

COPY

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE

MAR 31 2003

STATE OF ILLINOIS
Pollution Control Board

THE CITY OF KANKAKEE, an Illinois
Municipal Corporation)

Petitioner)

v.)

No. PCB 03-125

COUNTY OF KANKAKEE, a body politic and
Corporate; KANKAKEE COUNTY BOARD;
And WASTE MANAGEMENT OF ILLINOIS,
INC.,)

Respondent)

(Third-Party Pollution Control Facility
Siting Appeal)

MERLIN KARLOCK,)

Petitioner)

v.)

No. PCB 03-133

COUNTY OF KANKAKEE, a body politic and
Corporate; KANKAKEE COUNTY BOARD;
And WASTE MANAGEMENT OF ILLINOIS,
INC.,)

Respondent)

(Third-Party Pollution Control Facility
Siting Appeal)

MICHAEL WATSON,)

Petitioner)

v.)

No. PCB 03-134

COUNTY OF KANKAKEE, a body politic and
Corporate; KANKAKEE COUNTY BOARD;
And WASTE MANAGEMENT OF ILLINOIS,
INC.,)

Respondent)

(Third-Party Pollution Control Facility
Siting Appeal)

KEITH RUNYON,)

Petitioner)

v.)

No. PCB 03-135

COUNTY OF KANKAKEE, a body politic and
Corporate; KANKAKEE COUNTY BOARD;
And WASTE MANAGEMENT OF ILLINOIS,
INC.,)

Respondent)

(Third-Party Pollution Control Facility
Siting Appeal)

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MAR 31 2003

STATE OF ILLINOIS
Pollution Control Board

No. PCB 03-144
(Pollution Control Facility
Siting Appeal Consolidated)

WASTE MANAGEMENT OF ILLINOIS
INC.,

Petitioner

v.

COUNTY OF KANKAKEE,

Respondent

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on March 27, 2003 there caused to be filed via U.S. Mail with the Illinois Pollution Control Board an original and 9 copies of the following document, a copy of which is attached hereto:

Response to Motion to Dismiss Petition for Review Filed by The City of Kankakee

Respectfully submitted,

The City of Kankakee

By: 
Attorney for City of Kankakee

Prepared by:
L. Patrick Power #2244357
Corporate Counsel
956 North Fifth Ave.
Kankakee, IL 60901
(815) 937-6937

AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on March 27, 2003, a copy of the foregoing Response to Motion to Dismiss Petition for Review Filed by the City of Kankakee was served upon:

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James Thompson Center
100 W. Randolph St., Suite 11-500
Chicago, IL 60601-3218

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Brad Halloran, Hearing Officer
Illinois Pollution Control Board
100 W. Randolph St., Suite 11-500
Chicago, IL 60601-3218

By depositing a copy thereof, enclosed in an envelope in the United States Mail at Kankakee, Illinois, proper postage prepaid, before the hour of 5:00 p.m., on 27th day of March 2003, addressed as above.

SUBSCRIBED AND SWORN TO before me this 27th day of March 2003.

Notary Public

Prepared by: L. Patrick Power
Assistant City Attorney
956 N. Fifth Avenue
Kankakee, IL 60901
(815) 937-6937

Kenneth A. Leshen
Assistant City Attorney
One Dearborn Square, Suite 550
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

THE CITY OF KANKAKEE, an Illinois)
Municipal Corporation)

Petitioner)

v.)

COUNTY OF KANKAKEE, a body politic and)
Corporate; KANKAKEE COUNTY BOARD;)
And WASTE MANAGEMENT OF ILLINOIS,)
INC.,)

Respondent)

STATE OF ILLINOIS
Pollution Control Board

No. PCB 03-125

(Third-Party Pollution Control Facility
Siting Appeal)

MERLIN KARLOCK,)

Petitioner)

v.)

COUNTY OF KANKAKEE, a body politic and)
Corporate; KANKAKEE COUNTY BOARD;)
And WASTE MANAGEMENT OF ILLINOIS,)
INC.,)

Respondent)

No. PCB 03-133

(Third-Party Pollution Control Facility
Siting Appeal)

MICHAEL WATSON,)

Petitioner)

v.)

COUNTY OF KANKAKEE, a body politic and)
Corporate; KANKAKEE COUNTY BOARD;)
And WASTE MANAGEMENT OF ILLINOIS,)
INC.,)

Respondent)

No. PCB 03-134

(Third-Party Pollution Control Facility
Siting Appeal)

KEITH RUNYON,)

Petitioner)

v.)

