BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Citizens Against Landfill Expansion, Petitioners	
v.	
American Disposal Services of Illinois, Inc. Respondent,	No. PCB 03-236
and	Bradley Halloran, Hearing Officer
Livingston County Board, Livingston County, Illinois, Respondent	

PETITIONER'S MOTION TO COMPEL LIVINGSTON COUNTY BOARD

Petitioner Citizens Against Landfill Expansion, an unincorporated association of residents of Livingston County (hereinafter "Petitioner" or "CALE"), through its attorney Carolyn K. Gerwin, moves for an order to compel Respondent Livingston County Board (hereinafter "County Board") to respond to Petitioner's Interrogatories, Requests for Admission and Requests for Production of Documents, which were served on August 22, 2003 (hereinafter collectively referred to as "Petitioner's Discovery Requests), as set out more particularly below. Petitioner also requests sanctions in the amount of $1,500 for the County Board's failure to comply with the discovery process, which necessitated this motion and presented a hardship to Petitioner under the circumstances of the particularly condensed discovery schedule ordered in this matter.

Petitioner's Discovery Requests must be relevant to matters at issue in the instant Petition for Review or be reasonably calculated to lead to relevant information. In its Petition for Review, Petitioner has stated the following claims: (a) that the County Board lacked jurisdiction to conduct the siting hearing due to the failure of Applicant to give required statutory notice under Section 39.2(b); that the process was fundamentally unfair based on the following: (1) upon information and belief, many members of the siting authority pre-judged or failed to judge whether the Applicant had satisfied the statutory criteria: (a) due to fear that if the County Board did not approve of the application, the City of Pontiac would annex the property in question and collect the host fees, and/or (b) due to an overpowering desire to obtain the $162 million host fee that was previously negotiated, which figure included higher host fees for the existing landfill (almost double the rate per ton) if the County Board approved an unspecified expansion (assuming such expansion became final); and (2) any such other bases of fundamental unfairness as may hereafter be discovered and established; and (c) that the following statutory criteria were not met: (a) need; (b) health, safety and welfare; (c) minimization of incompatibility and

property value impacts; and (d) consistency with the County's Solid Waste Management Plan. 415 ILCS 5/39.2(a)(i), (ii), (iii) & (viii). See Petition to Review Pollution Control Facility Siting Decision, pp. 2-4. Petitioner is unquestionably entitled to discovery on the issues of jurisdiction and fundamental fairness. Petitioner also requested discovery (mainly admissions) on facts relating to statutory criteria preparatory to developing an agreed statement of fact on those issues, thereby streamlining the review process. The County Board refused to answer the vast majority of Petitioner's requests. A copy of the County Board's response is attached hereto for ease of reference.

Failure to Answer Interrogatories

The County Board, through its attorneys Larry Clark and Thomas Blakeman, objected to Interrogatories Nos. 1-4:

1. With respect to each Board Member, please identify all documents relative to the proposed expansion of Livingston Landfill reviewed by such Board Member prior to the vote on whether to approve the Application. For purposes of this interrogatory, "review" shall mean read or study.

2. When and where was such review conducted?

3. For each Board Member, state whether they attended the hearings held March 10-14, 2003, and state the times when he or she was in attendance.

4. For each Board Member, state whether they attended the Ag Committee meetings regarding the Application that were held in May, 2003, and state the times when he or she was in attendance.

These interrogatories relate to the fundamental fairness prong of the Petition. Except for Chairman Jeanne Rapp, each Board Member ultimately voted on whether to approve the Application. If Board Members failed to review the Application, failed to attend the hearings, failed to review public comment, and/or failed to attend the meetings regarding special conditions, such disinterest in the facts is evidence of non-judgment or pre-judgment of the merits of American Disposal's Application for Siting of Pollution Control Facility dated December 4, 2002 (hereinafter, the "Application").

