BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, INC.,	)	
	)	
Petitioner,	)	No. PCB 04-186
	)	
vs.	)	(Pollution Control Facility
	)	Siting Appeal)
	)	
COUNTY BOARD OF KANKAKEE COUNTY, ILLINOIS,	)	
	)	
	)	
Respondent.	)	

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on March 15, 2005, we filed with the Illinois Pollution Control Board, an original and four copies of the attached Waste Management of Illinois, Inc.'s Motion to Compel.

WASTE MANAGEMENT OF ILLINOIS, INC.

By: _____
One of Its Attorneys

Donald J. Moran
PEDERSEN & HOUPT
161 North Clark Street, Suite 3100
Chicago, Illinois 60601
(312) 641-6888
Attorney Registration No. 1953923

388313

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, INC.,	)	
Complainant/Petitioner,	)	
v.	)	No. PCB 04-186
COUNTY BOARD OF KANKAKEE COUNTY, ILLINOIS,	)	
Respondent.	)	

MOTION TO COMPEL

Now comes Complainant/Petitioner WASTE MANAGEMENT OF ILLINOIS, INC. ("WMII"), by and through its attorneys, Pedersen & Houpt, and for its Motion to Compel states as follows:

INTRODUCTION

This motion seeks an order permitting discovery as to why certain members of the County Board of Kankakee County ("the County") denied, without explanation, a siting application they had previously approved on a substantially identical application and record. The County's counsel has consistently instructed County Board members not to answer questions regarding the County's otherwise inexplicable shift in position on the ground that such questions invade the "mental process" or "deliberative process" privilege of governmental decision-makers.

As set forth in detail below, these privileges do not apply here. First, the mental process privilege only applies when the decision under review was made in conjunction with formal administrative findings that explain the decision. No such findings explain the County's change of position in this case. Second, the mental process privilege does not apply when circumstances indicate bad faith or improper behavior in connection with the decision-making process. Here, the

County's inexplicable change in position, on the same application, record, and Planning Commission recommendation, is sufficient to raise the inference of bad faith or improper behavior. Finally, neither of the privileges protects communications made after the decision-making process is complete. The Hearing Officer should issue an order compelling the County Board Members to explain the basis for their change of position.

FACTS

A. The County Board's Change of Position

On August 16, 2002, WMII filed an application for local siting approval for an expansion of its existing landfill in Kankakee County. The Kankakee County Regional Planning Commission ("the Planning Commission") considered this application, issued findings that the proposed expansion complied with the nine statutory criteria of Section 39.2 of the Illinois Environmental Protection Act and recommended that the County approve the application. On January 31, 2003, the County Board followed the Planning Commission's findings and recommendation, and approved the application.

On August 7, 2003, the Illinois Pollution Control Board ("IPCB") vacated the approval on the ground that notice to one property owner within the subject area was insufficient under 415 ILCS 5/39.2(b). On September 26, 2003, WMII filed a second application for approval of the same expansion of the same landfill. This second application was also considered by the Planning Commission, which found it to be "substantially similar (if not identical) to the application filed by WMI in 2002." The Planning Commission found that the proposed expansion complied with Section 39.2's nine criteria and, again, recommended approval of WMII's application.

In a surprising reversal, however, on March 17, 2004, the County Board rejected WMII's September 26 application. Without explanation, thirteen County Board members who previously voted to approve the landfill expansion changed their votes with respect to one or more of the statutory criteria and voted to reject the application. The County Board made no factual findings explaining why it rejected the Planning Commission's recommendations or why the statutory criteria were not satisfied.

George Washington, Jr., a seventeen-year County Board member and chairman of the Planning Commission, later testified that "[c]onsidering all the information that was presented and it was essentially the same as it was the first time, [the second vote] was very disappointing to me. As a long standing county board member, I have never seen a reversal like that and not knowing what it was based on." (Washington Tr., p. 23:2-7).

