

BEFORE THE
THE ILLINOIS POLLUTION CONTROL BOARD

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JAN 27 2004

STATE OF ILLINOIS
Pollution Control Board

BYRON SANDBERG,
Petitioner,

vs.

THE CITY OF KANKAKEE, ILLINOIS
CITY COUNCIL, TOWN & COUNTRY
UTILITIES, INC., and KANKAKEE
REGIONAL LANDFILL, L.L.C.
Respondents.

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) PCB 04-33
) (Third Party Pollution Control
) Facility Siting Appeal)
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WASTE MANAGEMENT OF ILLINOIS
INC.,
Petitioner,

vs.

THE CITY OF KANKAKEE, ILLINOIS
CITY COUNCIL, TOWN & COUNTRY
UTILITIES, INC., and KANKAKEE
REGIONAL LANDFILL, L.L.C.,
Respondents.

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) PCB 04-34
) (Third Party Pollution Control
) Facility Siting Appeal)
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COUNTY OF KANKAKEE, ILLINOIS,
and EDWARD D. SMITH, KANKAKEE
COUNTY STATE'S ATTORNEY,
Petitioners,

vs.

THE CITY OF KANKAKEE, ILLINOIS
CITY COUNCIL, TOWN & COUNTRY
UTILITIES, INC., and KANKAKEE
REGIONAL LANDFILL, L.L.C.,
Respondents.

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) PCB 04-35
) (Third Party Pollution Control
) Facility Siting Appeal)
) (Consolidated)
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**RESPONSE OF TOWN & COUNTRY TO KANKAKEE COUNTY'S MOTION
TO SUPPLEMENT THE RECORD**

Now come the Respondents, Kankakee Regional Landfill, L.L.C. and Town &
Country Utilities, Inc. (hereinafter "Town & Country") by their attorney, George

Mueller, P.C., and for their Response to the Motion of Kankakee County to supplement the record herein state as follows:

1. The County seeks the unprecedented relief of supplementing the record herein by including the testimony of a witness from a different case with different parties for the reason that the testimony of this witness is allegedly corroborative of some testimony offered by the County in the instant case.
2. Town & Country is not a party in the case from which testimony is sought to be admitted, and the witness whose testimony is sought to be included did not testify in the instant case. The County sits as the decision maker in the case from which testimony is sought to be admitted (the Waste Management siting case).
3. The County has previously argued in its Brief, without citing any legal or regulatory authority, that Town & Country's failure to include sensitivity analyses (which are nothing more than variations of the baseline groundwater impact model) in a siting application renders that application so incomplete that the local decision maker loses jurisdiction to even consider the application. Town & Country has responded in its Brief that there are no rules, precedents, or even guidelines suggesting that any groundwater modeling be part of an application for local siting approval. Town & Country has further responded that the County's argument is factually incorrect in that the two Town & Country siting applications actually contain five variations of its groundwater model.

4. The County has also argued in its Brief that the City approving a siting application which does not contain multiple sensitivity analyses renders that decision against the manifest weight of the evidence. Town & Country has responded that, in addition to the argument being unsupported by the facts, the County's prior approval of a hydrogeologically similar landfill expansion described in a Waste Management siting application which contained only a single baseline groundwater model suggests that the County is advancing its argument in bad faith.
5. Town & Country believes that the summary of the testimony sought to be added to this record is neither correct, complete, nor in context, but the accuracy of the factual assertions in the County's Motion is not material to how this Board should dispose of that Motion.
6. In considering whether the decision of the Kankakee City Council on the substantive siting criteria is against the manifest weight of the evidence, the Board is confined to reviewing the record of the siting proceedings held before the City Council. The County Motion to supplement the record, just like their Reply Brief in this case, overtly seeks to have the Board make its own independent determination of the credibility of the witnesses when, as a matter of law, that determination is the exclusive responsibility of the local decision maker, and the Board is specifically precluded from re-weighing that credibility determination. *Waste Management of Illinois, Inc. vs. Pollution Control Board*, 160 Ill.App.3d 434, 513 N.E.2d 592 (2nd Dist. 1987). See

also Fairview Area Citizens Task Force vs. Illinois Pollution Control Board, 198 Ill.App.3d 541, 555 N.E.2d 1178 (3rd Dist. 1990), File vs. D&L Landfill, Inc., 219 Ill.App.3d 897, 579 N.E.2d 1228 (5th Dist. 1991).

7. The County points out in its Motion, in an apparent attempt to embarrass counsel for Town & Country, that he presented the witness whose testimony they seek to add to this record. The fact that attorneys represent different clients in different cases, and sometimes advocate different positions on their respective behalf, is neither surprising nor relevant. This case is about the issues, not the lawyers.
8. There is no basis anywhere in the law for supplementing a record on review for the purpose of bolstering the testimony of a witness with the testimony of an unrelated witness from an unrelated proceeding. This is so manifestly obvious that one has to question whether the County's Motion is brought for any purpose other than to prejudice Town & Country and the City of Kankakee.

WHEREFORE, for the foregoing reasons, Town & Country prays that this Board deny the Motion of the County of Kankakee to supplement the record.

Respectfully Submitted,
Kankakee County Landfill, L.L.C. and
Town & Country Utilities, Inc.

BY: George Mueller
Their Attorney

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