ILLINOIS POLLUTION CONTROL BOARD
August 3, 2004

WASTE MANAGEMENT OF ILLINOIS, INC.,	)	
Petitioner,	)	
v.	)	PCB 04-186 (Pollution Control Facility Siting Appeal)
COUNTY BOARD OF KANKAKEE COUNTY,	)	
Respondent.	)	

HEARING OFFICER ORDER

This order memorializes in writing the oral denial of the fax-filed August 2, 2004 motion to quash subpoenas for the depositions of Frank and Brenda Keller, to be taken by counsel for Waste Management of Illinois, Inc. The Kellers depositions were scheduled, respectively, for 1:00 p.m. and 2:30 p.m., August 2, 2004 in Kankakee. This order also relates the arguments leading up to the hearing officer's ruling made at a conference call held between counsel for Waste Management, Inc., the Kellers, and the undersigned hearing officer between 12:20 p.m. and 1:15 p.m. on August 2, 2004.

BACKGROUND

While hearing officer orders do not ordinarily contain a description of the past history of a proceeding, this background is set out here to contextualize and abbreviate the later description of the premises of this motion and the arguments concerning it.

The siting approval process before the County and the appeal before the Board are governed by, respectively, Sections 39.2 and 40.1 of the Environmental Protection Act (Act) (415 ILCS 5/39.2 and 40.1 (2002)). The Board opened this docket on April 22, 2004, upon receipt of the petition for review of Waste Management of Illinois, Inc. (WMII). WMII appeals the March 17, 2003 denial of siting approval by the County Board of Kankakee County for WMII's September 26, 2003 application for expansion of the existing Kankakee County landfill. WMII sought approval to expand around its existing 179-acre site, to result in an expanded site covering 664 acres, with a 302-acre disposal site. WMII challenges the fundamental fairness of the proceeding, and also contends that the County's finding that criteria 1, 3, and 6 of Section 39.2 had not been met was against manifest weight of the evidence.

The Board has 180 days from the filing of the petition to allow the parties to conduct discovery, and the Board to conduct a public hearing, receive briefs, conduct its deliberations, and issue a written opinion and order. Only the party who has applied for siting, here WMII, can waive the decision deadline. The current decision deadline is November 19, 2004, as a result of WMII waivers.

This is the second appeal before the Board of a County decision concerning WMII's application for siting approval for this same proposed expansion. City of Kankakee v. County of Kankakee, Kankakee County Board and Waste Management of Illinois, Inc.; Merlin Karlock v. County of Kankakee, Kankakee County Board and Waste Management of Illinois; Michael Watson v. County Board of Kankakee County, Illinois and Waste Management of Illinois, Inc.; Keith Runyon v. County of Kankakee, Kankakee County Board, and Waste Management of Illinois, Inc., PCB 03-125, PCB 03-133, PCB 03-134, PCB 03-135 (cons.) (Aug. 7, 2003), *appeal pending sub. nom.* Waste Management of Illinois, Inc. v. PCB, County of Kankakee, County Board of Kankakee, City of Kankakee, Merlin Karlock, and Keith Runyon, No. 3-03-0924 (Third Dist.).

On January 31, 2003, the Kankakee County Board reached a decision granting site location approval, with conditions, to Waste Management of Illinois, Inc. for a "regional pollution control facility". The County of Kankakee as well as Michael Watson, owner of United Disposal Systems (a competitor to Waste Management), and two individual citizens (Merlin Karlock and Keith Runyon) each filed separate appeals of the same County decision. The various appeals argued that the County lacked jurisdiction to decide siting (raised by all petitioners save Runyon), that the County proceedings were fundamentally unfair, and that the County decision finding that the statutory siting criteria had been met was against the manifest weight of the evidence.

In its August 7, 2003 opinion and order, the Board determined that the County lacked jurisdiction to decide the application because Waste Management had improperly failed to notify all landowners as required by Section 39.2 (b) of the Environmental Protection Act. 415 ILCS 5/39.2(b)) (2002). The Board found that, although Robert Keller had been properly served, Brenda Keller had not been properly served. (These persons are the same Robert and Brenda Keller whose depositions was the subject of the August 2, 2004 motion to quash at issue here.) The Board accordingly vacated the County decision without reaching the other issues presented.

