

ILLINOIS POLLUTION CONTROL BOARD
March 5, 2009

WASTE MANAGEMENT OF ILLINOIS,)	
INC., and KENDALL LAND AND CATTLE,)	
LLC,)	
)	
Petitioners,)	
)	
v.)	PCB 09-43
)	(Pollution Control Facility
COUNTY BOARD OF KENDALL COUNTY,))	Siting Appeal)
)	
Respondent.)	

ORDER OF THE BOARD (by A.S. Moore):

Both the Village of Minooka (Minooka) and Kankakee Regional Landfill, LLC (KRL) have filed a motion for leave to file an *amicus curiae* brief in this appeal of the Kendall County Board's determination to deny siting approval for a proposed recycling and disposal facility. Petitioners in this appeal, Waste Management of Illinois, Inc. (WMII) and Kendall Land and Cattle, LLC (KLC) (collectively, petitioners), have objected to those motions and have also moved to strike appearances filed on behalf of Minooka and KRL.

The Board first provides the procedural history of this case before summarizing the arguments made in the various motions and responses. Then Board then discusses those issues before granting Minooka's and KRL's motions for leave to file an *amicus curiae* brief and denying petitioner's motions to strike appearances.

PROCEDURAL HISTORY

On December 24, 2008, petitioners filed a petition asking the Board to review a November 20, 2008, decision of the Kendall County Board (County Board). The County Board's decision concerns petitioners' proposed siting of a pollution control facility known as Willow Run Recycling and Disposal Facility in Kendall County. In an order dated January 8, 2009, the Board accepted the petition for hearing. In the same order, the Board directed the County Board to file the record of its proceedings on or before January 29, 2009. Pursuant to a waiver filed by WMII on February 4, 2009, the statutory deadline for the Board's decision is now August 6, 2009.

On January 22, 2009, during a status conference with the hearing officer, the County Board orally moved for an extension of the deadline to file the record. The hearing officer granted the motion and extended the deadline for filing the record to February 13, 2009.

On February 2, 2009, the County Board filed a motion for extension of time to file motions attacking the sufficiency of the petition. During a status conference with the hearing

officer on February 4, 2009, the hearing officer granted the motion and extended the deadline for filing motions attacking the sufficiency of the petition to February 17, 2009.

On February 9, 2009, Minooka filed a motion for leave to file *amicus* brief. (Minooka Mot.). On the same date, Daniel J. Kramer filed an appearance for Minooka (Minooka App.). On February 13, 2009, KRL filed a motion for leave to file *amicus* brief (KRL Mot.). Accompanying the motion was an appearance by George Mueller on behalf of Fox Moraine, LLC (Fox Moraine).

On February 13, 2009, the County Board filed a motion for extension of time to file the record. In an order dated February 18, 2009, the hearing officer granted the motion and extended the deadline to file the record to February 24, 2009.

On February 17, 2009, the County Board filed a “Notice of Demand for Bill of Particulars.”

On February 20, 2009, petitioners filed their objection to the motion for leave to file *amicus* brief by Minooka (Minooka Obj.). On February 24, 2009, petitioners filed a motion to strike the appearance filed by Minooka (Mot. Strike Minooka). Also on February 24, 2009, petitioners filed their objection to the motion for leave to file *amicus* brief by KRL and motion to strike the appearance of Fox Moraine, LLC (KRL Obj.).

On February 24, 2009, the County Board filed the record on appeal.

On February 25, 2009, the Board received a motion to withdraw the appearance of George Mueller on behalf of Fox Moraine, LLC (Mot. Withdraw) and an appearance by George Mueller on behalf of KRL.

MINOOKA

Motion for Leave to File Amicus Brief]

Minooka states that, on or about June 3, 2008, petitioners filed an application to site a solid waste facility under the Kendall County siting ordinance and the Environmental Protection Act (Act). Minooka Mot. at 1, citing 415 ILCS 5/39 *et seq.* (2006). Minooka further states that the County Board conducted hearings on the application from approximately September 11, 2008, until October 1, 2008. Minooka Mot. at 1. Minooka further states that, on or about November 20, 2008, the County Board adopted a resolution denying petitioners’ application. *Id.*

Minooka argues that it “participated as an objector to the Siting Application by appearing and participating through the cross-examination of the Applicant’s experts and presenting their own experts for Criterion 2 and 3.” Minooka Mot. at 1; *see* 415 ILCS 5/39.2(a)(ii), (a)(iii) (2006). Specifically, Minooka claims that it offered testimony that the application did not meet the burden of demonstrating “that the facility was so designed, located, and proposed to be operated that the public health, safety and welfare were protected.” Minooka Mot. at 1-2; *see* 415 ILCS 5/39.2(a)(ii) (2006). Minooka also claims that it offered testimony that the application

“completely and utterly failed to minimize the effect of the facility on the value of the surrounding area. . . .” Minooka Mot. at 2; *see* 415 ILCS 5/39.2(a)(iii) (2006).

