

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, INC. )  
and KENDALL COUNTY LAND AND )  
CATTLE, LLC,, )

Petitioner, )

PCB No. 09-43 )

v. )

COUNTY BOARD OF KENDALL COUNTY, )  
ILLINOIS, )

Respondent. )

**NOTICE OF FILING**

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

PLEASE TAKE NOTICE that on March 30, 2009, the undersigned filed with the Illinois Pollution Control Board, 100 West Randolph Street, Chicago, Illinois 60601, Grundy County's Reply in Support of its Motion for Leave to Intervene, copies of which are attached hereto.

Dated: March 30, 2009

Respectfully submitted,

On behalf of GRUNDY COUNTY, ILLINOIS

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

WASTE MANAGEMENT OF ILLINOIS, INC. )  
AND KENDALL LAND AND CATTLE, LLC, )

Petitioners, )

vs )

COUNTY BOARD OF KENDALL COUNTY, )  
ILLINOIS )

PCB 09-043

(Pollution Control Board Facility  
Siting Appeal)

**GRUNDY COUNTY'S REPLY IN SUPPORT OF ITS MOTION TO INTERVENE**

NOW COMES the County of Grundy by and through its attorneys, State's Attorney Sheldon Sobol, and HINSHAW & CULBERTSON LLP, and for its Reply in Support of its Motion to Intervene, states as follows:

**1. Petitioners Mischaracterize Grundy County's Motion to Intervene**

Petitioners assert that Grundy County's motion to intervene is predicated on an expansive reading of the Board's decision in *Fox Moraine, LLC v. United City of Yorkville*, PCB 07-146 (August 23, 2007). (Petitioners' Opposition at 2). As a threshold matter, Grundy County's motion and brief in support cite numerous bases that support intervention, including but not limited to, the *Fox Moraine* decision.<sup>1</sup>

More importantly, Petitioner's reading of *Fox Moraine* as precluding Grundy County's intervention relies upon the fact that the State's Attorney in *Fox Moraine* happened to be the State's Attorney of the county in which the facility was to be sited. The Board's decision, however, did not state, as implied by Petitioners here, that the decision to grant the State's Attorney's motion to intervene in that case was based on Section 107.202(b). In fact, the Board

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<sup>1</sup> Notably, *Fox Moraine* is not even mentioned in Grundy County's motion, and is referenced in only one paragraph of Grundy County's Memorandum of Law.

never mentioned 107.202(b) as forming the basis for its decision. The Board instead explained:

[W]hen the third party is a state's attorney or the Attorney General's Office intervening to represent the public interest, a third party may intervene. *See, e.g., Land and Lakes*, PCB 94-195, slip op. at 3.

The courts have also noted that intervention is based on the state's attorney's analogous rights and duties to the Attorney General, so that a state's attorney may intervene to represent the public interest. *See Land and Lakes Co. v. IPCB*, 245 Ill. App. 3d 631, 616 N.E.2d 349, 186 Ill. Dec. 396 (3d Dist. 1993); *see also Pioneer Processing, Inc. v. IEPA*, 102 Ill.2d 119, 464 N.E.2d 238, 79 Ill. Dec. 640 (1984). Therefore, the Board grants Kendall County's motion to intervene, subject to the provisions of 35 Ill. Adm. Code 101.402(e).

*Fox Moraine*, at \*1-2 (emphasis added).

In alleging that Grundy County's request to intervene seeks to impermissibly expand the Board's holding in *Fox Moraine*, and "expand the plain language of Section 107.202(b)," Petitioners conveniently ignore the fact that the Board has discretionary authority to permit "any person" to intervene. The regulations provide, at 35 Ill. Adm. Code 101.402, as follows:

Section 101.402      Intervention of Parties

a)      **The Board may permit any person to intervene in any adjudicatory proceeding.** If a person seeks to intervene in an adjudicatory proceeding, the person must file a motion to do so with the Clerk and serve a copy of the motion on all parties to the proceeding. The motion must set forth the grounds for intervention.

b)      In determining whether to grant a motion to intervene, the Board will consider the timeliness of the motion and whether intervention will unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding.

c)      Subject to subsection (b) of this Section, the Board will permit any person to intervene in any adjudicatory proceeding if:

- 1) The person has an unconditional statutory right to intervene in the proceeding; or
  - 2) It may be necessary for the Board to impose a condition on the person.
- d) Subject to subsection (b) of this Section, the Board **may** permit any person to intervene in any adjudicatory proceeding if:
- 1) The person has a conditional statutory right to intervene in the proceeding;
  - 2) The person may be materially prejudiced absent intervention; or
  - 3) The person is so situated that the person may be adversely affected by a final Board order.

