

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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AUG 24 2004

STATE OF ILLINOIS
Pollution Control Board

CITY OF KANKAKEE,)
Petitioner,)

v.)

PCB 03-0125

COUNTY OF KANKAKEE, COUNTY)
BOARD OF KANKAKEE, AND WASTE)
MANAGEMENT OF ILLINOIS, INC.,)
Respondents.)

MERLIN KARLOCK,)
Petitioner,)

v.)

PCB 03-133

COUNTY OF KANKAKEE, COUNTY)
BOARD OF KANKAKEE, AND WASTE)
MANAGEMENT OF ILLINOIS, INC.,)
Respondents.)

MICHAEL WATSON,)
Petitioner,)

v.)

PCB 03-134

COUNTY OF KANKAKEE, COUNTY)
BOARD OF KANKAKEE, AND WASTE)
MANAGEMENT OF ILLINOIS, INC.,)
Respondents.)

KEITH RUNYON,)
Petitioner,)

v.)

PCB 03-135

COUNTY OF KANKAKEE, COUNTY BOARD)
OF KANKAKEE, AND WASTE)
MANAGEMENT OF ILLINOIS, INC.,)
Respondents.)

Consolidated Third-Party
Pollution Control Facility
Siting Appeal, *on appeal*,
3-03-0924 (3rd Dist.)


NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on August 23, 2004, there was caused to be mailed by overnight mail, for immediate filing with the Illinois Pollution Control Board, the following documents:

Motion for Leave to File Response Instanter

Merlin Karlock's Response Objecting to WMII's Motion for Relief from Judgment

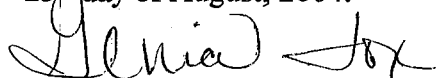

George Mueller
Attorney for Merlin Karlock

PROOF OF SERVICE

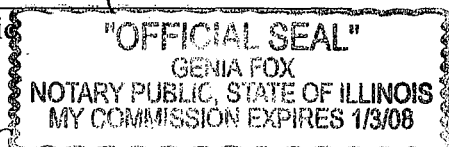
I, Susan McCollum, a non-attorney, on oath state that I served a copy of the foregoing documents by sending same to the persons on the attached service list, by depositing same in the U.S. Mail at Ottawa, Illinois, at 5:00 p.m. on August 23, 2004.



SUBSCRIBED and SWORN to before me this
23rd day of August, 2004.



Notary Public



George Mueller, P.C.
501 State Street
Ottawa, IL 61350
815/433-4705

Service List

Donald Moran
Pedersen & Houpt
161 North Clark Street, Suite 3100
Chicago, IL 60601

Edward Smith
Kankakee County State's Attorney
Kankakee County Administrative Bldg.
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Kankakee, IL 60901

Charles F. Helsten
Hinshaw & Culbertson
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105

Jennifer J. Sackett Pohlenz
Querrey & Harrow, Ltd.
175 West Jackson St., Ste. 1600
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Keith Runyon
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One Dearborn Square, Suite 550
Kankakee, IL 60901

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

AUG 24 2004

STATE OF ILLINOIS
Pollution Control Board

CITY OF KANKAKEE,)
Petitioner,)

v.)

PCB 03-0125

COUNTY OF KANKAKEE, COUNTY)
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COUNTY OF KANKAKEE, COUNTY BOARD)
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Respondents.)

Consolidated Third-Party
Pollution Control Facility
Siting Appeal, *on appeal*,
3-03-0924 (3rd Dist.)

MOTION FOR LEAVE TO FILE RESPONSE INSTANTER

NOW COMES MERLIN KARLOCK by his attorney, GEORGE MUELLER, P.C., and

moves for leave to file his Response to the Motion of WMII for Supplemental Relief *instanter*, and in support thereof states as follows:

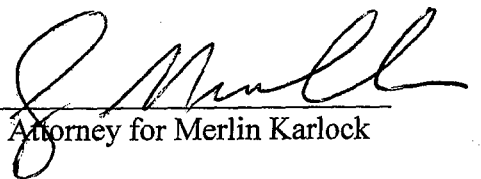
1. Waste Management of Illinois, Inc. filed a Motion to Supplemental Relief herein on August 6, 2004, and pursuant to Board Rules, Responses to said Motion were due by August 20, 2004.