COUNTY OF KANKAKEE, a body politic and)
Corporate; KANKAKEE COUNTY BOARD;)
And WASTE MANAGEMENT OF ILLINOIS,)
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MAR 31 2003

STATE OF ILLINOIS
Pollution Control Board

WASTE MANAGEMENT OF ILLINOIS)
 INC.,)
) **Petitioner**)
))
) **v.**)
 COUNTY OF KANKAKEE,)
))
) **Respondent**)

No. PCB 03-144
 (Pollution Control Facility
 Siting Appeal Consolidated)

**RESPONSE TO MOTION TO DISMISS
 PETITION FOR REVIEW FILED BY THE CITY OF KANKAKEE**

Now comes City of Kankakee, a Municipal Corporation, ("City"), by and through its attorneys, L. Patrick Power and Kenneth A. Leshen, Assistant City Attorneys, and files this response to the Motion to Dismiss Petition for Review filed by the City of Kankakee, and in support thereof, states as follows:

I. THE ABOVE REFERRED TO MOTION WAS NOT FILED IN A TIMELY MANNER IN ACCORDANCE WITH THE PROVISIONS OF THE ILLINOIS POLLUTION CONTROL BOARD RULE 101.506.

- A. Rule 101.506 requires that all Motions such as the one filed by the County of Kankakee must be filed within 30 days after service of the challenged document, unless the Board determines that material prejudice would result.
- B. In this case, notice was served upon Movant on February 20, 2003. The motion in question was filed more than 30 days after service of the City of Kankakee's Petition for Review. (See Exhibit 1 attached)

II. THE POLLUTION CONTROL BOARD HAS ALREADY DETERMINED THAT THE CITY OF KANKAKEE IS A PROPER PARTY TO THIS PROCEEDING AND HAS ACCEPTED ITS PETITION IN THE ORDER OF MARCH 6, 2003.

- A. The Order states in pertinent part as follows:

“For the reasons set forth below, the Board accepts the petitions for hearing and consolidates the proceedings on the Board’s own motion.”

- B. In accepting the Petition, the Board has found that the Petitioner satisfies all of the requirements of 415 ILCS 5/40.1(b) and is therefore not “duplicitous or frivolous”.
- C. Said Order further finds that the Petition of the City of Kankakee meets the content required of 35 Ill. Adm. Code 107.28, including the fact that the Petitioner is so located as to be affected by the proposed facility.

III. THE CITY OF KANKAKEE HAS STANDING TO APPEAL THE DECISION OF THE COUNTY OF KANKAKEE APPROVING THE SITING IN THIS CAUSE TO THE POLLUTION CONTROL BOARD, IS WITHOUT MERIT, BECAUSE IT MEETS THE REQUIREMENTS OF 415 ILCS 5/40.1(b).

- A. In this case, the City of Kankakee filed as an objector and fully participated in the siting hearings held in this cause pursuant to the rules established by the County Board of Kankakee County and in accordance with the provisions of 415 ILCS 5/39.2. No party, including Kankakee County, objected to the City of Kankakee participating as an objector.
- B. After fully participating in said siting hearings, without objection, the City of Kankakee filed its Petition to Review the County Board’s decision approving the siting with the Illinois Pollution Control Board pursuant to the provisions of 415 ILCS 5/40.1(b).
- C. Said section 5/40.1(b) reads in pertinent part as follows:

A third party other than the applicant who participated in the public hearing conducted by the county board or governing body of the municipality may, within 35 days after the date on which the local siting authority granted siting approval, petition the Board for a hearing to contest the approval of the county board or the governing body of the municipality. Unless the Board determines

that such petition is duplicative or frivolous, or that the petitioner is so located as to not be affected by the proposed facility, the Board shall hear the petition in accordance with the terms of subsection (a) of this Section and its procedural rules governing denial appeals, such hearing to be based exclusively on the record before county board or the governing body of the municipality.

- D. The County of Kankakee's Motion does not argue that the City of Kankakee's Petition is "duplicative" or "frivolous". The Pollution Control Board's Order of March 6, 2003, makes this specific finding.
- E. The *City of Elgin* case cited by Movant is inapplicable to this case. That case involved to a contest of a zoning amendment passed by an agency called the Solid Waste Agency of Northern Cook County (SWANCC), which was a zoning approval for a construction of a landfill. Rather than appeal that decision to the Illinois Pollution Control Board, the objectors chose to file suit in the Circuit Court of Cook County. The County Court dismissed this action with prejudice. In support of its position, the Plaintiff-Appellant argued that *Barrington Hills v. Village of Hoffman Estates*, 81 Ill. 2d 392 and *Hickory Hills v. Village of Bridgview*, 67 Ill. 2d 399, allowed them to appeal such decisions to the Circuit Court. The Elgin Court distinguished these cases by indicating that they were zoning decisions that did not involve the siting of a solid waste disposal facility and did not otherwise implicate the Illinois Environmental Protection Act (Page 65 of said decision). The Courts then indicated that ". . . the 1981 amendments provided that the local government decisions approving the siting of pollution control facilities are appealable to the Pollution Control Board. (415 ILCS 5/40.1(b))". Only the decision of the Pollution Control Board is appealable to the Court.
- F. In this case, the City of Kankakee has appealed to the Pollution control Board, as called for in *City of Elgin v. County of Cook*.