B. WMII Sought an Explanation but was Denied

On April 21, 2004, WMII filed a petition for review of the County's March 17, 2004 decision on the ground that it was fundamentally unfair and against the manifest weight of the evidence. To conduct such a review, the IPCB is required to review the "entire record." *Chicago Messenger Serv. v. Jordan*, No. 1-03-1391, 2005 WL 396575, at *4 (Ill. App. Feb. 18, 2005). In this case, however, nothing in the record explains why the County approved the first siting application but rejected, on a substantially identical application and Planning Commission recommendation, the second.

Accordingly, WMII sought to discover whether the County Board members who changed their votes did so on the basis of facts contained in the administrative record. The County, however, resisted all such attempts as invading the "mental process" or "deliberative process" privileges of governmental decision-makers. The deposition of County Board member Linda Faber, for instance,

provides a typical exchange:[1]

Q Did you become aware at some point that Waste Management of Illinois had filed an application to expand the existing Kankakee landfill in August of 2002?

A Yes.

* * *

Q Was there a vote on that application in January of 2003?

A Yes.

Q Did you vote on the application?

A Yes, I did.

Q And how did you vote?

A I voted yea.

Q You voted to approve the application?

A Yes, I did.

* * *

Q Were you aware that Waste Management of Illinois filed another siting application in September of 2003?

A Yes.

* * *

Q Did you have any understanding as to whether the application filed in September of 2003 was the same or a different application than the one filed in August of 2002?

---

[1] Objections and instructions not to answer similar questions seeking information relating to the Board members' reversal decision were made at the deposition of Board members Frances Jackson, Ralph Marcotte, Linda Faber, Stanley James, Ruth Barber, Karen Hertzberger, Jamie Romein, James Vickery, Leo Whitten, Ed Meents, William Olthoff, Lisa Waskosky, Mike LaGesse and Sam Nicholos.

A Not until I read the application. I picked up the book and read through it.

Q And what was your understanding? Were the applications same or different?

A I think it was the same.

* * *

Q Did you vote on the application filed in September fo 2003?

A Yes.

* * *

Q And how did you vote on the second siting application?

A I voted against it.

Q What information or facts were made available to you in making your decision to turn down the September 2003 application?

MR. PORTER: Objection. Instruct the witness not to answer on the grounds that invades the mental impressions of a decision maker.

BY MR. MORAN:

Q How did you become aware of the facts or information that you considered in voting to deny the September 2003 application?

MR. PORTER: Same direction.

BY MR. MORAN:

Q Who provided those facts to you?

MR. PORTER: Same direction.

BY MR. MORAN:

Q When did you make your decision on the September 2003 siting application?

MR. PORTER: Same direction.

* * *

Q Did you consider any facts or information that was different than the facts or information you considered in voting on the application in January of 2003?

MR. PORTER: Objection. ... I think that's a direct question of a decision maker of her mental impression in coming to her decision and clearly is improper and I direct her not to answer.

(Farber Tr., pp. 6:10-14, 7:1-9, 8:8-16, 9:16-18, 10:3-23, 22:55-9, 22:13-17).

Not only did the County refuse to allow Board members to testify as to the basis for their own, otherwise unexplained decisions, the County also refused to allow any Board member to testify regarding the decisions of *other* Board members. For example, Ms. Faber was asked:

Q Did you hear or learn of any facts of information from whatever source as to why an county board member voted to deny the September 2003 siting application when they had previously voted to approve the January 2003 — I should say August 2002 siting application?

MR. PORTER: I'd ask the witness to answer this question, but it calls for a yes or no response and no elaboration at this time.

BY THE WITNESS:

A. Okay. Yes.

BY MR. MORAN:

Q And what information or facts do you have as to why any county board member who had voted to approve the August 2002 siting application voted to deny the September 2003 siting application?

MR. PORTER: Now that I have to direct you not to answer because it's a direct question as to the mental impressions of the witness — of a decision maker.

(*Id.*, pp. 22:18 - 23:14).