2. Your Movant did not receive WMII'S Motion until August 10, 2004, and additionally, your Movant's attorney has been without a secretary for a significant period of time between August 10, 2004, and the current date, by reason of personnel changes in his office.

3. Allowing a late filing of this Response does not prejudice any of the parties or materially delay resolution of the issue.

WHEREFORE, MERLIN KARLOCK PRAYS that this Court grant him leave to file his Response to the Motion of WMII for Supplemental Relief *instanter*.

MERLIN KARLOCK

By: 
Attorney for Merlin Karlock

George Mueller, P.C.
Attorney at Law
501 State Street
Ottawa, IL 61350
815/433-4705

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD AUG 24 2004

STATE OF ILLINOIS
Pollution Control Board

CITY OF KANKAKEE,)
Petitioner,)

v.)

PCB 03-0125

COUNTY OF KANKAKEE, COUNTY)
BOARD OF KANKAKEE, AND WASTE)
MANAGEMENT OF ILLINOIS, INC.,)
Respondents.)

-----)
MERLIN KARLOCK,)
Petitioner,)

v.)

PCB 03-133

COUNTY OF KANKAKEE, COUNTY)
BOARD OF KANKAKEE, AND WASTE)
MANAGEMENT OF ILLINOIS, INC.,)
Respondents.)

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MICHAEL WATSON,)
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PCB 03-134

COUNTY OF KANKAKEE, COUNTY)
BOARD OF KANKAKEE, AND WASTE)
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KEITH RUNYON,)
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PCB 03-135

COUNTY OF KANKAKEE, COUNTY BOARD)
OF KANKAKEE, AND WASTE)
MANAGEMENT OF ILLINOIS, INC.,)
Respondents.)

Consolidated Third-Party
Pollution Control Facility
Siting Appeal, *on appeal*,
3-03-0924 (3rd Dist.)

MERLIN KARLOCK'S RESPONSE OBJECTING TO
WMII'S MOTION FOR RELIEF FROM JUDGMENT

NOW COMES MERLIN KARLOCK by his attorney, GEORGE MUELLER, P.C., and in

response to WASTE MANAGEMENT OF ILLINOIS, INC.'S Motion for Relief from Judgment, states as follows:

1. That Waste Management of Illinois, Inc., (WMII) has filed herein a Motion for Relief from Judgment, pursuant to Section 101.904(b)(1) of the Board's Rules. The relief requested is that the Board reverse its Decision of August 7, 2003, based upon some so-called newly discovered evidence. Concurrently with the filing of its Motion before the Board for relief from Judgment, WMII also filed in the Third District Appellate Court, a Motion for Stay of Appeal and *Instantier* Remand for Presentation of Newly Discovered Evidence.

2. That the Attorney General of the State of Illinois has filed in Case No. 3-03-0924, pending in the Third District Appellate Court, on behalf of the Illinois Pollution Control Board, a Response in opposition to WMII'S Motion in the Appellate Court. This Response points out that the Pollution Control Board was divested of jurisdiction in this matter by WMII'S Notice of Appeal of the August 7, 2003 Decision, that the so-called newly discovered evidence is nothing but inadmissible hearsay, and that the so-called newly discovered evidence is irrelevant in that it deals with possible, constructive or actual receipt of "posted" notice when this Board has previously ruled that posting is not an acceptable method of serving pre-filing notice of Landfill Siting Applications. The Attorney General's Response filed in the Appellate Court is entirely appropriate and relevant here, and KARLOCK hereby attaches a copy of the same to this Response and adopts the same as if set forth fully by him.

