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 November 18, 2009, Leo P. Dombrowski, one of the attorneys for Respondent, United City of Yorkville, filed via electronic filing the attached **The United City of Yorkville's Response to Fox Moraine's Motion for Reconsideration** 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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CERTIFICATE OF SERVICE

I, Susan Hardt, a non-attorney, certify that I caused a copy of the foregoing **Notice of Filing and The United City of Yorkville's Response to Fox Moraine's Motion for Reconsideration**, 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 November 18, 2009.

/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.

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

THE UNITED CITY OF YORKVILLE'S RESPONSE TO FOX MORAINE'S MOTION FOR RECONSIDERATION

Fox Moraine apparently feels that the 175 pages it previously submitted to the Board (113-page opening brief and 62-page reply brief) were not enough to fully explain its arguments for reversal of the City of Yorkville's decision to deny Fox Moraine's landfill application. Or perhaps Fox Moraine simply wishes to needlessly increase the costs of this appeal. In either event, its motion violates all standards applicable to motions for reconsideration, wastes the resources of the Board, and imposes unfair costs on Yorkville.

The Board has already heard, fully evaluated, and rejected the arguments Fox Moraine makes in its motion. Unfortunately, the Board must do so again. Fox Moraine's motion should be denied.

I. FOX MORAINE'S MOTION IS NOTHING MORE THAN A RE-HASH OF ARGUMENTS PREVIOUSLY MADE AND REJECTED.

"The purpose of a motion to reconsider is not to reiterate arguments already made. . . ." Instead, the "intended purpose of a petition to reconsider is to bring to the court's attention newly

discovered evidence that was not available at the time of the first hearing, changes in the law, or errors in the court's previous application of existing law." *Woolums v. Huss*, 323 Ill. App. 3d 628, 639-40 (4th Dist. 2001); *see also Farley Metals, Inc. v. Barber Colman Co.*, 269 Ill. App. 3d 104, 116 (1st Dist. 1994) (affirming denial of plaintiff's motion for reconsideration that "merely reiterated its earlier arguments before the court."); *Citizens Against Regional Landfill v. County Bd. of Whiteside County*, PCB 92-156 (April 22, 1993), slip op. at 1 (where the Board denied motion for reconsideration "because the arguments presented . . . are the same as those" previously presented and considered by the Board); 35 Ill. Admin. Code § 101.902 ("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.")

Fox Moraine's motion comes nowhere close to meeting this standard. Fox Moraine offers no new evidence, changes in the law, or errors in application of the law that would necessitate reconsideration. It simply repackages and re-hashes arguments it previously made – and the Board fully considered and rejected. While many of Fox Moraine's earlier arguments may have been "inartfully" presented (Mtn. ¶ 16), a motion for reconsideration is not a chance for Fox Moraine to try to clarify or improve what it has already submitted.

A cursory look at Fox Moraine's motion shows that Fox Moraine is simply re-arguing the points it previously raised, and nothing more. In paragraph after paragraph, Fox Moraine claims the "Board erred" in reaching various holdings, and then invites the Board to compare a section of its October 1 Opinion and Order with some portion of Fox Moraine's opening or reply brief. (For example, Fox Moraine asks the Board to "*Compare* Final Order at 62 *with* Fox Moraine's Post-Hearing Brief at 15-28. (Mtn. ¶ 18).) Fox Moraine's point seems to be that the Board should reconsider its prior ruling because that ruling did not favor Fox Moraine. Fox Moraine

offers nothing new. The following chart shows that Fox Moraine's motion for reconsideration is nothing more than an attempt to re-argue points already made and rejected.

