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ILLINOIS POLLUTION CONTROL BOARD

APR 30 2003

CITY OF KANKAKEE,)
)
 Petitioner,)
)
 v.)
)
 COUNTY OF KANKAKEE, COUNTY)
 BOARD OF KANKAKEE, and WASTE)
 MANAGEMENT OF ILLINOIS, INC.)
)
 Respondents.)

PCB 03-125
 PCB 03-133
 PCB 03-134
 PCB 03-135
 (consolidated)
 (Pollution Control Facility Siting Appeals)

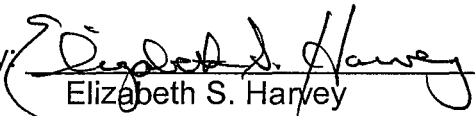
STATE OF ILLINOIS
Pollution Control Board

NOTICE OF FILING

To: (See attached Service List.)

PLEASE TAKE NOTICE that on this 30th day of April 2003, the following County's **Response to City's Motion for Leave to File "Response to County's Response to City's Motion to Reconsider Discovery Ruling"** and **Surreply to City's Motion to Reconsider Discovery Rulings** were filed with the Illinois Pollution Control Board, attached and herewith served upon you.

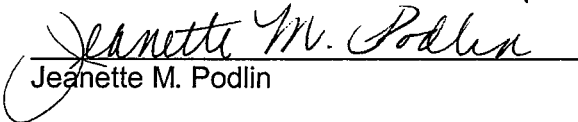
COUNTY OF KANKAKEE and
COUNTY BOARD OF KANKAKEE

By: 
 Elizabeth S. Harvey
 One of Its Attorneys

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CERTIFICATE OF SERVICE

I, the undersigned non-attorney, state that I served a copy of the described documents in the above-captioned matter via messenger to the hearing officer and via facsimile/U.S. Mail to all persons listed on the service list on April 30, 2003.


Jeanette M. Podlin

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.

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ILLINOIS POLLUTION CONTROL BOARD

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CITY OF KANKAKEE,)		
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Petitioner,)	PCB 03-133	<i>Pollution Control Board</i>
)	PCB 03-134	
v.)	PCB 03-135	
)	(consolidated)	
COUNTY OF KANKAKEE, COUNTY)	(Pollution Control Facility Siting Appeals)	
BOARD OF KANKAKEE, and WASTE)		
MANAGEMENT OF ILLINOIS, INC.)		
)		
Respondents.)		

RESPONSE TO CITY'S MOTION FOR LEAVE TO FILE "RESPONSE TO COUNTY'S RESPONSE TO CITY'S MOTION TO RECONSIDER DISCOVERY RULING"

Respondent COUNTY BOARD OF KANKAKEE ("County"), by its attorneys Hinshaw & Culbertson and Swanson, Martin & Bell, hereby responds in opposition to the CITY OF KANKAKEE's ("City") motion for leave to file a "response" to the County's response. In the alternative, the County seeks leave to file the attached surreply.

1. On April 30, 2003, the City filed a document entitled "Response to the County of Kankakee's Response to the City's Motion to Reconsider Discovery Rulings". Despite this misleading title, the document is not a response, but is actually a reply to the County's response, which was filed on April 29, 2003. Later on April 30, 2003, the City filed its belated motion for leave to file that "response".
2. The County opposes that motion for leave to file. The City fails to even address the standard for granting such motions, which is to prevent material prejudice. 35 Ill.Adm.Code 101.500(c). The City merely states that wishes to respond to affidavits filed with the County's response. Those affidavits address only the allegations of the City's motion, and the City has identified no "need" to respond to those affidavits.
3. This situation, where the moving party seeks leave to file a reply the afternoon

before the Board may rule on its motion, points out why the Board rules prohibit replies. Both the Board and the County have been forced into the difficult position of reviewing and considering (and in the County's case, responding to) a reply on extremely short notice. The City has identified no reason why this is necessary.

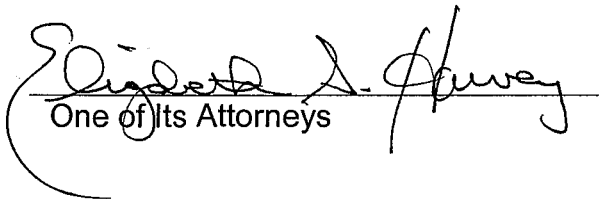
4. In the alternative, if the Board allows the filing of the City's reply, the County seeks leave to file the attached surreply. The City's reply asserts matter not asserted in its motion to reconsider. Some of that new matter is inaccurate and misleading. The County will be materially prejudiced if the Board allows the filing of the City's reply, but does not allow the County to respond to the new allegations in the reply.