Minooka states that its boundary extends to within two miles of the proposed site. Minooka Mot. at 2. Minooka further states that the proposed site is adjacent to areas within its approved comprehensive plan. *Id.* Minooka claims that the proposed facility will affect its municipal services including water service. *Id.* Minooka suggests that the application’s failure to meet criterion (iii) will affect the value of property in Minooka. *Id.*

Minooka concludes by requesting that the Board grant it leave to file an *amicus* brief and add Minooka to the Service List in this proceeding. Minooka Mot. at 2, citing 35 Ill. Adm. Code 101.110(c).

Petitioners’ Objection to Motion for Leave

Petitioners note that the County Board on November 20, 2008, denied their application for site location approval based on findings that application had not met statutory criteria (ii) and (iii). Minooka Obj. at 1-2; *see* 415 ILCS 5/39.2(a)(ii), (a)(iii) (2006). Petitioners state that their petition “challenges the denial on the grounds that the decision was fundamentally unfair and against the manifest weight of the evidence.” Minooka Obj. at 2. Petitioner note the filing of appearances indicating that the County Board’s “interest is being represented by two sets of lawyers. . . .” *Id.*

Petitioners argue that “[a]*micus curiae* briefs are not allowed as a matter of right . . .” and that “it is within the discretion of the Board to permit *amicus curiae* briefs.” Minooka Obj. at 3, citing 35 Ill. Adm. Code 101.110(c). Petitioners argue that exercising this discretion helps avoid “the risk of injecting irrelevant, duplicative or unnecessary matters into an appeal, as well as the delay and cost associated with the interference.” Minooka Obj. at 3.

Petitioners state that Minooka bases its February 9, 2009, motion for leave to file *amicus* brief on its position that petitioners had failed to meet statutory criteria (ii) and (iii). Minooka Obj. at 2; *see* 415 ILCS 5/39.2(a)(ii), (a)(iii) (2006); Minooka Mot. at 1-2. Petitioners characterize this position as one that the County Board will defend. Minooka Obj. at 2. Specifically, petitioners claim that the County Board’s attorneys are capable of defending and will defend the position that the record supports the County Board’s findings on Criteria (ii) and (iii). *Id.* at 3. Petitioners further claim that “[t]he evidence relating to criteria (ii) and (iii) are set out in the record, and there is nothing that can be added to the record with regard to the criteria.” *Id.* at 4. Petitioners argue that any *amicus* brief filed by Minooka thus “will be of no aid to the board and should not be allowed.” *Id.*

Petitioners claim that the other issues raised by Minooka in its motion for leave are “irrelevant to the appeal.” Minooka Obj. at 4. Petitioners argue that the nine statutory criteria do not include Minooka’s proximity to the proposed site or the potential effect of the facility on Minooka’s municipal services. *Id.* Petitioners further argue that “Minooka’s attempt to raise these arguments is an improper attempt to raise political issues in this appeal, and it should not be allowed to do so.” *Id.*

Petitioners also argue that the Act allows only the applicant for siting approval to appeal a decision to deny that approval. Minooka Obj. at 5, citing 415 ILCS 5/40.1(a) (2006). Petitioners further argue that the Act does not allow third-party participants to appeal such a denial. Minooka Obj. at 5, citing 415 ILCS 5/40.1(a), 40.1(b) (2006). Petitioners argue that allowing Minooka to file an *amicus* brief would “circumvent” the Act. Minooka Obj. at 5. “Permitting objectors to file *amicus curiae* briefs in the appeal of a siting denial because they have an interest or issue they want to raise would nullify the prohibition in Section 40.1, and create a third party right to appeal a siting denial when the legislature has specifically provided that there is no such right.” *Id.* Petitioners thus request that the Board deny Minooka’s motion for leave to file *amicus* brief and its request to add Minooka to the Service List. *Id.* at 5, 6.

Motion to Strike Appearance

Petitioners note that, in connection with its motion for leave to file *amicus* brief, Minooka filed an appearance. Mot. Strike Minooka at 1-2. Petitioners argue that only a party may file an appearance and that the Board’s procedural rules define “party” as “the person by or against whom a proceeding is brought.” *Id.* at 2, citing 35 Ill. Adm. Code 101.202 (definitions), 101.400 (appearances). Petitioners argue that Minooka is not the local authority that denied approval of siting. Mot. Strike Minooka at 2. Petitioners further argue that the Act does not allow a third-party objector such as Minooka to appeal a decision denying approval. *Id.*, citing 415 ILCS 5/40.1(a) (2006). Petitioners conclude that Minooka is not a party to this appeal, that Minooka did not properly file an appearance, and that the Board should strike that appearance.

