BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

BYRON SANDBERG, Petitioner, vs. CITY OF KANKAKEE, ILLINOIS, THE CITY OF KANKAKEE, ILLINOIS CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC., and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents.	Case No. PCB 04-33
WASTE MANAGEMENT OF ILLINOIS, INC., Petitioner, vs. THE CITY OF KANKAKEE, ILLINOIS CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC., and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents.	Case No. PCB 04-34
COUNTY OF KANKAKEE, ILLINOIS and EDWARD D. SMITH, KANKAKEE COUNTY STATE'S ATTORNEY, Petitioners, vs. CITY OF KANKAKEE, ILLINOIS, THE CITY OF KANKAKEE, ILLINOIS CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC., and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents.	Case No. PCB 04-35

Copy filed
12-2-03

MOTION TO DISQUALIFY CLAIRE MANNING

NOW COME, Respondents, COUNTY OF KANKAKEE, ILLINOIS and EDWARD D. SMITH, KANKAKEE COUNTY STATE'S ATTORNEY, and for their Motion to Disqualify Claire Manning, state as follows:

1. Attorney Manning, former Chairman of the Illinois Pollution Control Board from 1993 to 2002, is attempting to appear as counsel for Town and Country Utilities in this proceeding.

2. The Respondents' reply upon and incorporated as though fully cited verbatim herein the Respondents' Response and Objections to Attorney Manning's Request Concerning Appearance, attached hereto as Exhibit A.

3. Pursuant to this Board's Procedural Rule 101.112 (35 Ill.Adm. Code 101.112) and this Board's recent decision in *People v. Skokie Valley Asphalt, Co., Inc.*, PCB 96-98 (Oct. 16, 2003), this Board must find that Attorney Claire Manning is disqualified from appearing in this proceeding because Attorney Manning served as Chairman of the Illinois Pollution Control Board while cases PCB 03-31, 03-33 and 03-35 were pending before the Board, and she issued substantive rulings in those cases. See *County of Kankakee v. City of Kankakee*, PCB 03-31, 03-33, 03-35 (Oct. 3, 2002); *County of Kankakee v. City of Kankakee*, PCB 03-31, 03-33, 03-35 (Nov. 7, 2002).

4. It would be especially improper for Ms. Manning to represent the Applicant in this case because one of the primary issues is whether the current application is substantially the same as the application at issue in PCB 03-31, 33, and 35. Not only was Ms. Manning substantially involved in the prior proceeding, the content of the application reviewed in that proceeding is highly relevant to the instant case. Therefore, it would be clearly improper for Ms. Manning to represent the Applicant in this case.

WHEREFORE, , Respondents, COUNTY OF KANKAKEE, ILLINOIS and EDWARD D. SMITH, KANKAKEE COUNTY STATE'S ATTORNEY, respectfully requests that Court find that Attorney Claire Manning is disqualified from representing Town and Country Utilities, Inc. in this proceeding before the Illinois Pollution Control Board.

Dated: 12-1-03

Respectfully Submitted,

On behalf of the COUNTY OF KANKAKEE, ILLINOIS, and EDWARD D. SMITH, KANKAKEE COUNTY STATE'S ATTORNEY,

By: Hinshaw & Culbertson

Richard S. Porter
One of Attorneys

HINSHAW AND CULBERTSON
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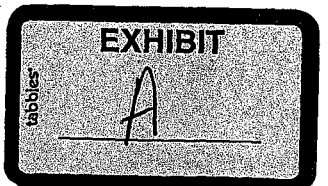
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

BYRON SANDBERG, Petitioner, vs. CITY OF KANKAKEE, ILLINOIS, THE CITY OF KANKAKEE, ILLINOIS CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC., and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents.	)	Case No. PCB 04-33
WASTE MANAGEMENT OF ILLINOIS, INC., Petitioner, vs. THE CITY OF KANKAKEE, ILLINOIS CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC., and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents.	)	Case No. PCB 04-34
COUNTY OF KANKAKEE, ILLINOIS and EDWARD D. SMITH, KANKAKEE COUNTY STATE'S ATTORNEY, Petitioners, vs. CITY OF KANKAKEE, ILLINOIS, THE CITY OF KANKAKEE, ILLINOIS CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC., and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents.	)	Case No. PCB 04-35



RESPONSE AND OBJECTIONS TO ATTORNEY MANNING'S REQUEST CONCERNING APPEARANCE

NOW COME, Respondents, COUNTY OF KANKAKEE, ILLINOIS and EDWARD D. SMITH, KANKAKEE COUNTY STATE'S ATTORNEY, and for their Response to Attorney Manning's Request Concerning Appearance, state as follows:

1. Pursuant to this Board's Procedural Rule 101.112 (35 Ill.Adm. Code 101.112) and this Board's recent decision in *People v. Skokie Valley Asphalt, Co., Inc.*, PCB 96-98 (Oct. 16, 2003), this Board must find that Attorney Claire Manning is disqualified from appearing in this proceeding.