In their objections to the interrogatories, counsel for the County Board state that they do not have to answer because "[t]here is no statutory or County ordinance requirement that Board Members read or study the documents prior to voting on the Application," Answer to Interrogatory No. 1, and similarly "[t]here is no statutory or County ordinance requirement that Board Members attend the hearing, Answer to Interrogatory No. 3. Petitioner respectfully disagrees. After twelve pages of text listing the extensive information required to be provided by the Applicant and filed as part of an application, the siting ordinance states that "[t]he members of the Agricultural Committee...shall be responsible for reviewing the application, conducting the public hearing and making a recommendation to the Livingston County Board on whether to

approve, approve with conditions, or deny the request for site location approval." Siting Ordinance, Section B, para.3 on page 15. Later, the ordinance states that "The Agricultural Committee shall consider the record of the public hearing, reports submitted by the Administrator of the Department of Zoning, and the findings of fact and conclusions of law submitted to it by the Hearing Officer and make a recommendation to the Livingston County Board." Id., para. 14, pages 16-17. Finally, the ordinance requires that "[t]he County Board shall consider the record of the public hearing, reports submitted by the Administrator of the Department of Zoning, the findings of fact and conclusions of law filed by all parties and shall make a determination concerning the request for site location approval." Id., para. 15, page 17. In sum, the siting ordinance, not surprisingly, indicates that the County Board must review the Application and related materials. Thus, the interrogatories are also highly relevant to the issues of whether the Board followed the required procedures.

Counsel for the County Board state these interrogatories are an improper attempt to "invade the mind of the decision maker." See answer to Interrogatory No. 1. **[review this case].** However, as noted below, these interrogatories go to process, which is clearly a permissible subject of inquiry. Furthermore, all claims that the decision makers pre-judged or failed to judge the Application on the merits relate to some extent to the state of mind of the decision makers, yet they are proper bases for reversal. As such, the interrogatories are clearly proper.

Counsel for the County Board also appear to be arguing that identification of the material reviewed by Board Members is irrelevant because applicable law allows Board Members to vote on the Application even if they are ignorant of the facts contained with the Application, elicited at the hearing, or set forth in any other documents. That is a legal argument more properly made in the County Board's brief. In addition, that argument does not render the interrogatories irrelevant to the issue of fundamental fairness, which is not confined to the question of whether the Board's review complied with the formalities set forth in the ordinance. For example, if Board Members reviewed materials that they should not have, that would be relevant to the fundamental fairness prong of the Petition. Thus, the interrogatories are highly relevant to the issues of non-judgment, pre-judgment, and fundamental fairness in general, and Petitioner is entitled to discovery on these issues.

Through its attorneys, the County Board also objected to, and refused to answer, Interrogatory No. 5:

5. Identify each expert witness or potential expert witness retained or consulted by LCB with respect to the Petition for Review.

This is a standard interrogatory. Respondent American Disposal and Petitioners asked this same question and both answered it. Again, the County's reference to what they are required to do is no excuse for failure to answer the question. A simple answer of "none" would have sufficed. Failure to answer this question demonstrates the County's bad faith in not responding to Petitioner's Discovery Requests.

Through its attorneys, the County Board also objected to, and refused to answer, Interrogatory No. 6, claiming only that it is "irrelevant as to any issue presented here for review":

6. Describe all communications to, from or among LCB (including its members, agents, consultants and employees) relating to annexation or potential annexation by the City of Pontiac of land at, near or extending toward Livingston Landfill.

Far from being irrelevant, this request directly addresses Petitioner's claim that Board Members pre-judged or failed to judge the merits of the Application due to fear that if the County Board did not approve of the application, the City of Pontiac would annex the property in question and collect the host fees. Again, failure to answer this question demonstrates the County's bad faith in not responding to Petitioner's Discovery Requests.

For Interrogatory No. 8, Petitioner asked:

8. Was the Livingston Alternative School located within 500 feet of Livingston Landfill during the 2001-03 school years? State when it was first established at that location.

This interrogatory relates to lack of foundation of the opinion of American Disposal's consultant on incompatibility. He was unaware of this school, which is located extremely near the existing facility. Transcript, pp. ____. Contrary to the County Board's contention that "this interrogatory attempts to elicit information that could have been obtained at the local siting hearing," Petitioner could not have done so. It does not have personal knowledge of these matters, the consultant had no knowledge of the school whatsoever, and the County did not put on a single witness, so there was no opportunity to examine or cross-examine any witness on this issue.

For Interrogatories Nos. 9, 13, and 14, Petitioner asked:

9. For each Board Member, if the County did not receive any Host Fees in connection with the expansion, would you have approved the Application? If not, describe your grounds for disapproval.

13. For each Board Member, state whether you believe that collection of Host Fees from the expansion is necessary or advisable in order for Livingston County to achieve a balanced budget without having to increase taxes.

