

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
v.	)	Appeal)
	)	
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 5th day of May, 2009, caused to be filed with the Clerk of the Illinois Pollution Control Board, via electronic filing, the attached ***County Board's Reply in Support of Its Motion to Dismiss Portions of Amended Petition*** 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

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**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 May 5, 2009.

/s/ Sabrina Sanders

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Petitioners,	)	(Pollution Control Board Facility
	)	Siting Appeal)
vs.	)	
	)	
COUNTY BOARD OF KENDALL COUNTY,	)	
ILLINOIS, <i>et. al.</i> ,	)	
	)	
Respondent.	)	

**COUNTY BOARD'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS  
PORTIONS OF AMENDED PETITION**

NOW COMES Respondent, COUNTY BOARD OF KENDALL COUNTY, ILLINOIS ("County Board"), by its attorneys MOMKUS McCLUSKEY, LLC, and as its Reply in Support of its Motion to Dismiss Portions of Amended Petition, states as follows:

**INTRODUCTION**

The County Board's 735 ILCS 5/2-619 Motion to Dismiss Portions of Amended Petition for Hearing to Contest Site Location Denial ("Motion to Dismiss") should be granted because the fundamental fairness claims at issue in the Motion to Dismiss are determinable solely from the record of the underlying proceedings and application of the law.

Here, the County Board has moved to dismiss only those allegations—more correctly, claims—related to the hearing officer's rulings to strike late-filed evidence. If the hearing officer had authority to, and correctly reached the decision to, strike the late-filed evidence, Petitioners have no claim related thereto. The terminal questions are: did the record contain the information sought to be submitted prior, or was it, in fact late-filed evidence?

The record affirmatively negates Petitioners' claims and this limited issue should be summarily dismissed.

### **DISCUSSION**

#### **I. In This Case, Seeking Dismissal Of Allegations, As Opposed To Claims, Is Proper.**

In this appeal, the Petitioners' assert the following grounds (or, better stated, claims) for appeal:

“10. The hearing officer improperly struck the public comment filed October 28, 2008 by WMII, in violation of Section 39.2(c) of the Act and of Articles 6 and 7 of the Amended and Restated Kendall County Site Approval Ordinance for Pollution Control Facilities (“Ordinance No. 08-15”).

11. The hearing officer improperly struck a portion of the written findings of the County Board's legal counsel, in violation of Sections 8.4 and 9.2 of Ordinance No. 08-15.” (Exhibit A, Amended Petition).

The County Board seeks to narrow the issues, or permissible claims, as a matter of law.

The County Board filed a §2-619 Motion to Dismiss that seeks to dismiss allegations of fundamental unfairness made by Petitioners in their Amended Petition for Hearing to Contest Site Location Denial (“Amended Petition”). In their response to the Motion to Dismiss, Petitioners argue that “the purpose and scope of Section 2-619 of the Code is to dismiss “claims” based on defects of [sic] defenses that defeat the claim, and thus does not authorize the dismissal of ‘allegations’...” (Petitioners' Response, p. 2). However, Petitioners cite no statutes or case law that specifically support this position, and, indeed, Petitioners' argument is belied by the Amended Petition.

Further, the reason that the County Board is seeking to dismiss certain allegations, as opposed to claims, is because the Amended Petition does not articulate any causes of actions or claims, but simply lists allegations and then seeks reversal of the County Board's siting denial. (Ex. A). In the Amended Petition, the Petitioners do not separate their allegations into cause of actions, claims, or even counts. (Ex. A). However, as stated above, the Amended Petition's allegations fall into two categories: (i) fundamental unfairness and (ii) whether the County Board's denial was or was not supported by the record, against the manifest weight of the evidence and contrary to law.

Pursuant to 735 ILCS 5/2-613(a), "[p]arties may plead as many causes of action, counterclaims, defenses, and matters in reply as they may have, **and each shall be separately designated and numbered.**" (Emphasis added). While multiple causes of action may be joined, each cause of action must be separately designated and numbered. Herman v. Hamblet, 81 Ill.App.3d 1050, 1056 (1<sup>st</sup> Dist. 1980) (affirming dismissal of complaint because it improperly purported to allege multiple causes of action in a single count).