(On the same day, in a separate order in a separate case, the Board granted Waste Management's motion to withdraw its appeal of the conditions the County had imposed on its grant of siting approval. *See* Waste Management of Illinois, Inc. v. Kankakee County Board, PCB 04-144 (Aug. 7, 2003).)

THE HANDLING OF THE KELLERS'MOTION TO QUASH

The substance of the motion will be discussed later, in the discussion of the conference call. The facts behind the Board's receipt of the motion follow. At 8:47 a.m. on Monday, August 2, 2004, the office of the Clerk of the Board began to receive a telefaxed filing addressed to the regular hearing officer in this matter, Bradley Halloran. The filing was a motion to quash the subpoenas for Robert and Brenda Keller, signed by Robert B. LaBeau of the firm LaBeau, Dietchweiler, and Associates in Kankakee. The depositions were scheduled to commence on the same day, August 2, 2004 at the Kankakee Administrative Building at 1:00 p.m. and 2:30 p.m., respectively.

The Board's procedural rules provide that telefax filings are accepted only with prior approval of the Clerk or the hearing officer. The Assistant Clerk who received the filing determined that no appearance had previously been filed by this firm on behalf of these individuals. After learning that Mr. Halloran would not be in the office Monday, the Assistant Clerk referred the motion to Senior Attorney Kathleen Crowley. He also told Ms. Crowley that he had received a call from the office of WMII's counsel asking for Mr. Halloran to discuss the motion.

At some time after 10:00 a.m., WMII's counsel Donald Moran called Ms. Crowley and asked if there would be an opportunity to respond to the motion. He stated that he would be taking depositions in this case, and that he would not be available until after noon. He asked that further instructions be left on his voicemail. Ms. Crowley reviewed the motion. Given the nature of the motion's allegations, and the timing of the deposition, she authorized the Assistant Clerk to accept the filing.

Ms. Crowley unsuccessfully attempted to telephone movant's counsel Robert LaBeau at approximately 11:00 a.m. Having been told he was in a meeting, she left a message stating that the Board had received the motion and that she needed to set up a conference call to discuss the motion. When she had not received a phone call from Mr. LaBeau by 11:45 a.m., Ms. Crowley left a message to that effect for Mr. Moran, and asked him to call her.

Shortly before 12:00 noon, Ms. Crowley again attempted to reach Mr. LaBeau, who was not available. Again explaining the situation to a secretary, Ms. Crowley was then connected with Mr. LaBeau's parter, Mr. Michael Dietchweiler. Mr. Deitchweiler explained that he was unfamiliar with the motion to quash or with the Board. Ms. Crowley explained the situation, and stated that she would hear argument from Mr. Moran by telephone, and wanted a member of the movant's firm present if possible. Mr. Deitchweiler stated that he would participate in a conference call anytime after 12:15 p.m. Mr. Moran called Ms. Crowley, who then set up 12:20 p.m. as the time for the call.

THE CONFERENCE CALL

The conference call commenced at 12:20 p.m. and lasted until 1:15 p.m. As a preliminary matter, Mr. Deitchweiler advised the hearing officer and Mr. Moran of the Kellers' filing of a petition for injunction and temporary restraining order against Mr. Moran in the Kankakee County Circuit Court. The case, No. 2004 MR 735, was filed at 11:45 a.m. on August 2, 2004. He explained that the case was premised on some of the allegations of witness harassment related in the motion and supported by the supporting affidavits of the Kellers. Mr. Deitchweiler explained that, while he was unfamiliar with the siting appeal before the Board, that he had worked on the case filed in the Circuit Court, and had not connected the two prior actions prior to his review of the motion to quash.

Mr. Deitchweiler for the Kellers objected to the short notice he had been given of the conference call, and Mr. Moran for WMII objected to the filing of the motion so shortly before the deposition was scheduled to commence. Ms. Crowley overruled both objections. As to issues of timing, the motion to quash itself could have been filed earlier, since the subpoenas had

been issued 13 days before on July 21, 1004. But, given the Board's preference that motions to quash subpoenas be ruled on in advance of the scheduled start time of the deposition, and the nature of the allegations, Ms. Crowley determined that argument on the motion would be heard.

