

ILLINOIS POLLUTION CONTROL BOARD

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APR 11 2003

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

STATE OF ILLINOIS
Pollution Control Board
 PCB 03-125
 (Third-Party Pollution Control
 Facility Siting Appeal)

MERLIN KARLOCK,)
)
 Petitioner,)
 vs.)
)
 COUNTY OF KANKAKEE, COUNTY BOARD OF)
 KANKAKEE, and WASTE MANAGEMENT OF)
 ILLINOIS, INC.)
 Respondents.)

PCB 03-133
 (Third-Party Pollution Control
 Facility Siting Appeal)

MICHAEL WATSON,)
)
 Petitioner,)
 vs.)
)
 COUNTY OF KANKAKEE, COUNTY BOARD OF)
 KANKAKEE, and WASTE MANAGEMENT OF)
 ILLINOIS, INC.)
 Respondents.)

PCB 03-134
 (Third-Party Pollution Control
 Facility Siting Appeal)

KEITH RUNYON,)
)
 Petitioner,)
 vs.)
)
 COUNTY OF KANKAKEE, COUNTY BOARD OF)
 KANKAKEE, and WASTE MANAGEMENT OF)
 ILLINOIS, INC.)
 Respondents.)

PCB 03-135
 (Third-Party Pollution Control
 Facility Siting Appeal)

WASTE MANAGEMENT OF ILLINOIS, INC.,)
)
 Petitioner,)
 vs.)
)
 COUNTY OF KANKAKEE,)
 Respondent.)

PCB 03-144
 (Pollution Control Facility
 Siting Appeal)

RESPONSE TO COUNTY OF KANKAKEE'S
OBJECTIONS TO DISCOVERY PROPOUNDED
BY THE CITY OF KANKAKEE

NOW COMES the CITY OF KANKAKEE (hereinafter the "City"), by and through its Assistant City Attorneys, L. PATRICK POWER and KENNETH A. LESHEN, and filing this response to the discovery objections filed by the County of Kankakee (hereinafter the "County"), states as follows:

1. The linchpin of the County's discovery objections is its assertion that the City should not be allowed to inquire into the formation of the County Solid Waste Management Plan or any prefiling contacts between the County and Waste Management of Illinois, Inc. (hereinafter "WMII").

2. The County should be ordered to fully comply with the City's discovery because the formation and substance of its solid waste plan and host agreement create a suspicion of bias in favor of the applicant during the siting process; and therefore, go directly to the issue of fundamental fairness. In fact, the designation of WMII as the sole operator of any new landfill by the very language of the solid waste plan and inferentially, the exclusion of any other applicant, smacks not only of bias but of collusion between the County and WMII.

3. The County cites *Residents Against A Polluted Environment v. The Illinois Pollution Control Board*, 293 Ill.App.3d 219 for the proposition that the County's relationship and involvement with WMII in the amendment of the solid waste plan does not create a suspicion of bias by the County in its consideration of WMII's siting application. *Residents*, supra, specifically found that other than the mere reference to LandComp's (the applicant) involvement with the amendment of the plan, the appellants did not offer any specific allegation establishing how LandComp's involvement

with the amendment of a solid waste plan created bias during the siting process. In the instant case, the Illinois Pollution Control Board (hereinafter the "Board") has the following specific allegations to consider:

a.) On March 12, 2002, by Resolution, the Kankakee County Board amended its Solid Waste Management Plan, which stated in pertinent part as follows, to-wit:

"The first two paragraphs of Section VI: Available Landfill Capacity in Kankakee County of the Kankakee County Solid Waste Management Plan are hereby deleted and replaced with the following:

Kankakee County has a single landfill owned and operated by Waste Management of Illinois, Incorporated. This landfill has provided sufficient capacity to dispose of waste generated in Kankakee County and its owner has advised the County that it plans to apply for local siting approval to expand the facility to provide additional disposal capacity for the County. Operation of the landfill has been conducted pursuant to a Landfill Agreement signed by the County and Waste Management in 1974, and subsequently amended from time to time. In the event siting approval for any expansion is obtained, the landfill would provide a minimum of twenty (20) years of long term disposal capacity through expansion of the existing landfill.