The County's prohibition even extended to County employees who were not members of the

County Board. For instance, Michael VanMill, the County's planning director, testified that he had discussed the Board's second vote — after the fact — with Culver James Vickery, a Board member. The County refused to allow Mr. VanMill to disclose the content of that conversation, however, even though it did not bear on any decision-making process of Mr. VanMill's and even though Mr. Vickery's decision-making process was, by definition, complete. (Vanmill Tr., pp 41:16 - 44:15).

ARGUMENT

The County's reliance on the "mental process" and "deliberative process" privileges will result in an incomplete record. As it is, the County Board has made no effort to explain its sudden reversal of position with respect to WMII's two siting applications. In such circumstances, the privileges do not apply. Moreover, the Board's unexplained reversal of position creates an inference of bad faith or improper behavior sufficient to overcome the privileges. Finally, neither of the privileges protects communications made after the decision-making process is complete. The Hearing Officer should issue an order compelling the County Board members to explain the basis for their change of position.

A. The Mental Process Privilege Does Not Apply Absent Administrative Findings

The County Board members can be compelled to explain their decision regarding the second siting application because a governmental decision-maker's mental processes are only privileged where contemporaneous administrative findings explain the decision.

"[B]efore an inquiry can be made into the decisionmaker's mental processes *when a contemporaneous formal finding exists*, there must be a strong showing of bad faith or improper behavior." *City of Rockford v. Winebago Cnty.*, (Nov. 19, 1987), PCB 87-92 at 9 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 41 U.S. 402, 91 S. Ct. 814 (1971)) (emphasis added). In

Overton Park, the United States Supreme Court held that "inquiry into the mental processes of administrative decisionmakers" was permitted in the absence of administrative findings explaining the decision. *Overton Park*, 41 U.S. at 420, 91 S. Ct. at 825. Where there are no contemporaneous administrative findings, examination of decision-makers' mental processes may "provide the only possibility for effective judicial review." *Community for Creative Non-Violence v. Lujan*, 908 F.2d 992, 997 (D.C. Cir. 1990) (citing *Overton Park*).

In this case, no administrative findings explain why the County approved the first siting application but rejected, on a substantially identical application and Planning Commission recommendation, the second. The testimony of Ms. Farber and Mr. VanMill confirm that some additional facts or information influenced thirteen Board members to change their votes. Meaningful review of that vote, however, is impossible without discovery regarding that information. Under the longstanding rule of *Overton Park*, therefore, the mental processes of the County Board members are discoverable.

B. The Board's Unexplained Reversal Implies Bad Faith or Improper Behavior Sufficient to Overcome the Privilege

Even if contemporaneous administrative findings were present in this case, the Board's sudden and unexplained reversal creates an inference of bad faith or improper behavior sufficient to overcome the mental process privilege.

"[W]here there are administrative findings that were made at the same time as the decision ... there must be a strong showing of bad faith or improper behavior before [inquiry into the decision-maker's mental processes] may be made." *Overton Park*, 41 U.S. at 420, 91 S. Ct. at 825. "To conclude otherwise would be an abandonment of any meaningful judicial protection against arbitrary

administrative action." *Abbott Labs. v. Harris*, 481 F. Supp. 74, 78 (N.D. Ill. 1979).

"Courts should weigh the limited means plaintiffs have at this stage of the proceedings to uncover ... impropriety in determining whether they have made a 'strong showing'". *Sokaogon Chippewa Community v. Babbitt*, 961 F. Supp. 1276, 1280 (W.D. Wis. 1997). Where circumstances are sufficient to "at least call into question whether or not non-statutory facts have been decisive," discovery should be allowed. *Abbott Labs.*, 481 F. Supp. at 78.

In this case, the County Board has offered no explanation at all for its refusal to adopt the Planning Commission's recommendations and no explanation why it approved the first siting application but rejected, on a substantially identical application and Planning Commission recommendation, the second.

