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Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MICHAEL WATSON, Petitioner, vs. COUNTY BOARD OF KANKAKEE COUNTY, ILLINOIS, and WASTE MANAGEMENT OF ILLINOIS, INC., Respondent.	No. PCB 03-134 (Pollution Control Facility Siting Appeal) Consolidated With PCB 03-125, 03-133, 03-135)

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on July 3, 2003, we filed with the Illinois Pollution Control Board, the attached **Petitioner, Michael Watson's, Reply Brief in Support of his Petition Contesting the January 31, 2003 Decision of the Kankakee County Board, Conditionally Approving WMII's Application to Expand the Kankakee County Landfill**, a copy of which is attached hereto and served upon you.

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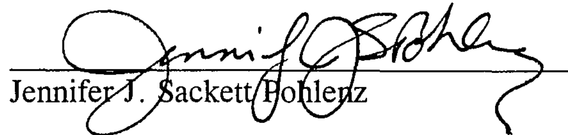

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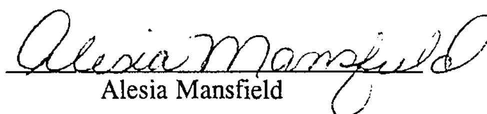
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PETITIONER MICHAEL WATSON'S REPLY BRIEF IN SUPPORT OF HIS PETITION CONTESTING THE JANUARY 31, 2003 DECISION OF THE KANKAKEE COUNTY BOARD CONDITIONALLY APPROVING, WMII'S APPLICATION TO EXPAND THE KANKAKEE COUNTY LANDFILL

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MICHAEL WATSON, **Petitioner,** **vs.** **COUNTY BOARD OF KANKAKEE COUNTY, ILLINOIS, and WASTE MANAGEMENT OF ILLINOIS, INC.,** **Respondent.**	**No. PCB 03-134** **(Pollution Control Facility Siting Appeal)** **Consolidated With PCB 03-125, 03-133, 03-135)**

PETITIONER MICHAEL WATSON'S REPLY BRIEF IN SUPPORT OF HIS PETITION CONTESTING THE JANUARY 31, 2003 DECISION OF THE KANKAKEE COUNTY BOARD CONDITIONALLY APPROVING, WMII'S APPLICATION TO EXPAND THE KANKAKEE COUNTY LANDFILL

This reply brief, submitted by Petitioner Michael Watson by and through his attorneys at Querrey & Harrow, Ltd., addresses the response briefs submitted by the County Board and County of Kankakee, jointly (and collectively referenced herein as "Kankakee County"), and Waste Management of Illinois, Inc. (WMII) in this matter. In particular, this reply addresses five subjects **(1)** WMII's attempt to change the standard of review on a jurisdictional issue from *de novo* to manifest weight must fail, as *de novo* is the correct standard; **(2)** that Kankakee County's decision is null and void, as jurisdiction did not vest in Kankakee County, since WMII failed to serve notice on Brenda and Robert Keller pursuant to Section 39.2(b); **(3)** that the Kankakee County proceedings were fundamentally unfair, for the individual and collective reasons set forth in Petitioner Watson's opening brief; **(4)**, that the decision of Kankakee County was against the manifest weight of the evidence with respect to Criteria (i), (ii), (iii), (v), (vi), (vii), and (viii) of Section 39.2 of the Act; and **(5)** that, if the Illinois Pollution Control Board (IPCB) finds that Kankakee County's decision stands, then this matter should be scheduled for further discovery and hearing before the IPCB, due to certain rulings during the

course of this proceeding that prejudiced the Petitioners and hindered their ability to develop a record for this appeal.[1]

1. **The Standard of Review of a Jurisdictional Issue, Such as Notice, Is *De Novo***

WMII asserts that the standard of review on appeal to the IPCB of a jurisdictional issue should be the manifest weight of the evidence and, in support, cites Land and Lakes v. Pollution Control Board, 743 N.E.2d 188 (3rd Dist. 2000). WMII is incorrect both concerning its proposition concerning the standard of review and its assertion that Land and Lakes is authority for such a proposition. The proper standard of review is *de novo*. Geneva Cmty. Unit Sch. Dist. No. 304 v. Prop. Tax Appeal Bd., 695 N.E.2d 561, 564 (2nd Dist. 1998)(agency's determination of the scope of its jurisdiction is a question of law that is reviewed *de novo*).

Land and Lakes does not support WMII's position and, in fact, its cited to in Petitioner Watson's opening brief (p. 3) in support of the *de novo* standard of review, which is actually what the page citation provided by WMII references. Thus, WMII cites Land and Lakes incorrectly, and fails to provide any legal or other basis for changing the standard of review on jurisdictional issues to manifest weight. Therefore, the IPCB should find that and should review the jurisdictional issue(s) in this case *de novo*.

[1] Petitioner Watson notes that the Respondents devote a large portion of their brief making assertions based on arguments raised by the parties, not the actual IPCB holdings, in the City of Kankakee case. Neither Watson nor his counsel were a party or representing a party, respectively, in that case, and these "assertions" by Respondents

2. **Kankakee County's Decision Should Be Found Null and Void, as WMII Failed to Perfect Pre-Filing Notice, Pursuant to Section 39.2(b), and, thus, the County Board Did Not Have Jurisdiction**

WMII and Kankakee County argue that (a) People *ex rel.* $39,700 U.S. Currency, 776 N.E.2d 1084 (2002), is controlling and overrules the long standing case law requiring notice to actually be received (except in circumstances of recalcitrance), by property owners within the distance requirements of Section 39.2(b) of the Illinois Environmental Protection Act (Act); (b) that the IPCB should find constructive notice, with or without the necessary finding of recalcitrance; and, WMII alone argues, (c) that the IPCB should expand the flexibility of 39.2(b) of the Act beyond that even provided for in forcible entry and detainer law, and find that contested testimony, as in this case, concerning whether notice is posted is sufficient to satisfy this important jurisdictional requirement.[2[1]] Kankakee County's and WMII's arguments must fail, as they: (a) misapply People *ex rel.* $39,700 U.S. Currency, which, although it distinguishes Avdich v. Kleinert, (1977), 69 Ill.2d 1, 370 N.E.2d 504, does not overrule either it or Ogle County Board v. Pollution Control Board, 272 Ill.App.3d 184, 649 N.E.2d 545 (2nd Dist. 1995), and thus, Ogle County Board remains controlling law on this issue; (b) neither the IPCB nor any Court has found that service under Section 39.2(b) can be achieved through constructive notice, without proof of recalcitrance and there is no proof that either Brenda or Robert Keller were recalcitrant; and (c) WMII fails to provide any legal or other basis for its theory that posting is sufficient, alone, or with other "attempts" on the eve of the statutory