An expansion of the existing landfill, if approved, would then satisfy the County's waste disposal needs for at

least an additional 20 years, and in accord with the Kankakee County Solid Waste Management Plan (as amended), as well as relevant provisions of the Local Solid Waste Disposal Act and the Solid Waste Planning and Recycling Act, no new facilities would be necessary."

This amendment is part of the record in the siting hearing.

Consequently, as is apparent in the record, the County knew that its favored and designated applicant, WMII, intended to file a siting application at the time it amended its solid waste plan. WMII repeatedly colluded with the County regarding the solid waste plan and its own designation as the sole operator of any new landfill immediately prior to its application. This inherent and stated bias percolated through the siting process and hearing.

b.) The County's March 12, 2002 amendment to its solid waste plan preceded by a scant 24 hours the application of Town and Country Utilities, Inc., to the City of Kankakee for siting of a solid waste disposal facility. The timeline is instructive:

i.) December 17, 2001: Correspondence from Dale Hoekstra of Waste Management to Charles Helsten regarding proposed amendment of solid waste management plan.

ii.) January 14, 2002: Correspondence from Dale Hoekstra of Waste Management of Illinois, Inc., to Solid Waste Director, Efraim Gil, responding to a report of a citizen's group by the name of "Outrage" regarding capacity of the Kankakee landfill.

iii.) March 4, 2002: Notes of Mike VanMill concerning telephone call with Charles Helsten.

iv.) March 11, 2002: Documents from files of Mike VanMill concerning proposed solid waste plan amendments.

v.) March 12, 2002: Resolution amending Kankakee County Solid Waste Management Plan. See log of documents provided by Hinshaw & Culbertson attached hereto and incorporated herein as Exhibit A.

vi.) March 13, 2002: Application of Town and Country to City of Kankakee for siting non-contiguous facility (strongly opposed by Waste Management and County of Kankakee).

This flurry of activity did not occur by happenstance. Rather, it is emblematic of the deeply flawed and biased activity of the County that permeated the siting process.

4. The County further seeks to thwart the City's discovery requests by cloaking itself in various alleged privileges. The first privilege asserted by the County is that of the attorney-client privilege. The privilege is not absolute and first requires a determination by the Board that the attorney-client relationship in fact exists. In the instant case, the "client" is neither a private individual nor a private corporation. It is, instead, the County of Kankakee, a body politic and corporate. Its elected public officials and/or employees are only the client if the Board determines that these individuals are in its "control group". See, e.g., *Midwesto-Paschen Joint Venture for Viking Projects...* 638 N.E.2d 32 Ill.App. 1 Dist. 1994.

The Seventh Circuit Court of Appeals in *A Witness Before the Special Grand Jury 2000-2*, 288 Fed.3d 289, determined that in that case the attorney-client privilege did not apply. The court stated in pertinent part "... government lawyers have responsibilities and obligations

different from those facing members of the private bar. While the latter are appropriate concerned first and foremost with protecting their clients - - even those engaged in wrongdoing - - from criminal charges and public exposure, government lawyers have a higher, competing duty to act in the public interest." The court further stated, "it would be both unseemly and a misuse of public assets to permit a public official to use a taxpayer-provided attorney to conceal from the taxpayers themselves otherwise admissible evidence of financial wrongdoing, official misconduct, or abuse of power." Although this case arose in the context of a criminal investigation, the principles of law are the same.

The log of documents provided by Hinshaw & Culbertson on behalf of the County establishes by its own terms that at least some of these documents are not privileged. For example, there are documents concerning consulting experts of staff and internal staff communications that were not shared with the decision maker. Consequently, the documents referenced under said heading are not documents prepared by the control group and are, therefore, not privileged.

5. The County asserts in a boilerplate and repetitive objection asserted in response to both the document requests and to the interrogatories that they are burdensome and over-broad. In fact, the document work has already been done as evidenced by the log prepared by Hinshaw & Culbertson and submitted to us. Consequently, the County has already surmounted the burden.