2. As set forth in Rule 101.112(b):

> No former Board Member or Board employee may represent any other person in any board proceeding in which he or she participated personally and substantially as a Board Member or Board employee, unless the Board and, as applicable, all parties or proponents in the proceeding consent in writing after disclosure of the participation.

35 Ill. Adm. Code 101.112(b).

3. For purposes of Rule 101.112(b), "representation includes consulting on legal or technical matters." 35 Ill. Adm. Code 101.112(b).

4. There is no question that Attorney Manning is a former Board Member, as she admittedly served as Chairman of the Board from 1993 to 2002. (See Request Concerning Appearance, ¶1).

5. Additionally, there is no question that Attorney Manning is attempting to "represent" a party in a board proceeding because she is both attempting to appear as counsel for Town and Country Utilities, Inc. and is consulting on legal and technical issues in this case before the Illinois Pollution Control Board. (See Attorney Manning's Request Concerning Appearance, ¶4).

6. Furthermore, it is clear that Attorney Manning has participated personally and substantially as a Board Member in this proceeding, and is therefore disqualified from acting as an attorney in this proceeding, because Attorney Manning served as Chairman of the Illinois Pollution Control Board while cases PCB 03-31, 03-33 and 03-35 were pending before the Board, and she issued substantive rulings in those cases.

7. Attorney Manning's position as a Board member and participation in the decision of cases PCB 03-31, 03-33 and 03-35 should disqualify her from the present proceeding because the parties involved in PCB 03-31, 03-33 and 03-35 and this case are identical. Furthermore, the pollution control facility at issue in PCB 03-31, 03-33, and 03-35 is identical to the pollution control facility at issue in this case. Finally, the issues presented in PCB 03-31, 03-33 and 03-35 are identical to the issues presented in this case, namely the fundamental fairness of the proceeding, the sufficiency of notice and the applicant's compliance with the statutory criteria set forth in 415 ILCS 5/39.2(a)(ii) and (viii).

8. Attorney Manning contends that her participation in PCB 03-31, 03-33 and 03-35 was not "substantial." (Request Concerning Appearance, ¶8). However, it is clear based on this Board's holding in *People v. Skokie Valley Asphalt Co., Inc.*, PCB 96-98 (Oct. 16, 2003) that Attorney Manning did personally and substantially participate in those cases because Attorney Manning served as Chairman of the Board during the pendency of those cases and even drafted orders in those cases, including an order denying County of Kankakee and Edward D. Smith's Motion for Summary Judgment. *See County of Kankakee v. City of Kankakee*, PCB 03-31, 03-33, 03-35 (Oct. 3, 2002); *County of Kankakee v. City of Kankakee*, PCB 03-31, 03-33, 03-35 (Nov. 7, 2002) (attached hereto as Exhibits A and B, respectively).

9. While Attorney Manning contends that the neither of these orders was "substantive" (See Attachment B to Request Concerning Appearance), it is clear that a decision on a summary judgment motion is clearly substantive and "substantial" because it requires the Board to examine the factual and legal issues in the case to determine whether the case should continue.

10. In *Skokie Valley*, this Board was called upon to determine whether a former attorney assistant of a Board Member Melas was disqualified from representing a party based on his previous employment with the Board.

11. This Board found that the attorney assistant, Mr. Sternstein, was disqualified from representing the party at issue because he had personally and substantially participated in the case before the Board even though neither he nor Board Member Melas drafted any orders or opinions in the proceeding at issue.

12. In that case, Mr. Sternstein submitted an affidavit indicating that he never drafted any opinions or orders or had any involvement in the proceeding; however, this Board found that Mr. Sternstein did personally and substantially participate in the proceeding because the record showed that Board Member Melas had voted on two orders that were made in the proceeding while Mr. Sternstein was employed by the Board.

