BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FOX MORAINE, LLC, Petitioner, v. UNITED CITY OF YORKVILLE, CITY COUNCIL, Respondent.	)	PCB No. PCB 07-146

NOTICE OF FILING

TO: All counsel of Record (see attached Service List)

Please take notice that on November 4, 2009, the undersigned filed with the Illinois Pollution Control Board, 100 West Randolph Street, Chicago, Illinois 60601, **Petitioner Fox Moraine's Motion for Reconsideration**..

Dated: November 4, 2009

Respectfully submitted,

On behalf of FOX MORAINE, LLC

/s/ Charles F. Helsten
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FOX MORAINE, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB No. 07-146
	)	
UNITED CITY OF YORKVILLE, CITY COUNCIL,	)	
	)	
	)	
Respondent.	)	

PETITIONER FOX MORAINE'S MOTION FOR RECONSIDERATION

NOW COMES the Petitioner, Fox Moraine Landfill, LLC ("Petitioner" or "Fox Moraine"), by its attorneys, George Mueller and Charles Helsten, and for its Motion for Reconsideration of the Board's October 1, 2009 Final Order, pursuant to 35 Ill.Adm.Code 101.520, states as follows:

1. The Petitioner, Fox Moraine, appealed in the aftermath of the Respondent City of Yorkville's denial of Fox Moraine's application for siting approval. The appeal was based on the lack of fundamental fairness in the proceedings below, erroneous rulings by the Hearing Officer, and because the City's denial of siting approval was against the manifest weight of the evidence and contrary to law.

2. The denial of fundamental fairness in the siting approval proceedings included the bias of Mayor Burd, and Aldermen Spears, Werderich, Plocher and Sutcliff, based on overwhelming evidence that they prejudged the siting application against Fox Moraine.

3. In its Final Order, the Board erred in holding that Fox Moraine waived its right to challenge the bias of Aldermen Werderich and Plocher because it did not assert its objection to their bias during the siting proceedings. (Final Order at 60). In that regard, the Board erroneously applied the law on waiver, which requires a timely objection where there is knowledge of bias.

E&E Hauling, Inc. v. PCB, 107 Ill.2d 33, 481 N.E.2d 694 (1985). Here, prior to the discovery conducted in this appeal, Fox Moraine merely suspected these two individuals were biased against Fox Moraine. Suspicion is not the same as knowledge. The holding that Fox Moraine waived its right to object by, instead of acting on mere suspicion, waiting until it had actual "knowledge" to raise its objection, misconstrues the law. *Id.; see also ARF Landfill, Inc., v. PCB,* 174 Ill.App.3d 82, 528 N.E.2d 390 (1988), and *Waste Mgmt of Illinois, Inc. v. PCB,* 175 Ill.App.3d 1023, 530 N.E.2d 682 (1988).

4. Additionally, the Board's holding is squarely at odds with 415 ILCS 5/39.2(d) (incorrectly cited as subsection(e)) (Final Order at 54), which states, in pertinent part, that "the fact that a member of the county board or governing body of the municipality has publicly expressed an opinion on an issue related to a site review proceeding shall not preclude the member from taking part in the proceeding and voting on the issue." The record is undisputed that as of the time of the final decision, Fox Moraine's only evidence of bias relating to Werderich and Plocher was their public statements. Only later, during discovery in this case, did Fox Moraine become aware of Werderich and Plocher's close ties with each other, with Valerie Burd, and with the objector group, FOGY.

5. The Board's holding further overlooks the fact that Plocher and Werderich did not participate in the proceedings until the Council began its deliberations. At that point, the City Attorney announced that Fox Moraine was prohibited from providing any input, thereby foreclosing any opportunity for Fox Moraine to object to their participation. (C18537).