14. For each Board Member, describe any time when you recall any other Board Members stating that he or she believed that collection of additional Host Fees from the expansion was necessary or advisable in order for Livingston County to achieve a balanced budget without having to increase taxes

Counsel objected to these interrogatories on grounds that they were "improper request[s] for answer[s] to a hypothetical question," they were irrelevant to any issue on appeal," and they were "an attempt to invade the mind of the decision maker." These questions are both relevant to issues in this appeal. Petitioner has specified as one ground for pre-judgment that the County Board had an overwhelming desire to collect the Host Fee, regardless of the merits of the Application. These interrogatories are clearly relevant to that issue. Interrogatory No. 9 neatly slices host money—which is not grounds for ignoring the statutory criteria—out of the equation. Answers to this question would allow Petition to identify which Board Members were influenced by the money. Similarly, Interrogatory No. 14 is intended to identify Board Members who could be deposed or examined regarding possible pre-disposition of the Board. Further discovery or testimony could then establish whether potential receipt of the $162 million host fee rendered Board Members apathetic as to whether the statutory criteria had been met. **[address invasion of mind stuff?]** Thus, although the answers to Interrogatory No. 14 might not be admissible in and of themselves, they could lead to admissible evidence.

Through counsel, the County Board also refused to answer Interrogatories No. 10 and 29:

10. For each Board Member, describe any meetings involving said Board Member and American Disposal that occurred since January 1, 2001, other than official meetings of LCB or committees thereof that were open to the public in accordance with the Open Meetings Act and describe the substance of communications related to such meetings.

29. Describe any communications or meetings involving LCB and American Disposal that occurred since January 1, 2001 relating to the Previous Application, the Application, host fees, the proposed expansion or opposition to the expansion, other than official meetings of LCB or committees thereof that were open to the public in accordance with the Open Meetings Act, and describe the substance of any communications related to such meetings, including communications or meetings of American Disposal's consultants and LCB's consultants that occurred between the pendency of the Previous Application and the Application.

Petitioner has requested information pre-dating when American Disposal originally filed an Application for this project, which was filed in June 2002. Counsel for the Board claims that this interrogatory is irrelevant as to any meetings occurring prior to December 4, 2002, which is when the current Application was filed. In a meeting with Petitioner's representatives, American Disposal indicated it had met with virtually all the Board Members prior to the June filing. Such meetings could have had the result of so influencing the Board Members in question that they pre-judged or failed to judge the Application on its merits in accordance with statutory criteria. Such discovery is permitted under the Pollution Control Board's decision in _____ [Kankakee

citation]. Similarly, Interrogatory No. 29 deals with communications between agents of the Applicant and the County Board. Petitioner is aware that members of the County's so-called "Independent Review Team" and American Disposal planned to meet sometime between the filing of the first and second applications to discuss concerns the team had regarding the proposed site's hydrogeology and possibly other issues. The Pollution Control Board has opined that such discussions are supposed to be held in public on the record. [get cite] Petitioner is entitled to discovery on those communications and any similar communications.

Through counsel, the County Board also refused to answer Interrogatories Nos. 11, 12 and 18:

11. Identify all documents relating to any agreement, understanding, contract or proposed agreement between any Board Member and American Disposal.

12. Identify any payments, gifts, agreements, promises, services or anything of value provided by American Disposal to LCB (or any of its members, agents, employees, attorneys or consultants) other than payments made to Livingston County pursuant to the Host Agreement.

18. Describe any interest, relationship, agreement or proposed agreement of any Board Member with any contractor that had, has or will have any business with respect to Livingston Landfill (other than de minimis contractors doing less than $5,000 worth of business with Livingston Landfill in any given year).

The County's statement that agreements between the County Board (as a whole, presumably) and American Disposal being in the Record on Appeal is unresponsive as the interrogatory clearly addresses contracts between individual Board Members and the Applicant. The County has attached the Board Members' statements of economic interest, but those statements may or may not reflect all the agreements and/or gifts to be identified. American Disposal admits to having had a contract with County Board Chairman Jeanne Rapp, see American Disposal's answers to interrogatories, which reportedly prevented her from commenting on or participating in matters related to the landfill. With regard to Interrogatory No. 18, counsel brazenly claims that the interrogatory is irrelevant. Petitioner is entitled to discovery on the issue of whether the Board Members (including Mrs. Rapp, who abstained but participated in the process), had a personal financial interest in continuance of the landfill operations. These interrogatories (combined with the document request related thereto) address issues of bias, pre-judgment and non-judgment, and other issues relating to fundamental fairness. The County Board's response that these interrogatories are irrelevant demonstrates bad faith. Furthermore, the County's counsel improperly failed to consult Board Members in responding to any of the interrogatories. See answer to Interrogatory No. 31 and discussion thereof below.