Sudden reversal of positions and rejection of lengthy and considered staff recommendations create an inference of bad faith or improper behavior. For example, in *Sokaogon Chippewa*, certain Lake Superior Chippewa Indian bands challenged the Department of the Interior's denial of an application under the Indian Gaming Regulatory Act. 961 F. Supp. at 1284. Although the Indian Gaming Management Staff had released a report recommending the approval of the application, the department inexplicably rejected the proposal less than three weeks later. *Id.* The Secretary offered a "brief explanation" for the department's reversal of position in a letter, but the *Sokaogon Chippewa* court held that this brief explanation "became suspect as pretext when compared with the much lengthier, in-depth reports prepared by the ... Indian Gaming Management Staff that reached the opposite conclusion." *Id.*

Under these circumstances, the *Sokaogon Chippewa* court allowed discovery into the processes the administrative decision-makers used to reach their decisions. *Id. See also Abbott*

Labs, 481 F. Supp. at 78 (discovery into mental processes warranted when FDA refused to approve food additive despite recommendations from prior FDA Commissioners and reported recommendation by Bureau of Foods). Considering that the County has offered no explanation whatsoever for its decision, the Hearing Officer should allow similar discovery here.

Moreover, the privilege does not apply to material which explicitly evidences concern for the possible political ramifications or other factors unrelated to the decision-maker's statutory mandate and which suggests various actions in light of these political ramifications or other factors. *United States v. Hooker Chems. & Plastics Corp.*, 123 F.R.D. 3, 8 (W.D.N.Y. 1988). To the extent, therefore, that the County Board members acted took into account political ramifications or other non-statutory factors, their mental processes cannot be privileged.

C. The Deliberative Process Does Not Protect Post-Decision Communications

Conversations in which a County Board member or other County employee learned the reason why a particular Board member changed his or her vote is not protected by the "deliberative process" privilege.

"[T]he deliberative privilege ... does not apply to post-decisional, or so-called 'working law communications,' *i.e.*, explanations or interpretations or an existing government decision." *Id.* "At the point where the deliberative process comes to an end, the protection of both privileges comes to an end." *Id.*

In this case, the County refused to allow Board Members and employees to answer questions regarding after-the-fact conversations regarding the decision to reject WMII's second siting proposal. These communications fall outside the scope of the mental and deliberative process privileges, and are discoverable.

CONCLUSION

For all the reasons stated above, the Hearing Officer should issue an Order pursuant to Section 101.610(g) of the Pollution Control Board Procedural Rules.

A. Compelling the following members of the County Board to answer questions regarding the reason for their rejection of WMII's second siting application: Frances Jackson, Ralph Marcotte, Linda Faber, Stanley James, Ruth Barber, Karen Hertzberger, Jamie Romein, James Vickery, Leo Whitten, Ed Meents, William Olthoff, Lisa Waskosky, Mike LaGesse and Sam Nicholos.

B. Compelling County Board members and Michael VanMill to answer questions regarding their knowledge of or any communications regarding the reason any County Board member reversed their vote on WMII's second siting application; and

C. Granting such other relief as the Hearing Officer deems just.

Respectfully submitted,

WASTE MANAGEMENT OF ILLINOIS, INC.

By: _____
One of Its Attorneys

Donald J. Moran
PEDERSEN & HOUPT
161 North Clark Street, Suite 3100
Chicago, Illinois 60601
Telephone: (312) 641-6888

PROOF OF SERVICE

Bridget Killing, a non-attorney, on oath states that she served the foregoing **Waste Management of Illinois, Inc.'s Motion to Compel** by enclosing same in an envelope addressed to the following parties as stated below, and by depositing same in the U.S. mail at 161 N. Clark St., Chicago, Illinois 60601, on or before 5:00 p.m. on this 15th day of March, 2005:

Mr. Rick Porter
Hinshaw & Culbertson
P.O. Box 1389
Rockford, IL 61105-1389

and by hand delivery to:

Bradley Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Bridget Killing