*Id.* (emphasis added).

Petitioners' assertion that it would be an impermissible expansion of the law for the Board to permit Grundy County to intervene ignores both 35 Ill.Adm.Code 101.402(a) and 101.402(d)(2), (3), which clearly permit the Board to allow intervention by a party that may be adversely affected by the final order in the appeal.

Finally, the assertion that allowing Grundy County to intervene would run afoul of 415 ILCS 5/40.1(a) is simply erroneous. The Environmental Protection Act, at 5/40.1(a), merely limits those who are authorized to initiate an appeal of decision that denies siting. The Act imposes no special limitations on intervenors in such actions. Thus, the Board's authority to grant leave to intervene derives from 35 Ill.Adm.Code 101.402 (set forth above), which expressly authorizes intervention where the intervenor may be materially prejudiced if intervention is not permitted, or whether the person may be adversely affected by a final Board order. An order granting Grundy County's request to intervene would, therefore, be fully in keeping with Illinois law.

2. **Grundy County has demonstrated that it may be adversely affected by the outcome of the appeal.**

Petitioners allege that Grundy County has provided nothing more than "simple and conclusory statements to support its position" that its citizens will be adversely affected if the Board overturns the Kendall County Board's decision at issue in this appeal (Petitioner's Opposition at ¶12). Notably, the decision to deny siting was based on the Petitioners' failure to show the facility would be safe, and failure to show that it would be located so as to minimize incompatibility with the surrounding area and negative effect on the value of surrounding property.

In claiming that Grundy County provided nothing but "simple and conclusory statements" concerning the adverse impact of the proposed siting on Grundy County residents, Petitioners blithely ignore the voluminous record of witnesses presented by Grundy County during the siting hearings, for which numerous citations were provided in Grundy County's Memorandum in support of its Motion to Intervene. (*See Grundy County's Memorandum of Law at pp. 4-5*).

The two cases cited by Petitioners at paragraph 12 of its Opposition brief, which purport to supply support for its argument, are at a minimum, entirely inapposite. Among the distinguishing factors is the glaringly obvious fact that neither case involves a siting appeal, and in neither case was the would-be intervenor a party to proceedings below, as is true here.

The first opinion cited by Petitioners, *Stuart v. Fisher*, which was incorrectly cited as "PCB 02-162," was a noise enforcement case, in which a county sought to intervene, asserting that if the Board's ruling was in conflict with the county's noise ordinance, it would adversely affect that county; the Board disagreed. *Stuart v. Fisher*, PCB 02-164 (January 23, 2003). Indeed, in *Stuart*, which was, again, not a siting case, the would-be intervenor county offered no

explanation why or how the county or its residents would be adversely impacted by a Board decision in the case, except to argue that a Board decision *might* conflict with the county's own ordinance. This is nothing whatsoever like the instant appeal, where Grundy County participated as a party in the proceedings from which Petitioners appeal, and where Grundy County presented and examined witnesses and evidence demonstrating the public safety dangers presented by the proposed facility, as well as its incompatibility with the surrounding area. (*See Memorandum in Support of the Motion to Intervene*, at pp. 4-5). Moreover, the Board need not search the record for the evidence: Grundy County has provided the Board with numerous citations to the record. *Id.*

The second supposed authority in support of the Petitioners' position was an underground storage tank case, in which the Board declined to allow the City of Chicago to intervene, where the basis alleged by the City was that it might be entitled to obtain reimbursement for certain costs, along with the City's concern that a subsequent complaint for reimbursement might be barred as duplicative if the City did not intervene. *2222 Elston LLC v. Purex Indus.*, PCB 03-055, at \*4 (January 23, 2003). The Board explained that there would be no bar to a complaint for reimbursement by the City, and that the City was free to file a reimbursement complaint, whereupon consolidation of the two actions would likely be appropriate. *Id.* Again, the case cited by Petitioners could not be more unlike this appeal.

**3. Kendall County's interests are distinct from those of Grundy County.**

Petitioners assert, at paragraph 13, that Grundy County has not established that the Kendall County Board is "incapable" of making arguments to address the adverse impacts of the proposed facility on Grundy County's residents. There is no need for Grundy County show Kendall County to be "incompetent" to represent the interests of persons who are not Kendall

County residents. Kendall County simply has no duty to, and cannot be expected to, expend the its taxpayers' resources to advocate on behalf of those who do not live in the County. Protection of the health, safety, and welfare of Grundy County residents falls upon the Grundy County State's Attorney, not on the state's attorney of nearby counties. Thus, Grundy County's residents would be materially prejudiced if their distinct interests are not defended by their state's attorney.