Fox Moraine's Claim of Error in the Board's October 1 Opinion and Order	**Fox Moraine's Previous Argument on the Point and Board's Consideration and Ruling on It**
"Board erroneously applied the law on waiver." (Mtn. ¶¶ 2-6, citing PCB Order at 60.)	In its reply brief (pp. 3-9), Fox Moraine argued that it had not waived allegations of bias. The Board thoroughly evaluated the issue and decided it, for the most part, in Fox Moraine's favor. (Order at 45-46, 53-55, 61-62, rejecting Yorkville's claim that Fox Moraine had waived bias allegations as to seven Council Members and finding waiver only as to two.) Fox Moraine also fails to note that, while the Board found that Fox Moraine had waived objections of bias only as to Council Members Werderich and Plocher, the Board nonetheless considered most of Fox Moraine's arguments concerning the alleged bias of Werderich and Plocher. (Order at 60-61, 83.)
Board "erred" by finding "Roth Report" was privileged. (Mtn. ¶¶ 7-8, citing Order at 63.)	Fox Moraine argued this point in its opening brief (pp. 36-38), which was thoroughly discussed and evaluated and correctly decided by the Board. (Order at 41-42, 52, 59, 63.)
"Board further erred by declining to conduct a critical and technical review of the record. . . . [Board also abdicated] its statutory duty to apply its technical expertise." (Mtn. ¶¶ 9-11, citing *Town & Country*, 225 Ill. 2d 103 (2007).)	Fox Moraine discussed this point at length in its opening brief (pp. 51, 105-07) and reply brief (pp. 22-23). The Board properly evaluated and decided it, finding that *Town & Country* did not change the Board's standard of review. (Order at 65-67, citing *Peoria Disposal*, 385 Ill. App. 3d at 800 ("*Town & Country* does not change that standard. In fact, *Town & Country* does not even address that issue.")) Additionally, although Fox Moraine disagrees with the outcome, it should not ignore the fact that the Board was clearly cognizant of its statutory duty to apply its technical expertise ("The Board reviews the record using the Board's technical expertise to determine whether the decision of the local siting authority is against the manifest weight of the evidence." Order at 70), and applied that expertise in reaching its conclusions. (*Id.* at 68-82.)
"Board further erred in holding" that the recommendations in the Price report	In its opening and reply briefs, Fox Moraine extensively argued its position regarding the

"constituted evidence of 'deficiencies' in the landfill design," arguing that because the Environmental Protection Act authorizes the imposition of conditions, a recommendation of conditions therefore cannot be evidence of deficiencies. (Mtn. ¶ 12, citing Order at 81.)	significance of Price's and Clark's experience and their recommendation of conditions. (Op. Brief at 3, 28, 106; Reply Brief at 26-28, 34, 44, 46, 48.) The Board thoroughly evaluated their recommendations, which were based on the **evidence** contained in the record, and correctly found that the recommended conditions showed flaws in the landfill design. (Order at 81.) Fox Moraine's argument that recommended conditions cannot be evidence of design deficiencies because the Act permits the imposition of conditions is a *non sequitur* and makes no sense.
"Board also erred in holding" that Yorkville City Council did not improperly delegate authority to its City Attorney. (Mtn. ¶ 14, citing Order at 64.)	Fox Moraine addressed this point in its opening brief (pp. 36-38, 41-47), which was thoroughly discussed and evaluated and correctly decided by the Board. (Order at 43, 58, 63-64.)
"Board erred" in finding the City Council's written decision was proper. (Mtn. ¶¶ 15-16, citing Order at 58.)	Fox Moraine discussed the City's written decision at length in its opening brief (pp. 41-47) and reply brief (20-21). The Board thoroughly discussed and evaluated and correctly decided the issue. (Order at 14-15, 51-52, 58, 63-64.)
"Board further erred . . . and overlooked" precedent in upholding the deliberative process privilege. (Mtn. ¶ 17, citing Order at 59-60.)	Fox Moraine addressed this point in its opening brief (pp. 7-9), and the Board thoroughly discussed and evaluated and correctly decided it. (Order at 35-36, 59-60.) Fox Moraine disingenuously claims the Board "overlooked" precedent regarding the deliberative process privilege even though the Board analyzed the relevant case law and addressed all of Fox Moraine's arguments.
"Board further erred by ignoring compelling evidence . . . and erroneously discounted testimony" of bias and prejudgment. (Mtn. ¶¶ 18-20, 22, citing Order at 34, 62.)	Fox Moraine argued at length in its opening brief (pp. 5, 15-28, 47-48) and reply brief (pp. 13-22) that there was evidence of bias and prejudgment. That the Board **rejected** Fox Moraine's claims that the evidence showed bias and prejudgment does not mean that the Board **ignored** the evidence. Rather, the Board thoroughly evaluated all the evidence before reaching its decision. (Order at 8-11, 34-39, 46-48, 55-57, 61-62.)
"Board summarily dismissed argument" concerning City's hiring of outside law firm and law firm's invoice. (Mtn. ¶ 21.)	Fox Moraine addressed this point in its opening brief (pp. 28-34). The Board did not summarily dismiss Fox Moraine's arguments, but rather discussed and evaluated them in great detail before reaching its