13. This Board concluded that because all Board Members are presumed to make well-reasoned decision on each case they vote on and are adequately prepared to make such decisions, the attorney assistants, such as Mr. Sternstein, play an integral role in preparing board members for such decisions and are, therefore, personally and substantially participating in the proceeding.

14. Consequently, this Board found Mr. Sternstein's prior Board employment rose to the level of personal and substantial participation that disqualified him from appearing for the party in question.

15. This Board's decision in *Skokie Valley* makes clear that Attorney Manning's participation in PCB 03-31, 03-33 and 03-35 was personal and substantial, requiring her to be disqualified in this case, as Attorney Manning's involvement in this case was much more direct than Mr. Sternstein's involvement in *Skokie Valley*.

16. Unlike Mr. Sternstein, who may have merely advised Board Member Melas on how to vote on a particular issue, Attorney Manning not only voted on orders in PCB 03-31, 03-33 and 03-35, but she actually drafted those orders, including at least one substantive order. As such, it is clear that she was personally and substantially involved in cases PCB 03-31, 03-33 and 03-35 and must, therefore, be disqualified from acting as counsel in this case.

17. Attorney Manning attempts to draw this Board's attention away from her conflict of interest in this case by insinuating that some other attorney who has entered an appearance in this proceeding also has a conflict of interest. She alleges that an attorney is "engaged by the county" and was "an attorney assistant at the Board during the late 80's and early 90's who, during her tenure, provided considerable input into the landfill siting decisions that today serve as the precedent for other landfill siting issues, some of which are relevant to the legal issues in this very proceeding." (Request Concerning Appearance, ¶18).

18. Attorney Manning's statement is totally incorrect because Elizabeth Harvey, the attorney that Attorney Manning is alluding to in her statements, has not filed an appearance in the present case and has not been retained by the County to represent its interests. (See Affidavit of Elizabeth Harvey, attached hereto as Exhibit C). Furthermore, Attorney Harvey's employment

by the Board almost nine years ago has absolutely nothing to do with the issues involved in the present case because, unlike Attorney Manning, Attorney Harvey did not participate in making any decisions regarding the proceeding at issue or the parties involved in the proceeding at issue. (See Exhibit C). In fact, Attorney Harvey's employment with the Board ended many years before PCB cases 03-31, 03-33 and 03-35 were ever filed. (See Exhibit C). Therefore, this Board should totally disregard Attorney Manning's attempt to insinuate that anyone other than she has a conflict of interest in this case.

19. This Board should also disregard Attorney Manning's attempt to dissuade this Board from strictly applying the provisions of Procedural Rule 101.112. Attorney Manning argues that application of Rule 101.112(b) will "unduly restrict" her in "the practice of law." (Request Concerning Appearance, ¶18). However, the Rule does no such thing, as it does not prevent her from practicing as an attorney before the Board, but it only prohibits her from representing clients in proceedings in which she has previously participated as a Board member. See 35 Ill.Adm. Code 101.112(b). Such a rule is clearly not unduly restrictive, but is necessary to avoid the appearance of impropriety and to uphold the integrity of our judicial system.

20. Moreover, it is clear that disqualifying Attorney Manning will have no negative or prejudicial effect on Town and Country Utilities, Inc., the party Attorney Manning is attempting to represent in this case, because Town and Country Utilities, Inc. will still be represented by its able, experienced and knowledgeable counsel, Attorney Mueller, who is more than capable of representing Town and Country Utilities, Inc. and addressing the issues presented in this proceeding.

21. In fact, Attorney Manning's role in this case appears improper, as she had been hired to "provide input and advise on two discrete legal issues that are involved in this appeal."

(Request Concerning Appearance, ¶4). It is clearly inappropriate for an attorney to provide additional evidence and testimony, as Attorney Manning will apparently attempt to offer as counsel in this matter, because this Board is allowed only to review the testimony and evidence provided at the County Board hearing on the issues that Attorney Manning attempts to address. See 415 ILCS 5/41(b). As such, Attorney Manning's role in this case, to offer new evidence and arguments on various issues, is clearly improper and should not be allowed by this Board.