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are not precedential, are not holdings of the IPCB in the City of Kankakee case, and should not be considered in this matter.

deadline for service when there is no proof of recalcitrance. Therefore, the IPCB should find that neither Robert nor Brenda Keller were served pre-filing notice pursuant to Section 39.2(b) of the Act, Kankakee County had no jurisdiction, and, thus, the IPCB should vacate the decision of Kankakee County.

(a) Ogle County Board Is Precedential and Requires that the IPCB Vacate Kankakee County's Siting Decision, for Lack of Jurisdiction

Kankakee County and WMII contend that People *ex rel.* $30,700 U.S. Currency establishes that service was completed on the Kellers as early as July 25, 2002, the date on which notice was purportedly sent to both Robert Keller and Brenda Keller via regular mail. They are wrong. People *ex rel.* $30,7000 U.S. Currency is inapposite to the instant matter. In that case, the Illinois Supreme Court held that under the Drug Asset Forfeiture Procedure Act ("the Act"), 725 ILCS 150/1 et seq. (2000), service of notice by mailing is perfected when the notice is deposited in the mail, as opposed to when it is received by an addressee. Pivotal to the Court's ruling, however, was the fact that the Drug Asset Forfeiture Procedure Act contained an explicit provision stating that notice served under it was effective upon mailing. Specifically, the Act provided, in relevant part: "Notice served under this Act is effective upon personal service, the last date of publication, or the mailing of written notice, whichever is earlier." See 725 ILCS 150/4(B). Also crucial to the Court's holding was the remedial purpose underlying the Drug Asset Forfeiture Procedure Act and the fact that individuals who are typically served under its provisions (*i.e.*, mere couriers of drug trafficking proceeds) generally have no interest in receiving certified mail notifying them of forfeiture proceedings.

[2[1]] It should also be noted that the Respondents fail to address the application of the analogous Illinois Code of Civil Procedure requirements for substitute service, rather than constructive notice, as both a summons and pre-

This case concerns the Illinois Environmental Protection Act, not the Drug Asset Forfeiture Procedure Act. As such, the ruling in People *ex rel.* $30,7000 U.S. Currency has no place here. Indeed, Kankakee County and WMII have attempted to analogize when no such analogy is appropriate given the *expressly* ***limited holding*** of People *ex rel.* $30,7000 U.S. Currency. Notwithstanding Kankakee County and WMII's suggestions to the contrary, Ogle County Board – an d not People *ex rel.* $30,7000 U.S. Currency – controls in this matter, and clearly establishes that notice of the Application was never properly served upon the Kellers.

(b) Constructive Receipt of Section 39.2(b) Pre-Filing Notice Is Not Proper, Except In Circumstances of Recalcitrance, and Neither of the Keller's were Recalcitrant

Despite the Respondents arguments that the IPCB has held that constructive notice absent recalcitrance, *i.e.,* refusal to be served, is allowed to perfect Section 39.2(b) notice, that is not the case. In fact, the IPCB was explicit in the one of the three cases referenced by WMII which contains reference to constructive receipt as to its ***limited*** use; and, notwithstanding, all of three cases are inapplicable and distinguishable from the instant circumstances. In ESG Watts, Inc. v. Sangamon County Board, PCB 98-2 (June 17, 1999), even though the IPCB did **not** find constructive receipt in this case, the IPCB was very careful in its notation that "a property owner . . . may be deemed to be in constructive receipt of a notice if the property owner **refuses** service before the deadline." (emphasis added). Likewise, the City of Columbia, *et al.* v. County of St. Clair, *et al.*, PCB 85-177, 85-220, 85-223 (consolidated)(April 3, 1986), does not support WMII's use of it, as in that case, the IPCB

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filing siting notice require receipt of their respective documentation.

found no jurisdiction, as the applicant was unreasonable in its attempt at service by sending out notice the fifteenth day prior to filing.

Similarly, DiMaggio, PCB 89-138 (Jan. 11, 1990), is distinguishable, as neither of the Keller's moved from their address, and thus, the holding of this case, decided before Ogle County Board is also inapplicable to the instant facts. Finally, Waste Management of Illinois v. Bensenville, PCB 89-28 (Aug. 10, 1989), is not applicable to the precedent for which WMII suggests, as it was decided by the IPCB prior to the Appellate Court's decision in Ogle County Board v. Pollution Control Board, 272 Ill.App.3d 184, 649 N.E.2d 545 (2nd Dist. 1995)[3[2]]. Additionally, the IPCB's seeming acceptance of the "served when mailed" argument presented in Bensenville, is clearly rejected in Ogle County Board, and this case is factually distinguishable from Bensenville, as in Bensenville, the property owner signed and returned the registered mail notice, albeit three days following the 14-day pre-filing notice deadline, wherein, in this case, there is uncontested testimony that neither Brenda nor Robert received ***any*** notice.

Thus, the only circumstance wherein the IPCB has articulated a constructive receipt exception (and the only case of the three cited by Respondents after the Ogle County Board Appellate decision), is ESG Watts, Inc. Since there is absolutely no proof of recalcitrance or refusal of service on either the part of Brenda or Robert Keller, or anyone who would be allowed to accept abode service, this exception is not applicable.

[3[2]] Likewise, City of Columbia was decided prior to the Appellate Court's holding in Ogle County, thus any dicta referenced by WMII (and likewise referenced by it from City of Columbia in the Bensenville case) cannot be considered prededential.