While Petitioners seek one remedy, that is reversal of the County Board's siting decision, they offer several different legal bases for a reversal, including fundamental unfairness of the siting proceedings and that the County Board's decision was unsupported by the record and against the manifest weight of the evidence. (Ex. A, pp. 2-3). Therefore, the Amended Petition inappropriately combines several causes of action into a list of allegations in violation of 735 ILCS 5/2-613(a), which requires that causes of actions, or claims, be separately designated and numbered into counts. 735 ILCS 5/2-613(a); Herman, 81 Ill.App.3d at 1056.

Because the Amended Petition improperly offers no separate counts, claims or causes of action, the County Board is forced to seek dismissal of individual allegations,

which, in actuality, are claims disguised as allegations. Indeed, in their response to the Motion to Dismiss, Petitioners apparently inadvertently refer to their “claim” of fundamental unfairness in a sentence that reads as follows: “Moreover, the County Board has not presented any “affirmative matter” that negates Petitioners’ **claim** of fundamental unfairness.” (Emphasis added). (Ex. A, p. 2). Clearly, the Petitioners themselves view their “allegations” as claims.

Pursuant to 735 ILCS 5/2-619, a Defendant may “file a motion for dismissal of the action **or for other appropriate relief** upon any of the following grounds.” (Emphasis added). Here, it is procedurally appropriate for the County Board to seek dismissal of the fundamental unfairness allegations in Petitioners’ Amended Petition because those allegations are, in reality, claims that are dismissible under §2-619 for the reasons set forth in the County Board’s Motion to Dismiss.

**II. Respondent Presents Affirmative Matters That Negate Petitioners’ Allegations And Claims of Fundamental Unfairness.**

In arguing that the County Board does not present an affirmative matter that negates Petitioners’ claims, Petitioners cite Waterford Executive Group, Ltd. v. Clark/Bardes, Inc., 261 Ill.App.3d 338, 343 (2<sup>nd</sup> Dist. 1994) for the proposition that a Motion to Dismiss brought under §2-619 is proper only when an affirmative matter is raised that completely negates the plaintiff’s cause of action or **refutes critical conclusions of law** or unsupported conclusions of material fact. The County Board agrees with this interpretation of §2-619 and reiterates that the fundamental fairness claims at issue present a question of law that should be determined solely from the record of the underlying proceedings. No set of facts can be proven to contradict the record and, therefore, the County Board is entitled to judgment as a matter of law pursuant to §2-619. In its Motion to Dismiss, the County Board presents the affirmative

matter that Petitioners' allegations are legal conclusions affirmatively negated by the record.

Further, Petitioners posit that "the County Board has mistaken the application of Section 2-619(a) for Section 2-615 of the Code..." (Petitioner's Response, p. 4). This is undoubtedly not the case. The Motion to Dismiss does not seek dismissal based on the defective portions of the Amended Petition or for failure to provide sufficient factual allegations, as is essential to a §2-615 motion. Rather, the Motion to Dismiss seeks summary dismissal of the fundamental unfairness allegations in the Amended Petition on the basis that those allegations are completely negated and disposed of, as a matter of law, by the underlying record.

**III. The Hearing Officer Had Authority To Strike Waste Management's Late-Filed Evidence And Portions Of The County Board's Counsel's Written Findings.**

Petitioners claim that "nothing in the plain language of the Act or the Ordinance grants the hearing officer the authority to strike the WMII Public Comment or portions of the County Counsel's written findings." (Petitioners' Response, p. 5). This statement is directly controverted by Section 7.1(2)(a) of the Ordinance, which empowers the hearing officer to rule on all evidentiary issues. Simply because the Petitioners take the position that the "public comment" and "written findings" at issue contained no evidence does not mean that it is so. In reality, the record demonstrates that these filings were indeed inadmissible late-filed evidence.

Moreover, the Petitioners note that Sections 8.4, 9.2 and 10.1 of the Ordinance specifically mandate that the County Board's counsel's written findings be made part of the record. The County Board does not disagree. However, it is imperative to note the difference between the words "findings" and "evidence." Nowhere in the Act or Ordinance does it state that the County Board or its counsel is granted leave to file evidence whenever it pleases. Certainly, such a rule would circumvent the Illinois



Pollution Control Board's rules regarding due process, notice and disclosure. Additionally, although not defined in the Ordinance, the word "findings" implies that the County Board's counsel is to provide his opinion, not scientific evidence, to the County Board and then his opinions, not scientific evidence, will then be made part of the record.