4. **Petitioners misrepresent the law concerning intervention to protect the rights of third parties.**

Petitioners allege, at paragraph 13, that "the Board has held that it is insufficient to base intervention on the belief that the respondent will not adequately represent the concerns of third parties." *Id.* In purported support of this assertion, Petitioners cite *Alloy Engineering & Casting, Co.*, although they fail to supply a case number or date. Fortunately, the Board's website provides a search tool that makes it possible to locate the case number, and a date for the cited opinion: PCB 01-155, September 6, 2001. The opinion, however, does not stand for the proposition alleged by Petitioners.

*Alloy Engineering* was an enforcement case brought by the State against the respondent in that case for causing or allowing the emission of contaminants, and for failing to comply with its operating permit and with state air pollution regulations. The would-be intervenors in *Alloy* were nearby homeowners who wanted to participate in the State's enforcement action, despite the fact that they already had their own simultaneous civil suit against the respondent pending in circuit court. The Board declined to allow them to intervene, noting that the Attorney General had brought the enforcement action, and the Attorney General represents the concerns of all of the People of the State of Illinois. *Id.* at \*3 (emphasis added). Thus, the Board's holding in *Alloy* was not, as represented by Petitioners in their brief, that it is "insufficient to base intervention on

the belief that the respondent will not adequately represent the concerns of third parties.” (Petitioners’ Opposition at ¶13). Rather, the Board observed, quite correctly, that where the Illinois Attorney General brings an enforcement action against an alleged violator of the law, he or she is necessarily representing the interests of the entire State of Illinois.<sup>2</sup> This is clearly not the case in this landfill siting appeal.

**5. Grundy County’s motion is timely.**

On March 24, 2009, while this motion to intervene was pending, Petitioners amended their petition. Moreover, as of the filing of this Reply, no depositions have been taken, no written discovery has been exchanged, and no hearings have been held. In other words, this appeal is still in early infancy, and granting the motion to intervene will therefore cause no delay and will have no deleterious effect on the proceedings.

**CONCLUSION**

If the Petitioners are successful in overturning Kendall County’s denial of their application for siting, the resulting landfill will endanger the health, safety, and welfare of Grundy County residents. The evidence in the record shows that Petitioners’ landfill would, *inter alia*, threaten the integrity of the area aquifer from which many Grundy County residents derive their water, risk downstream damage to the Aux Sable watershed basin through improvident surface water runoff from the proposed facility, endanger air traffic safety at and near the Morris

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<sup>2</sup> The Board further noted, in *Alloy Engineering*, that if the Board found that the respondent violated the Act, its order would require that respondents cease and desist from further violations of the Act, an order that would not adversely affect the would-be intervenors. (Id. at \*3). The Board went on to explain that if it did not find the respondent violated the Act, the would-be intervenors would still not be adversely affected, and the ruling would have no impact on their civil suit. In other words, the Board found that no matter which way the case was decided, the would-be intervenors could not possibly experience an adverse effect from the decision.

Community Airport, and adversely impact traffic and roads in Grundy County.

Because Grundy County's interests are separate and distinct from those of Kendall County, Kendall County can not, and should not be expected to, advance Grundy County's interests. Accordingly, Grundy County residents may be adversely affected by a final Board Order, and their interests will be materially prejudiced absent intervention. Grundy County therefore has a duty to intervene in order to protect the health, safety, and welfare of its residents.

Inasmuch as Petitioners' Amended Petition was filed during the pendency of this motion to intervene, Grundy County's motion is timely, and its intervention would cause no undue delay, would not materially prejudice the proceeding, and would not otherwise interfere with an orderly or efficient proceeding. The Board should, therefore, grant Grundy County's Motion to Intervene.

WHEREFORE, for the reasons set forth in their Motion to Intervene, the Memorandum of Law in Support, and in this Reply, Grundy County respectfully requests that the Board grant the Motion to Intervene.

Dated: March 30, 2009

Respectfully submitted,

Grundy County, Illinois

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By:

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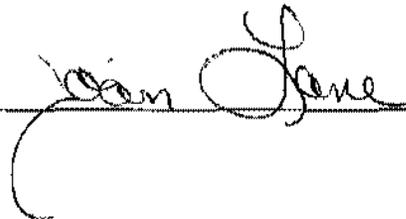
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**AFFIDAVIT OF SERVICE**

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 March 30, 2009, she served a copy of the foregoing upon:

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Via E-Mail and by depositing a copy thereof, enclosed in an envelope in the United States Mail at Rockford, Illinois, proper postage prepaid, before the hour of 5:00 p.m., addressed as above.



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