22. Lastly, and in conclusion, Attorney Manning even expressly concedes that she has both personally and substantially participated in this proceeding as a Board member (thus requiring the consent of all parties or proponents in the proceeding after disclosure of the proposed participation). In this regard, Attorney Manning's letter of October 23, 2003 to Attorney Moran (Exhibit B to Attorney Manning's "Request Concerning Appearance") is an admission by conduct in this regard. More specifically, in the last paragraph of this letter, Attorney Manning states: "Nonetheless, so that the question of my participation will not in any way unnecessarily jeopardize the current Board proceeding, and to avoid the appearance and impropriety, I will agree to participate only with the written consent of the parties and the Board". (Emphasis added). This sentiment was reiterated in a letter of that same date to the other participants in this matter (including the County of Kankakee and the Kankakee State's Attorney). Accordingly, and again, by these very words, Attorney Manning realizes the very real and express conflict that her appearance in this matter poses.

WHEREFORE, , Respondents, COUNTY OF KANKAKEE, ILLINOIS and EDWARD D. SMITH, KANKAKEE COUNTY STATE'S ATTORNEY, respectfully requests that Court find that Attorney Claire Manning is disqualified from representing Town and Country Utilities, Inc. in this proceeding before the Illinois Pollution Control Board.

Dated: 11/25/05

Respectfully Submitted,

On behalf of the COUNTY OF KANKAKEE, ILLINOIS, and EDWARD D. SMITH, KANKAKEE COUNTY STATE'S ATTORNEY,

By: Hinshaw & Culbertson

Charles F. Helsten
One of Attorneys

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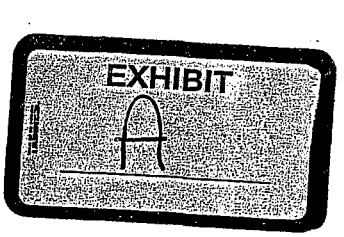


ILLINOIS POLLUTION CONTROL BOARD
October 3, 2002

COUNTY OF KANKAKEE and EDWARD D. SMITH, STATES ATTORNEY OF KANKAKEE COUNTY, Petitioners, v. THE CITY OF KANKAKEE, ILLINOIS, CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC. and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents.	)	PCB 03-31 (Third-Party Pollution Control Facility Siting Appeal)
BYRON SANDBERG, Petitioner, v. THE CITY OF KANKAKEE, ILLINOIS, CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC. and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents.	)	PCB 03-33 (Third-Party Pollution Control Facility Siting Appeal)
WASTE MANAGEMENT OF ILLINOIS, INC., Petitioner, v. THE CITY OF KANKAKEE, ILLINOIS, CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC. and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents.	)	PCB 03-35 (Third-Party Pollution Control Facility Siting Appeal) (Consolidated)

ORDER OF THE BOARD (by C.A. Manning):

The Board has received three separate petitions requesting the Board to review an August 19, 2002, decision of the City Council of the City of Kankakee (City). In its decision, the City granted the application of Town & Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C. (Town & Country) to site a pollution control facility. The proposed facility, a landfill, consists of approximately 400 acres located in Otto Township within the municipal boundaries of the City of Kankakee.

The County of Kankakee and Edward D. Smith, States Attorney of Kankakee County (the County); Byron Sandberg (Sandberg); and Waste Management of Illinois, Inc. (Waste Management), in case numbers PCB 03-31, PCB 03-33, and PCB 03-35 respectively, appeal on common grounds. All three petitioners argue that the procedures the City used to reach its siting decision were fundamentally unfair, and that the City's findings on several statutory siting criteria were not supported by the manifest weight of the evidence. Each petitioner contends, for example, that the manifest weight of the evidence does not show that the proposed landfill is designed, located, and proposed to be operated so as to protect public health, safety, and welfare. *See* 415 ILCS 5/39.2(a)(ii) (2000) *as amended by* P.A. 92-0574, eff. June 26, 2002. Additionally, the County argues that the City lacked jurisdiction over Town & Country's application.

For the reasons set forth below, the Board accepts all three petitions and consolidates them for hearing. The Board addresses procedural issues before turning to the petitions.

PROCEDURAL ISSUES

Concurrent with his petition for review of the City's decision, Sandberg requested that the Board waive the filing fee. The Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (2000)) states that "[a]ny person who files a petition to contest a decision of the . . . governing body of the municipality shall pay a filing fee." 415 ILCS 5/40.1(c) (2000 *as amended by* P.A. 92-0574, eff. June 26, 2002. The Act requires a $75 filing fee to contest a local siting decision. *See* 415 ILCS 5/7.5 (2000). The Board cannot waive the mandatory filing fee and consequently denies Sandberg's request for waiver.

