on the 11th day of March, 2008, Emily R. Vivian, one of the attorneys for Petitioner, CONCERNED CITIZENS OF OGLE COUNTY, filed a Motion for Leave to File an Amicus Curiae Response to Motions for Reconsideration of Opinion and Order, *Instante*, via electronic filing as authorized by the Clerk of the Illinois Pollution Control Board.

Respectfully submitted,

CONCERNED CITIZENS OF OGLE  
COUNTY

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

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STATE OF ILLINOIS        )  
                                          )  
COUNTY OF PEORIA        )        SS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Motion for Leave to File an Amicus Curiae Response to Motions for Reconsideration of Opinion and Order, *Instante*, was served upon the following persons via email and regular mail on the 11th day of March, 2008, before 5:00 p.m., with all fees thereon fully prepaid and addressed as follows:

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**MOTION FOR LEAVE TO FILE AN AMICUS CURIAE RESPONSE TO MOTIONS FOR RECONSIDERATION OF OPINION AND ORDER, INSTANTER**

NOW COMES Concerned Citizens of Ogle County (“CCOC”), by and through its attorneys, David L. Wentworth II and Emily R. Vivian of Hasselberg, Williams, Grebe, Snodgrass & Birdsall, and for its Motion for Leave to File an *Amicus Curiae* Response to Motions for Reconsideration of Opinion and Order, *Instanter*, pursuant to 35 Ill. Admin. Code Sections 101.110(c) and 101.520(b), state and allege as follows:

1. That, on July 12, 2007, the Illinois Pollution Control Board (the “Board”) entered an Order granting CCOC’s Motion for Leave to File an Amicus Curiae Brief in the above-captioned matter.
2. That on December 10, 2007, CCOC filed its Amicus Curiae Brief, supporting and defending the conditions imposed by the Rochelle City Council (the “City Council”).
3. That throughout the local pollution control facility siting public hearings before the City Council, CCOC was the only objector to the City of Rochelle’s application seeking local siting approval for an expansion of the existing municipal solid waste landfill in Rochelle, Illinois.

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4. That throughout the proceedings before this Board, CCOC has been the only supporter and defender of the conditions imposed by the City Council.

5. On January 24, 2008, the Board issued an Opinion and Order (the "Order" or "Opinion"), affirming the decision of the City Council to impose Special Conditions 8, 13, 22, 23, 26 and 28 and modifying Special Conditions 33 and 34.

6. That on March 5, 2008, Respondent, the City Council (local siting authority) filed a Motion to Reconsider this Board's Order.

7. That on March 5, 2008, Respondent, the City of Rochelle (applicant) filed a Motion for Reconsideration of the Order.

8. That on March 6, 2008, apparently buoyed up by the "commend[able]" and "admirable" work of the Respondents in filing for reconsideration, the Petitioner, Rochelle Waste Disposal (operator) filed its own Motion for Reconsideration of the Order.

9. Where, as here, CCOC was an active participant in the local siting proceedings, and CCOC was the only participant to file an amicus brief seeking to have the special conditions in the proceedings before this Board affirmed, CCOC is, by necessity, the only participant capable and qualified to continue to defend the imposition of the various conditions at issue in the Motions for Reconsideration.

10. That a copy of CCOC's *Amicus Curiae* Response to Motions for Reconsideration of Opinion and Order ("Response") is attached hereto as Exhibit A.

11. That although "response" briefs related to *amicus curiae* are normally not allowed by the Board rules, 35 Ill. Admin. Code Section 101.110(c), responses to motions to reconsider are. 35 Ill. Admin. Code Section 101.520(b).

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12. That the proposed Response is tendered in a timely manner within the time allotted for a response to a motion to reconsider, and therefore, should not delay the decision-making of the Board. 35 Ill. Admin. Code Sections 101.110(c) and 101.520(b).

WHEREFORE, Concerned Citizens of Ogle County respectfully prays that the Illinois Pollution Control Board grant its Motion, thereby giving CCOC permission to file an *Amicus Curiae* Response to Motions for Reconsideration of Opinion and Order, *Instante*, in this matter, and for such other and further relief as the Board deems just and proper.