In terms of arguing refusal of service and recalcitrance, the Respondents essentially make two arguments: the Kellers were friends of Watson and thus, the IPCB should find that they are not credible, and the mere number of times service was attempted starting on July 25, 2002 (when the deadline for service was August 2, 2002), along with an alleged and mysterious woman at the door, is enough to show refusal of service. Neither of these arguments can prevail.

First, the fact that Brenda and Robert Keller admitted being friends of Watson is no more discrediting to them than the fact that WMII hired and paid Ryan Jones to perfect service. In fact, Mr. Jones, who testified he has served at least one person a work-day between the time of his last attempted service on the Kellers and the date of his testimony (totaling at least 88 other persons served), and who took no notes on the mysterious woman who appeared at the Keller's house while both were at work[4[3]], is not believable from not only a financial and potential liability motivation standpoint, but also because of his lack of documentation concerning his woman at the Keller house encounter, and his lack of clarity concerning other service attempts he made, in addition to the other reasons raised in Watson's opening brief. [5[4]]

[4[3]] Robert Keller testified concerning his work schedule; Brenda Keller, however, could not be absolutely certain at the time of her testimony whether she was at work, thus, her employer filled out and signed an affidavit proving she was at work at the time in question. (Watson Written Comment, Exhibit N). Additionally, Robert Keller testified concerning the work schedule of the only other person who resides with them (a tall male, who comes nowhere near the description Jones provides of the mysterious woman), which likewise puts him at work during the days when this Jones to woman encounter occurred.

[5[4]] WMII alleges that Watson's counsel's reference to posting on a door, generally, not a particular door, within a document filed with the County, is somehow suspicious and WMII attempts to assert that as evidence to impeach the Keller's credibility. This is nonsense. All the main cases (forcible entry and detainer) discussing posting talk about it being on a door. What else would it be? This is not suspicious, this was common sense. WMII attempt to insert counsel's argument, without any evidence concerning how information about a "door" then, on WMII's theory, got from the Kellers (who testified that they had not spoken with Watson's counsel until very recent to

Second, it does not matter if an applicant starts eight, nine or ten days in advance of its service deadline, if there is no refusal of service, there is no law to support constructive receipt of service. There is absolutely no evidence cited or presented or otherwise in the record that either Keller, at any time, refused service. There is also no contention (as obvious from Brenda's work's affidavit and her description of herself and inability to identify Ryan) that Brenda Keller was Jones' mysterious woman. Supportive of the Keller's lack of refusal of service is the fact that on WMII's first attempt to file an application in March 2002, Robert Keller accepted personal service and gave the green card he received in the mail (at the Keller's residence) to Brenda, who signed for it and picked it up from the post office. Additionally, there was no certified mail attempt on Brenda Keller; and, the one certified mail attempt on Robert Keller (who picked up the mail from his house, had previously picked up the notice that he had certified mail on WMII's first attempt in March 2002 for pre-filing notice), was "unclaimed" and the uncontradicted testimony is that Robert Keller never received another notice for a certified mail following the March 2002 siting application attempt by WMII. Finally, although there were five personal service attempts on the Keller house, all of those occurred on weekdays and all except for two occurred during typical working hours. This combined with Mr. Jones' admission that the best time for serving people at home is after 5:00 p.m. (12/05/02 6:00 pm Tr.26), Mr. Jones' and WMII's failure to even attempt to telephone the Kellers who have an answering machine and were cooperative with service during WMII's March 2002 application attempt, and the fact that service attempts were not ***started*** until July 25th (when there is an August 2nd notice deadline), shows, if anything WMII was unreasonable

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their testimony), to counsel for Watson. WMII's assertion is not supported by evidence, is nonsense, and should

in its attempts at service and provides no support for the Respondents' arguments and baseless allegations of recalcitrance. Therefore, the IPCB should find that the evidence shows that the Kellers were not ***served*** with pre-filing notice for the WMII application which is the subject of this case (filed August 16, 2002), and vacate Kankakee County's decision for lack of jurisdiction.

(c) Posting Notice Alone and Without Circumstances of Recalcitrance, Does Not Meet the Requirements of Section 39.2(b)

WMII contends that posting meets the service requirements of Section 39.2(b), while admitting that there is no case law on point. As legal support for its unique position, however, WMII cites Greene v. Lindsey, 456 U.S. 444 (1982), in which the U.S. Supreme Court actually found (as footnoted by WMII), that posting was not sufficient, under the circumstances of the case. Additionally, WMII fails to address or distinguish Edward Hines Lumber Co. v. Erickson, 29 Ill. App. 2d 35, 172 N.E.2d 429 (2d Dist. 1961)(service by posting only proper after doing "all that was possible under the circumstances," in this case repeated calls and 4 or 5 visits to defendants home, finally talking to wife of defendant who refused service after she called husband on telephone), which supports lack of notice and failure to perfect jurisdiction in this case, even if posting is allowed as a form of service under Section 39.2. Thus, the IPCB should find that service of pre-filing notice on Brenda and Robert Keller was not perfected and, thus, the IPCB should vacate Kankakee County's decision for lack of jurisdiction.

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not be given any weight by the IPCB.

3. The Kankakee County Proceedings Were Fundamentally Unfair, for the Individual and Collective Reasons Set Forth in Petitioner Watson's Opening Brief

Petitioner Watson raised four areas of fundamental unfairness in his opening brief: ***(a)*** unavailability of the record; ***(b)*** perjury of Patricia Beaver-McGarr; ***(c)*** predetermination; and ***(d)*** *ex parte* contacts. The Respondents' arguments against each of these are addressed separately, below.