The Substance of the Kellers' Motion and Supporting Arguments

The motion to quash is based on two major premises: (1) that the purpose of the subpoenas was to harass and intimidate the Kellers; and (2) that there was no relevant material that could be discovered, since jurisdiction is not at issue in this case. Mot. at 2. More specifically, the motion asserts that Mr. Keller had already appeared at the appointed place and time for deposition twice, on June 22 and June 23, 2004. As he had twice taken time off from his job at Pickett Stone Company, he argued that he should not be forced to appear again.

The motion also asserted that Mr. Moran, accompanied by a woman, had appeared uninvited at the Keller residence on or about July 20, 2004. Mr. Moran allegedly stated that

> unless they signed and Affidavit or other document be brought with him that Mr. Moran would present proof of perjury of the Kellers . . . but that] if they signed [the document that WMII] would not pursue their alleged perjury. Mot. at 2.

Attached to the motion was the affidavit of Robert Keller, as well as two subpoenas. The first required appearance at 1:00 p.m. on a June date—the date part of the typewritten date of June 22 was crossed out and "23" was inked in. The other subpoena was for August 2 at 1:00 p.m. Also attached to the motion were the affidavit of Brenda Keller, and her August 2 subpoena from WMII.

WMII'S RESPONSE IN OPPOSTION

In response, Mr. Moran explained that the June subpoena should have had a 4:00 p.m. start time, and not a 1:00 p.m. start time. He said it was his understanding that one of the County attorneys had explained that to Mr. Keller, who also suggested that he come back at that time or contact Mr. Moran with questions. Mr. Moran stated that he was told that Mr. Keller said he would not be back later on June 22. Mr. Moran stated that Mr. Keller had not called him, and that he had no idea who may have told Mr. Keller to return on June 23. Mr. Moran denied that he had harassed the Kellers at their home on July 22, 2004, or at any other time, asserting that the Kellers had in fact invited him to their home.

Mr. Moran reminded that the purpose of discovery is to uncover all relevant information and information calculated to lead to relevant information. *See* 35 Ill. Adm. Code101.616 (a). He argued that there were at least two areas of relevant inquiry. The first would be their receipt of notice of this application, despite the Kellers' affidavits asserting that notice was not an issue in this case. Mr. Moran stated that the courts have held that challenges to jurisdiction can be made at any time. He noted that the jurisdictional challenges regarding notice were brought up in the prior case by persons who have sought to intervene here and who would be participating at the Board's hearing and filing *amicus* briefs.

Second, Mr. Moran noted that Mr. Keller had testified before the County in opposition to the second, September 26, 2003 application on appeal here. Mr. Moran also stated that he wished to depose the Kellers on the subject of ex parte contacts between the County Board Members and members of the community. Mr. Moran did not allege that the Kellers themselves had made such contacts. Mr. Moran stated that he had information and belief that an individual living in a trailer on the Kellers property had left the Kellers' phone number as a contact number for persons opposed to the landfill.

THE RULING

In summary, my ruling denies the Keller's motion to quash the subpoenas. For the purposes of discovery, Mr. Moran demonstrated the relevance of an inquiry into possible ex parte contacts, and of a limited inquiry into the Keller's admission that they had received notice. I ordered the rescheduling of the depositions of the Kellers, stating that this written order would follow.

I have given great weight to the fact that Mr. Keller has already taken off from work two days in June. The record is clear that Mr. Keller has been inconvenienced by WMII's time error in the June 22 subpoena. But, it appears that by inquiry to WMII's counsel, Mr. Keller could have avoided further inconvenience. Mr. Keller could have returned later, as suggested by one of the County attorneys. Additionally, the source of any instruction to return for deposition on June 23 was unclear. Again, I made no ruling on any allegations concerning harassment of the Kellers by Mr. Moran on July 20 or any other date.

Mr. Moran requested that the deposition be rescheduled within one week. I did not grant that motion, as the Board has no details as to the exact scope of the relief requested in the Kankakee circuit court. Again, this order is in no way intended to conflict with any order entered by the Kankakee Circuit Court.

In conclusion, the motion to quash subpoenas is denied. These depositions shall be conducted as expeditiously as is practicable, consistent with any order of the Kankakee Circuit Court. The parties are directed to take due care to minimize additional loss of work time by Mr. Keller.

IT IS SO ORDERED.

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