- G. Further, *City of Elgin v. County of Cook* relates to Section 39.2 (c) of the Environmental Protection Act. (Page 70 of said case) This case at bar, is an appeal from a decision under 39.2 of the Environmental Protection Act. The latter provides for broad public input; the former does not.
- H. Since the City of Kankakee was allowed to participate by the County in these hearings as an objector, and since the issue of lack of standing was not raised prior to the hearing by the County, that issue if it has any merit whatever, was waived, except for the grounds contained in Section 5/40.1(b).

IV. THE CITY OF KANKAKEE IS SO LOCATED AS TO BE SIGNFIANTLY AFFECTED BY THE PROPOSED FACILITY.

- A. Movant cites *Ogle County Board v. Pollution Control Board*, 272 Ill. App. 184 in support of the proposition City of Kankakee is so located as to not be affected by the proposed facility. In the *Ogle County* case, the Court found that an objector named Carmichael, who lived 10 miles from the proposed facility and who was a director and shareholder in a bank located approximately 4 miles from the proposed facility and who was a director at a grain elevator located 2.5 miles from the landfill was not a person “so located as to not be affected by the proposed facility.” (page 190 of said decision)
- B. In the case at bar, the City of Kankakee’s interest are dramatically affected: (i) the City’s boundary lines run approximately one mile from the proposed site in this case; (ii) property values, traffic congestion and safety hazards caused by improper design or operation of any facility on the proposed site could clearly affect the interest of the City of Kankakee whose boundaries lie so close to said proposed cite; (iii) the City of Kankakee takes it drinking water from the Kankakee River, which receives water from the proposed site. Any run-off from the proposed facility and the run-off from the existing facility or pollution of the aquifer underlying the site and the entire County of Kankakee as a result of the


unsafe design or operation of the facility would directly affect the health, safety and welfare of the City of Kankakee's citizens; (iv) the proposed site is within the mile and one-half zoning jurisdiction of the City of Kankakee.

WHEREFORE, the City of Kankakee prays that the Motion to Dismiss filed herein by the County of Kankakee be either dismissed or denied.

Respectfully submitted,

The City of Kankakee

By:



Attorney for City of Kankakee

Prepared by:
L. Patrick Power #2244357
Corporate Counsel
956 North Fifth Ave.
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FEB 20 2003

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS
Pollution Control Board

THE CITY OF KANKAKEE, an Illinois
Municipal Corporation)

Plaintiff)

VS.)

COUNTY OF KANKAKEE, a body politic and
Corporate; KANKAKEE COUNTY BOARD;
And WASTE MANAGEMENT OF ILLINOIS,
INC.,)

Defendants)

No. PCB /

(Pollution Control Facility
Siting Appeal)

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on February 20, 2003 there has caused to be filed via U.S. Mail with the Illinois Pollution Control Board, an original of the following documents, a copy of which are attached hereto:

PETITION FOR HEARING TO CONTEST SITE LOCATION APPROVAL

By: *L. Patrick Power*
Attorney

STATE OF ILLINOIS)
)ss
COUNTY OF KANKAKEE)

Proof of Service

The undersigned, being first duly sworn, state that I served a true and correct copy of the foregoing Notice, together with a copy of each document referred to therein, upon the person(s) indicated at their address(es) indicated by mailing in Kankakee, Illinois, before 6:00 P.M. on the 20th day of February 2003.

SUBSCRIBED AND SWORN TO before me this 20th day of February 2003.

Kristine A. Schmitz
OFFICIAL SEAL
L. PATRICK POWER
NOTARY PUBLIC STATE OF ILLINOIS
MY COMMISSION EXPIRES 02/28/2005
Notary Public

Prepared by:
L. PATRICK POWER #2244357
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(815) 937-6937

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FEB 20 2003

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

THE CITY OF KANKAKEE, an Illinois
Municipal Corporation)

Plaintiff)

VS.)