Through counsel, the County Board also refused to answer Interrogatory No. 15:

15. For each Board Member, identify any properties that you own or have any other interest in that are located within two miles of Livingston Landfill.

Counsel objected to this interrogatory as irrelevant. However, it is relevant in that answers to this interrogatory will allow Petitioner to argue that the vast majority of the Board would not expect to be personally affected by approval of the Application, i.e., it would not directly impact their lives if the statutory criteria were not met. Again, this is clearly relevant to fundamental fairness issues.

Through counsel, the County Board refused to answer Interrogatory No. 17:

17. Describe any independent environmental investigation performed by LCB relating to Livingston Landfill (i.e., other than review of data supplied by American Disposal) and identify all documents relating thereto.

Counsel refused to answer this interrogatory, stating only that "Respondent has complied with the Livingston County Pollution Control Facility Siting Ordinance." This is a legal conclusion. Again, whether the process set forth in the ordinance was followed is one factor to be considered, but is not grounds for failure to respond to interrogatories that relate to fundamental fairness issues. This non-response does not even state an objection. The interrogatory is relevant to the issue of whether the County Board pre-judged or failed to judge the merits of the Application. If the Board had done such a review, that would be evidence that could be used to argue against Petitioner's claims. Petitioner is entitled to such information. If no such investigation was done, a simple answer of "none" would have sufficed.

NO. 19???

The County Board's answer to Interrogatory No. 23 was non-responsive:

23. Describe the process by which the County's "Review Team" was formed and instructed.

Counsel responded only that the "Independent Review Team complied with the Livingston County Pollution Control Facility Siting Ordinance." Such a non-response does not reveal what the actual "marching orders" of this purported "Independent Review Team" were, whether they did in fact comply with the ordinance or whether the ordinance could be complied with and the results still be biased or otherwise fundamentally unfair. In light of Counsel's apparent intention (based on its objections to Interrogatories Nos. 1-4) to argue that Board Members were not required to review the Application itself, this Interrogatory is extremely relevant. Counsel did not even state an objection. Petitioner is therefore entitled to a full response to this interrogatory.

Through counsel, the County Board refused to answer or only partially answered Interrogatories Nos. 25-28:

25. Describe all instances dating from 1995 to the present in which any member of the County's "Review Team" worked on matters relating to Livingston Landfill other than the Application or the Previous Application.

26. Describe all instances in which it is anticipated that any member of the County's "Review Team" will or may provide any materials or services to American Disposal or in connection with matters relating to Livingston Landfill at any time hereafter.

27. Describe all instances in which it has been discussed or anticipated that any of American Disposal's consultants, witnesses or persons making public comment in support of the Application will or may provide any materials or services to American Disposal at any time hereafter.

28. Describe all instances in which it is has been discussed or anticipated that any of LCB's consultants, employees, agents or witnesses who participated in the Application process in any way will or may provide any materials or services to American Disposal at any time hereafter.

These interrogatories address the potential financial bias of Applicant's witnesses and consultants, as well as the financial interest of the so-called "Independent Review Team," which in turn relied upon the reports and testimony of Applicant's witnesses and consultants. These interrogatories address past, present and future anticipated financial benefits from the landfill enjoyed by those who advised the Board. Obviously, the Board can only respond to the best of its own knowledge. However, in a small community that knowledge may be extensive and it could lead to additional discoverable evidence of bias and self-interest. Petitioner strongly believes, based on news reports, that a forthright answer to these interrogatories will reveal that the key consultant on the "Independent" Review Team is already profiting as a result of providing the County with consulting services that are needed due to anticipated continual landfill operations at the site.

Through counsel, the County Board refused to answer Interrogatory No. 30:

30. If LCB denies any of Petitioner's Requests for Admission, explain in detail the basis for the denial.

Counsel merely stated that the interrogatory was "inappropriate. There are no statutes or County ordinances requiring that Respondent explain in detail the basis for denying any of Petitioner's requests for admission. Rather said denials speak for themselves." Petitioner disagrees. Since Petitioner has included this as an interrogatory and it functions as such. Thus, to the extent the requests for admission are proper, the interrogatory requesting an explanation is proper. This is a useful tool for establishing agreed facts and identifying the precise grounds for disagreement. Knowing the precise reason for disagreement may lead to admissible evidence or establishment of other agreed facts. Review of Respondent's objections to some of the Requests for admissions show

that the reason for denial may be something petty such as a failure to admit due to the lack of a designated time frame when the intention of the statement was that it be taken to apply to the time frame of consideration of the Application. See, e.g., Request for Admission No. 8. Petitioner could have re-stated all of the Requests for Admission as Interrogatories, but it is more efficient to simply state the basis for the denial, as both Petitioner and American Disposal did in their own responses to requests for admission.