6. The Board's opinion thus created a "Catch 22" situation for Fox Moraine. It holds that the prior public statements of Werderich and Plocher were sufficient to constitute actual knowledge of bias, giving rise to a duty to object, yet, at the same time, the Board holds that the

public statements made by Aldermen Spears and Sutcliff, and by Mayor Burd, were not evidence of bias, despite the fact that those statements demonstrated far more bias than the statements of Werderich and Plocher. In other words, if Wederich and Plocher's public statements were sufficient to cause Fox Moraine to have actual, actionable knowledge of their bias, then, as a matter of law, the Board should have found that Spears, Sutcliff and Burd were biased.

7. The Board further erred by affirming, without analysis or reasoning, the Hearing Officer's ruling that "the Roth Report" (which apparently offered the author's portrait of what the evidence at the siting hearing showed, and recommended denial of siting approval), was protected by the attorney client privilege. (Final Order at 63). This holding overlooks the fact that the City Council considered the Roth Report as evidence when it deliberated and relied upon it in reaching its decision, which clearly placed it within the realm of material that needed to be disclosed in order to comport with the requirements of fundamental fairness. (*See e.g.* C18538, 18540, 18550; *see also* Fox Moraine's Post-Hearing Brief at 36-38, 41-47). Illinois law requires that an administrative agency limit its decision to facts, data, and testimony which appear in the record. *Seul's Inc. v. Liquor Control Comm'n*, 240 Ill.App.3d 828, 831, 608 N.E.2d 530, 532 (1993). Although administrative decisions must be based on material in the record, the Roth Report, upon which the City Council relied in reaching its decision, was never made a part of the record.

8. Although the Board has long held that local decision-makers may rely on reports and proposed findings of fact prepared by consultants, such reports are always made available to the parties. This enables litigants a meaningful opportunity to comment upon or challenge such reports and proposed findings. For example, in *Residents Against a Polluted Environment v. County of LaSalle and Landcomp Corp.*, PCB 96-243 (Sept. 19, 1996), the Board held that

materials, and in particular a consultant's report which influenced the vote, not shared with all parties could not be considered by the local siting authority in reaching its decision.

9. The Board further erred by declining to conduct a critical and technical review of the record developed during the local siting hearing to determine whether the evidence in the record supported the local authority's conclusion. *Town & Country Utilities, Inc. v. PCB*, 225 Ill.2d 103, 123, 866 N.E.2d 227 (2007). Rather than conducting a technical review of the record, the Board simply assumed the evidence presented by objectors to be competent, and therefore failed to determine whether it supported the City Council's decision.

10. This error is especially noticeable in the context of the testimony by the objectors' "experts." Rather than considering the competence of the so-called "experts," the Board repeatedly disclaimed its authority to "weigh the evidence," explaining that it would merely check to see whether *any* evidence was presented that might possibly support the City Council's determination. For example, it held that the objectors' evidence on Criterion (i) ("need"), which consisted of testimony by a retired industrial arts teacher about what he had read on the internet and in newspapers, was sufficient to show there was a glut of landfill space in Illinois, in contrast to testimony by Fox Moraine's expert, who has nineteen years of experience in the solid waste field, and who presented evidence concerning IEPA's statistical analysis showing the need for solid waste disposal sites.(Final Order at 15-16, 70) (*See also* Fox Moraine's Post-Hearing Brief at 51-55). In making its finding on criterion (i), the Board also disregarded the well-established principle that a siting applicant has the right to designate a service area, and that the analysis of need must be with regard to that designated service area only. *File v. D&L Landfill*, 219 Ill.App.3d 897, 597 N.E.2d 1228 (1991).