6. It is somewhat disingenuous for the County to assert privilege and burden given the fact that these are fundamentally the same requests propounded by the County during the discovery process prior to the fundamental fairness hearing for the siting application of Town and

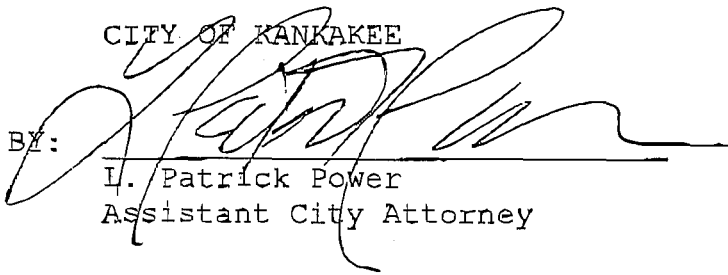
Country to the City. The City determined that the public's right to know outweighed various tenuous objections that could have been made. It is the belief of the City that the interrogatories and document requests propounded by the County in that case were propounded in good faith and answers were made in the same vein. It was the belief of the City that the County would react in kind.

WHEREFORE, the City prays that an order be entered denying the objections of the County to the discovery propounded by the City and for such other and further relief as the Board deems just, necessary and proper.

Respectfully submitted,

CITY OF KANKAKEE

BY:


L. Patrick Power
Assistant City Attorney

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Assistant City Attorney
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EXHIBIT A

HINSHAW & CULBERTSON

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NEW YORK, NEW YORK
APPLETON, WISCONSIN
MILWAUKEE, WISCONSIN

FILE NO. 813053

WRITER'S DIRECT DIAL
815-490-4920

April 10, 2003

Kenneth A. Leshen
One Dearborn Square, Suite 550
Kankakee, IL 60901

Re: City of Kankakee v. County of Kankakee

Dear Mr. Leshen:

Pursuant to our communications I have agreed to provide you with a log of the various documents for which we are asserting privileges and objections. The purpose behind this log is to allow the parties to understand that the County of Kankakee is in possession of no documents between August 16, 2002 and January 31, 2003, which are not part of the public record. The only exception to this statement is internal memoranda between members of County staff that were involved in drafting the proposed recommendation. These memoranda were in no way reviewed by the decision makers and, therefore, are irrelevant, inadmissible, and not likely to lead to admissible evidence. Please also be advised that though a document may appear under a specific heading below, which reflects a primary privilege or objection to producing said document, that document may also be protected from discovery or production on additional bases. For example, many of the documents for which there is an obvious attorney-client privilege are also protected because they were drafted prior to April 16, 2002.

ATTORNEY CLIENT PRIVILEGED

| | |
|-------------------|---|
| November 2, 2001 | Correspondence from State's Attorney Edward Smith to Assistant State's Attorney Brenda Gorski concerning search for special assistant state's attorney concerning solid waste issues. |
| November 9, 2001 | Correspondence from Attorney Edward Smith to Chairman of the County Board, Douglas Graves, concerning host agreement. |
| November 19, 2001 | Correspondence from Attorney Helsten to Efraim Gil and Brenda Gorski regarding special assistant state's attorney position. |

Kenneth A. Leshen
 April 10, 2003
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| | |
|-------------------|--|
| March 4, 2002 | Notes of Mike Van Mill concerning telephone call with Charles Helsten. |
| April 8, 2002 | Correspondence from State's Attorney Edward Smith to Efraim Gil concerning procedures for consultant retention. |
| April 16, 2002 | Correspondence from Assistant State's Attorney Brenda L. Gorski to Efraim Gil regarding consultant expert retention. |
| April 15, 2002 | Correspondence from Efraim Gil to Attorney Edward Smith regarding consulting expert retention. |
| April 23, 2002 | Correspondence from Charles Helsten to Brenda Gorski concerning expert witness retention. |
| December 12, 2002 | Correspondence from Edward Smith to Bruce Clark regarding administrative rules relating to the record to be prepared for landfill siting process. |
| December 17, 2002 | Correspondence from Attorney Elizabeth Harvey to Kankakee County Board and Regional Planning Commission members regarding procedure to be followed from close of hearing on December 6, 2002 until rendering decision. |