Also, the Board notes that Sandberg is the only named petitioner in docket PCB 03-33. Seven other citizens signed Sandberg's petition; however, those citizens are not parties to this siting appeal. The remaining signatories may participate in this proceeding through public comment and any other means prescribed in the Board's procedural rules. *See* 35 Ill. Adm. Code 107.404.

Finally, nothing in Sandberg's petition indicates that he is an attorney, yet he refers to himself as the "[c]ontact person" for the signatories. Sandberg Petition at 2. To be clear, because Sandberg is not an attorney, he is allowed to represent only himself. Under Illinois law, an individual who is not an attorney, may not represent any other individuals or entities before the Board. *See* 35 Ill. Adm. Code 101.400(a); *see also* Sierra Club v. City of Wood River, PCB 98-43, slip op. at 2 (Oct. 2, 1997).

THIRD-PARTY APPEALS

Section 40.1(b) of the Act (415 ILCS 5/40.1(b) (2000) *as amended by* P.A. 92-0574, eff. June 26, 2002) allows certain third parties to appeal a local government decision granting approval to site a pollution control facility. Third parties who participated in the local government's public hearing and who are so located as to be affected by the proposed facility may appeal the siting decision to the Board. 415 ILCS 5/40.1(b) (2000) *as amended by* P.A. 92-0574, eff. June 26, 2002; 35 Ill. Adm. Code 107.200(b). The petition for review must, among other things, specify the grounds for appeal and include a copy of the local government's siting decision. 35 Ill. Adm. Code 107.208. The third party must file the petition within 35 days after the local government approves siting. 415 ILCS 5/40.1(b) (2000) *as amended by* P.A. 92-0574, eff. June 26, 2002; 35 Ill. Adm. Code 107.204. Unless the Board determines that the third party's petition is "duplicative or frivolous," the Board will hear the petition. 415 ILCS 5/40.1(b) (2000) *as amended by* P.A. 92-0574, eff. June 26, 2002; 35 Ill. Adm. Code 107.200(b).

All three petitioners state that they appeared and participated in the City's public hearing. The petitioners specify the grounds for the appeal and include a copy of the City's siting decision. Each petition meets the content requirements of 35 Ill. Adm. Code 107.208. In addition, the County filed its petition on September 20, 2002, while Sandberg and Waste Management filed their petitions on September 23, 2002. Therefore, each petitioner filed its petition within 35 days after the City's August 19, 2002 decision.

HEARING AND DECISION DEADLINE

An action before the Board is duplicative if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. An action before the Board is frivolous if it is "a request for relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.* No evidence before the Board indicates that any of the three actions are duplicative or frivolous. The Board accepts the third-party petitions for hearing.

On its own motion, the Board consolidates all three appeals for hearing. Each petition involves the same burden of proof and addresses common issues and respondents. Thus, for reasons of administrative economy, consolidation is appropriate. *See* Sierra Club v. Will County Bd., PCB 99-136, 99-139, 99-140, 99-141 (consol.), slip op. at 3 (Apr. 15, 1999).

Petitioners have the burden of proof. 415 ILCS 5/40.1(b) (2000) *as amended by* P.A. 92-0574, eff. June 26, 2002; *see also* 35 Ill. Adm. Code 107.506. The record before the City will be the exclusive basis for all hearings except when considering issues of fundamental fairness or jurisdiction. 415 ILCS 5/40.1(b) (2000) *as amended by* P.A. 92-0574, eff. June 26, 2002. Hearings will be scheduled and completed in a timely manner, consistent with the decision deadline (*see* 415 ILCS 5/40.1(a), (b) (2000) *as amended by* P.A. 92-0574, eff. June 26, 2002), which only Town & Country may extend by waiver (35 Ill. Adm. Code 107.504; *see also* 35 Ill. Adm. Code 101.308). If the Board fails to take final action by the decision deadline, Town & Country "may deem the site location approved." 415 ILCS 5/40.1(a) (2000) *as amended by* P.A.

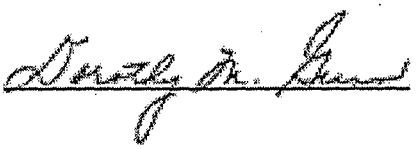
92-0574, eff. June 26, 2003. Currently, the decision deadline is January 18, 2003, for the County's petition (the 120th day after September 20, 2002) and January 21, 2003, for Sandberg's and Waste Management's petitions (the 120th day after September 23, 2003). *See* 35 Ill. Adm. Code 107.504. The Board meeting immediately before either decision deadline is currently scheduled for January 9, 2003.