(a) WMII's Complete Application Was Not Provided to the Participants or Properly made Available for Public Review in Violation of 415 ILCS 5/39.2(c) and Rendered the Proceedings Fundamentally Unfair

WMII argues, incorrectly, that Petitioners need to show actual prejudice and have not, as a result of the unavailable portions of the siting application (multi-box operating record and exhibits to the property value protection plan portion of the host agreement). Kankakee County argues, despite testimony from its own Clerk supporting a contrary conclusion, and without addressing Mr. Clark's or Ms. Fox's testimony, that the record was available, and even if it was not available until the first day of hearing, that is an acceptable and non-prejudicial practice. All of these arguments must fail. The testimony is uncontradicted (*see,* summary and citations on pp. 17-18 of Watson's opening brief), and the case law is clear. The unavailability of the application creates a presumption of prejudice, and neither WMII nor Kankakee County has overcome that presumption. *See*, American Bottom Conservancy v. Village of Fairmont City, PCB 00-200 (October 19, 2000).

Further, Kankakee County's attempt to distinguish the American Bottom Conservancy precedent by arguing that, in that case, none of the application was available until two weeks prior to the public hearing, must fail. Kankakee County asks for the IPCB to carve out an exception that will create a slippery slope: this time multiple boxes containing the operating

record were not available, what if next time all of Criterion 2 is not available? The cases cited by the County for support of a proposition that an applicant only has to provide its full application prior to the close of the hearing and can leave out substantive material at the time of filing, are distinguishable, most concern availability of transcript and not the application (*e.g.* Landfill 33 v. Effingham County Board, PCB 03-43 (February 20, 2003)), and the proposition asserted by Kankakee County is directly contrary to the stated purpose of the minimum 90-day wait between filing of the application and the first public hearing, to allow review of the application in preparation of hearing.

Finally, prejudice should be presumed with the unavailability of the record and, even if it is not, it is shown by the volume of the material which was not available at the Clerk's office (multiple boxes of the operating record, even with a portion of it on microfiche), and the fact that it wasn't until the first day of hearing that this material was made available to the public. Even though the operating record is otherwise available through a Freedom of Information Request to the Illinois Environmental Protection Agency, the volume of the record is so large, that any public participant wanting to obtain the response would have to spend a great deal of money to obtain copies, which is contrary to the intent of having these documents available for review at the Clerk's office. Lastly, the alleged "sign" in the Clerk's office regarding documents being available at libraries doesn't defer the duty of the Clerk and logic dictates that a person who asks and is denied the operating record from the keeper of this record, the County Clerk, is not going to think a local library and "unofficial" copy, is going to somehow have documents not maintained by the Clerk's Office.

Thus, the IPCB should find the proceedings were fundamentally unfair due to the unavailability of the operating record as well as the unavailability of the exhibits to the property value guaranty plan.[6]

(b) The Decision of Kankakee County Is Fundamentally Unfair or, Alternatively, Against the Manifest Weight of the Evidence, as it Relied on the Perjured Testimony of Patricia Beaver-McGarr; Further, the Proceedings were Fundamentally Unfair, as WMII Failed to Produce Beaver-McGarr's Diploma and Refused to Submit her for the Completion of Cross-Examination

Respondents argue that Patricia Beaver-McGarr did not commit perjury and that even if she did, it was not fundamentally unfair, because, essentially, her testimony relies on her experience rather than her representations of her education. As respects the procedural component, the Respondents argument interestingly amounts to no more than an assertion that an attorney's argument (without the supporting evidence) is sufficient to bring the credibility of Ms. Beaver-McGarr into consideration, and that the promise of the diploma or putting Beaver-McGarr back on the stand was properly revoked, despite Petitioner's reliance on same. The Respondents are simply wrong, on all arguments: about their asserted lack of "knowledge" by Ms. Beaver-McGarr that she was lying, concerning the material nature of her lie, and concerning the procedural ability of Watson to Beaver-McGarr's credibility "at issue" in the proceeding. Further, Respondents fail to show any law that contradicts the two legal premises asserted in Watson's brief: that the IPCB can and should review Ms. Beaver-McGarr's credibility as it is

[6] Throughout Respondents' briefs they allege Petitioners' misstated facts and missaplied the law. There are not enough pages to address each of these allegations, individually, however, Petitioner Watson denies those addressed against him and states that the record speaks for itself. For example, Kankakee County asserts that Watson's statement that the exhibits to the property value protection plan were not available "is simply erroneous" and blame it on Petitioners not re-acquiring the application. However, the local Hearing Officer also was **without** the exhibits, (11/21/02 9:00am Tr. 92-96); Watson specifically asked the Clerk's office what new material was filed after the August 16, 2002, filing, and no mention was made of the exhibits to the property value protection plan, among other things. (Watson Written Comment, Exhibit O).

against the manifest weight of the evidence that her testimony could be found credible[7] and that the use of perjured testimony is fundamentally unfair and it cannot be relied on by a trier of fact. Eychaner v. Gross, *et al.*, 202 Ill.2d 208, 779 N.E.2d 1115, 1130 (S.Ct. 2002) and People of the State of Illinois v. Moore, 199 Ill.App.3d 747, 557 N.E.2d 537 (1st Dist. 1990), respectively.

First, the testimony of Ms. Beaver-McGarr and Ms. Powers proves that Ms. Beaver-McGarr knowingly made false statements concerning her credentials, namely her alleged degree, under oath. The most striking evidence of this, which is not contradicted in either Respondents' briefs, is Ms. Beaver-McGarr's false statements that not only did she have a degree from Daley College, but that her degree was ***in her attic*** and that she could and world get a copy of her diploma and present it at the hearings. (11/19/02 6:50pm Tr. 5-9, 36-37; 11/20/02 9:00 am Tr. 13-14). When considered with Ms. Power's testimony that approximately in May of 2002 (one year prior to Ms. Power's testimony at the IPCB hearing), **prior to** Ms. Beaver-McGarr's testimony at the Kankakee County public hearings, Ms. Powers informed Ms. Beaver-McGarr that Ms. Beaver-McGarr ***had not graduated*** and even explained to her that she did not have enough credits to graduate and ***was not entitled to a degree***. (IPCB Hearing 5/6 Tr. 61-65). This evidence shows that Ms. Beaver-McGarr knew prior to, and thus knew at the time of her testimony in November 2002 before Kankakee County, that she not only had no degree, but that she was not qualified to obtain one.