Respectfully submitted,

CONCERNED CITIZENS OF OGLE  
COUNTY

By: /s/ Emily R Vivian  
One of Its Attorneys

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Motion for Amicus Response.combined.doc

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**AMICUS CURIAE RESPONSE TO MOTIONS FOR RECONSIDERATION  
OF OPINION AND ORDER**

NOW COMES Concerned Citizens of Ogle County, by and through its attorneys, David L. Wentworth II and Emily R. Vivian of Hasselberg, Williams, Grebe, Snodgrass & Birdsall, and as and for its *Amicus Curiae* Response to Motions for Reconsideration of Opinion and Order, respectfully states and submits as follows:

**INTRODUCTION**

On January 24, 2008, the Illinois Pollution Control Board (the "Board") issued an Opinion and Order (the "Order" or "Opinion"), affirming the decision of the Rochelle City Council (the "City Council") to impose Special Conditions 8, 13, 22, 23, 26 and 28 and modifying Special Conditions 33 and 34.

On March 5, 2008, the City of Rochelle (the "City") filed a Motion for Reconsideration of the Opinion and Order, requesting that the Board reconsider its affirmance of Special Condition 23, involving perimeter berms, and Special Condition 13, involving the exhumation of unit 1. In addition, on March 5, 2008, the City Council filed a Motion to Reconsider, requesting that the Board reconsider its affirmance of Special Condition 23. On March 6, 2008, Rochelle

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Waste Disposal (“RWD”) filed a Motion for Reconsideration, requesting the Board to revise its Order with respect to Special Conditions 13 and 23. The motions for reconsideration filed by the City, the City Council and RWD shall be collectively referred to as the “Motions.”

The Board properly considered all of the available evidence and applied the proper standard of law in affirming Special Conditions 13 and 23, and thus, the Motions should be denied in their entirety and said Special Conditions should be upheld.

### **ARGUMENT**

#### **I. INTRODUCTION**

Pursuant to Section 101.902 of Title 35 the Illinois Administrative Code, “In ruling upon a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board’s decision was in error.” 35 Ill. Adm. Code 101.902 (2008). “The Board is not in a position to reweigh the evidence, but it must determine whether the decision of the City Council is against the manifest weight of the evidence.” *Rochelle Waste Disposal, L.L.C., v. The City of Rochelle*, PCB 07-113, slip op. at p. 21 (January 24, 2008). “The petitioner bears the burden of proving that the conditions are not necessary to accomplish the purposes of the Act and therefore were imposed unreasonably. *Rochelle Waste Disposal, L.L.C., v. The City of Rochelle*, PCB 07-113, slip op. at p. 52 (January 24, 2008), citing *IEPA v. PCB*, 118 Ill. App. 3d 772, 780, 455 N.E.2d 188, 194 (1<sup>st</sup> Dist. 1983); 415 ILCS 5/40.1(a) (2006); 35 Ill. Adm. Code 107.506.

RWD mistakenly asserts that the positions taken by the local siting authority *during* the instant appeal constitute the "findings" and "decision" of the local siting authority subject to review by this Board. To the contrary, the findings and decision of the local siting authority subject to review by this Board were those made by the City Council on April 11, 2007

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(approving application subject to conditions), as affirmed by the City Council on May 8, 2007, by denial of RWD's motion to reconsider the April 11 imposition of Special Conditions 13 and 23, among others. *Rochelle Waste Disposal, L.L.C., v. The City of Rochelle*, PCB 07-113, slip op. at pp. 5-6 (January 24, 2008); 415 ILCS 5/39.2(e); 415 ILCS 5/40.1(a). RWD's Motion for Reconsideration marks the third time it has attacked Special Conditions 13 and 23, and both prior attempts for relief were denied by the local siting authority and this Board, respectively.

In addition to confusing what "findings" are at issue, throughout its Motion for Reconsideration, RWD repeatedly claims that no "party" has challenged the local siting authority's position on appeal before this Board as to Special Conditions 13 and 23. RWD further asserts, albeit incorrectly, that the findings of the local siting authority were "unchallenged" by any "party." Although RWD is technically correct that CCOC, as an *amicus*, is not a "party" to the immediate proceedings, RWD's hyperbole does not get it anywhere. CCOC was granted leave to file an *amicus curiae* brief. In its brief, CCOC recited evidence from the record sufficient to sustain the conditions, including Special Conditions 13 and 23.