WHEREFORE, the County of Kankakee opposes the City's motion for leave to file its "Response to the County of Kankakee's Response to the City's Motion to Reconsider Discovery Rulings", and in the alternative seeks leave to leave to file the attached surreply, and for such other relief as the Board deems appropriate.

Respectfully submitted,

COUNTY OF KANKAKEE and
COUNTY BOARD OF KANKAKEE

By:


One of its Attorneys

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BOARD OF KANKAKEE, and WASTE)		
MANAGEMENT OF ILLINOIS, INC.)		
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Respondents.)		

SURREPLY TO CITY'S MOTION TO RECONSIDER DISCOVERY RULINGS

Respondent COUNTY BOARD OF KANKAKEE ("County"), by its attorneys Hinshaw & Culbertson and Swanson, Martin & Bell, hereby submits its surreply to petitioner the CITY OF KANKAKEE's ("City") motion to reconsider discovery rulings.

1. The City continues to pose red herrings to the Board, in its quest to depose Mr. Helsten and Ms. Harvey. First, it asserts that because Mr. Helsten and Ms. Harvey submitted affidavits regarding January 2003 phone calls with representatives of WMII, demonstrating that those calls were non-substantive, the City should now be allowed to depose Mr. Helsten and Ms. Harvey on their affidavits. However, rather than opening the door to inquiry, the affidavits slam the door on any further inquiry. The affidavits are unequivocal and definite, and leave no room for varying interpretations: they clearly state that there were no substantive contacts between Mr. Helsten, Ms. Harvey, and any WMII representative while the application was pending. The affidavits were submitted to demonstrate that, contrary to the City's assertions, there were no substantive and improper contacts during the siting process. The City seeks to depose Mr. Helsten and Ms. Harvey as to alleged improper contacts, which the City has

claimed occurred. Counsel's affidavits demonstrate that those calls were not improper. Allowing the City to depose counsel on their affidavits, which were submitted only to rebut the City's unsupported allegations, would allow the City to create a reason to depose counsel by simply making unsupported statements which counsel would be required to rebut. Such an occurrence would fly in the face of the Board's long-standing reluctance to allow the depositions of attorneys. See, e.g., *Citizens Against Regional Landfill v. County Board of Whiteside County*, PCB 92-156 (February 25, 1993).

2. Contrary to the City's claims, the submittal of affidavits, to rebut unsupported allegations, does not waive the County's objections to the depositions of Mr. Helsten and Ms. Harvey. The County did not raise attorney-client privilege on the limited issue of the January 2003 phone calls, and thus has not waived any attorney-client privilege. As to its other objections to the depositions (as set forth in the County's response), the City cites no support for its claim that the County has waived those objections merely by submitting affidavits in support of the objections.
3. The City raises new matter regarding the discovery deposition testimony of Leonard Martin, a Kankakee County Board member. The City asserts that Mr. Martin testified at his deposition that Mr. Helsten had contacts with WMII regarding the conditions imposed by the County, and that those contacts occurred prior to January 31, 2003. The City attaches just three pages of the transcript of Mr. Martin's testimony.
4. However, the City has grossly misrepresented Mr. Martin's deposition testimony. Mr. Martin clarified his testimony to indicate that, to his knowledge, any such conversations between Mr. Helsten and WMII occurred after January 31, 2003,

not prior to that date. (See Exhibit 1, page 38, lines 2 through page 39, line 6.)¹