Second, to propose that an expert's credentials and its testimony or perjury concerning those credentials is not material, is nothing less than ridiculous. Ms. Beaver-McGarr's credentials, including her non-existing degree, were supplied by WMII and her as the foundation for her qualification as an expert. There was no testimony that a degree is irrelevant to being an

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[7] No express finding was included in Kankakee County's decision concerning credibility of Ms. Beaver-McGarr,

expert appraiser for purposes of Criterion 3, further, if someone lies about their degree, something at such a basic credential level, how can ***any*** of their testimony, particularly technical testimony, be considered credible? If her non-existent degree had no material role in her qualifications, why was it even presented as part of her qualifications, particularly when she knew she did not actually have a degree at the time she testified, under oath, to having one? To find that Ms. Beaver-McGarr lied about her degree, but the lie was not material to her testimony is a finding that would not only go against public policy, but also common sense.

Third, Respondents arguments on the procedural aspect of this issue, specifically, Watson's denial of a right to finish his cross-examination of Beaver-McGarr when the alleged diploma was not produced as promised (by WMII counsel and under oath by Ms. Beaver-McGarr), essentially seeks the IPCB's finding that an applicant's obstruction of disclosure at a public hearing is acceptable. Respondents argue that Watson had no right to "re-cross," when actually, he did and it was a right to complete his cross. Watson relied on WMII's representations that it would produce the diploma or Beaver-McGarr, when it discontinued its cross of Beaver-McGarr on her qualifications. Watson did not waive this issue or "voluntarily" discontinue, as argued by Respondents, as he did it pursuant to and in reliance on WMII's representations. Throughout the hearing Watson asked for the diploma and Beaver-McGarr's return to the stand and was delayed by WMII, even after the hearing, during public comment, Watson sought the information from WMII and was repetitively denied the information (*see,* Watson Written Comment, Exhibit H).

Additionally, Respondents' argument that the mere raising of the issue by counsel for Watson at the time of the hearing and during closing statements is ludicrous, particularly when

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however, in order to find Criterion 3 was met, Kankakee County had to accept Ms. Beaver-McGarr's testimony.

counsel for Kankakee County is also arguing that "[T]he statements made by attorneys during opening and closing arguments, and during examination, are not evidence, and cannot be used to prove a particular position." (Kankakee County Bf. 58). Watson repetitively attempted and was denied evidence concerning Beaver-McGarr's lack of diploma, despite his reliance on WMII's promise to provide it or produce Beaver-McGarr to finish cross-examination on this issue. WMII delayed response on this issue until after the public hearings and written comment period were closed (when it had to have known by then that there was no diploma, and, thus, the reason why it refused to put Beaver-McGarr back on the stand and refused to produce her transcript or authorization for Watson to obtain it, which shows she has no degree). Further, WMII has attempted to prevent evidence of perjury from coming to light in this proceeding by tying to bar Ms. Powers from testifying through both a motion to quash her subpoena (which was correctly denied by the IPCB Hearing Officer) as well as a motion to bar her testimony (which was incorrectly granted by the IPCB Hearing Officer[8], however, the IPCB Hearing Officer correctly allowed an offer of proof).

Therefore, Respondents' arguments must fail and the IPCB should find, consistent with the Illinois Supreme Court's and Fist District Appellate Court's holdings in Eychaner v. Gross, *et al.*, and People of the State of Illinois v. Moore, that either Kankakee County proceeding was fundamentally unfair due to Kankakee County's consideration (and the local hearing officer's failure to strike) Ms. Beaver-McGarr's testimony as a result of her perjury, or due to Watson's denial of completion of his cross-examination of Beaver-McGarr; or alternatively, that Kankakee County's decision was against the manifest weight of the evidence as concerns Criterion 3, and

[8] The IPCB Hearing Officer granted WMII's motion to bar based on his understanding that the IPCB could not weigh credibility of witnesses, however, this finding goes against the Supreme Court's holding in Eychaner v.

reverse the decision of Kankakee County. In either circumstance, although the normal remedy for fundamental unfairness is to remand to correct the unfairness, in this circumstance, perjury cannot be "corrected," thus, to the extent the IPCB's decision finds that Beaver-McGarr perjured herself, the decision should be reversed. To the extent the IPCB's decision relies solely on the proceedings being rendered fundamentally unfair through denial of Watson of either the non-existent diploma or completion of his cross-examination of Beaver-McGarr, then the proceeding should be remanded with direction for a new hearing at which Beaver-McGarr should be ordered to take the stand for completion of her cross-examination and that the testimony of Ms. Powers can be read into evidence before the Kankakee County Board.

(c) Kankakee County Prejudged the Application, Rendering its Decision Fundamentally Unfair

Respondents' arguments in response to prejudgment relies on the application of Residents Against a Polluted Environment v. County of LaSalle and Landcomp, PCB 96-243 (September 16, 1996), wherein the IPCB Hearing Officer's decision not to allow evidence of the ***adoption*** of the Solid Waste Management Plan (SWMP) was upheld, and some allegedly neutralizing language in the host agreement. Neither of these arguments should prevail. First, the Residents Against a Polluted Environment holding is not applicable, as it concerns the IPCB denial of a petitioner's request to review the ***adoption*** of a SWMP. In this case, Petitioner is not seeking review of the manner in which Kankakee County adopted its SWMP or amendments, its is pointing to the SWMP, itself, as evidence that, at a minimum, Kankakee County predetermined the location and operator of, and therefore, at a minimum predetermined at least a

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Gross, *et al.*, 202 Ill.2d 208, 779 N.E.2d 1115, 1130 (S.Ct. 2002) and, therefore, the evidence submitted as an offer of proof (Ms. Power's testimony and related exhibits), should be admitted.

large portion of Criteria 1, 2, 3[9], and 5. Neither Respondent is able to point to any case in which a County had similar designating language in its SWMP and was found not to have predetermined at least a portion of the nine criteria of Section 39.2 of the Act. Further, neither Respondent points to any case in which the decision-maker received accelerated payments for siting approval. In fact, EE Hauling, referenced by WMII for the proposition that government decision-makers make decisions regularly about money and are presumed neutral is distinguishable, as the money involved in that case was being paid as part of an on-going operation, which is not the circumstance here. The $500,000 cash plus other benefits (new GPS, police cars, etcetera) were paid in addition to the existing host fee for the existing site, as an accelerated payment for siting approval and nothing, including the language of the agreement, rebuts the, at a minimum, predisposition this creates. Combined with a SWMP designating this site, the pre-approval payment and gifts guaranty, and the testimony of County Board Member Martin[10], prejudgment becomes evident to any "disinterested observer." Therefore, the IPCB should find that Kankakee County was predisposed to and prejudged the subject application, thus rendering is proceeding fundamentally unfair.