THE CITY'S RECORD

The City must file the entire record of its proceedings within 21 days after the date of this order. The record must comply with the content and certification requirements of 35 Ill. Adm. Code 107.304, 107.308. Because Sandberg is an individual citizen, he is "exempt from paying the costs of preparing and certifying the record." 415 ILCS 5/39.2(n) (2000); 35 Ill. Adm. Code 107.306. However, the County and Waste Management must pay to the City the cost of preparing and certifying the record. 415 ILCS 5/39.2(n) (2000) *as amended by* P.A. 92-0574, eff. June 26, 2002; 35 Ill. Adm. Code 107.306.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 3, 2002, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD
November 7, 2002

COUNTY OF KANKAKEE and EDWARD D. SMITH, STATES ATTORNEY OF KANKAKEE COUNTY, Petitioner, v. THE CITY OF KANKAKEE, ILLINOIS, CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC. and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents.	)	PCB 03-31 (Third-Party Pollution Control Facility Siting Appeal)
BRYAN SANDBERG, Petitioner, v. THE CITY OF KANKAKEE, ILLINOIS, CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC. and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents.	)	PCB 03-33 (Third-Party Pollution Control Facility Siting Appeal)
WASTE MANAGEMENT OF ILLINOIS, INC., Petitioner, v. THE CITY OF KANKAKEE, ILLINOIS, CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC. and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents.	)	PCB 03-35 (Third-Party Pollution Control Facility Siting Appeal) (Consolidated)

ORDER OF THE BOARD (by C.A. Manning):

On October 23, 2002, the petitioners County of Kankakee and Edward D. Smith, State's Attorney of Kankakee County (County) filed a motion for expedited decision on its accompanying motion for summary judgment and memorandum of law in support of the motion for summary judgment. The County argued that the City of Kankakee's (City) decision to approve Town and County Utilities, Inc. and Kankakee Regional Landfill, L.L.C.'s (Town & Country) application for siting of a pollution control facility should be reversed because the public hearing held to address the siting application was fundamentally unfair.[1] Mot. for S.J. at 6-9. The Board denies both of the County's motions.

PROCEDURAL HISTORY

On September 20 and 23, 2002, three separate petitions were filed requesting the Board to review an August 19, 2002 decision of the City Council of the City. In its decision, the City granted Town & Country's application to site a pollution control facility. The proposed landfill consists of approximately 400 acres located in Otto Township within the municipal boundaries of the City. All three petitioners raised common arguments including, but not limited to, that the procedures the City used to reach its siting decision were fundamentally unfair, and that the City's findings on several statutory siting criteria were not supported by the manifest weight of the evidence.

The Board accepted all three petitions for hearing and consolidated the petitions in its October 3, 2002 order. County of Kankakee v. The City of Kankakee, PCB 03-31 (Oct. 3, 2002). Subsequently, the hearing officer scheduled a hearing for November 4, 6, 7, and 8, 2002. County of Kankakee v. The City of Kankakee, PCB 03-31 (hearing officer order Oct. 11, 2002). The parties have since engaged in discovery.

On October 23, 2002, the County filed its motion for expedited decision on its motion for summary judgment and memorandum of law in support of the motion for summary judgment. As of that date, the Board's next regularly scheduled meeting was November 7, 2002, three days after the first day of the scheduled hearing. Town & Country filed a response on October 31, 2002.[2]

THE COUNTY'S MOTIONS

In acting on a motion for expedited review, the Board considers all statutory requirements and whether material prejudice will result from the motion being granted or denied. 35 Ill. Adm. Code 101.512(b). As a practical matter, the Board must reach a decision within 120 days after the petition's filing under Section 40.1 of the Act, or the applicant may deem the siting approved regardless of the actual decision of local government. Town & Country has not waived the statutory decision deadline in this case; therefore, the Board is statutorily required to issue a decision on the County's petition by January 18, 2003.

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[1] The Board cites the County's motion for expedited decision on motion for summary judgment as "Mot. to expedite at _." The Board cites the County's memorandum of law in support of motion for summary judgment as "Mot. for S.J. at _."

