BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITY OF KANKAKEE, Petitioner, vs. COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC. Respondents.	)	PCB 03-125 (Third-Party Pollution Control Facility Siting Appeal)
MERLIN KARLOCK, Petitioner, vs. COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC. Respondents.	)	PCB 03-133 (Third-Party Pollution Control Facility Siting Appeal)
MICHAEL WATSON, Petitioner, vs. COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC. Respondents.	)	PCB 03-134 (Third-Party Pollution Control Facility Siting Appeal)
KEITH RUNYON, Petitioner, vs. COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC. Respondents.	)	PCB 03-135 (Third-Party Pollution Control Facility Siting Appeal)

REPLY BRIEF OF PETITIONER MERLIN KARLOCK

INTRODUCTION

Little reply is necessary to the Briefs filed by Waste Management and the County. The Board is urged to review the record to determine whose arguments and whose assertions of facts are supported by the evidence. The County, in its Brief, makes much of the fact that different

arguments have been made by various attorneys for various parties in different cases. This is nothing more than a diversion since the arguments in the Briefs ought to be judged on their merit, and not on their consistency with arguments made by the same attorneys in other cases. For example, footnote 9 on page 50 of the County's Brief is particularly troubling as it introduces matters outside the record in an attempt to undermine the credibility of Petitioner Karlock's attorney. Such unwarranted attacks can only be construed as a tacit admission that the arguments, themselves, cannot be undermined.

THE COUNTY LACKED JURISDICTION TO CONDUCT THE SITING PROCEEDING DUE TO A FAILURE TO GIVE REQUIRED JURISDICTIONAL NOTICES

The County's Brief glosses over the failure to give required notice to Brenda Keller. Waste Management's Brief treats the issue in detail, but misses the crucial points which lead to the inescapable conclusion that required notice was not given. Waste Management initially and erroneously states that certified mail notice was attempted on both Robert and Brenda Keller (Waste Management Brief, Page 11). The Brief subsequently corrects the point acknowledging that certified mail notice was never attempted on Brenda Keller. (Waste Management Brief, Pages 13, 22).

Waste Management now argues that regular mail service on Brenda Keller is sufficient to satisfy the jurisdictional requirements of the statute. This is not the language of Section 39.2 of the Act, nor is it the law in any reported case of the Board or the Appellate Courts. Waste Management alternatively argues that posted service is sufficient to satisfy the notice requirement, and cites in support of this argument the United States Supreme Court case of Greene v. Lindsey, 456 U.S. 444 (1982). Not only does this case deal with the limited issue of

notices involving continued possession by the owner of the property on which the notice is posted, but the Court in Greene found the posted notice to actually be insufficient. That leaves the Board with the existing law that posted notice is not authorized in Section 39.2 of the Act, nor in any case construing those notice requirements.

Waste Management next argues that this Board should conclude that Brenda Keller was somehow avoiding service of notice. While the legal effect of the avoidance of service by a property owner has not been clearly decided by this Board, the line of Board decisions cited in the Waste Management Brief suggesting that under certain circumstances the notice requirement of the statute may be excused, seems to have been effectively overruled in Ogle County Board v. Pollution Control Board, 272 Ill.App.3d 184, 649 N.E.2d 545 (2nd Dist. 1995), which decision seems to much more strictly construe the notice requirement. More importantly, however, there is no evidence that Brenda Keller was avoiding service of notice, or that she was otherwise unavailable to be served. In fact, the evidence is to the contrary as Brenda Keller acknowledged accepting certified mail notice when the March, 2002 notice on the first Waste Management application was mailed to her. The only evidence Waste Management has to support its position is the uncorroborated testimony of its process server that during one service attempt a woman who was admittedly not Brenda Keller declined to accept notice on Mrs. Keller's behalf. This evidence, alone, does not support the inferences which the Applicant asks the Board to draw.

Lastly, Waste Management's reliance on People ex rel. $30,700 U.S. Currency, 1999 Ill.2d 142, 766 N.E.2d 1084 (2002), for the proposition that certified mail notice is complete upon mailing is inapplicable to Mrs. Keller as the record is undisputed that no such certified mail notice was ever attempted on Mrs. Keller.