5. In fact, even the limited portion of the transcript provided by the City casts doubt on its representation of Mr. Martin's testimony. On page 23, Mr. Martin testifies that he believes that Mr. Helsten's contact with WMII occurred "[a]fter the County Board passed the siting and the application from Waste Management I think that he was---he was told by the County that he could negotiate the conditions on behalf of the County Board." (Page 23, lines 16-20 (emphasis added)(attached as Exhibit A to the City's reply.)
6. The City's motion misrepresents and misstates the substance of Mr. Martin's testimony, stating that Mr. Martin testified that contacts occurred before January 31, 2003, when it is clear that Mr. Martin stated that the contacts took place after January 31, 2003. Contacts after January 31, when the County Board made its decision on the siting application, are simply irrelevant to this appeal, and cannot violate fundamental fairness.
7. In view of the City's misrepresentations, which are the basis for the majority of the City's reply, the County moves the Board to impose sanctions on the City, pursuant to Section 101.802 of the Board's rules. The City's misrepresentations constitute an abuse of discovery procedures.
8. Even considering Mr. Martin's testimony in the light set forth by the City, that testimony does not provide a basis for the deposition of Mr. Helsten, and certainly provides no basis for Ms. Harvey's deposition.² As pointed out in the County's response, Mr. Helsten did not represent the County Board, the decisionmaker in this matter, during the local siting proceeding. Thus, it is

¹ The County regrets that the extremely short time frame (less than five hours) to respond to the City's reply prevents the County from providing a complete certified transcript. Upon direction by the Board, the County will provide a complete transcript.

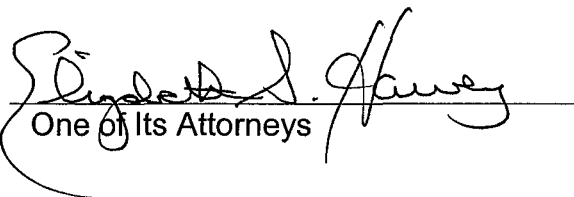
² In fact, Mr. Martin testified that he is not aware of any contacts between Ms. Harvey and WMII. See Exhibit 1.

difficult to understand how contacts with Mr. Helsten could have been improper *ex parte* contacts. Prohibited *ex parte* contacts occur between decisionmakers and those seeking to influence the decisionmakers. Assuming, without admitting, that a substantive contact between Mr. Helsten, who did not represent the decisionmaker during the local proceeding, and WMII did occur, such a contact cannot be improper.

9. In short, the City is trying desperately to create a reason to depose Mr. Helsten and Ms. Harvey, by asserting half-truths and red herrings. In reality, nothing the City has raised overcomes the presumption, long held by the courts and this Board, that attorneys can be deposed only when: (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case. *Citizens Against Regional Landfill v. County Board of Whiteside County*, PCB 92-156 (February 25, 1993). The City has failed to make any of those three required showings. The County asks the Board to uphold the hearing officer's rulings regarding depositions, and to impose sanctions on the City for its abuse of discovery procedures.

Respectfully submitted,

COUNTY OF KANKAKEE and
COUNTY BOARD OF KANKAKEE

By: 
One of Its Attorneys

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DEPOSITION OF LEONARD MARTIN - 4/29/03

1 THE WITNESS:

2 A. The thing that I, as I understood it that
3 the County has authorized Mr. Helsten to negotiate with
4 Waste Management and also with the City as to, for
5 example, the cost of the double liner in trying to come
6 to some kind of a solution to whatever that problem might
7 be.

8 MR. FLYNN:

9 Q. Did those conversations occur before or
10 after the Regional Planning Commission made the
11 recommendation?

12 A. After.

13 Q. Did those conversations occur before or
14 after the siting application was ruled upon?

15 A. Of the Kankakee City you mean?

16 Q. No, of the County of Kankakee.

17 A. I don't -- has it been ruled upon?

18 Q. Well, you had a Board Meeting on January
19 31, 2003 --

20 A. Yes.

21 Q. -- where the application was approved?

22 A. Yes, it would be after that.

23 Q. Are you aware of any conversations that
24 occurred between Elizabeth Harvey and Waste Management at

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DEPOSITION OF LEONARD MARTIN - 4/29/03

39

1 any time between March of 2002 and January 31 of 2003?

2 A. No.

3 Q. Are you aware of any conversations that
4 occurred between Mr. Helsten and Waste Management during
5 that time frame?

6 A. Not that I know.

7 Q. You were present at the hearing on January
8 31, 2003?

9 A. You talking about the Regional Planning
10 Commission?

11 Q. No. I'm talking about the County of
12 Kankakee Board Meeting.

13 A. Yes, yes.

14 Q. Do you recall what time the meeting
15 started that day?

16 A. Probably 9:00, but I can't say for sure.
17 They all start at nine.

18 Q. Do you know what time it ended that day?

19 A. No.

20 Q. Did it run straight through from start to
21 finish?

22 A. I didn't hear that.

23 Q. Did the meeting go straight through from
24 start to finish?

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