[2] The Board cites Town & Country's response as "Resp. at _."

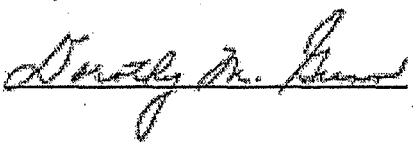
In order to meet the statutory decision deadline schedule, the hearing officer had to coordinate a very tight schedule. Since the hearing began on November 4, 2002, the County's motion for expedited decision on its motion for summary judgment is moot. Consequently, the Board denies the County's motion. The County will suffer no material prejudice as a result of the Board's decision to deny the motion for expedited decision since the County may raise the same issues at hearing and argue them in a future filing.

Although the Board need not address the merits of the County's argument on summary judgment since the motion is moot, the Board finds summary judgment unwarranted. The County is entitled to summary judgment only if there is no genuine issue of material fact and the County is entitled to judgment as a matter of law. *See* Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998); 35 Ill. Adm. Code 101.516(b). In this circumstance, questions of material fact remain and the County is not entitled to judgment as a matter of law.

The County alleges that on the first day of the hearing before the City, at least 75 people were unable to access the hearing room because of overcrowding. Mot. for S.J. at 5. However, the County and Town & Country disagree about whether any individual was denied the opportunity to participate during the first day of the hearing. *Compare* Mot. for S.J. at 7 *with* Resp. at 3. This genuine issue of material fact alone bars summary judgment. Furthermore, the County has provided no persuasive legal authority indicating that it is entitled to judgment as a matter of law. Contrary to the County's contention, there is no "*per se*" rule indicating that the approval of a pollution control facility siting application must be reversed if a citizen is unable to participate in the hearing. *See* City of Columbia v. County of St. Clair, PCB 85-177, slip op. at 14 (Apr. 3, 1986). Furthermore, the Board's opinion in American Bottoms Conservancy v. Village of Fairmont City, PCB 00-200 (Oct. 19, 2000), is inapposite to the facts of this case and does not require a different result. Summary judgment is denied.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 7, 2002, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

EXHIBIT C

AFFIDAVIT OF ELIZABETH HARVEY

I, Elizabeth Harvey, being first duly sworn on oath, depose and state as follows:

1. I am an attorney licensed to practice law in the State of Illinois.

2. I was employed by the Illinois Pollution Control Board as an attorney assistant from August 1987 to January 1995.

3. I am currently employed by the law firm of Swanson, Martin & Bell, One IBM Plaza, 330 North Wabash, Suite 3300, Chicago, Illinois 60611.

4. I have not filed an appearance in *Sandberg v. City of Kankakee, Illinois*, PCB 04-33, 04-34, 04-35, now pending before the Illinois Pollution Control Board.

5. I have not been retained by the County of Kankakee to represent its interests in PCB cases 04-33, 04-34 or 04-35.

6. During my employment at the Illinois Pollution Control Board, PCB cases 04-33, 04-34 and 04-35 were not pending before the Board nor were the predecessor to those cases, PCB 03-31, 03-35, as those cases were filed with the Illinois Pollution Control Board many years after my employment with the Illinois Pollution Control Board ended.

7. As an employee of the Illinois Pollution Control Board, I did not participate in making any decisions regarding the precise issues or parties involved in PCB cases 04-33, 04-34 and 04-35.

Further affiant sayeth not.

Elizabeth Harvey

Sworn to before me this
25th day of November, 2003

Linda L. Dunn

OFFICIAL SEAL
LINDA L DUNN
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES: 01-29-07

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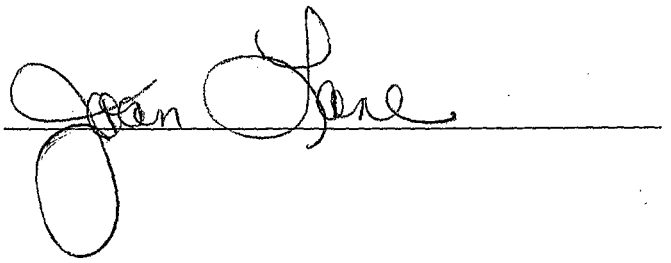
AFFIDAVIT OF SERVICE

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 25, 2003, a copy of the foregoing was served upon:

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601-3218

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, IL 60601
(312) 814-8917
(312) 814-3669 FAX

By faxing and by UPS overnight mail.



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