It is interesting to note that neither the County nor Waste deny Waste Management's failure to serve Brenda Keller with the required statutory notice. They make numerous excuses for non-service and argue that the Board should accept service alternatives not set forth in the statute or approved by the courts. Finally, Waste Management argues that Brenda Keller did have notice because she knew Petitioner Watson and was aware of the proceedings. In this argument, Waste Management mistakenly misconstrues knowledge with notice. The Court rejected such a misconstruction in the Ogle County case, pointing out that failure to satisfy the mandatory service of notice requirement is an argument available to all potential objectors so that even waiver of service of notice is not legally possible.

THE UNAVAILABILITY OF THE REQUIRED IEPA DOCUMENTS CREATES A PRESUMPTION OF UNFAIRNESS

Initially Waste Management argues that the siting application was for expansion of an existing facility and since there were no documents on file with the IEPA related to the expansion, the documents on file with the IEPA related to the existing facility were not required to be included with the application. To the extent that the existing facility is included within the boundaries of the new proposed expanded facility, this argument is a clear attempt to avoid the requirement of Section 39.2(c) of the Act which requires that the request for siting approval "shall include (i) the substance of the applicant's proposal and (ii) all documents, if any submitted as of that date to the Agency pertaining to the proposed facility ..." (415 ILCS 5/39.2(c)). The question also has been settled against the applicant in Tate v. Pollution Control Board, 188 Ill.App.3d. 994, 554 N.E.2d 1176 (4th Dist. 1989). Interestingly, Waste Management in an apparent abandonment of its initial argument that the IEPA record was not required to be

filed, cites the Tate decision for the proposition that the Section 39.2(c) filing requirements are procedural rather than jurisdictional. (Waste Management Brief, Page 24). In fact, the Court in Tate stated, "This court need not consider whether subsection (c) of Section 39.2 is jurisdictional." (Tate at 136 Ill. Dec 416). To the extent that the Act specifies that an applicant "shall file," it is submitted this unresolved legal question should be settled in favor of Petitioners since the word "shall" is mandatory.

Both the County and Waste Management devote considerable time to the discussion in the Tate decision that an applicant's failure to include with an application documents readily available from other sources such as the IEPA does not necessarily render siting proceedings fundamentally unfair. What both parties miss in the discussion is that these are precisely the documents which the Court in Tate found to not be a required part of the filing due to the fact that an earlier version of Section 39.2(c) of the Act did not explicitly require them. This is not the same as saying that the unavailability of documents required to be filed is not necessarily fundamentally unfair. This Board held in American Bottom Conservancy, PCB 00-200 (October 19, 2000), a case in which Waste Management was coincidentally the offending party, that the unavailability of the application to the public created a presumption of prejudice. Since Waste Management's prior filings to the IEPA in connection with the existing facility were required to be filed pursuant to Section 39.2(c), those filings are most appropriately treated as part of the application.

Both parties assert that the IEPA filings were available at various local libraries, but this assertion does not rebut the testimony of Charles Norris that in the library he checked the filings were not complete in that the microfiche was not included. Moreover, the statute would suggest that these filings are to be available at the County along with the application, and the evidence is

language of the County's Solid Waste Plan Amendments enacted in close proximity to the filing of Waste Management's application, which Amendments evidence the explicit desire of the County to approve the Waste Management expansion. Petitioner Karlock here reiterates and adopts the arguments made by Petitioners Watson and the City of Kankakee regarding ex parte contacts and all the other indicia of prejudgment by the County in this case. The cumulative effect of the Plan Amendments, the ex parte contacts, the County and Waste Management working together to oppose Town & Country, and the County's disregard of its own siting ordinance requirements has to be considered. All of these irregularities, taken as a whole, can support no other conclusion but that the hearings were fundamentally unfair.

THE COUNTY'S DECISION THAT THE PROPOSED FACILITY WAS SO DESIGNED, LOCATED AND PROPOSED TO BE OPERATED SO THAT THE PUBLIC HEALTH, SAFETY AND WELFARE WILL BE PROTECTED IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

The fact that both the County and Waste Management defend Waste's characterization of the existing site should not be construed to mean that the site is safe. Waste Management argues that Petitioner Karlock's Brief, which points out at least four boring locations where there is at most three feet of clay between the aquifer and the bottom liner grade, is selective. Of course it is selective since the facility cannot perform any better than its weakest component. The undisputed fact remains that the amount of clay separating the aquifer from the bottom liner grade is minimal at a number of locations. (Siting Hearing Transcript, Volume 20, Pages 85, 95, 96). The Waste Management Brief acknowledges its chief engineer's assumption that the "least amount" of in situ clay that he believed was beneath the bottom of the liner was eight feet, but attempts to explain this by saying that he and Ms. Underwood were talking about different

thickness of in situ material and not the same thickness. (Waste Management Brief, Page 45). This entirely misses the argument that the facility designer was working under a completely erroneous assumption and thereby throws the integrity of the design completely into doubt.

