

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JUL 1 2003

**THE CITY OF KANKAKEE, an Illinois
Municipal Corporation**

Petitioner

v.

**COUNTY OF KANKAKEE, a body politic and
Corporate; KANKAKEE COUNTY BOARD;
And WASTE MANAGEMENT OF ILLINOIS,
INC.,**

Respondent

STATE OF ILLINOIS
Pollution Control Board

No. PCB 03-125

(Third-Party Pollution Control Facility
Siting Appeal)

MERLIN KARLOCK,

Petitioner

v.

**COUNTY OF KANKAKEE, a body politic and
Corporate; KANKAKEE COUNTY BOARD;
And WASTE MANAGEMENT OF ILLINOIS,
INC.,**

Respondent

No. PCB 03-133

(Third-Party Pollution Control Facility
Siting Appeal)

MICHAEL WATSON,

Petitioner

v.

**COUNTY OF KANKAKEE, a body politic and
Corporate; KANKAKEE COUNTY BOARD;
And WASTE MANAGEMENT OF ILLINOIS,
INC.,**

Respondent

No. PCB 03-134

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KEITH RUNYON,

Petitioner

v.

**COUNTY OF KANKAKEE, a body politic and
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(Consolidated)

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**CITY OF KANKAKEE'S REPLY BRIEF TO RESPONSE BRIEF OF
WASTE MANAGEMENT OF ILLINOIS, INC. AND COUNTY OF KANKAKEE** STATE OF ILLINOIS
Pollution Control Board

NOW comes the Petitioner, CITY OF KANKAKEE, by and through its attorneys, Christopher Bohlen, Corporation Counsel, Kenneth A. Leshen and L. Patrick Power, Assistant City Attorneys and in reply to the response brief filed by Waste Management of Illinois, Inc. and the County of Kankakee, states as follows:

I. Re: Waste Management of Illinois's failure to comply with Section 39.2.

Waste Management of Illinois, Inc. in paragraph II A. of response briefs in A & B make the unsupported statement the “. . . WMII accomplished actual notice on Petitioner Karlock, Mr. Mehrer and the Kellers, as well as constructive notice on Mr. Mehrer and the Kellers in compliance with the Section 39.2(b.)”

Apart from this raw conclusion, WMII failed to present any proof that Brenda Keller, a landowner clearly entitled to service under the requirements of Section 39.2(b) of the Act, was never served in any fashion requested by 39.2(b). That issue was discussed in detail in the brief of objector, Michael Watson. (Also see Siting hearing transcript – Volume 28, page 44).

It is also argued by WMII, that Mr. and Mrs. Keller attempted to evade service of process and therefore they were not entitled to service. The record is clear that the Kellers did not evade service. Mr. and Mrs. Kellers' testimony is uncontradicted as set forth in volume 28, pages 58, 59 and 101-135 of the siting hearing transcript. Furthermore, it is pointed out in the brief of objector, Karlock, that the Kellers accepted certified mail service by Waste Management in March 2002 relating to preliminary matters. *Ogle County Board v. Pollution Control Board*, 272 Ill. App. 3d 184, calls for strict construction of the service requirements contained in Section

39.2, unless the property owners have clearly attempted to evade service. Since there was no such evasion shown of record in this case, strict compliance should be required and clearly, WMII has not complied with regard to the Kellers.

Waste Management attempts to establish that the Kellers saw the posted notice on their door and further state that the evidence supports that conclusion. In fact, the evidence supports only a contrary conclusion. The Kellers testified under oath that they did not see any such posting and were never served or notified as required by Section 39.2. There is no evidence contradicting that testimony, only the unsupported assertion of Waste Management in its response brief.

Waste Management further attempts to argue that posting satisfies the requirement of Section 39.2(b) by citing *Green v. Lindsey*. It is clear that 39.2(b) calls for much more stringent service requirements than were discussed in *Green v. Lindsey*. The petitioner in this case is required to comply with the strict requirements of 39.2 under the *Ogle County* case, *supra*.