	decision. (Order at 13, 39-41, 63.)
"Board erred," "further erred," and "also erred" in finding that the City Council correctly concluded that Fox Moraine had failed to establish the various landfill siting criteria. (Mtn. ¶¶ 23-28.)	Fox Moraine devoted most of its opening brief (pp. 49-104) and reply brief (pp. 22-60) to discussing the siting criteria in painstaking detail. Its motion offers nothing new. The Board thoroughly discussed and evaluated and correctly decided the siting criteria. (Order at 15-34, 68-82.)

Fox Moraine is disappointed that it lost, but where arguments have previously been raised and rejected, the proper remedy is an appeal, not a motion for reconsideration. Fox Moraine's baseless motion is a waste of this Board's time and resources, as well as the tax dollars the City of Yorkville must devote to responding to it.

II. FOX MORAINE TAKES EXTREME LIBERTIES WITH THE APPELLATE COURT'S RECENT *CITY OF ROCHELLE* DECISION.

Fox Moraine cites one new case, decided after Fox Moraine's appeal had been fully briefed. (Mtn. ¶ 13, citing *City of Rochelle v. Pollution Control Bd.*, (2nd Dist. Sept. 4, 2009).) Yet even here, Fox Moraine cannot refrain from blatantly disregarding the rules and from mischaracterizing the facts and the law, as it has done throughout this appeal.

The decision in *City of Rochelle* was a Rule 23 order. (A copy of the decision is attached as Exhibit A.) Fox Moraine admits that "a Rule 23 Order has no precedential value." (Mtn. ¶ 13.) Not only does a Rule 23 Order have no precedential value, but it "**may not be cited by any party** except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case." Ill. Sup. Ct. Rule 23(e) (emphasis added).

Fox Moraine ignores the purpose of Rule 23 by claiming that "a tribunal may nevertheless take judicial notice of prior . . . court proceedings" and urging the Board to take notice of *City of Rochelle*. (Mtn. ¶ 13.) Were this Board to accept Fox Moraine's invitation, Rule 23 would be meaningless, because **every** un-citable Rule 23 Order could be cited for the

purpose of "judicial notice." Fox Moraine's manipulation of the rules and case law is nothing short of jaw-dropping and reveals the depths to which it will go to increase the costs of this appeal. *See also Wallis v. Country Mut. Ins. Co.*, 309 Ill. App. 3d 566, 572 (2nd Dist. 2000) (striking citation of case from party's brief "because it is unpublished and therefore nonprecedential" and admonishing party for citing it).

Not only does Fox Moraine violate Rule 23 by citing *City of Rochelle*, but its interpretation of the decision is flat-out wrong. (And it is telling that Fox Moraine did not attach a copy of the decision to its motion even though Rule 23(e) requires a citing party to furnish the Board and all other counsel with a copy.) Fox Moraine claims that the Board erroneously regarded the Price Report as "evidence" that the siting criteria had not been met, in contravention of *City of Rochelle's* holding that "a consultant's report submitted after the close of evidence did not constitute 'evidence' that can be used to support the City's decision." (Mtn. ¶ 13.) The Board's Order clearly demonstrates that the Board did not consider the Price Report to be "evidence." Rather, the Board correctly noted that the Price Report summarized evidence in the record and discussed whether a particular siting criterion had or had not been met and whether additional conditions were warranted. *See, e.g.*, Order at 17, 23, 27-28.