In fact, one party has partially broken ranks: The City Council is not seeking modification as to Special Condition 13. Stated differently, the City Council is not challenging the Order of this Board as to Special Condition 13. The City Council now apparently agrees with its original "decision," and finds the Board's Order regarding the exhumation schedule for Unit 1 to be sound.

Furthermore, CCOC has consistently challenged the application. As an alternative to denial of the application, CCOC proposed numerous conditions to be imposed during the siting hearing before the City Council. On appeal, CCOC had no procedural opportunity to attack the positions of the City Council and the City of Rochelle during the instant appeal due to the

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limitations imposed by the Board rules governing public participation. See 35 Ill. Admin. Code Section 101.110(c). Nonetheless, CCOC was, as it turns out, the only supporter on appeal of the conditions initially imposed by the local siting authority, and did so in its *amicus curiae* brief by reciting evidence from the record sufficient to sustain the conditions, including Special Conditions 13 and 23.

In its Motion for Reconsideration, RWD cites to *Waste Management of Illinois v. County Bd. of Kankakee County*, PCB 04-186 (January 4, 2008) for the general proposition that the Board may not reweigh the evidence on the siting criteria or substitute its judgment for that of the local siting authority. In this case, the Board did not reweigh the evidence. It appears that RWD is forgetting that the Board actually *affirmed* the decision of the City Council. RWD's argument that the Board cannot substitute its judgment for that of the City Council is misplaced as the Board did not reweigh evidence but merely affirmed the decision of the City Council. In its Response Brief, the City Council itself reweighed the evidence, after it had already rendered a formal decision. RWD frames the "reweighing" issue by focusing on the local siting authority's position taken during the instant appeal, rather than on the correct decision issued by the City Council on April 11, 2007.

The terms of the restated host agreement appear to be in play between the parties on appeal. CCOC is not privy to any post-decision communications since April 2007 between or among the City Council, the City and the operator, RWD. However, a fair reading of the briefs of the parties on appeal suggests that RWD has communicated to the City and the City Council (if by no other way than by RWD's briefs) that the Special Conditions at issue on reconsideration (if not more conditions), are, in the opinion of RWD, "materially more restrictive or costly than those specified in the Restatement [Host Agreement]." By letter agreement dated September 26,

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2006 from the attorney for the City to RWD confirming the understanding of the parties to the restated host agreement, RWD will not be obligated to go forward with the development and construction of the expansion if the City and RWD cannot mutually agree on modifications to the restated host agreement to address said "materially more restrictive or costly" special conditions imposed by the City Council beyond the basic requirements set forth in the restated host agreement. Application, Appendix C (1). The record is silent as to the purported increased cost or expense caused by the subject Special Conditions.

The City Council decided that Special Conditions 13 and 23, *inter alia*, were necessary to ensure that the design, location and operation of the expansion were protective of the public health, safety and welfare, and this Board affirmed said decision. No contract is "perfect." The restated host agreement was drafted prior to the siting hearing and the presentation of a significant amount of evidence regarding the design, location and operations of the proposed facility, and the past operating history of the operator, RWD. The local siting authority was obligated to follow and apply Section 39.2 of the Act, and it properly did so, even in the face of its own City Manager acting as the applicant. To now have a form of "expansion remorse" because of a potential future cost modification between the City and RWD pursuant to the restated host agreement should not and cannot undo the April 11, 2007 decision which rested not on cost, but on being protective of the public health, safety and welfare. Allowing the Motions to Reconsider would therefore be contrary to Section 39.2 of the Act.