Waste Management's argument under paragraph II. A. (1) (iii.), state that the Kellers received notice of Waste Management's intent to file the application. That in no way speaks to the issue of whether or not the Kellers were properly served in accordance with the statute. Further, contrary to the assertion of Waste Management, the testimony of the Kellers is credible and has not been impeached by any evidence on the record. Their testimony therefore, should stand as the truthful, credible, and unimpeached.

Waste Management's entire argument with regards to the Kellers, seems to be a series of excuses as to why they could not get the required service on the them, particularly Brenda Keller. That may speak to the incompetence of the process server but does not in any way vest the Kankakee County Board with jurisdiction to hear this petition.

WMII admits in its brief that it never made any attempt to serve Brenda Keller by certified mail. On page 22 of its brief it states, “WMII sent notices via certified mail to Robert, and via regular mail to Robert and Brenda. The process server also sent notices to both Kellers via regular mail.” This is a clear admission that Brenda Keller was never served by certified mail as required by Section 39.2.

At page 17 of its response brief, WMII tries to distinguish their facts from those that appertain in the *Ogle County* case. The *Ogle County* case is the law in this area and it states, “Because compliance with the notice requirements goes to the power of the County Board to act (See *Kane County v.* 139 Ill. App. 3d 593). The failure to notify any party entitled to statutory notice will divest the County Board of jurisdiction over the landfill application.” *Ogle County v. Pollution Control Board*, 272 Ill. App. 3d 184, 193.

Waste Management’s response totally fails to address the argument of objector Karlock set forth in paragraph III, 6. of his brief, which argument the City of Kankakee hereby adopts.

Further, Waste Management’s reliance as in *ESG Watts* case is inapposite. It quotes the case, “If the property owner does not receive the notice on time, he or she nonetheless may be deemed to be in constructive receipt of notice if the property owner refuses service before deadline.”

Here, as pointed out above, Waste Management admits making no attempt to serve Brenda Keller by certified mail. Further, there is no evidence that she refused service.

The County of Kankakee made similar arguments in its brief in paragraph I, A & B, which are faulty for the same reasons.

II. Fundamental Fairness.

Waste Management's argument that the fundamental fairness of the proceedings was not affected by its failure to make its current operating record available prior to the hearing seem to ignore the purpose of the requirement of prior disclosure. Waste Management's brief concedes that this operating record was not readily available for inspection. The brief of Merlin Karlock went into great detail on pages 9, 10 and 11 demonstrating the difficulties that his attorney had in trying to secure these records. The fact that these records were available elsewhere in no way mitigates the damage that members of the general public would have suffered in attempting to gain access these records that should have been readily available, but were not. *American Bottom Conservancy v. Village of Fairmont and Waste Management of Illinois, Inc.*, IPCB 00-200, stands for the proposition the unavailability of public materials required to be filed as part of the siting applications is fundamentally unfair. Waste Management's argument does not overcome this proposition of law.

Waste Management argues that the objectors in this case are required to show "actual, resulting prejudice" in order to prevail as to their argument of fundamental unfairness. The purpose of this statute in requiring the availability of such information is clearly to protect the entire public, and particularly those who were unsophisticated in dealing with the exigency of a landfill siting proceedings. Clearly, the general public is harmed by these failures to disclose.

Waste Management further argues that its witness, Beaver-McGarr's false testimony indicating that she had received a degree from Daley College was neither perjury nor fraud because, (1) it not relate to a material issue and (2) she genuinely believed that she had received such a degree. These propositions are preposterous. Waste Management cites the fact that Ms. Beaver-McGarr continued to insist that she had received a degree somehow supports the proposition that she genuinely believed that fact. She agreed to produce the documents but never