Tellingly, Petitioners' response does not address Waste Management's attempt to file late evidence nor does it provide legal support for their position that the hearing officer lacked authority to strike that evidence. Rather, Petitioners' response only attempts to show that the hearing officer lacked authority to strike portions of the County Board's counsel's written findings. This determination is a legal one and is demonstrated by the record to negate Petitioners' claims in this regard in their entirety.

WHEREFORE, for the above stated reasons, Respondent, COUNTY BOARD OF KENDALL COUNTY, ILLINOIS, respectfully requests that the Illinois Pollution Control Board dismiss the Petitioners' allegations set forth in paragraphs 10 and 11 of their Amended Petition for Hearing to Contest Site Location Denial, with prejudice, and for any other or further relief the Illinois Pollution Control Board deems just and proper.

Respectfully submitted,

COUNTY BOARD OF KENDALL COUNTY,  
ILLINOIS

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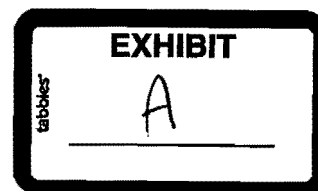
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and KENDALL LAND AND CATTLE, L.L.C.,	)	
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Petitioners,	)	No. PCB 09-43
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vs.	)	(Pollution Control Facility
	)	Siting Appeal)
	)	
COUNTY BOARD OF KENDALL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

**AMENDED PETITION FOR HEARING  
TO CONTEST SITE LOCATION DENIAL**

Petitioners Waste Management of Illinois, Inc. ("WMII") and Kendall Land and Cattle, L.L.C. ("KLC"), by Pedersen & Houpt, their attorneys, respectfully request a hearing to contest the decision of the County Board of Kendall County, Illinois ("County Board") denying site location approval for the proposed Willow Run Recycling and Disposal Facility. In support of this Petition, WMII and KLC state as follows:

1. This Petition is filed pursuant to Section 40.1(a) of the Illinois Environmental Protection Act (the "Act") (415 ILCS 5/40.1).
2. On February 5, 2007, WMII and KLC filed a Site Location Application for the Willow Run Recycling and Disposal Facility with the County Board ("2007 Application"). As proposed in the 2007 Application, Willow Run was located on a 669-acre site with a 282-acre waste footprint. Its waste disposal capacity was 35 million tons, and it had a site life of 35 years. Over one-third of the base double composite liner system was to be constructed within the underlying bedrock aquifer. At its highest point, Willow Run would be 235 feet above ground surface.



3. Public hearings on the 2007 Application were held over a three-week period in May, 2007. Having been made aware of the concerns that the County Board and the public had regarding the proposal, WMII and KLC withdrew the 2007 Application in July, 2007.

4. On June 3, 2008, WMII and KLC filed a revised Site Location Application for the Willow Run Recycling and Disposal Facility with the County Board ("2008 Application"). As proposed in the 2008 Application, Willow Run was substantially reduced in size and scope from the facility proposed in the 2007 Application. The site was reduced from 669 to 368 acres, the waste footprint from 282 to 134 acres, the capacity from 35 to 14.5 years and the high point from 235 to 180 feet. In addition, no part of the double composite liner would be constructed in the bedrock aquifer, but would be completely out of, and above, the bedrock aquifer. In fact, the bottom of the double composite liner and the top of the bedrock aquifer would be separated by a low permeability soil layer ranging in thickness from 5.2 to 24 feet providing further environmental protection.

5. Public hearings on the 2008 Application were conducted by the County Board and were held from September 11 to October 1, 2008.

6. On November 20, 2008, the County Board considered the 2008 Application, and voted to approve each of the statutory criteria except criteria (ii) and (iii). A true and correct copy of the Resolution Denying the Application, No. 08-34, is attached as Exhibit A.

7. WMII and KLC contest and object to this decision and its denial of criteria (ii) and (iii) as fundamentally unfair.

8. On information and belief, County Board members had improper *ex parte* communications with third persons both before and after the filing of the Application that prejudiced or otherwise influenced their vote to deny.