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[9] The language of the SWMP specifically finds the expansion would limit impact to the surrounding area that is already affected by a landfill (*see,* Kankakee County Bf. 13-14), which at a minimum is a finding inconsistent with siting law, which holds that an existing site has no relevance to whether an expansion is compatible, and also shows predisposition as to Criterion 3.

[10] Kankakee County apparently questions the authenticity of the citation to Martin's testimony in Watson's opening brief. One of the two exchanges occurred as follows:

Q: From March 2002 until August 2002 only looking at that time period, in those time periods did you share your belief that the site had been pre-selected with other members of the County Board?

A: When you say share, what do you mean?

Q: Talk, communicate in any way?

A: I would say no.

Q: At that point in your mind was it a foregone conclusion?

A: It seemed that way so there was no use talking about it.

(Martin Tr. p. 15).

(d) Improper Ex Parte Communications Between WMII and the County, Prior to the Decision of the County Board, Rendered the Proceedings Fundamentally Unfair

Petitioner Watson raises, essentially, two areas of *ex parte* communications: admitted communication between Mr. Moran and Ms. Harvey, and admitted communication between Mr. Helston and the County Board Members between March 2002 and January 31, 2003, regarding the Amendment to the SWMP (Kruse Dep. Tr. 40). Kankakee County responds by denying the record contains evidence of such communication, even though WMII answers to interrogatories disclose, under certification, that such communications occurred[11], and failing to respond to the Mr. Helston-Count Board communications, other than to criticize Watson's reference to Mr. Hoekstra's testimony that Helston was "our [WMII] attorney." As respects this criticism, Mr. Hoestra reserved signature and had plenty of time to correct his testimony, including when he, again, testified at the IPCB hearing. The fact that he did not correct it, means it stands. Kankakee County has no evidence that the statement was a "typo" as it asserts.

WMII responds to Watson's *ex parte* issues by asserting that no "reliable" evidence was presented and no prejudice was established. WMII's fails however to assert how the evidence, primarily its own answers to interrogatories and Kankakee County Board Chairman Karl Kruse's testimony is not reliable, thus this argument should be disregarded. Further, part of Watson's argument is that, since he was unable to depose or cross-exam those persons involved in the communications (particularly with respect to Mr. Moran and Ms. Harvey), the substance and

[11] Kankakee County also responds that the communication between Mr. Moran and Ms. Harvey concerned "procedure" per an affidavit of Ms. Harvey, except Petitioners were denied the opportunity to cross-examine either Ms. Harvey or Mr. Moran on these communications, and denied the opportunity to cross-examine Ms. Harvey on her affidavit, by the IPCB Hearing Officer's ruling preventing those depositions. Watson has asserted that such ruling was in error and, particularly when Ms. Harvey submits an affidavit as "evidence," Watson should have been provided an opportunity to cross-examine her on, at least, the contents of the affidavit and what she has, in a conclusory fashion, termed "procedural" communications.

effect of those communications is impossible to investigate and, therefore, should either be found prejudicial as a presumption or this proceeding should be remanded to the IPCB Hearing Officer to allow those depositions to proceed.

Therefore, the IPCB should find that the *ex parte* communications that occurred caused the proceeding to be fundamentally unfair.

4. The decision of Kankakee County was against the manifest weight of the evidence with respect to Criteria (i), (ii), (iii), (v), (vi), (vii), and (viii) of Section 39.2 of the Act

Petitioner Watson addressed Criteria (i), (ii), (iii), (v), (vi), (vii), and (viii) in his opening brief and Respondents submit argument contesting Watson's argument on each of these Criteria, which is addressed, per Criterion, below.

(a) Criterion (i) Was Against the Manifest Weight of the Evidence

The basic premise of Petitioner Watson's argument on Criterion 1 is that WMII did not provide sufficient, clear evidence to establish a prima facie showing that a 30 million ton expansion of the Kankakee Landfill was necessary and, in fact, the evidence presented by WMII was inconsistent (overestimating generation and underestimating capacity), speculative, and biased, such that the Kankakee County Board's was against the manifest weight of the evidence. WMII and Kankakee County respond to Watson's argument by contesting the generation and capacity calculations, in particular the capacity of Spoon Ridge, and minimizing the insufficiency of WMII's burden to prove the need for the **30 million tons capacity**, as opposed to some lesser figure, it seeks, by characterizing, without any law to support the theory that the numeric testimony concerning "need" is "methodology" and, thus, credibility. The Respondents' arguments must fail. In American Bottom Conservancy, the IPCB acknowledged that "necessary" means a "degree of requirement or essentiality" and not just that a landfill be

"reasonably convenient." Sierra Club v. City of Wood River, PCB 98-43, slip op. at 4 (Jan. 8, 1998), *citing* Waste Management of Illinois v. PCB, 122 Ill. App. 3d 639, 461 N.E.2d at 546. The IPCB went on to cite that the Illinois Appellate Court Second District adopted this construction of "necessary," adding that the applicant *must demonstrate both an urgent need for, and the reasonable convenience of, the new facility.* Waste Management of Illinois v. PCB, 175 Ill. App. 3d 1023, 1031, 530 N.E.3d 682, 689 (2nd Dist. 1988); A.R.F. Landfill, 174 Ill. App. 3d at 91, 528 N.E.2d at 396; Waste Management of Illinois v. PCB, 123 Ill. App. 3d 1075, 1084, 463 N.E.2d 969, 976 (2nd Dist. 1984) (emphasis added). Thus, the numeric items at issue are not merely credibility factors, they are the basis for the need analysis which, if it has not demonstrated both an urgent need and reasonable convenience for the proposed 30 million ton expansion, should be found to be against the manifest weight of the evidence.