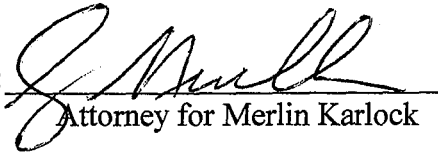
3. That even if this Board retains jurisdiction to grant supplemental relief, WMII has not met the test for receiving such relief. Board Rule 101.903(b)(1) purports to make supplemental relief available based upon "newly discovered evidence that existed at the time of hearing and that by due

diligence could not have been timely discovered". The Record in this case indicates that the parties engaged in extensive discovery prior to the Board Hearing. WMII'S failure to serve required statutory Notices on Mr. and Mrs. Keller was an issue known and recognized by all of the parties at the time that pre-hearing discovery took place. The testimony of Mr. and Mrs. Keller regarding WMII'S failure to serve them with Notice was part of the Record of the local siting hearing before the Kankakee County Board. WMII had every opportunity to engage in discovery, including, but not limited to, Interrogatories to the County and the deposition of County Board Members, but WMII chose not to take that route.

4. That although the Board Rule is not explicit on the point, newly discovered evidence, in order to be the basis of post-judgment relief, needs to be conclusive and indisputable, and needs to be of such a nature that it would most probably change the outcome. Neither of these tests if met here. As pointed out by the Attorney General in her Response in the Appellate Court, the newly discovered evidence consists merely of the hearsay statements of a County Board Member regarding discussion she allegedly had with Robert Keller. These statements come from a known supporter of WMMI'S Siting Application. They are uncorroborated by any other person or any physical evidence and they were not cross-examined or tested by any participant in this proceeding. Additionally, these hearsay statements by a biased County Board Member are hardly conclusive or likely to alter the previous outcome. While the statements appear to contradict the testimony of Robert Keller, they leave open the question of whose testimony is more credible. Disagreement of one witness with another on an issue that is at best a collateral point, falls far short of the kind of evidence required to change a result after a hearing of trial is finally concluded.

5. For the foregoing reasons, MERLIN KARLOCK prays that the Motion of Waste Management of Illinois, Inc. for Supplemental Relief be denied.

MERLIN KARLOCK

By: 
Attorney for Merlin Karlock

*George Mueller, P.C.
Attorney at Law
501 State Street
Ottawa, IL 61350
815/433-4705*

IN THE
APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT

WASTE MANAGEMENT OF)	Petition for Review of an Order of the
ILLINOIS, INC., a Delaware)	Illinois Pollution Control Board,
corporation,)	PCB 03-125, 03-133, 03-134 & 03-135
)	
Petitioner,)	
)	
v.)	
)	
ILLINOIS POLLUTION CONTROL)	
BOARD, COUNTY OF KANKAKEE,)	
COUNTY BOARD OF KANKAKEE,)	
CITY OF KANKAKEE, MERLIN)	
KARLOCK, KEITH RUNYON, and)	
MICHAEL WATSON,)	
)	
Respondents.)	

**RESPONSE IN OPPOSITION OF
THE ILLINOIS POLLUTION CONTROL BOARD
TO THE MOTION FOR STAY OF APPEAL AND
INSTANTER REMAND FOR PRESENTATION OF
NEWLY DISCOVERED EVIDENCE TO THE BOARD**

Respondent, ILLINOIS POLLUTION CONTROL BOARD, through its attorney, LISA MADIGAN, Attorney General of Illinois, responds in opposition to Petitioner's "Motion for Stay of Appeal and *Instanter* Remand" and states the following:

1. In its August 7, 2003 final decision, the Board vacated the Kankakee County Board's January 31, 2003 decision granting Waste Management of Illinois, Inc.'s application for expansion of its existing pollution control facility. The

Petitioner filed a petition for review, seeking this Court's review of that determination.

2. Petitioner has now filed a motion to stay its appeal, requesting that the Court remand the matter to the Board. It has contemporaneously filed a motion with the Board asking the Board to grant relief from the Board's judgment that the County Board of Kankakee lacked jurisdiction to review the siting application.

3. The Board lacks jurisdiction to rule on the motion currently pending before it: "It is fundamental that the proper filing of a notice of appeal causes the jurisdiction of the appellate court to attach *instantly* and deprives the trial court of jurisdiction to modify its judgment or to rule on matters of substance which are the subject of appeal." *Cain v. Sukkar*, 167 Ill. App. 3d 941, 521 N.E.2d 1292, 1294 (4th Dist. 1988) (citing *Montgomery Ward & Co. v. Wetzel*, 98 Ill. App. 3d 243, 423 N.E.2d 1170 (1st Dist. 1981)). This Court is the proper venue to address the substance of the motions.

