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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JUL 07 2004

STATE OF ILLINOIS
Pollution Control Board

WASTE MANAGEMENT OF ILLINOIS, INC.,)
)
Petitioner,)
)
vs.)
)
COUNTY BOARD OF KANKAKEE COUNTY,)
ILLINOIS,)
)
Respondent.)

No. PCB 04-186
(Pollution Control Facility
Siting Appeal)

NOTICE OF FILING

TO: All Attorneys of Record

PLEASE TAKE NOTICE THAT on July 6, 2004, I filed with the Illinois Pollution Control Board, Chicago, Illinois, the attached **Respondent's Objection to Michael Watson's Motion to Intervene and Motion for Leave to File an Amicus Curiae Brief**, a copy of which is herewith served upon you.

DATED: 7/6/04

COUNTY BOARD OF KANKAKEE COUNTY,
ILLINOIS,

BY: HINSHAW & CULBERTSON

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**RESPONDENT'S OBJECTION TO MICHAEL WATSON'S MOTION TO INTERVENE
AND MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF**

NOW COMES Respondent, COUNTY BOARD OF KANKAKEE COUNTY, ILLINOIS, and as and for its Objection to Michael Watson's Motion to Intervene and Motion for Leave to File an *Amicus Curiae* Brief, states as follows:

I. BACKGROUND

1. On September 26, 2003, Waste Management of Illinois, Inc. ("WMII") filed a site location application with the County Board of Kankakee, Illinois ("County Board") for expansion of an existing landfill located in the County of Kankakee, Illinois.

2. On March 17, 2004, the County Board denied WMII's application.

3. WMII has sought review of the County Board's decision pursuant to Section 40.1(a) of the Illinois Environmental Protection Act ("Act"), and Michael Watson, an objector in the local siting hearing, seeks to intervene in these proceedings.

4. Watson asserts that he should be allowed to intervene in the Pollution Control Board ("PCB") proceedings because: 1) he will be "directly and adversely affected if WMII is successful on its appeal"; 2) he should have the opportunity to participate in discovery and the presentation of evidence as an "adjacent property owner"; 3) he "actively participated" in the

local siting hearing; and 4) his "property rights will be directly and adversely impacted" as the owner of land surrounding the proposed expansion. *See* Watson's Motion to Intervene ("Motion"), paras. 4-6.

5. In the alternative, Watson seeks leave to file an amicus curiae brief with this Board. Motion, paras. 22-26.

II. ARGUMENT

A. MR. WATSON'S MOTION TO INTERVENE SHOULD BE DENIED.

6. In support of his Motion to Intervene, Watson cites to IPCB Procedural Rule 101.402, which he contends gives him the right to intervene in this case. *See* Motion, paras. 7-8. However, Watson's reliance on Rule 101.402 is clearly misplaced, as Rules 107.200 and 107.202, not Rule 101.402, govern who may be parties to an appeal of a county board's decision regarding site location approval.

7. Rule 107.200 sets forth who may file a petition for review concerning siting of a new pollution control facility, and allows only two types of people to do so: 1) siting applicants when there has been a "decision to deny siting" or to "appeal conditions imposed in a decision granting siting approval"; and 2) a person who participated in the local siting hearing who is adversely affected by a unit of local government's "decision to grant siting." 35 Ill. Adm. Code 107.200 (emphasis added).

8. As set forth above, only the applicant may be a petitioner when a siting application is denied by a local governing unit. *See* 35 Ill. Adm. Code 107.200.

9. Furthermore, Rule 107.202 specifically sets forth who may be parties to a review of a local government's decisions concerning a new pollution control facility. Rule 107.202 provides:

a) In a petition to review a local government's decision concerning a new pollution control facility, the following are parties to the proceeding:

1) The petitioner or petitioners are the persons described in Section 107.200 of this Part. If there is more than one petitioner, they must be referred to as co-petitioners; and

2) The unit(s) of local government whose decision is being reviewed must be named the respondent(s). In an appeal pursuant to Section 107.200(b), the siting applicant must also be named as respondent.

b) Where the interests of the public would be served, the Board or hearing officer may allow intervention by the Attorney General or the State's Attorney of the county in which the facility will be located.