As respects Spoon Ridge, the main thrust of the Respondent's argument appears to be that Smith did not waiver in maintaining unavailability of this capacity, even though this landfill is fully permitted. Thus, Respondents seek to revise the standing law that permitted facilities must be included in capacity analysis, by creating an exception for, apparently, "economic viability." First, the economic argument, although it can be considered, should not be controlling. American Bottom Conservancy, PCB 00-200 at 59. Second, Respondents argue that Smith did not testify that Spoon Ridge was not being used for economic reasons, however, the transcript (11/20/02 6:00 pm Tr. 68-71) shows otherwise. In particular, after a serious of questions and answers concerning why Spoon Ridge was not operating, the exchange ended with:

Q: And Spoon Ridge is an existing permanent alternate location that isn't even being used because it's not profitable?

A: **[Smith]** Correct.

(11/20/02 6:00 pm Tr. 71).

Thus, even if the numbers are re-adjusted to account for WMII's asserted Watson mathematical errors and Watson's asserted mathematical errors, or, taking it a step further, *in arguendo*, no generation numbers are adjusted and take Smith's for what they state, and the minimum additional capacity considered, which was not considered by Smith is Spoon Ridge, WMII still fails to prove a need for 30 million tons of capacity (even looking as far out as 2030).[12] Therefore, the Kankakee County decision should be reversed as it is against the manifest weight of the evidence.

(b) Criterion (ii) Was Against the Manifest Weight of the Evidence

The thrust of the Respondents argument is that the points raised by Watson in his brief are inaccurate. Watson disagrees with this assertion and states that the record cited by Watson in support of the failures of WMII to provide Criterion (ii) speaks for itself. For example, the testimony of Mr. Nickodem is clear that he did not consider the proposed location of the expansion in his design, or, at a minimum failed to present any evidence concerning location standards during his testimony or in the application, since it was "not required" in his view, by the local siting ordinance. (11/22/02 1:30pm Tr. 12-13). While a local government may expand on documentation required in its local ordinance for siting, can it minimize and exclude that information, thereby limiting the public review of the location issues? Under WMII's theory it can; under Watson's it cannot.

Another example of heightened concern is Mr. Nickodem's failure to consider downstream water intakes. The Respondents argue that Nickodem was not given an opportunity

to look up the information and respond to the question, however, that is not the case, as, when he resumed his testimony (after a weekend break), he testified he looked into that question and concluded that the supply was located upstream of the proposed expansion. (11/25/02 9:00 am Tr. 4-5).

Finally, Watson joins in Petitioner Karlock's reply brief concerning Criterion 2. Therefore, the IPCB should find that Kankakee County's decision was against the manifest weight of the evidence.

(c) ***Criterion (iii) Was Against the Manifest Weight of the Evidence***

Petitioner Watson's reply to arguments raised by Respondents concerning Kankakee County's decision on Criterion 3 being against the manifest weight of the evidence are addressed in Section 2(b) of this brief, above, and, therefore, will not be repeated in this Section.

(d) ***Criterion (v) Was Against the Manifest Weight of the Evidence***

Respondents assert the same types of arguments in response to Criterion (v) as they did in response to Criterion (ii) and, as in Criterion (ii), Watson submits that the record speaks for itself. For example, although Nickodem describes the fact that a landfill operator is required, by law, to respond to landfill gas in excess of the lower explosive limit, he admits there is no plan for such response in the application:

Q: Do you have any plan included in this application for the event that one of those monitoring wells does collect a sample that is five percent of the LEL?

A: **[Nickodem]** I don't know if there is any specific plan. I mean that is something you address with IEPA when that comes up. . .

(11/22/02 1:30pm Tr. 59).

[12] Smith's generation number of 186,367,304 – (Smith's capacity number of 89,433,450 + 39,500,000 for Spoon

For a concern as fundamental and dangerous if it occurs as landfill gas migration, should there not be a plan rather than a "wait until it becomes an issue" approach? In fact, the application does not contain a plan to address the situation in which gas is found in excess of five percent of the lower explosive limit in a monitoring well.

Therefore, based on the record in this case, the IPCB should find that Kankakee County's decision is against the manifest weight of the evidence.

(e) ***Criterion (vi) Was Against the Manifest Weight of the Evidence***

Again, the trust of Respondents' arguments concerning Criterion (vi) is that Watson presents no data showing a lack of minimization of impact on traffic, in an apparent attempt to argue that the manifest weight standard cannot be met if the evidence itself, as presented by the applicant is not sufficient. This simply is neither the law nor the circumstances of this case. If an applicant does not meet its burden of proof, and the decision of the local government based on the evidence presented by the applicant is against the manifest weight of the evidence, then that decision must be reversed. The Respondents' "smoke and mirrors" type arguments with the data is insufficient to rebut the fact that there is simply insufficient evidence submitted by WMII to uphold Kankakee County's decision.[13] Therefore, the IPCB should find that Kankakee County's decision was against the manifest weight of the evidence.

Ridge) = 20,657,746 shortfall.

[13] The County's assertion that performing the traffic count in the winter when two activities producing an increase in traffic in the area (fair grounds and farming) is just as representative of traffic conditions as if the count was performed in the summer (*i.e.,* its "reversal" argument) is seriously flawed. How can taking a count at a high period of activity in traffic be less or as representative as taking it during the low period in traffic. That's like saying an applicant can take off-street peak hour counts only and not consider street-peaks (*i.e.,* high periods of traffic) and satisfy its evidentiary burden. Likewise, the County's assertion that the 7,000 ton per day figure is not in evidence is flawed. Per words taken from WMII's own brief (p. 3), the expansion will receive **no more than** 7,000 tons and there is no limitation preventing WMII from taking 7,000 tons per day. Thus, is it not necessary to provide data in an application to support a Criterion (vi) finding at tonnage above 4,000 up to 7,000 tons per day? WMII fails to provide ***any*** evidence that in support of this Criterion at any tonnage above 4,000 tons.