KRL

Motion for Leave to File Amicus Brief

KRL states that, on June 3, 2008, petitioners filed an application under the Act to site a solid waste facility in Kendall County. KRL Mot. at 1, citing 415 ILCS 5/39 (2006). KRL further states that the County Board conducted hearings on the application “on numerous days between September 11, 2008 and October 1, 2008.” KRL Mot. at 1. KRL further states that, “[o]n November 20, 2008, the Kendall County Board denied the application for local siting approval.” *Id.*

KRL states that, in objecting to the request for siting approval, it “registered as a participant in the aforesaid siting hearings, actively participated in said siting hearings, filed evidence, cross-examined witnesses, presented expert testimony and submitted proposed findings of fact.” KRL Mot. at 1. KRL argues that the County Board’s decision “was supported by the evidence and the law, and the proceedings leading up to said decision were fundamentally fair.” *Id.* In addition, KRL claims that “there were additional reasons to deny the application for siting approval in addition to those adopted by the Kendall County Board as part of its resolution denying siting.” *Id.* at 2. KRL states that it “has an interest in the outcome of this proceeding.” *Id.*

KRL argues that it is an “interested party” under the Board’s procedural rules and that the Board should grant it permission to file an *amicus* brief and to be added to the Service List in this proceeding. KRL Mot. at 2, citing 35 Ill. Adm. Code 101.110(c), 101.628.

Petitioners’ Objection to Motion for Leave

Petitioners note that the County Board on November 20, 2008, denied their application for site location approval based on findings that application had not met statutory criteria (ii) and (iii). KRL at 1-2; *see* 415 ILCS 5/39.2(a)(ii), (a)(iii) (2006). Petitioners state that their petition “challenges the denial on the grounds that the decision was fundamentally unfair and against the manifest weight of the evidence.” KRL Obj. at 2. Petitioners state that KRL “acknowledges that the basis for denial is contained in the record, but adds a conclusory statement of its belief that there may be additional reasons to deny the application.” *Id.* at 2, citing KRL Mot. at 2. Petitioners note the filing of appearances indicating that the County Board’s “interest is being represented by two sets of lawyers. . . .” *Id.*

Petitioners argue that “[a]*micus curiae* briefs are not allowed as a matter of right . . .” and that “it is within the discretion of the Board to permit *amicus curiae* briefs.” KRL Obj. at 3, citing 35 Ill. Adm. Code 101.110(c). Petitioners argue that exercising this discretion helps avoid “the risk of injecting irrelevant, duplicative or unnecessary matters into an appeal, as well as the delay and cost associated with the interference.” KRL Obj. at 3.

Petitioners suggest that KRL’s objection to the proposed facility and the basis for its February 9, 2009, motion for leave to file *amicus* brief is its position that petitioners had failed to meet statutory criteria (ii) and (iii). KRL Obj. at 3-4; *see* 415 ILCS 5/39.2(a)(ii), (a)(iii) (2006); KRL Mot. at 1-2. Petitioners characterize this position as one that the County Board will defend. KRL Obj. at 4. Specifically, petitioners claim that the County Board’s attorneys are capable of defending and will defend the position that the record supports the County Board’s findings on Criteria (ii) and (iii). *Id.* Petitioners further claim that “[t]he evidence relating to criteria (ii) and (iii) are set out in the record, and there is nothing that can be added to the record with regard to the criteria.” *Id.* Petitioners argue that any *amicus* brief filed by KRL thus “will be of no aid to the board and should not be allowed.” *Id.*

Petitioners also argue that the Act allows only the applicant for siting approval to appeal a decision to deny that approval. KRL Obj. at 4, citing 415 ILCS 5/40.1(a) (2006). Petitioners further argue that the Act does not allow third-party participants to appeal such a denial. KRL Obj. at 4, citing 415 ILCS 5/40.1(a), 40.1(b) (2006). Petitioners argue that allowing KRL to file an *amicus* brief would “circumvent” the Act. KRL Obj. at 4. “Permitting objectors to file *amicus curiae* briefs in the appeal of a siting denial simply because they have an interest or issue they want to raise would nullify the prohibition in Section 40.1, and create a third party right to appeal a siting denial when the legislature has provided no such right.” *Id.* at 5. Petitioners thus request that the Board deny KRL’s motion for leave to file *amicus* brief and its request to add KRL to the Service List. *Id.* at 5, 6.

Motion to Strike Appearance

Petitioners note that, on February 12, 2009, Mr. George Muller filed an appearance on behalf of (Fox Moraine). KRL Obj. at 5. Petitioners argue that, although Mr. Mueller represented Fox Moraine, LLC in an earlier proceeding, “he did not so indicate to the Kendall County Board in the proceedings on this siting application.” *Id.* Petitioners also argue that neither Fox Moraine nor KRL are proper parties to this appeal and that the Board’s procedural rules do not allow an attorney to appear on behalf of non-parties. *Id.*, citing 415 ILCS 5/40.1 (2006), 35 Ill. Adm. Code 101.110(c). Petitioners request that the Board strike the appearance of Fox Moraine filed by the attorney for KLR. KLR Obj. at 6.