9. County Board members considered and relied upon matters outside the record in voting to deny.

10. The hearing officer improperly struck the public comment filed October 28, 2008 by WMII, in violation of Section 39.2(c) of the Act and of Articles 6 and 7 of the Amended and Restated Kendall County Site Approval Ordinance for Pollution Control Facilities ("Ordinance No. 08-15").

11. The hearing officer improperly struck a portion of the written findings of the County Board's legal counsel, in violation of Sections 8.4 and 9.2 of Ordinance No. 08-15.

12. The County Board's denial of criterion (ii) is unsupported by the record and against the manifest weight of the evidence.

13. The County Board's denial of criterion (iii) is unsupported by the record, against the manifest weight of the evidence and contrary to law.

WHEREFORE, WMII and KLC respectfully request that this Board enter an order (1) setting for hearing this contest of Resolution No 08-34, and (2) reversing the County Board siting denial.

Respectfully submitted,

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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EXHIBIT "A"

No. 08-34

**A RESOLUTION DENYING THE APPLICATION OF  
KENDALL LAND & CATTLE, LLC AND WASTE MANAGEMENT OF ILLINOIS, INC.  
FOR SITING APPROVAL OF A POLLUTION CONTROL FACILITY  
LOCATED IN UNINCORPORATED KENDALL COUNTY, ILLINOIS**

**WHEREAS**, pursuant to §39.2 of the Illinois Environmental Protection Act (the "Act"), 415 ILCS 5/39.2, Kendall County, Illinois (the "County") has the authority to approve or deny requests for local siting approval for new pollution control facilities, such as landfills; and

**WHEREAS**, the General Assembly of the State of Illinois has provided in the Illinois Environmental Protection Act, 415 ILCS 5/1, *et seq.* (the "Act"), that the Illinois Environmental Protection Agency may not grant a permit for the development or construction of a new pollution control facility which is to be located in an unincorporated area without proof that the location of said facility has been approved by the County Board of the County in which said new pollution control facility is proposed to be located; and

**WHEREAS**, Section 39.2 of the Act provides that an applicant for local siting approval shall submit sufficient details describing the proposed facility to demonstrate compliance with, and the County Board approval shall be granted only if, the proposed facility meets the following criteria (the "criteria"):

- (i) the facility is necessary to accommodate the waste needs of the area that it is intended to serve;
- (ii) the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;
- (iii) the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property;

- (iv) the facility is located outside the boundary of the 100-year flood plain or the site is flood-proofed;
- (v) the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills or other operational accidents;
- (vi) the traffic patterns to and from the facility are so designed as to minimize the impact on existing traffic flows;
- (vii) If the facility will be treating, storing, or disposing of hazardous waste, an emergency response plan exists for the facility which includes notification, containment and excavation procedures to be used in case of an accidental release;
- (viii) if the facility is to be located in a county where the county board has adopted a solid waste management plan consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act, the facility is consistent with that plan; for purposes of this criterion (viii), the "solid waste management plan" means the plan that is in effect as of the date the application for siting approval is filed; and
- (ix) if the facility will be located within a regulated recharge area, any applicable requirements specified by the [Pollution Control] Board for such areas have been met; and

**WHEREAS**, the County Board may also consider as evidence the previous operating experience and past record of convictions or admissions of violations of the applicant (and any subsidiary or parent corporation) in the field of solid waste management when considering criteria (ii) and (v) under §39.2 of the Act; and

**WHEREAS**, in conjunction with the Act, the Kendall County Site Approval Ordinance For Pollution Control Facilities, as amended (the "Siting Ordinance"), establishes certain rules and regulations relating to the form, content, fees, and filing procedures for

applications and other matters relating to the approval of sites for the location of New Pollution Control Facilities in the unincorporated areas of the County; and

**WHEREAS**, on June 3, 2008, Kendall Land & Cattle, LLC and Waste Management of Illinois, Inc. (collectively the "Applicant") filed with the County Board an application for site location approval for the Willow Run Recycling and Disposal Facility in unincorporated Kendall County (the "Application"), which Application consists of nine (9) volumes of reports and supporting data; and

