

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, INC.,)	
and KENDALL LAND and CATTLE, L.L.C.)	
)	
Petitioners,)	No. PCB 09-43
)	
vs.)	(Pollution Control Facility
)	Siting Appeal)
)	
COUNTY BOARD OF KENDALL COUNTY,)	
ILLINOIS,)	
)	
Respondent.)	

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on February 24, 2009, we filed with the Illinois Pollution Control Board, via electronic filing, **PETITIONERS' OBJECTION TO THE MOTION FOR LEAVE TO FILE AMICUS BRIEF BY KANKAKEE REGIONAL LANDFILL, LLC AND MOTION TO STRIKE APPEARANCE OF FOX MORaine, LLC.** in the above entitled matter, which is attached hereto and herewith served upon you.

WASTE MANAGEMENT OF ILLINOIS, INC. and
KENDALL LAND and CATTLE, L.L.C.

By: s/Donald J. Moran
One of Their Attorneys

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CERTIFICATE OF SERVICE

I, Victoria Kennedy, a non-attorney, on oath certify that I caused to be served the foregoing, **PETITIONERS' OBJECTION TO THE MOTION FOR LEAVE TO FILE AMICUS BRIEF BY KANKAKEE REGIONAL LANDFILL, LLC AND MOTION TO STRIKE APPEARANCE OF FOX MORaine, LLC.**, to be served upon the following parties listed below, both (1) electronically and (2) by U.S. Mail from 161 N. Clark Street, Chicago, IL 60601 on this 24th day of February 2009.

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s/Victoria Kennedy

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**PETITIONERS' OBJECTION TO THE MOTION FOR LEAVE
TO FILE AMICUS BRIEF BY KANKAKEE REGIONAL LANDFILL, LLC
AND MOTION TO STRIKE APPEARANCE OF FOX MORaine, LLC.**

Petitioners, WASTE MANAGEMENT OF ILLINOIS, INC. ("WMII"), and KENDALL LAND and CATTLE, L.L.C. ("KLC"), by and through their attorneys, PEDERSEN & HOUP, P.C., object to the Motion for Leave to File Amicus Brief filed by Kankakee Regional Landfill, LLC ("Motion to File Amicus Brief"), and move to strike the appearance of Fox Moraine, LLC, filed by Kankakee Regional Landfill, LLC. In support thereof, WMII and KLC state as follows:

ISSUES PRESENTED IN PETITION FOR REVIEW

1. On December 24, 2008, WMII and KLC filed with the Illinois Pollution Control Board ("Board") their Petition for Hearing to Contest Site Location Denial ("Petition for Review") pursuant to Section 40.1(a) of the Illinois Environmental Protection Act ("Act").
2. The Petition for Review contests and objects to the County Board of Kendall County's ("County Board") November 20, 2008 decision denying WMII and KLC's request for site location approval for the proposed Willow Run Recycling and Disposal Facility ("Willow

Run"). The denial was based on the County Board's finding that statutory criteria (ii) and (iii) were not met. The Petition for Review challenges the denial on the grounds that the decision was fundamentally unfair and against the manifest weight of the evidence.

3. The County Board has filed an Appearance and its interest is being represented by two sets of lawyers, namely by James F. McCluskey and James S. Harkness from the law firm of Momkus McCluskey, LLC, as well as by Eric C. Weis, the Kendall County State's Attorney.

4. On February 12, 2009, Kankakee Regional Landfill, LLC filed its Motion for Leave to File Amicus Brief in this appeal.¹ Kankakee Regional Landfill, LLC, 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. (*See* Kankakee Regional Landfill, LLC's Mot., ¶5.)

5. WMII and KLC timely object to Kankakee Regional Landfill, LLC's Motion to File Amicus Brief. For the reasons discussed below, the Motion should be denied.

STANDARD FOR PERMITTING *AMICUS CURIAE* BRIEFS

6. Section 101.110(c) of the Illinois Administrative Code ("Code") provides:

Amicus curiae briefs may be filed in any adjudicatory proceeding by any interested person, provided permission is granted by the Board. Response briefs may be allowed by permission of the Board, but not as of right. The briefs must consist of argument only and may not raise facts that are not in evidence in the relevant proceeding. Amicus curiae briefs, and any responses, will be considered by the Board only as time allows. The briefs will not delay decision-making of the Board.

¹ On February 6, 2009, the Village of Minooka, another objector to Willow Run who participated in the local siting proceeding, filed its Motion for Leave to File Amicus Brief and to add the Village of Minooka to the Service List. WMII and KLC have already objected to the Village of Minooka's Motion by separate response.

35 Ill. Adm. Code 101.110(c) (emphasis added). Thus, as expressly stated, it is within the discretion of the Board to permit *amicus curiae* briefs.