DOCUMENTS CONCERNING NEGOTIATION OF HOST AGREEMENT

| | |
|---------------------------------------|--|
| March 8, 2001 to January 16, 2002 | File of documents in possession of Mike Van Mill concerning negotiation of host agreement. |
| October 23, 2001 to December 10, 2001 | Documents from files of County Board member Pam Lee concerning host fee negotiations and agreements. |

SOLID WASTE MANAGEMENT PLAN AMENDMENTS

| | |
|---------------------------------|---|
| 2001 through March 11, 2002 | Documents from files of Mike Van Mill concerning proposed solid waste plan amendments. |
| April 12, 2001 to March 1, 2002 | Documents of Pam Lee concerning solid waste management plan amendments and host agreement negotiations. |

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DOCUMENTS PRE-DATING AUGUST 16, 2002

| | |
|---|---|
| October 30, 1997 through November 2001 | Various documents, notes and records of Mike Van Mill, member of County staff. |
| October 2001 | Lists of actual or possible attendees of landfill site bus tour. |
| Undated | Materials from Waste Management of Illinois concerning Settlers Hills Recycling Disposal Facility. |
| Undated | Document from Waste Management of Illinois concerning comprehensive Solid Waste Proposal. |
| November 13, 2001 through December 11, 2001 | Public resolution appointing special committee to negotiate host fee agreement and minutes of meetings regarding same. |
| December 17, 2001 | Correspondence from Dale Hoekstra of Waste Management to Charles Helsten regarding proposed amendment of solid waste management plan. |
| January 14, 2002 | Correspondence from Dale Hoekstra of Waste Management of Illinois, Inc. to Solid Waste Director, Efraim Gil responding to a report of a citizen's group by the name of "Outrage" regarding capacity of the Kankakee landfill. |
| January 28, 2002 | Correspondence from Dennis Wilt of Waste Management to Charles F. Helsten concerning proposed changes of the Kankakee County Solid Waste Management Plan. |
| April 11, 2002 | Correspondences from Lee Addleman of Waste Management of Illinois to various land owners regarding the agreement to guarantee property value copied to Efraim Gil of Kankakee County. |

DOCUMENTS CONCERNING CONSULTING EXPERTS OF STAFF AND INTERNAL STAFF COMMUNICATIONS NOT SHARED WITH DECISION MAKER

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|---------------|--|
| April 3, 2002 | Internal memorandum between Mike Van Mill and Mike Lammey regarding consulting experts |
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Kenneth A. Leshen
 April 10, 2003
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|------------------|--|
| April 23, 2002 | Correspondence from Assistant State's Attorney Brenda Gorski concerning consulting expert retention. |
| October 30, 2001 | Correspondence to Brenda Gorski regarding consulting expert retention. |
| January 6, 2003 | Draft of summary report of proposed expansion of the Kankakee Recycling and Disposal Facility. |
| January 7, 2003 | Correspondence between Chris Burger and Mike Van Mill regarding recommendations. |
| January 2003 | E-mails between County staff and attorneys concerning amendments for recommendation report. |

DOCUMENTS POST DATING DECISION

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| January 31, 2003 (issued after decision was rendered) | Memorandum from Waste Management of Illinois to Kankakee County Board. |
|---|--|

Sincerely

HINSHAW & CULBERTSON

By: 

Richard S. Porter

RSP:dmh

cc: All Parties

AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that a copy of the foregoing was served upon the following parties by facsimile to those parties with facsimile numbers listed below and by depositing same to all parties in the U. S. Mail at Kankakee, Illinois, before 5:00 p.m., on the 11th day of April, 2003:

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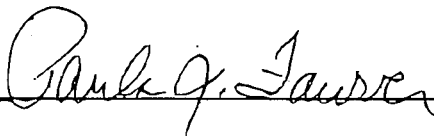
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STATE OF ILLINOIS
Pollution Control Board

Facsimile
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FACSIMILE TRANSMITTAL COVER LETTER

DATE: April 11, 2003

FROM: Kenneth A. Leshen

RE: City of Kankakee vs. County of Kankakee, et al.
Illinois Pollution Control Board
PCB 03-125, et al.

THERE WILL BE (14) PAGES INCLUDING THIS PAGE

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