11. The Board's repeated statement that it could not "reweigh the evidence" resulted

in an abdication of its statutory duty to apply its technical expertise in evaluating the evidence in the record, and a failure to determine whether the manifest weight of the evidence supported the City Council's finding that the §39.2 statutory siting criteria were not met. In that regard, the Board misconstrued the holding in *Peoria Disposal Co. v. PCB*, 385 Ill.App.3d 781, 896 N.E.2d 460 (2008), and disregarded the mandate of the Illinois Supreme Court in *Town & Country Utilities v. PCB*, 225 Ill.2d 103, 118-21 (2007). The Board's refusal to consider the competency of the evidence ignored the Legislature's clear directive in §40.1 of the Act that there be a careful examination of the evidence by a body with sufficient technical expertise to conduct a truly meaningful review of that evidence. 415 ILCS 5/40.1. Where, as here, the Board declines to utilize its technical expertise, an appeal to the Board in advance of judicial review is a waste of resources and an exercise in futility by all concerned.

12. The Board further erred in holding that the inclusion of recommended conditions in the report prepared by Attorney Derke Price constituted evidence of "deficiencies" in the landfill design, thereby justifying a finding that criterion (ii) was not met. (Final Order at 81). However, the Environmental Protection Act expressly authorizes the imposition of such conditions "as may be reasonable and necessary to accomplish the purposes of this section," clearly showing that, as a matter of law, a recommendation of conditions is not the equivalent of evidence that the §39.2 siting criteria were not met. *See* 415 ILCS 5/39.2(e).

13. Moreover, although the conclusions of Mr. Price offered helpful guidance to the decision-maker, the Price Report was not, itself, "evidence" that could support a finding that the Section 39.2 siting criteria were not met. The Board is urged to take judicial notice of the Appellate Court's recent reversal of the Board's decision in *City of Rochelle v. Rochelle Waste Disposal and the Rochelle City Council*, PCB No. 07-113. In *City of Rochelle*, this Board held

that a consultant's report submitted after the close of evidence, which first raised the idea of requiring erection of a 14-foot berm (which was adopted as a condition, but challenged on appeal as unsupported by the record), provided evidence to support the imposition of the challenged condition. (PCB Order, January 24, 2008, at 52). The Appellate Court reversed this holding, finding there was nothing in the record to support the challenged condition. *City of Rochelle v. PCB, et al.*, Cons. Nos. 2-02-0427 and 2-08-0433 (Ill.App.Ct. Sept. 4, 2009) (Rule 23 Order)(emphasis added). Although a Rule 23 Order has no precedential value, a tribunal may nevertheless take judicial notice of prior administrative decisions (*see Lynch v. City of Waukegan*, 363 Ill.App.3d 1078 (2006), citing *Colvett v. L. Karp & Sons, Inc.*, 211 Ill. App. 3d 731, 734 (1991)), as well as court proceedings (*Walsh v. Union Oil Co. of Calif.*, 53 Ill.2d 295, 299-300 291 N.E.2d 644, 647 (1973)). This Board can and should take judicial notice of the Appellate Court's reversal of the Board's erroneous holding in *City of Rochelle* that an *ex parte* consultant's report was evidence that could support a local siting authority's decision. In this case, as in *City of Rochelle*, a consultant's report submitted after the close of evidence did not constitute "evidence" that can be used to support the City's decision.

14. The Board also erred in holding that the City Council properly delegated to its attorney the authority to craft a denial-of-siting resolution making the findings needed to support a denial that could withstand appeal. (*See* Final Order at 64; Fox Moraine Post Hearing Brief at 42-43, citing relevant pages of the transcript of the deliberations). In so holding, the Board disregarded the City Council's abrogation of its legal duty to make its own findings. (*Compare* Fox Moraine's Post Hearing Brief at 36-38, 41-47 *with* Final Order at 64). Notably, the City Attorney who was charged with creating findings that would withstand an appeal was also the author of the above-referenced Roth Report, which had advocated for denial of siting approval

(in sharp contrast with the recommendations of the independent Hearing Officer and the City's Special Environmental Council, both of whom recommended that siting be approved).

