

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

**NOTICE OF FILING**

To: All Counsel of Record, See Attached Service List

PLEASE TAKE NOTICE that the undersigned has, on this 6th day of March, 2009, caused to be filed with the Clerk of the Illinois Pollution Control Board, via electronic filing, the attached ***County Board of Kendall County's Combined Response to Petitioners' Objections to the Village of Minooka's and Kankakee Regional Landfill, LLC's Motion for Leave to File Amicus Brief*** on behalf of the County Board of Kendall County, Illinois, a copy of which is herewith served on you.

Respectfully submitted,  
County Board of Kendall County, Illinois

By: /s/James S. Harkness

James F. McCluskey  
James S. Harkness  
Jennifer L. Friedland  
Momkus McCluskey, LLC  
1001 Warrenville Road, Suite 500  
Lisle, IL 60532  
Tel: (630) 434-0400  
Fax: (630) 434-0444  
jfmcccluskey@momlaw.com  
jharkness@momlaw.com  
jfriedland@momlaw.com  
W:\26\_59\4587.080523\Pleadings\NOF 3.6.09.doc

**PROOF OF SERVICE**

Under penalties as provided by law, pursuant to Section 1-109 of the Code of Civil Procedure, Sabrina Sanders, the undersigned non-attorney certifies that she served a true and correct copy of the foregoing Notice of Filing and all referenced enclosures, by (1) e-mail transmission and (2) U.S. Mail to all respective addresses as listed on the Service List from Lisle, Illinois 60532 on March 6, 2009.

/s/ Sabrina Sanders

James F. McCluskey  
James S. Harkness  
Jennifer L. Friedland  
Momkus McCluskey, LLC  
1001 Warrenville Road, Suite 500  
Lisle, IL 60532  
Tel: (630) 434-0400  
Fax: (630) 434-0444  
jfmcccluskey@momlaw.com  
jharkness@momlaw.com  
jfriedland@momlaw.com  
W:\26\_59\4587.080523\PLEADINGS\NOF 3.6.09.DOC

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, INC.)	)	
and KENDALL COUNTY LAND AND	)	
CATTLE, LLC,	)	PCB 09-43
	)	
Petitioners,	)	(Pollution Control Board Facility
	)	Siting Appeal)
vs.	)	
	)	
COUNTY BOARD OF KENDALL COUNTY,	)	
ILLINOIS, <i>et. al.</i> ,	)	
	)	
Respondent.	)	

**COUNTY BOARD OF KENDALL COUNTY'S COMBINED RESPONSE TO  
PETITIONERS' OBJECTIONS TO THE VILLAGE OF MINOOKA'S AND  
KANKAKEE REGIONAL LANDFILL, LLC'S MOTIONS FOR LEAVE TO FILE  
AMICUS BRIEF**

NOW COMES Respondent, County Board of Kendall County, Illinois ("County Board"), by its attorneys MOMKUS McCLUSKEY, LLC, and as its Combined Response to Petitioners' Objections to the Village of Minooka's and Kankakee Regional Landfill, LLC's (hereinafter, "Kankakee Regional") Motions for Leave to File *Amicus* Brief, states as follows:

1. On February 6, 2009, the Village of Minooka filed its Motion for Leave to File *Amicus* Brief in this matter. On February 20, 2009, the Petitioners filed their Objection to the Motion for Leave to File *Amicus* Brief by the Village of Minooka.

2. On February 12, 2009, Kankakee Regional Landfill, LLC ("Kankakee Regional") filed its Motion for Leave to File *Amicus* Brief in this matter. On February 24, 2009, the Petitioners filed their Objection to the Motion for Leave to File *Amicus* Brief by Kankakee Regional Landfill.

3. Because Petitioners argue the same basis for objecting to the Village of Minooka's and Kankakee Regional's Motions for Leave to File *Amicus* Brief, Respondent responds to Petitioners' objection in this combined motion.

4. The public hearings on Petitioners' Application for the siting of a solid waste facility in Kendall County took place from approximately September 11, 2008 to October 1, 2008. On November 20, 2008, the County Board denied the Application for siting approval, finding that Criterion 2 and 3 were not met.

5. At the public hearings, the Village of Minooka participated as an objector to the Siting Application by appearing and participating by filing evidence, cross-examination of the Applicants', now Petitioners', experts and by presenting expert testimony relating to Criterion 2 and 3. The Village of Minooka's boundaries extend within two (2) miles from the proposed site and its water service will be affected by the siting of this Application.

6. At the public hearings, Kankakee Regional also participated as an objector to the Siting Application by appearing and participating by filing evidence, cross-examination of witnesses, by presenting expert testimony and submitting proposed findings of fact.

#### **STANDARD FOR ALLOWING *AMICUS CURIAE* BRIEFS TO BE FILED**

7. Section 101.110(c) of the Illinois Administrative Code states the following:

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.

35 Ill. Admin. Code 101.110(c) (emphasis added).

8. Section 101.628(c) of the Illinois Administrative Code states the following:

Public Comments or Amicus Curiae Briefs. Participants may file public comments subject to the requirements of this Section and the hearing officer's schedule for completion of the record. The Board also allows for the filing of amicus curiae briefs by non-party participants. Amicus curiae briefs will be allowed in accordance with Section 101.110 of this Part.