7. *Amicus curiae* briefs are not allowed as a matter of right due to the risk of injecting irrelevant, duplicative or unnecessary matters into an appeal, as well as the delay and cost associated with the interference. A third party seeking leave to file an *amicus curiae* brief must demonstrate that the proposed brief will provide the reviewing court with unique ideas, arguments, or insights helpful to the resolution of the case that will not be addressed by the litigants themselves. *See Kinkel v. Cingular Wireless, L.L.C.*, 2006 Ill. LEXIS 1, *2-3 (2006).

As the Supreme Court in *Kinkel* explained:

Briefs which essentially restate arguments advanced by the litigants are of no benefit to the court or the adversarial process. To the contrary, they are a burden on the court's time and on the resources of the litigants who must review and respond to them. In some cases, they may represent an improper attempt to inject interest group politics into the appeals process.

Id. 2006 Ill. LEXIS at *3. In addition to the concerns expressed in the *Kinkel* case, as discussed below, in the context of appeals before the Board, additional caution should be taken before allowing *amicus curiae* briefs in light of the Act's prohibition against third party appeals of siting denials.

ARGUMENT OPPOSING THE MOTION TO FILE AMICUS BRIEF

8. Kankakee Regional Landfill, LLC's Motion to File Amicus Brief should be denied because there are no arguments it could make on this record that Kendall County is unable or unwilling to present. The decision to disapprove the application was based on the denial of two

criteria, criteria (ii) and (iii). The 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. The County Board, through its attorneys, will be filing a brief arguing that the denial of criteria (ii) and (iii) is supported by the record. The County Board is fully capable of addressing the facts and arguments relating to those criteria. Kankakee Regional Landfill, LLC's opposition to Willow Run (or landfills in general) and its arguments concerning criteria (ii) and (iii) factors are not unique, and will repeat or restate the arguments that will be raised by the County Board. The criteria (ii) and (iii) issues will be sufficiently represented by the County Board, and therefore, any brief by Kankakee Regional Landfill, LLC will be of no aid to the Board and should not be allowed.

9. Moreover, permitting Kankakee Regional Landfill, LLC to file an *amicus curiae* brief runs counter to the Act, which does not allow third party participants to appeal denials of siting applications. See 415 ILCS 5/40.1(a), (b). Section 40.1(a) of the Act only allows the applicant to appeal a decision denying local siting approval for a new pollution control facility. See 415 ILCS 5/40.1(a). A third party participant may only appeal a decision *granting* local siting approval. See 415 ILCS 5/40.1(b); *see also Waste Management of Illinois Inc. v. Illinois Pollution Control Board*, 160 Ill. App. 3d 434, 443-44, 513 N.E.2d 592, 598 (2d Dist. 1987); *McHenry County Landfill, Inc. v Environmental Protection Agency*, 154 Ill. App. 3d 89, 94-95, 506 N.E.2d 372, 376 (2d Dist. 1987). Granting the Motion to File Amicus Brief will allow Kankakee Regional Landfill, LLC to, in effect, circumvent Section 40.1 the Act. The Village of Minooka is also attempting to bypass Section 40.1's proscription by asking for leave to

file its own *amicus curiae* brief. 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.

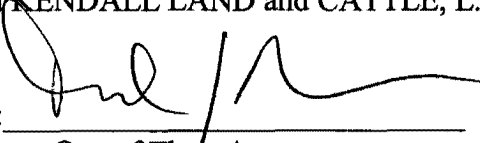
10. On February 12, 2009, Mr. George Mueller, representing Kankakee Regional Landfill, LLC, filed his appearance as counsel of record in this appeal for Fox Moraine, LLC. While Mr. Mueller represented Fox Moraine, LLC in the prior siting application filed for Willow Run in 2007, he did not so indicate to the Kendall County Board in the proceedings on this siting application. In any event, neither Fox Moraine, LLC nor Kankakee Regional Landfill, LLC may appear as parties in this appeal. 415 ILCS 5/4.1. Additionally, this Board's Procedural Rules do not permit an attorney to file an appearance on behalf of non-parties. See 35 IAC §§ 101.110(c), 101.400.

11. In summary, Kankakee Regional Landfill, LLC's *amicus curiae* brief will not set forth arguments or perspectives that are unique from those presented by the County Board, and would introduce redundant or irrelevant matter into the appeal. This would complicate and lengthen the proceedings and require the unnecessary expenditure of substantial time and resources by the Board and the parties. It would also permit Kankakee Regional Landfill, LLC to circumvent Section 40.1 of the Act. For all of these reasons, the Board should deny the Motion to File Amicus Brief.

WHEREFORE, WASTE MANAGEMENT OF ILLINOIS, INC., and KENDALL LAND and CATTLE, L.L.C respectfully request that the Board deny the Motion for Leave to File Amicus Brief filed by Kankakee Regional Landfill, LLC, strike the appearance of Fox Moraine, LLC filed by the attorney for Kankakee Regional Landfill, LLC, and grant such other and further relief as the Board deems appropriate.

Respectfully Submitted,

WASTE MANAGEMENT OF ILLINOIS, INC.,
and KENDALL LAND and CATTLE, L.L.C

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One of Their Attorneys

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