4. Nevertheless, the Board respectfully submits that remand is inappropriate for two distinct reasons.

5. First, the new evidence that the Petitioner submits warrants remand is clearly hearsay, and the Petitioner has offered no applicable exceptions to the hearsay rule that would warrant the Board's consideration of that evidence.

6. Second, the new evidence is not relevant. The gist of petitioner's motion is that the new evidence indicates that Brenda Keller was aware of a posted notice of Petitioner's siting application, and that this would persuade the Board to change its

final decision in this matter. Petitioner misconstrues the rationale and findings in the Board's decision.

7. The Board found that, under Section 39.2 (b) of the Environmental Protection Act (415 ILCS 5/39.2 (2002)), service on property owners specified in the section "must be effectuated using certified mail return receipt or personal service." (R. CL vol. 10, pp. 001547-1564, 1561.) The Board further found that Mrs. Keller was not served via certified mail and was not served personally. (slip op at 16.) Consequently, the Board found that the statutory notice requirements were not met.

8. The Board's decision in this case specifically addressed the issue of "posting" notice and found that such notice was inadequate under the statute. Specifically, the Board ruled:

Waste Management argues that both "posting" notice and notice by regular mail was sufficient notice of an impending landfill siting application. However, the Act envisions two and only two types of service: personal or certified mail return receipt requested. Therefore, the attempts by Waste Management to serve property owners by methods such as sending notice of an application by regular mail and "posting" notice are not authorized by the plain language of Section 39.2(b) of the Act. 415 ILCS 5/39.2(b) (2002). Waste Management cites one case (Greene) on the issue of posting notice as a means of service; however, the United States Supreme Court found in Greene that posting a notice was insufficient even though the statute at issue specifically allowed for posting. The Board has reviewed the case law and can find no case where posting notice was adequate in place of personal service except pursuant to specific statutory language. There are statutes which allow for notice to be posted. See 65 ILCS 5/11-19.2-4, 5/11-31.1-1 and 735 ILCS 5/9-104 and 5/9-107 (2002). However, the plain language of Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)) does not allow for posting of notice. Therefore, the Board finds that "posting" notice is not sufficient to meet the notice requirements

of Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)), and notice by regular mail is insufficient based on the plain language of Section 39.2(b) of the Act. 415 ILCS 5/39.2(b) (2002). (R. CL vol. 10, pp. 001547-1564, 1562.)

9. Therefore, even if the “newly discovered evidence” was true and admissible, the evidence would not alter the Board’s decision in the underlying case.

10. Following its discussion of the adequacy of “posting notice”, the Board addressed arguments based on dicta in one of its prior cases concerning whether notice requirements could be met through “constructive notice”. The Board distinguished this case from its prior cases, all of which involved the mailing of notice. (R. CL vol. 10, pp. 001547-1564, 1563.) Here, the Board specifically found that mailing a certified letter to Brenda Keller’s husband “was not sufficient to find constructive notice” on Brenda. (R. CL vol. 10, pp. 001547-1564, 1564.) Given the Board’s finding that statutory notice requirements to a landowner could be met only through personal service or service by certified mail, return receipt requested, the Board’s discussion of its prior “constructive notice” cases and dicta is mere surplusage. Constructive notice is not contained within the plain wording of Section 39.2.

11. The issue of what Section 39.2 of the Act requires is squarely before this Court. The issues have been fully briefed by both Petitioner (see Brief of Petitioner pages 18-19) and the Board (See Brief of Respondent pages 29-30). Therefore, granting Petitioner’s motion would unnecessarily delay the ultimate resolution of this proceeding.

12. For these reasons, the Board respectfully requests that this Court deny petitioner's motion for stay and remand of this cause to the Board. Instead, in the interests of both judicial and administrative economy, the Board urges this Court to schedule oral argument and proceed to rendering its decision in this appeal.

Respectfully submitted,

LISA MADIGAN
Attorney General
State of Illinois

BY: 

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