### **II. THE BOARD PROPERLY APPLIED THE APPLICABLE LAW IN AFFIRMING SPECIAL CONDITION 23.**

As the City consistently fails to acknowledge, "the county board or the governing body of the municipality may also consider as evidence the previous operating experience and past record of convictions or admissions of violations of the applicant (and any subsidiary or parent

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corporation) in the field of solid waste management when considering criteria (ii) and (v) under this Section.” 415 ILCS 5/39.2(e) (2006). The City Council states in its Motion for Reconsideration, that the City, RWD, and the City Council all agreed - after the City Council had made and reconsidered its "decision" - that there was no evidentiary support in the record for the imposition of a fourteen (14) foot perimeter berm. However, the City Council fails to acknowledge that the CCOC presented a plethora of evidence supporting the imposition of a fourteen (14) foot perimeter berm. During the local pollution control facility siting public hearings before the City Council, CCOC unveiled the poor operating history of RWD. Thus, the City Council incorrectly concludes that “it was **undisputed** that the 14-foot perimeter berming requirement had no evidentiary support.” (City Council’s Motion, ¶ 6) (emphasis added). Rather, the CCOC aggressively disputed the argument that the fourteen (14) foot perimeter berm had no support in the record.

Although no witness expressly testified that a fourteen (14) foot perimeter berm was required, both Mr. Moose and Mr. Hilbert testified as to the poor operating history of RWD. The City Council’s technical consultant, Patrick Engineering, Inc. (“Patrick Engineering”) and the Hearing Officer considered the testimony of Mr. Moose and Mr. Hilbert regarding the abysmal operating record of RWD in making their recommendations to the City Council. In addition, this Board, as stated in its Order, considered the poor operating history of RWD in reaching its decision.

In its Order, the Board expressly held, “In light of the recommendations from Patrick Engineering and the hearing officer, the testimony of Mr. Moose, **and RWD’s operating record**, the Board finds that Special Conditions 22 or 23 are not against the manifest weight of the evidence.” *Rochelle Waste Disposal, L.L.C., v. The City of Rochelle*, PCB 07-113, slip op. at

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p. 52 (January 24, 2008) (emphasis added). Although the parties seem to consciously disregard the fact that the operating record of RWD is considered “evidence,” this Board properly applied the applicable law in rendering its Opinion. Requiring a fourteen foot perimeter berm from an operator who cannot even keep a proper perimeter fence, using instead only a three (3) foot wire fence, is well justified.

### **III. THE BOARD PROPERLY APPLIED THE APPLICABLE LAW IN AFFIRMING SPECIAL CONDITION 13.**

The City Council is not seeking modification of Special Condition 13. It is incomprehensible that RWD and the City continue to dispute the imposition of Special Condition 13. As the City acknowledges, the Application expressly estimates that the exhumation would take **five to ten years**. (Application, Section 2.6, 2.6-24; City’s Motion, p. 6) (emphasis added). Special Condition 13 is within this time span, as six years is between five years and ten years. The City argues that Special Condition 13 should be modified because it includes the term “good cause,” which is not defined. However, “good cause” is a legal term. It is defined as “a legally sufficient reason.” (BLACK’S LAW DICTIONARY 213 (7<sup>th</sup> ed. 1999)). Therefore, if RWD determines that six (6) years is not a sufficient amount of time in which to exhume unit 1, and it presents good cause for an extension of time to the City Council, the City Council must allow RWD additional time for the exhumation. If the City Council denies RWD additional time, RWD would have a legal cause of action against the City Council. In other words, the City Council cannot legally deny RWD additional time if RWD provides good cause.

Again, the fact that RWD and the City are prematurely claiming that the exhumation cannot occur within the allotted six (6) years should cause this Board to raise a suspicious eyebrow. Given the uncertainty of what lies beneath unit 1, allowing flexibility by use of the term “good cause” is completely justifiable. RWD should not be allowed to procrastinate in the

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exhumation process if it can reasonably be completed within six (6) years. Furthermore, it cannot be forgotten that RWD participated in the preparation of the application, and must have known that the five to ten year time frame was expressly included.

**CONCLUSION**

WHEREFORE, CONCERNED CITIZENS OF OGLE COUNTY, respectfully pray that the Illinois Pollution Control Board affirm the decision of The Rochelle City Council in imposing Special Conditions 13 and 23, and for such other and further relief as is just and proper.

Concerned Citizens of Ogle County

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

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