15. Moreover, the Board erred by affirming a siting decision that offers no explanation or reasons for the denial. The Act requires the PCB to consider the "written decision and reasons for the decision of the county board or the governing municipality." 415 ILCS 5/40.1. Here, the City Council's reasoning, such as it was, is contained solely in the transcript of the deliberations. However, the transcript fails to provide any reasons for the Council's final vote, thereby providing no reasons to review on appeal. The Act gives the parties the right to appeal. 415 ILCS 5/42(a). But review is only meaningful where the deciding tribunal's reasons are expressed. In the present case, the report of proceedings is devoid of any explanation for the City Council's vote, and the Board therefore erred in upholding the City's decision to deny siting.

16. The Board erroneously construed Fox Moraine's argument concerning the lack of reasoning in the City's decision, stating that "Fox Moraine does not challenge the sufficiency of the written decision." (Final Board at 58). This misconstrues Fox Moraine's argument. In its Post Hearing Brief, Fox Moraine explained that the problem with the City Council's decision was that:

> it does not comply with the bedrock requirement of Section 39.2(e) of the Act that the written decision specify the reasons for the decision. Paragraph 2 of the resolution states, "The United City of Yorkville finds, for the reasons set out in the record of these proceedings, including but not limited to the reasons stated at the special meetings of the Yorkville City Council held on May 23 and May 24, 2007 that the following criteria, as set forth in Sec. 39.2 of the Act, were not met..." ... Certainly the record of the siting proceedings provided no reasons for denial; instead, it provided

> compelling reasons for approval, as reflected in the comprehensive review of the evidence contained in the Clark and Price Reports. That leaves only the statements of the Aldermen during the public deliberations. (Fox Moraine's Post Hearing Brief at 46).

Although the Board's decision states that Fox Moraine does not challenge the sufficiency of the City Council's written decision, citing to Fox Moraine's Reply brief, that Reply brief stated, perhaps inartfully, that the "reasons" offered in the Resolution did not reflect the City Council's findings, but, instead, reflected those of its attorneys, explaining that with respect to the resolution drafted by the attorneys, the reasons stated therein might be:

> ***arguably*** otherwise sufficient ***at least in form*** to satisfy the minimum requirement for a written decision specifying reasons. Rather, Fox Moraine's ***primary argument*** is that the written decision issued is not the decision of the City Council. Although various Yorkville witnesses stated at various times that the final resolution presented to Fox Moraine was, in fact, in front of the council on the night of the vote, the record is clearly to the contrary, and even Yorkville's responsive brief finally admits the point. ...
>
> Yorkville now cites *Peoria Disposal Company* for the proposition that even a transcript can constitute the required written decision. ... Here, the final resolution clearly reflected the substantive work, and, worse yet, the controlling hand of the city attorneys, and contained a number of matters that were never voted on by the council. Therefore, the resolution is not the written decision of the council, it was the written decision of Attorney Michael Roth and his colleagues. The council still has not produced its written decision specifying its reasons for the claimed denial. (Fox Moraine Reply at 20-21)(emphasis added).

Contrary to the Board's assertion, therefore, Fox Moraine has at all times objected to the City Council's failure to articulate its reasons for its decision, which made meaningful review of its

decision impossible. *See Coyne v. Milan Police Pension Bd.*, 347 Ill.App.3d 713, 724, 807 N.E.2d 1276 (2004).

17. The Board further erred by ignoring and/or failing to address the arguments and offers of proof presented by Fox Moraine on the subject of the deliberative process privilege. Without analysis or reasoning, the Board declined to revisit its prior holdings on deliberative process privilege. (*Compare* Fox Moraine's Post Hearing Brief at 7-9 *with* Final Order at 59-60). The Board also overlooked controlling Illinois Supreme Court precedent holding that there is no deliberative process privilege in Illinois. *See People ex rel. Birkett v. City of Chicago*, 184 Ill.2d 521, 530, 705 N.E.2d 48 (1998). Even assuming such a privilege may exist (and Fox Moraine does not concede that it does), the privilege is clearly lost when, as here, there is evidence of bad faith by the decision-makers. *Id.*; Final Order at 60, citing *Rochelle Waste Disposal LLC v. City Council of the City of Rochelle, Illinois*, PCB 03-218 (Apr. 15, 2004). In this case, the evidence of bad faith by decision-makers was overwhelming, but the Board disregarded such evidence, finding, without explanation, no evidence of bad faith.

