

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 April 10, 2009, we filed with the Illinois Pollution Control Board, via electronic filing, **PETITIONERS' OBJECTION TO GRUNDY COUNTY'S MOTION FOR LEAVE TO FILE REPLY TO MOTION TO INTERVENE** 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/Lauren Blair
One of Their Attorneys

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**PETITIONERS' OBJECTION TO GRUNDY COUNTY'S
MOTION FOR LEAVE TO FILE REPLY TO MOTION TO INTERVENE**

Petitioners, WASTE MANAGEMENT OF ILLINOIS, INC. ("WMII") and KENDALL LAND AND CATTLE, L.L.C. ("KLC") (collectively "Petitioners"), by and through their attorneys, PEDERSEN & HOUP, P.C., object to Grundy County's Motion for Leave to File a Reply in Support of its Motion for Leave to Intervene, pursuant to Section 101.500(e) of the Illinois Pollution Control Board's ("Board") General Rules ("Rules"), 35 Ill. Adm Code §101.500(e). In support thereof, Petitioners state as follows:

INTRODUCTION

1. On or about March 4, 2009, Grundy County filed a Motion to Intervene in this appeal. Grundy County argues that it needs to intervene to address issues relating to (i) "the integrity of the area aquifer"; (ii) "air traffic safety at and near the Morris Community Airport"; and (iii) the "impact [on] traffic and roads in Grundy County."¹

¹ Petitioners' Application for local siting approval was denied on criteria (ii) and (iii), not on the basis of traffic and roads, or air traffic safety. Thus, Grundy County seeks to intervene to raise issues unrelated and immaterial to the issues raised on appeal.

2. On or about March 19, 2009, Petitioners filed a proper and timely Response objecting to the Motion to Intervene. Petitioners' Response essentially argued two points. First, Grundy County's reliance upon *Fox Moraine, LLC v. United City of Yorkville, City Council*, No. PCB 07-146 (Aug. 23, 2007), is misplaced because in that case, the Board allowed intervention by the State's Attorney of the county in which the facility was located, which is consistent with Section 107.202(b) of the Rules, but the Board did not hold, or even imply, that it intended its ruling in *Fox Moraine* to allow intervention of a State's Attorney from another county. Additionally, Grundy County has failed to satisfy the standard for intervention set forth in Section 101.402(b) of the Rules.

3. On or about March 30, 2009, Grundy County filed its Motion for Leave to File a Reply in support of its Motion for Leave to Intervene and, without leave², filed its eight-page Reply brief³. Grundy County argues that it should be given leave to file its Reply because Petitioners "grossly mischaracterize and/or misrepresent the arguments in Grundy County's motion, as well as governing law," and that it will be "materially prejudiced" in the absence of a Reply. (Mot. for Leave, ¶¶3, 4.)

4. Section 101.500(e) expressly states that: "The moving person will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice." 35 Ill. Adm. Code §101.500(e) (Emphasis added).

5. In reviewing motions for leave to file a reply, the Board requires a showing of

² Given that the Board has not yet ruled on Grundy County's Motion for Leave to File a Reply, it was improper for Grundy County to file the Reply as a separate pleading, and the Board should strike the Reply accordingly.

³ Grundy County's Memorandum in support of its Motion to Intervene was only six pages.

material prejudice. *City of Kankakee v. County of Kankakee*, No. PCB 03-125, 03-133, 03-134, 03-135 (May 1, 2003). Bald assertions that such prejudice will occur is insufficient. *See Illinois v. Skokie Asphalt Co. Inc.*, No. PCB 96-98 (June 5, 2003), slip op. at 3.

6. Here, Petitioners first take issue with Grundy County's assertion that the Response grossly mischaracterizes and/or misrepresents Grundy County's arguments and governing law. Petitioners' Response contains a fair analysis of Grundy County's purported basis to intervene and makes meritorious arguments against intervention using appropriate interpretation of governing law. In the Reply, Grundy County (i) nit-picks about typographical errors (*i.e.*, citing *Stuart v. Fisher* as PCB 02-162, rather than as PCB 02-164, and inadvertently omitting the case number for *Alloy Engineering & Casting, Co.*); (ii) reargues its interpretation of *Fox Moraine*; (iii) attempts to distinguish the case law cited in Petitioners' Response; and (iv) attempts to bolster its argument that its citizens will be adversely affected by the appeal. Nothing in the Reply shows that Petitioners' Response contains "gross" mischaracterizations or misrepresentations, or anything other than fair argument. Grundy County simply attempts to have the last word on the arguments without regard to the limitations of Section 101.500(e).

7. Moreover, despite the conclusory statement that it will be "materially prejudiced," Grundy County has not demonstrated any material prejudice. Grundy County failed to cite any legal authority for its apparent contention that Rule 101.500(e) was intended to permit reply briefs so that the movant can clarify its arguments or distinguish the non-movant's arguments, interpretations or characterizations of the movant's arguments and case law. Indeed, Section 101.500(e)'s express limitation on reply briefs seems to imply the opposite conclusion. Further, there should be no question that the Board is capable of reviewing, analyzing and assessing the arguments Grundy County's Motion to Intervene and Petitioners' Response, and making a

determination as to whether the points, authorities and arguments raised by the parties are fair and accurate.

8. Grundy County has failed to demonstrate that any material prejudice would occur in this instance, and therefore its Motion for Leave to File a Reply must be denied in accordance with Section 101.500(e).

WHEREFORE, WASTE MANAGEMENT OF ILLINOIS, INC., and KENDALL LAND AND CATTLE, L.L.C. respectfully request that the Board deny Grundy County's Motion for Leave to File a Reply in Support of its Motion to Intervene, 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.

By: /s/ Lauren Blair
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CERTIFICATE OF SERVICE

I, Lauren Blair, an attorney, on oath certify that I caused to be served the foregoing, **PETITIONERS' OBJECTION TO GRUNDY COUNTY'S MOTION TO INTERVENE**, to be served upon the following parties listed below electronically on this 10th day of April 2009.

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