In addition, Waste Management defends their hydrogeologist's use of vertical permeability results for the in situ clay based on laboratory tests of small intact samples because the glacial materials are laid down horizontally. (Waste Management Brief, Page 43). This serves as justification for Waste's hydrogeologist, Ms. Underwood, ignoring the slug test results in the glacial materials which showed horizontal permeabilities up to 3000 times higher than the laboratory test permeabilities. Even if this Board chooses to disregard Mr. Norris' testimony that field scale slug tests are a better measure of permeability because they encompass secondary permeability from fractures as well as the matrix permeability of intact material, even Ms. Underwood acknowledged that in glacial materials of this type, horizontal permeabilities would typically only be ten times higher than vertical permeabilities. (Siting Hearing Transcript, Volume 19, Page 124). Therefore, Waste's use of permeabilities for the clay in its model 1000 to 3000 times lower than the slug test results is unreasonable.

Likewise, neither Waste Management nor the County have an answer to the undisputed fact that Waste Management's groundwater impact evaluation modeled a sixteen foot thickness of clay between the bottom of the liner and the aquifer. Yes, sixteen feet is an average thickness, but that is simply not an appropriate parameter to use when modeling to determine the likelihood of facility failure. On average the facility may not leak, but in those places where the underlying clay is almost nonexistent, the average situation is not at all relevant.

Another inappropriate use of averaging by Ms. Underwood occurred when she averaged the permeability of the recompacted clay liner with the permeability of the plastic liner. The

argument that this entirely disregards the fact that the permeability of the plastic liner is 1.0 wherever that liner is compromised remains unrebutted.

Waste Management attempts to distinguish its characterization of the silurian dolomite from that of Town & Country found wanting by this Board in PCB 03-31. Waste Management correctly points out that they did more soil borings and tests than Town & Country to correctly ascertain the nature of the silurian dolomite. They state that this resulted in them referring to the entire thickness of the dolomite as being an aquifer unlike Town & Country, which only characterized the upper weathered portion of the dolomite as an aquifer. However, this contradicts all prior characterizations of the dolomite by Waste Management at the existing facility, wherein only the upper ten feet was treated as an aquifer.

Ms. Underwood testified for Waste Management that she considered the upper ten feet of the dolomite as an aquifer only for modeling purposes, but therein lies the crucial similarity between Waste Management's understanding of the site and Town & Country's previous understanding. Waste acknowledges a downward gradient within the aquifer (Waste Management Brief, Page 50), but proposes to monitor only the upper fifteen feet of the dolomite. (Waste Management Brief, Page 50). Thereby, Waste Management falls directly within the holding of this Board in the Town & Country case when it stated, "because Town & Country assumed the competent dolomite bedrock to be an aquitard, the modeling and groundwater impact evaluation failed to measure vertical flow of contaminants into the silurian dolomite aquifer." (PCB 03-31, January 9, 2003, Slip Opinion at 27).

THE COUNTY'S FINDING THAT THE PROPOSED FACILITY WAS CONSISTENT WITH ITS SOLID WASTE MANAGEMENT PLAN IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

Waste Management argues in its Brief that an applicant need only comply with the spirit or intent of a Solid Waste Management Plan. Such a requirement is so vague that no meaningful evidentiary hearing could then take place. In citing to the Town & Country case in support of its argument, Waste Management misconstrues the impossibility of complying with a vague plan with the illegality of vague compliance with a specific plan. Waste Management's similar contention that only substantial compliance with the solid waste plan is required was recently rejected by this Board. Waste Management of Illinois vs. County Board of Kane County, (PCB 03-104 June 19, 2003). In this case, the various specific instances of factual non-compliance clearly found in the record and unrebutted by Waste Management and the County can only lead to the conclusion that the County's decision on this criterion was against the manifest weight of the evidence.

CONCLUSION

For the foregoing reasons, Petitioner Merlin Karlock respectfully prays that the decision of the Kankakee County Board granting siting approval be reversed.

Respectfully Submitted,
Merlin Karlock, Petitioner

BY: George Mueller
His Attorney

GEORGE MUELLER, P.C.
Attorney at Law
501 State Street
Ottawa, IL 61350
Phone: (815) 433-4705
Fax: (815) 433-4913