(f) Criterion (vii) Was Against the Manifest Weight of the Evidence

Kankakee County argues that this Criterion applies only if the proposed facility is going to "accept" hazardous waste and, therefore it was inapplicable. WMII argues that there is no evidence to support that leachate from the existing facility is hazardous and, even if it were, there is no evidence that it would be treated, stored or disposed of at the expansion. The Criterion specifically provides: "if the facility will be treating, storing or disposing of hazardous waste. . ." and there is no condition of "acceptance" of hazardous waste as Kankakee County argues. Therefore, Kankakee County's argument should fail. To hold otherwise would mean that a new pollution control facility that generates hazardous waste and stores it on-site is not subject to this Criterion, which is neither fitting with the language of the Criterion nor logical.

WMII on the other hand, is correct (and it was never asserted by Watson to the contrary) that there is no evidence that the existing facility's leachate is hazardous, but, likewise, there is no evidence it is ***not*** hazardous. Isn't it the applicant's burden to show the inapplicability of the condition? The only testimony on this issue is inconclusive, as the witness (Nickodem) did not know, and the only other "evidence" is the conclusory assertion (with no specificity if this leachate issue was even reviewed) that this Criterion is not applicable. Further, the application shows that all the leachate (existing and new) will be stored in the same location on the site, albeit, apparently, in separate tanks. (*See, e.g.,* Drawing 4). Thus, based on insufficiency of evidence, the IPCB should find that Kankakee County's decision was against the manifest weight of the evidence.

(g) Criterion (viii) Was Against the Manifest Weight of the Evidence

The crux of the argument between the parties on Criterion 8 appears to be whether consistency means an applicant does not have to comply with the Solid Waste Management Plan (SWMP). WMII cites as legal support for the proposition that an applicant can not comply, yet still be consistent with the SWMP, City of Geneva v. Waste Management of Illinois, Inc., PCB 94-58 (July 21, 1994), yet City of Geneva, stands for a much more narrow proposition, namely that: "There is no requirement in Section 39.2(a)(8) that the SWMP be followed to the letter. It is within the County's purview to determine "consistency" on a specific circumstance as raised herein; it is the County who is responsible for drafting the plan. So long as the approval is not inapposite of the SWMP, (e.g., the SWMP calls for closure, and the siting decision expands the landfill for an additional 20 years) determining consistency is within the realm of the County's decision-making power under Illinois' landfill siting law." City of Geneva, PCB 94-58 at 48-49.

Unlike City of Geneva, where it was five verses approximately 9 years of landfill activity at issue, in this case WMII's proposal is inconsistent and fails to comply, and simply fails to address with ***any evidence*** significant requirements of the SWMP. Respondents' attempts to diminish the importance of these requirements, such as the requirement "[t]he protection of groundwater is one of the primary concerns in siting a landfill. . .[and a] . . .site should not be located above or near a groundwater recharge zone or a heavily utilized water supply aquifer" must fail when the only testimony or evidence on this issue shows that WMII has not complied with the requirement. Therefore, the IPCB should find that Kankakee County's decision is against the manifest weight of the evidence.

5. If the Illinois Pollution Control Board (IPCB) finds that Kankakee County's decision stands, then this matter should be scheduled for further discovery and hearing before the IPCB, due to certain rulings during the course of this proceeding that prejudiced the Petitioners and hindered their ability to develop a record for this appeal

Only Kankakee County responds to the portion of Watson's brief which raising this issue. Kankakee County argues that Watson is entitled to "minimal" standards of due process and that he has not shown prejudice, however, Kankakee County's application of "minimal" due process is not explained and its argument of failure to show prejudice is incorrect, thus its arguments must fail. Watson has asserted prejudice from those ruling specified in his opening brief (Watson Bf. p. 49-50): since the majority of the rulings concern barring depositions and certain discovery, the prejudice suffered is not having access to that information in the discovery portion of this proceeding. This is clearly stated in Watson's brief (p. 50), when it is stated that the Petitioners were: ". . . prejudiced in their ability to obtain evidence related to and in support of the fundamental fairness issues raised in their Petition's before the IPCB for review."

Supreme Court Rule 201(b)(1) and the objective of discovery as a mechanism which allows parties to better prepare for trial, seek the truth of a matter, eliminate surprise, and promote expeditious and final determination of controversies. IL S.Ct. Rule 201(b)(1); and D.C. v. S.A., et al., 178 Ill. 2d 551; 687 N.E.2d 1032, 1037 (S.Ct. 1997). Starting with those rulings concerning discovery and following those rulings barring admission of evidence, this case is like in any case where a ruling is made against a party barring that party from obtaining information during discovery or preventing that party from presenting evidence, that party has a right to seek review of that ruling and the prevention from it either obtaining the discovery or presenting evidence (whichever the argument may be). Thus, the County's

arguments should fail and the IPCB, if it decides to uphold Kankakee County's decision, should review the specified rulings and return this case for additional discovery and hearing, to correct the prejudice caused by barring the Petitioners from obtaining evidence through the discovery.

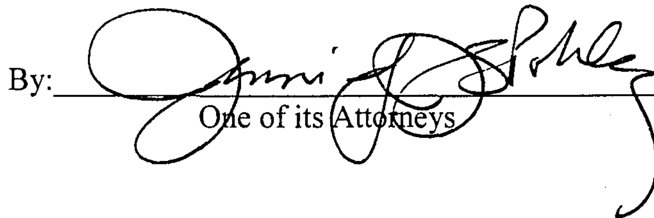
CONCLUSION

WHEREFORE, Michael Watson respectfully requests the Illinois Pollution Control Board to vacate the decision of the Kankakee County Board approving the Application of Waste Management of Illinois, Inc. Alternatively, Michael Watson respectfully requests that the Illinois Pollution Control Board remand the decision of the Kankakee County Board for further hearings and proceedings, to cure the fundamental unfairness of the subject decision and hearings.

Dated: July 3, 2003

Respectfully Submitted,

PETITIONER MICHAEL WATSON



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