COUNTY OF KANKAKEE, a body politic and
Corporate; KANKAKEE COUNTY BOARD;
And WASTE MANAGEMENT OF ILLINOIS,
INC.,)

Defendants)

No. PCB 0

(Pollution Control Facility
Siting Appeal)

PETITION FOR HEARING
TO CONTEST SITE LOCATION APPROVAL

Now comes Petitioner City of Kankakee, a Municipal Corporation, ("City"), by and through its attorneys, L. Patrick Power and Kenneth A. Leshen, Assistant City Attorneys, and respectfully requests a hearing to contest the decision of the Kankakee County Board ("County Board") granting site location approval for a new regional pollution control facility. In support of this Petition, the City states as follows:

1. This petition is filed pursuant to Section 40.1 of the Illinois Environmental Protection Act, (the "Act") (415 TLCS 5/40.1).

2. On August 16, 2002, Waste Management of Illinois, Inc. ("WMII") filed an application with the County Board for a new regional pollution control facility immediately adjacent to its existing landfill.

3. On January 31, 2003, following service and publication of notice and public hearings conducted before the County Board, the County Board formally approved the siting request. A true and correct copy of the decision of the County Board is attached hereto and incorporated herein as Exhibit A.

4. The City appeared and participated in the hearings held before the County Board.

5. The City contests and objects to the County Board's siting approval because the siting process and procedures used by the County Board in reaching its decision were fundamental unfair for the following reasons:

- (a) Members of the County Board prejudged the siting application;
- (b) The County Board did not make available to the public required documents;
- (c) Procedural irregularities rendered the hearings fundamentally unfair; and,
- (d) The application was not complete and neither the County Board nor WMII followed the local siting ordinance requirements;

6. The City further contests and objects to the County Board's siting approval because the County Board lacked jurisdiction to conduct the siting hearing and because of the failure of WMII to give statutory notice to each of the required parties.

7. The City further contests and objects to the County Board's siting approval because the evidence presented by WMII failed to establish that WMII met the following criteria as established in §39.2 of the Act, to wit:

(A) That the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected.

Specifically, the evidence submitted by WMII and considered by the County Board fell short in one or more of the following particulars:

- (i) WMII has mischaracterized the permeability, thickness and regularity of the in situ materials relied upon to protect the public safety;
- (ii) The groundwater impact assessment is based on incorrect input parameters and is thus of no value;
- (iii) The inward hydraulic gradient is not sufficiently established or understood; and,

(iv) The regional bedrock aquifer underneath the existing adjacent facility has been contaminated and impacted by the existing facility and the safety of leachate recirculation and the proposed tie-in of the new facility to the old facility have not been established.

(v) No statistics or testimony were presented by WMII to show the effects of recirculation of leachate upon the safe operation of the facility.

(vi) WMII failed to submit any plans whatever for monitoring the site during its operation for radioactive waste.

(vii) WMII failed to do a piezometric surface map of the clay beneath the liner in the proposed plan.

(viii) WMII failed to provide data that would establish that the proposed ground water monitoring system would be effective.

(B) That the facility is located so as to so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding properties.

Specifically, the evidence submitted by WMII and considered by the County Board fell short in one or more of the following particulars:

(i) WMII's expert witness, J. Christopher Lannert failed to testify as to the plan "minimizing incompatibility" and therefore did not speak to this criterion at all.

(ii) WMII's expert witness, Patricia Garr, misrepresented her credentials as an expert and further, her analysis of the estimated effect of the proposed facility on the value of farmland and residential land in the area is unpersuasive.

(C) That the plan of operation for the facility is designed the minimize the dangers to the surrounding area from fire, spills, or other operational accidents.

(D) That the traffic patterns to or from the facility is so designed as to minimize the impact of the existing traffic flow.

8. The City further contests and objects to the County Board's siting approval because the proposed facility is not consistent with the County Solid Waste Plan in that it prohibits location of a new regional pollution control facility above a major aquifer and because no Property value Guarantee program was independently prepared and approved by the County Board.

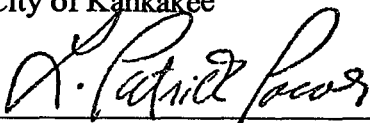
WHEREFORE, the City prays that the Board enter its order as follows:

- A. Setting for hearing this contest of the County Board Siting Decision;
- B. Reversing the County Board's siting decision; and
- C. Providing for such other and further relief as this Board deems to be just, necessary and proper.

Respectfully submitted,

The City of Kankakee

By:



Attorney for City of Kankakee

Prepared by:
L. Patrick Power #2244357
Corporate Counsel
956 North Fifth Ave.
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(815) 937-6937