**WHEREAS**, the County Board conducted public hearings on the Application on September 11, 12, 13, 15, 16, 17, 18, 22, 23, 24, 25, 29 and October 1, 2008, and the report of proceedings (transcripts) contains the testimony of each witness, the oral arguments of and cross-examination by the attorneys and participants and oral comments by citizens; and

**WHEREAS**, throughout the proceedings, comments and pleadings were filed by citizens, participants and parties, including but not limited to: (1) the Recommendation dated November 5, 2008 submitted by Mr. Michael S. Blazer, counsel to the County (the "Blazer Recommendation"), and (2) the proposed Findings dated November 11, 2008 submitted by Hearing Officer Patrick Kinnally (the "Kinnally Recommendation"); and

**WHEREAS**, the Siting Ordinance and Act require the County Board to determine compliance or non-compliance with the criteria and the County Board approves or denies a requested site location, which determination by the County Board may include conditions as permitted by the Act; and

**WHEREAS**, the Act requires that the County Board take final action on the Application within 180 days from the date of its filing; and

**WHEREAS**, the County Board undertook all the necessary and legal steps required to review and consider the Application and to develop a written decision consistent with

the requirements of §39.2 of the Act; and

**WHEREAS**, the County Board has accepted and considered all written comments received or postmarked within 30 days after the date of the last public hearing held in this matter; and

**WHEREAS**, the County Board has reviewed and considered the Blazer and Kinnally Recommendations; and

**WHEREAS**, the County Board has reviewed the Application in light of the criteria established for siting new pollution control facilities in §39.2 of the Act and the Siting Ordinance; and

**WHEREAS**, having reviewed the hearing record in accordance with the rulings of the Hearing Officer, the County Board finds that the application process was fundamentally fair and efficient and accessible to the County's citizens and the public generally; and

**WHEREAS**, after review of the Application, all relevant testimony, all exhibits, all public comments, the record made herein in its entirety and, after further consideration of all relevant and applicable factors and matters, the County Board finds that it has jurisdiction to rule on the Application of the Applicant for the Willow Run Recycling and Disposal Facility based upon the Applicant's proper notification as provided by the Act; and

**WHEREAS**, for the reasons set forth in the Kinnally Recommendation, the County Board finds that the Applicant has met its burden with respect to siting criteria 1, 4, 5, 6, 7, 8 and 9; and

**WHEREAS**, for the reasons set forth in the Kinnally Recommendation, the County Board finds that the Applicant has failed to meet its burden with respect to criteria 2 and 3; and



**NOW, THEREFORE, BE IT RESOLVED** by the Kendall County Board as follows:

**SECTION 1. Recitals.** The facts and statements contained in the preambles to this Resolution are found to be true and correct and are hereby adopted as part of this Resolution.

**SECTION 2. Decision.** The County Board denies the Application of Kendall Land & Cattle, LLC and Waste Management of Illinois, Inc. for failure to meet criteria 2 and 3.


**SECTION 3. Findings of Fact.** The County Board adopts the findings of fact and recommendations set forth in the Kinnally Recommendation.

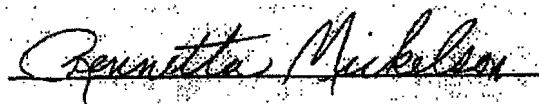
**SECTION 4. Severability.** If any section, subsection, sentence, clause, phrase or portion of this Resolution is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and such holding shall not affect the validity of the remaining portions of this Resolution.

**SECTION 5. Prior Resolutions.** All prior Ordinances and Resolutions in conflict or inconsistent herewith are hereby expressly repealed only to the extent of such conflict

**ADOPTED and APPROVED** by the **KENDALL COUNTY BOARD** on this

20<sup>th</sup> day of November, 2008

  
\_\_\_\_\_  
County Board Chairman

  
\_\_\_\_\_  
Benetta Mickelson

Electronic Filing - Received, Clerk's Office, May 5, 2009

Electronic Filing - Received, Clerk's Office, March 24, 2009

**County Clerk**

**CERTIFICATE OF SERVICE**

I, Lauren Blair, an attorney, on oath certify that I caused to be served the foregoing, **PETITIONERS' AMENDED PETITION FOR HEARING TO CONTEST SITE LOCATION DENIAL** to be served upon the following parties listed below electronically on this 24th day of March 2009.

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