18. The Board further erred by ignoring compelling evidence that the decision-makers prejudged the application and decided to vote to deny siting approval before the hearings had even concluded. The Board's Order effectively created an "election year" privilege to engage in bias, finding that the candidates' promises to deny siting to Fox Moraine were simply "the activities [of] citizens exercising their various rights during the election process." (*Compare* Final Order at 62 *with* Fox Moraine's Post Hearing Brief at 15-28).

19. The Board also erroneously held that Alderman Spears was credible, disregarding her undisputed impeachment by prior deposition testimony. The Board rationalized its decision to ignore Alderman Spears' impeachment by noting that impeachment is to be expected in cases

that involve discovery, and that take some time to prepare. (Final Order at 34). The Board appeared to forgive Burd's inconsistent statements because of the time lag. However, prior inconsistent statements go to witness credibility. This Board's holding disregards the fact that one of the primary purposes of deposition testimony is to obtain information which may potentially be used for subsequent impeachment, as Illinois Supreme Court Rule 212(a)(1) provides.

20. The Board also erroneously discounted testimony of bias and improper activities prior to the filing of the application, essentially limiting its consideration of fundamental fairness to what occurred in the siting hearing and the formal decision-making process thereafter. Yet, pre-filing activities related to annexation of the property were an essential preliminary part of, and were inextricably tied to, the siting process. The Board's refusal to consider statements showing bias against Fox Moraine in the annexation process (which carried over as continuing bias in the siting process) is inexplicable, given the overwhelming evidence that all of the annexation proceedings centered squarely on the question of whether a landfill should be sited in Yorkville.

21. Despite extensive arguments in Fox Moraine's brief, the Board summarily dismissed argument concerning the content of the Wildman invoice, and the fact that much of the work described in the invoice (which was clearly focused on and directed toward crafting a case for denial of Fox Moraine's request for siting approval), occurred prior to the firm even being retained by the City of Yorkville. The Board erroneously concluded that all issues concerning the illegal and improper retention of the Wildman firm were cured by the City's payment of the Wildman invoice, disregarding the fact that this evidence points directly to Mayor Burd's bias and orchestration of a plan to defeat the siting application, which included hiring the Wildman

firm before she was even sworn in.

22. The Board's decision disregarded evidence showing the Mayor's role in orchestrating defeat of the siting application on the basis that she did not cast a vote on the application. This misapprehends Fox Moraine's central argument: that the Mayor herself orchestrated the activities of most of the decision-makers who voted to deny siting. In that regard, the Board failed to make a finding as to the "plausibility" of Mayor Burd's testimony, even though the Hearing Officer invited the Board to make such a finding when he ruled on Fox Moraine's motion for a finding that the Mayor was not credible. The Board failed to take into account the Mayor's strong ties to and connections with FOGY, the main objector group, and the fact that one of FOGY'S so-called "expert" opposition witnesses was a member of the Mayor's campaign committee, a fact which the Mayor conveniently failed to disclose.

23. The Board erred by ignoring the opposition witnesses' uniform misunderstanding of the burden of proof and the standard required to prove the statutory siting criteria. A prime example of this phenomenon was Alderman Spears' statement that any impact at all on traffic was sufficient for her to vote 'no' on the traffic criterion. (*See* Fox Moraine Post Hearing Brief at 39-40). The traffic criterion does not, however, require an absence of any impact. Rather, it provides that the traffic patterns are to be designed so as to "minimize the impact on existing traffic flow." 415 ILCS 5/39.2(a)(vi) (emphasis added).