35 Ill. Admin. Code 101.628(c).

9. The **only** limitation on who may file an *amicus curiae* brief in an Illinois Pollution Control Board proceeding is that the person filing must be “interested.” 35 Ill. Admin. Code 101.110(c). The term “interested person” is not defined by the Illinois Pollution Control Board Procedural Rules. Therefore, those words must be given their plain and ordinary meaning. *Granite City Div. of Nat. Steel Co. v. IPCB*, 155 Ill.2d 149, 181 (1993).

### DISCUSSION

10. In this matter, the Village of Minooka and Kankakee Regional are clearly interested persons, as they were both participants in the underlying siting proceeding who filed evidence, presented expert testimony and cross-examined the Applicant’s expert testimony. Indeed, the Village of Minooka and Kankakee Regional participated in demonstrating that Criterion 2 and 3 were not met, which is the issue that Petitioners now appeal.

11. Petitioners object to the Village of Minooka and Kankakee Regional filing *amicus* briefs because “there are no arguments [they] could make on this record that Kendall County is unable or unwilling to present.” (Petitioners’ Objections, pages 3 and 4). Petitioners further state that the Village of Minooka’s and Kankakee Regional’s arguments are “not unique, and will repeat or restate the arguments that will be raised by the County Board.” (Petitioners’ Objections, page 4). Petitioners’ suggestion that the Village of Minooka’s and Kankakee Regional’s participation and interest in these two criteria—the certified issue in this appeal—is irrelevant or diminimus is wholly unfounded. First, these interested parties presented the witnesses against the Application. Their participation then and input now is essential to the record and this appeal. Second, in support of their argument, Petitioners specifically mis-quote and improperly rely solely on

*Kinkel v. Cingular Wireless*, 2006 Ill. LEXIS 1, \*2-3 (2006). The County Board assumes that this case is also that cited as *Kinkel v. Cingular Wireless*, 223 Ill.2d 1 (2006), which does not contain the language quoted by Petitioners, nor does it contain any discussion relating to *amicus curiae* briefs.

12. It is presumptuous of Petitioners to assume that “there are no arguments [the Village of Minooka or Kankakee Regional can] make on this record that Kendall County is unable or unwilling to present.” (Petitioners’ Objections, pages 3 and 4). It is possible that the Village of Minooka or Kankakee Regional may wish to present arguments to defend the County Board’s denial of the Application other than those arguments adopted by the County Board. Further, it is especially bold of the Petitioners to presume to know what the County Board is able or willing to present when Petitioners’ allegations against the County Board are so vague that no party is yet aware of what specific claims are being made. Petitioners, at this stage, have merely alleged that it objects to the County Board’s “denial of criteria (ii) and (ii) as fundamentally unfair, unsupported by the record and against the manifest weight of the evidence.” (Petition for Hearing to Contest Site Location Denial, page 2). In response, the County Board has issued a Notice of Demand for Bill of Particulars so that it, and this Hearing Board, can determine exactly what Petitioners are taking issue with. Thus, Petitioners’ objections are premature at this early stage, given that they have prevented the Pollution Control Board from considering how or why the *amicus* briefs may be relevant due to such vague claims.

13. Petitioners further argue that permitting the Village of Minooka and Kankakee Regional to file *amicus curiae* briefs would violate Section 40.1(a) of the Illinois Environmental Protection Act, which prohibits third parties from appealing a decision denying local siting approval of a pollution control facility. (Petitioners’ Objections, pages 4 and 5). Here, Petitioners once again misconstrue the issue and role

of *amicus curiae*, which is a limited advisory role, or "friend," to the court or agency. *Zurich Ins. Co. v. Raymark Industries, Inc.*, 118 Ill.2d 23, 59-60 (1987). *Amici curiae* file advisory opinions and are not able to engage in motion practice. *Id.* Allowing the Village of Minooka and Kankakee Regional to file *amicus curiae* briefs is ***in no way*** the same as allowing a third party to appeal a siting decision. This case was already appealed by Petitioners. The Village of Minooka and Kankakee Regional are simply attempting to file advisory briefs in support of the siting decision that Petitioners appealed.

WHEREFORE, Respondent, County Board of Kendall County, Illinois, respectfully requests that the Illinois Pollution Control Board:

- 1) Grant the Village of Minooka's Motion for Leave to File *Amicus* Brief;
- 2) Grant Kankakee Regional Landfill, LLC's Motion for Leave to File *Amicus* Brief; and,
- 2) Grant any further relief it deems just and necessary.

Respectfully submitted,

COUNTY BOARD OF KENDALL COUNTY  
ILLINOIS

By: \_\_\_\_\_

James F. McCluskey  
James S. Harkness  
Jennifer L. Friedland  
MOMKUS McCLUSKEY, LLC  
1001 Warrenville Road, Suite 500  
Lisle, IL 60532  
(630) 434-0400  
(630) 434-0444 FAX  
Attorneys for Respondent

W:\26\_59\4587.080523\Pleadings\PCB\ResponseObjectionAmicusBriefs.doc