Fox Moraine also falsely claims that the Second District held in *Rochelle* that a consultant's report does not constitute evidence. That was not an issue before the Second District, nor did the court even mention it. Rather, the Second District was asked to resolve whether the Board had correctly concluded that 14-foot berms were required at a particular landfill. *City of Rochelle* at p. 5. The Appellate Court found that: "There was no evidence either in favor of or in opposition to such a height. . . . The record supports the requirement that a berm be installed. However, the 14 foot height requirement is against the manifest weight of the

evidence." *Id.* Nowhere does the Second District, as claimed by Fox Moraine, address the admissibility or reliability of a consultant's report or the weight a siting authority should place on it. Fox Moraine's treatment of the *City of Rochelle* Rule 23 Order is typical of the way it has conducted itself throughout this appeal. Fox Moraine misrepresents the facts and the law, and when that's not enough, simply makes things up.

III. CONCLUSION

The Board thoroughly considered all the arguments made by both Fox Moraine and Yorkville. Its decision affirming the Yorkville City Council's denial of Fox Moraine's application was based on a careful analysis of all the relevant facts and the law. Fox Moraine received a full and fair hearing, but its landfill application was deficient in numerous ways. The Board should deny Fox Moraine's Motion for Reconsideration.

Dated: November 18, 2009

Respectfully submitted,

UNITED CITY OF YORKVILLE, CITY COUNCIL

/s/ Leo P. Dombrowski
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EXHIBIT A

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE CITY OF ROCHELLE, an Illinois municipal corporation, Petitioner, v. ILLINOIS POLLUTION CONTROL BOARD, ROCHELLE WASTE DISPOSAL, L.L.C., and THE ROCHELLE CITY COUNCIL, Respondents.	)	On Petition for Review of Orders of the Illinois Pollution Control Board. No. PCB--07--113

THE ROCHELLE CITY COUNCIL, an Illinois municipal body, Petitioner, v. ILLINOIS POLLUTION CONTROL BOARD, ROCHELLE WASTE DISPOSAL, L.L.C., and THE CITY of ROCHELLE, Respondents.	)	On Petition for Review of Orders of the Illinois Pollution Control Board. No. PCB--07--113

RULE 23 ORDER

In these consolidated cases, we review the final administrative decision of respondent, The Pollution Control Board (PCB), regarding an application by the City of Rochelle (City) for local siting approval of a landfill pollution control facility. We dismiss in part and affirm as modified.

The City owns a landfill at 6513 Mulford Road in Rochelle. The landfill began operation in 1972 and has been operated since 1995 by respondent Rochelle Waste Disposal (RWD). On October 16, 2006, the City filed an application with the Rochelle City Council (Council) to expand the landfill. The planned expansion included the exhumation and transfer of waste from the original landfill to a new section equipped with a composite liner, leachate control system, landfill gas management system, and groundwater monitoring system. This part of the expansion was estimated to take between five and ten years to complete. The application also provided for a vegetated berm, at least eight feet tall, around the perimeter of the facility.

The parties presented testimony from 10 witnesses over six days of public hearings. Patrick Engineers, retained by the Council as a technical consultant, submitted its report and recommendations after the close of evidence. Patrick recommended approval of the application subject to 37 various conditions. The hearing officer submitted his findings of fact and conclusions of law and recommended approval with the imposition of the 37 conditions recommended by Patrick. The Council adopted Resolution R07-10, approving the application subject to 37 special conditions based on, but slightly different from, Patrick's conditions.

RWD filed a motion to reconsider, objecting to eight of the special conditions. The City also filed a response to the motion, arguing that the conditions were unnecessary and specifically requesting the deletion or modification of eight of the conditions. The Council subsequently adopted a resolution modifying two of the conditions contained in Resolution R07-10 and reaffirming all other remaining conditions. RWD then appealed to the Board, contesting eight of the special conditions imposed by the Council. The Board affirmed the Council as to six of the conditions and modified two conditions that are not here at issue. Both the City and the Council then sought review in this court.

On review, it is the Board's final decision that we examine, not that of the local siting authority. See Town & Country Utilities, Inc., v. Illinois Pollution Control Board, 225 Ill. 2d 103, 122 (2007). Pursuant to section 5/41(b) of the Environmental Protection Act, final orders of the Board "shall be based solely on the evidence in the record of the particular proceeding involved, and any such final order *** shall be invalid if it is against the manifest weight of the evidence." 415 ILCS 5/41(b) (West 2006). A factual finding is against the manifest weight of the evidence if, when viewing all of the evidence in the light most favorable to the prevailing party, the opposite conclusion is clearly apparent or the finding is palpably erroneous and wholly unwarranted, is clearly the result of prejudice or passion, or appears to be arbitrary and unsubstantiated by the evidence. United States Steel Corporation v. Illinois Pollution Control Board, Illinois Environmental Protection Agency, 384 Ill. App. 3d 457, 461 (2008).