did. Her attorney agreed to bring her back for examination, but never did. These actions are hardly consistent with the genuine belief that she had indeed received a degree. In contrast, the Administrators from that college testified that no degree was ever issued to Ms. Beaver-McGarr. Waste Management's argument that this does not constitute a misrepresentation as to "a material fact", is also preposterous. What's more important than the credentials that an expert relies upon to support his or hers' expertise. Whether or not she had received a degree from Daley College was certainly important enough to Ms. Beaver-McGarr that she listed it prominently or curriculum vitae. Furthermore, if her belief that she actually received that degree was so steadfast why was she unwilling to return to explain this discrepancy? It is clear that this is perjured testimony because it was false and material. None of Waste Management's arguments overcome this conclusion and it so permeated the proceedings as to raise doubt about the truthfulness and accuracy on the issues raised by Criterion 3. In accordance with the provisions of law cited in *Harrington vs. Smith*, 138 Ill. App. 3d 28 in City of Kankakee's brief, Ms. Beaver-McGarr's testimony should have been stricken and cannot serve as a basis for the County Board's finding on Criterion 3. The City also adopts the argument of objector Watson on this issue.

WMII's brief as it addresses the City of Kankakee's argument on Criterion 3 as to WMII's witness Jay Christopher Lannert, totally mischaracterize the City's argument. Criterion 3 calls for evidence that the expansion is so located has to minimize incompatibility with the character of the surrounding area. This was argued at page 18 of City's brief. WMII's response fails totally to speak to the fact that Lannert's testimony stated that the plan was compatible, but completely failed to testify as to the minimization of incompatibility which is called for by the statute.

The County of Kankakee made similar arguments in its Brief in paragraph II, C & D, which are faulty for the same reasons.

As to the other arguments raised by WMII and Kankakee County in their response briefs, the City of Kankakee relies upon its arguments and the argument of objectors Karlock and Watson presented in their original briefs in support of their opposition to the decision of the Kankakee County Board siting the landfill in question.

Wherefore, the city of Kankakee prays that the findings and decision of the Kankakee County Board siting the Landfill in question be reversed.

Respectfully submitted,

City of Kankakee

By:


L. Patrick Power

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NOTICE OF FILING

To: See Attached Service List

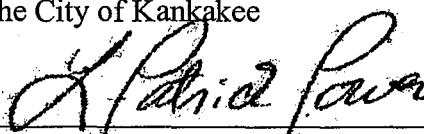
PLEASE TAKE NOTICE that on June 30, 2003 there caused to be filed via Federal Express-Overnight Delivery with the Illinois Pollution Control Board an original and 9 copies of the following document, a copy of which is attached hereto:

City of Kankakee's Reply Brief to Response Brief of Waste Management of Illinois, Inc. and County of Kankakee

Respectfully submitted,

The City of Kankakee

By:



Attorney for City of Kankakee

Prepared by:
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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 June 30, 2003, a copy of the foregoing **City of Kankakee's Reply Brief to Response Brief of Waste Management of Illinois, Inc. and County of Kankakee** was served upon:

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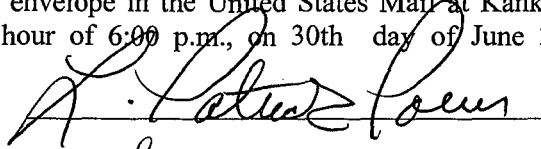
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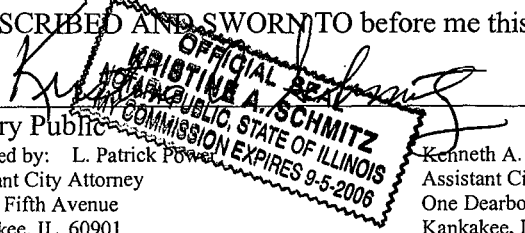
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By depositing a copy thereof, enclosed in an envelope in the United States Mail at Kankakee, Illinois, proper postage prepaid, before the hour of 6:00 p.m., on 30th day of June 2003, addressed as above.



SUBSCRIBED AND SWORN TO before me this 30th day of June 2003.


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