Counsel for the County Board, in response to Interrogatory, revealed a glaring deficit in the County Board's responses to Petitioner's Discovery Requests. The interrogatory in question was the de rigeur, standard interrogatory about preparation of the answers to discovery requests:

31. Identify all persons consulted in preparing the answers to these Interrogatories, Petitioner's First Request for the Production of Documents to LCB or Petitioner's First Request for Admissions by LCB.

Counsel responded that only one Board Member, namely, Chairman Jeanne Rapp (who abstained from the vote), was consulted in preparing the County's answers. Thus, *counsel failed to consult with the actual decision makers.* Counsel apparently felt no need to consult with any voting Board Member, even for those interrogatories that were expressly (and redundantly) introduced by the phrase "[f]or each Board Member" to emphasize the need for individual inquiries. See Interrogatories Nos. 1-4, 9-10, 13- 15, & 19. For purposes of the interrogatories, the Board is defined as the Board or members or agents thereof. This is an audacious attempt to prevent Petitioner from obtaining reasonable discovery of key evidence.

Failure to Produce Documents

The County Board, through its counsel, also failed miserably to comply with Petitioner's Request for Production of Documents. For Requests Nos. 1, 3, 5, 6, 10, 11, 12, and 15, the County's counsel merely referred Petitioner to the "Record on Appeal," without further disclosure or identification. Petitioner objects to this answer as instructions included with the Discovery Requests permitted the County to refer to the Application if they cited to a section or identified the part of the Application being relied upon. Petitioner further objects on grounds that the scope of discovery is not limited to the Record on Appeal with respect to issues of jurisdiction and fundamental fairness. Most of the Requests relate to such issues. Furthermore, Petitioner requested documents that relate to CALE or its consultant in the belief that the number of such documents would be limited and would be relevant to fundamental fairness issues. The County did not claim that such production would be unduly burdensome so Petitioner believes this request is proper as well.

As with the interrogatories, Respondent's attempts to limit the time period of Petitioners' requests to the pendency of the Application itself are not grounded. This

affects Requests Nos. 9, 11, 12, and 15. See above for discussion of the possibility of establishing fundamental fairness problems based on pre-Application contacts and events.

Petitioner requested copies of contract and communications between County Board Members and American Disposal (and its agents) as follows:

7. All documents relating to any agreement, understanding, or transaction between any Board Member and American Disposal.

Counsel's claim that asking 24 Board Members if they have a contract with the Applicant is unduly burdensome is disingenuous. Petitioner is not required to present evidence that such agreements exist prior to tendering a request for them. This is part of the function of discovery. In fact, there is evidence in the record that at least one such contract does exist. The County Board's failure to respond to this basic, undeniably relevant request is evidence of its bad faith in failing to respond to Petitioner's Discovery Requests.

Even with regard to Petitioner's request for documents identified in response to interrogatories, counsel for the County Board referred only to the Record on Appeal. As noted above, the County failed to respond to most of the interrogatories so presumably they also withheld the documents that should have been so identified. Thus, the County must be compelled to produce the documents related to the interrogatories that they are being compelled to answer.

In Interrogatory No. 13, Petitioner requested documents regarding the Board Member's review of the Application and related documents:

13. All documents evidencing review by any Board Member of the Application, Previous Application or public comment submitted in connection therewith, including but not limited to sign-out sheets, logs, e-mails and handwritten notes.

Petitioner incorporates by reference its statements regarding the discoverability of such information set forth above with regard to Interrogatories Nos. 1-4.

WHEREFORE, Petitioner requests the Hearing Officer to issue and Order to Compel the County Board to respond fully to Petitioner's Discovery Requests, to consult with Board Members in the responses thereto, and to impose sanctions on the County Board or its counsel in the amount of $1,500 for its failure to respond in good faith, thereby necessitating the instant motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2003, I electronically transmitted (receipt requested) the foregoing Motion to Compel Livingston County Board to:

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Larry M. Clark

Claire Manning

George Mueller

C. Thomas Blakeman

With a hard copy by U.S. Mail to:

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