At issue here are two of the special conditions imposed by the Council and affirmed by the Board. We first address Special Condition 13, which, in part, required RWD to exhume and redispose of waste from the original landfill "as soon as practicable, but in no event later than six (6) years from the date an IEPA permit is issued for the expansion, except as otherwise provided by the City Council for good cause shown." The City argues that the evidence in the record supports a ten-year time limit for these activities, not a six-year time limit, and requests this court to delete Special Condition 13. However, in April 2008, the Council adopted Ordinance 08--3668, which, among other things, approved an agreement to extend the time period for the exhumation and redisposal of waste from Unit 1 to ten years, subject to possible further extension. This intervening action by the Council makes it impossible for this court to grant the relief sought by the City, as the Council's

action is the equivalent of the relief sought on appeal. Thus, the issue is moot. See In re D.S., 217 Ill. 2d 306, 320 (2005). Because it is moot, we dismiss this portion of the review.

Both the City and the Council next contend that Special Condition 23, which provides for the building of berms 14 feet in height around the perimeter of the site, is against the manifest weight of the evidence. We agree.

The City's application to expand the landfill proposed a vegetated berm, at least eight feet tall, around the perimeter of the facility. The City also presented the testimony of J. Christopher Lannert of the Lannert Group, a company that provides professional services in the area of planning, community consulting, and landscape architecture. Lannert, a registered landscape architect, proposed a berm that would "undulate from a minimum of 8 feet high to a high of 10 feet high along Creston Road." The top of the berm was to be planted with "overstory trees, ornamental trees and evergreen trees". The only other testimony regarding berms was provided by Devin A. Moose, a registered professional engineer with Shaw Environmental, the principal designer of the expansion proposal. Moose referred to Lannert's testimony about an undulating berm "of a minimum of 8-foot height" but never testified about any other height for the berm.

Thomas Hilbert, the engineering manager for Winnebago Reclamation Service, whose duties included construction, permitting, and compliance at the Rochelle landfill, testified about the violation history at Rochelle that was "more extensive" than most landfill facilities. Stephen Rypkema of the Ogle County Solid Waste Management Department submitted a list of 16 various violations that had occurred between 1995 and 2006.

In its opinion and order, the PCB noted that Patrick Engineering and the hearing officer recommended the berm be at least 14 feet in height. The PCB also noted some of Devin Moose's

general testimony that berms help to screen operations from view and control litter. The PCB then concluded, based on the recommendations, Moose's testimony, "and RWD's operating record", that Special Condition 23 (and another condition related to an operational screening berm) was not against the manifest weight of the evidence.

Our examination of the record finds no support for the PCB's conclusion that 14 foot berms were required. There was no evidence either in favor of or in opposition to such a height. There was also no evidence suggesting that the planned 8 to 10 foot high berm was insufficient. The PCB argues, correctly, that an applicant's prior operating experience and record can be considered before granting approval of a pollution control facility. See 415 ILCS 5/39.2(a) (West 2006). The PCB also argues, correctly, that it can apply its technical expertise in examining the record to determine whether it supports the local authority's conclusion. See Town & Country Utilities, 225 Ill. 2d at 123. However, there simply is no evidence to support the finding that a 14 foot berm would be necessary to prevent further violations such as those committed in the past or that such a height would be required for any other reason. The PCB's technical expertise must be applied to the record and not imposed arbitrarily or at random.

The record supports the requirement that a berm be installed. However, the 14 foot height requirement is against the manifest weight of the evidence. Therefore, we determine the final order of the Board is invalid and vacate said order. This court retains jurisdiction during the pendency of any further action taken by the Board pursuant to this order. See 415 ILCS 5/41 (West 2006)

The order of the Illinois Pollution Control Board is vacated and remanded for further proceedings consistent with this order.

Vacated and remanded.

McLAREN, J., with HUTCHINSON and HUDSON, JJ., concurring.