BOARD DISCUSSION AND CONCLUSIONS

Minooka

The Board’s procedural rules provide in pertinent part that “[a]micus curiae briefs may be filed in any adjudicatory proceeding by any interested person, provided permission is granted by the Board.” 35 Ill. Adm. Code 101.110(c). The rules further provide that “[t]he Board also allows for the filing of *amicus curiae* briefs by non-party participants.” 35 Ill. Adm. Code 101.628(c). Minooka argues that it has demonstrated an interest in the issue of siting this facility by appearing at the local siting hearing, cross-examining the applicant’s witnesses, and offering the testimony of its own witnesses. Minooka Mot. at 1-2. Minooka further argues that the proposed expansion would affect its comprehensive plan, municipal services, and provision of municipal services. *See id.*

The Board grants Minooka’s motion for leave to file an *amicus curiae* brief. Any *amicus curiae* brief filed on behalf of Minooka must be timely filed as directed by the hearing officer, must consist only of argument, must not raise facts that are not in evidence, and must not delay the board’s decision-making. *See* 35 Ill. Adm. Code 101.110(c).

Petitioners move to strike the appearance on behalf of Minooka on the basis that Minooka is not a party to this adjudicatory proceeding. *See* Minooka Obj. at 2. Petitioners note that this appearance states that it is “on behalf of the Movant for Intervention.” Minooka Obj. at 2 n.1, citing Minooka App. at 1. Petitioners acknowledge that Minooka filed a motion for leave to file an *amicus curiae* brief and did not move to intervene. Minooka Obj. at 2, n.1, citing 35 Ill. Adm. Code 101.110(c), 101.402. Minooka’s motion for leave does not address the issue of intervention. *See* 35 Ill. Adm. Code 101.402, *see generally* Minooka Mot. Under these circumstances, the Board considers the reference to intervention in the appearance to be a technical error. The Board will address petitioner’s motion to strike as a motion to strike an appearance on behalf of a non-party participant granted leave to file an *amicus curiae* brief. *See* 35 Ill. Adm. Code 101.628(c).

The Board’s procedural rules provide that [a] person who is a party in a Board adjudicatory proceeding may appear” on various terms. 35 Ill. Adm. Code 101.400(a). Appearance on behalf of an entity granted leave to file an *amicus curiae* brief in an adjudicatory proceeding is not inconsistent with these regulations, and petitioners’ motion to strike the appearance is denied.

KRL

As noted in the preceding subsection of the opinion, the Board's procedural rules provide in pertinent part that "[a]micus curiae briefs may be filed in any adjudicatory proceeding by any interested person, provided permission is granted by the Board." 35 Ill. Adm. Code 101.110(c). The rules further provide that "[t]he Board also allows for the filing of *amicus curiae* briefs by non-party participants." 35 Ill. Adm. Code 101.628(c). KRL indicates in its motion for leave that its participation in the local siting hearing reflects its interest in the outcome of this proceeding. KRL Mot. at 1-2.

The Board grants KRL's motion for leave to file an *amicus curiae* brief. Any *amicus curiae* brief filed on behalf of KRL must be timely filed as directed by the hearing officer, must consist only of argument, must not raise facts that are not in evidence, and must not delay the Board's decision-making. See 35 Ill. Adm. Code 101.110(c).

The Board notes that, on February 25, 2009, Mr. Mueller filed a motion to withdraw his appearance on behalf of Fox Moraine "for the reason that the same was inadvertently filed in error when he intended to enter his Appearance on behalf of Kankakee Regional Landfill, LLC." The Board's procedural rules provide that "[w]ithin 14 days after service of a motion, a party may file a response to the motion. . . . Unless undue delay or material prejudice would result, neither the Board nor the hearing officer will grant any motion before expiration of the 14 day response period except in deadline driven proceedings where no waiver has been filed." 35 Ill. Adm. Code 101.500(d).

While petitioners have filed a waiver of the statutory decision deadline to August 6, 2009, the hearing officer has not yet established a schedule for any discovery that may take place, scheduled a hearing date, or set a post-hearing briefing schedule. Accordingly, the Board finds that undue delay would result from allowing the 14-day response period to run and will address the motion to withdraw. The Board grants the motion to withdraw Mr. Mueller's appearance on behalf of Fox Moraine. Accordingly, petitioners' motion to strike the appearance on behalf of Fox Moraine is denied as moot. The Board notes in this regard that, on February 25, 2009, Mr. Muller filed an appearance on behalf of KRL.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 5, 2009, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board