24. The statutory criteria relating to property values, incompatibility with the surrounding community, and traffic, which discuss minimizing the impact or effect of a landfill, demonstrate the Legislature's recognition of the fact that, as is the case with most (if not all) commercial development, some negative impact is inherent in the development of a landfill. *See* 415 ILCS 5/39.2(a)(iii), (v), (vi). As a result, it was improper for the Board to hold that evidence

of *any* negative impact justified a finding that these criteria were not met. The Act makes plain that competent evidence against these criteria must address whether the inherent impact has been minimized. *Id.*; *Fairview Area Citizens Taskforce v. PCB*, 198 Ill.App.3d 541, 554, 555 N.E.2d 1178 (1990) (holding the "operative word in the statute [relating to traffic flow] is 'minimize.' It is impossible to eliminate all problems."), abrogated on other grounds, *Town & Country Utilities v PCB*, 225 Ill.2d 103, 866 N.E.2d 227 (2007). Nevertheless, none of the opposition evidence in this case looked to the degree of minimization. This is particularly noticeable with respect to the traffic criterion, where the opposition witnesses uniformly misunderstood the criterion, and felt that a "no" vote was justified if *any* impact was present. (*See e.g.* Fox Moraine Post Hearing Brief at 39-40).

25. The Board further erred by failing to consider whether Kendall County's solid waste plan was consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act, as required under Section 39.2(a)(viii) of the Act. Criterion (viii) requires not only a consideration of consistency between a county plan and a siting application, but also a threshold consideration of consistency between that county plan and the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act. 415 ILCS 5/39.2(a)(viii).

26. The Board also erred by treating criterion (v) as a "tagalong" with criterion(ii). These are separate and distinct criteria and should therefore have been addressed separately.

27. Again, this Board has created a classic "Catch 22" scenario with respect to operator history. It held that because the proposed operating entity was legally a new entity, and therefore had no official operating experience, the City could properly find this to be a negative factor in terms of the "operator history" criterion. (Final Order at 82). However, it then in turn

inconsistently held that to the extent the operating entity will be controlled by Peoria Disposal Company ("PDC"), which *does* have an operating history, the City could view PDC's history of violations as a negative factor. (Final Order at 82). The Board accordingly erred by affirming the City's consideration of PDC's history of violations as a negative, while simultaneously viewing the newly-formed operating entity's lack of an operating history as also constituting a negative factor.

28. Moreover, and more importantly, the Board's analysis in this case demonstrates its failure to employ its technical expertise, as mandated by *Town & Country*. The record is undisputed that Peoria Disposal operates multiple pollution control facilities and has a lengthy operating history, and that its overall history of compliance is outstanding, as evidenced by the company's receipt of numerous environmental compliance awards. (*See* Fox Moraine Post Hearing Brief at 100-101). Like all companies with large and diverse pollution control operations, some violations are inevitable. Peoria Disposal Company therefore has some history of minor violations. However, its violations are minimal, both in terms of the number and the seriousness of those violations, demonstrating that its overall compliance record is outstanding. It is perhaps plausible to believe that an inexperienced City Council might mistakenly conclude that a few minor violations arising from multiple facilities over many years constitutes a negative operating history. But this Board, which possesses technical expertise in this area and deals with this subject on a day-to-day basis, erred in reaching the same conclusion.

WHEREFORE, for the reasons set forth above, Petitioner Fox Moraine respectfully requests that the Board reconsider and modify its Final Order to hold that the local siting application proceedings were not fundamentally fair, that the rulings by the Hearing Officer challenged by Petitioner, Fox Moraine in its Post-Hearing briefs should be overruled, and that

the City Council's decision to deny siting was against the manifest weight of the evidence.

Dated: November 4, 2009

Respectfully submitted,

On behalf of FOX MORAINE, LLC

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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 on November 4, 2009, she served a copy of the foregoing upon:

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