35 Ill. Adm. Code 107.202.

10. Rule 107.202 then clearly does not allow for an adjacent landowner, such as Mr. Watson, to be a party to this proceedings, as Rule 107.202 clearly limits the parties to the petitioner(s), the unit(s) of local government, and the Attorney General or State's Attorney (if they seek intervention).

11. Therefore, despite Mr. Watson's contention that Rule 101.402 somehow allows him to intervene in this action, Rules 107.200 and 107.202 clearly do not allow intervention, and the latter rules are controlling in this case based on the provisions contained in Parts 101 and 107 of the PCB Rules.

12. The PCB made clear that the rules set forth in Part 101 are "general rules." *See* 35

Ill. Adm. Code Part 101 Table of Contents. As set forth in Part 101 of the IPCB's rules:

This Part sets forth the rules generally applicable to proceedings before the Illinois Pollution Control Board (Board), and should be read in conjunction with procedural rules for the Board's specific processes, found at 35 Ill. Adm. Code 102 through 130, and the Board's Administrative Rules, found at 2 Ill. Adm. Code 2175. In the event of a conflict between the rules of this Part and those found in subsequent parts, the more specific requirement applies.

35 Ill. Adm. Code 101.100(a) (emphasis added).

13. Part 107 of the PCB's Rules provides more specific rules:

a) This part applies to adjudicatory proceedings before the Board concerning petitions to review a pollution control facility siting decision made by local government pursuant to Section 39.2 and 40.1 of the Act.

b) This Part must be read in conjunction with 35 Ill. Adm. Code 101, which contains procedures generally applicable to all of the Board's adjudicatory proceedings. In the event of a conflict between the requirements of 35 Ill. Adm. Code 101 and those of this Part, the provisions of this Part apply.

35 Ill. Adm. Code 107.100 (emphasis added).

14. A conflict exists between the intervention rules contained in Parts 101 and 107 because Rule 101.402 allows any person to intervene if certain requirements are met, while Rule 107.202 specifically provides that only the State's Attorney or Attorney General may intervene in a landfill siting appeal. Consequently, the more specific provisions of Part 107 control, and require that Mr. Watson's Motion to Intervene be denied.

15. Mr. Watson's Motion to Intervene must also be denied pursuant to the plain language of Section 40.1 of the Illinois Environmental Protection Act, which provides:

(a) If the county board * * * refuses to grant approval * * * the applicant may * * * petition for a hearing before the [IPCB] to contest the decision * * *.

(b) If the county board * * * grants approval * * * a third party other than the applicant * * * may petition the [IPCB] * * * for a hearing to contest the approval * * *

415 ILCS 5/40.1(a).

16. While the Act allows for intervention by third parties when an application is approved, "[t]he Act thus does not provide for a third-party appeal where the PCB has refused to grant site approval." *McHenry County Landfill, Inc. v. Illinois Environmental Protection Agency*, 154 Ill.App.3d 89, 95, 506 N.E.2d 372, 376 (2d Dist. 1987); *see also Waste Management of Illinois, Inc. v. Illinois Pollution Control Board*, 160 Ill.App.3d 434, 444, 513 N.E.2d 592, 598 (2d Dist. 1987) ("following a county board denial of a site approval request, section 40.1 of the Act precludes objectors from becoming parties to a PCB review hearing").

17. Based on the explicit language contained in Section 40.1 of the Act, this Board must not grant Mr. Watson's motion to intervene because "[t]he PCB is powerless to expand its authority beyond that which the legislature has expressly granted to it." *McHenry County*, 154 Ill.App.3d at 95, 506 N.E.2d at 376. As such, it would be improper and unlawful for this Board to allow Mr. Watson to intervene as a party in this proceeding. *See id.* (holding that "the PCB improperly permitted the objectors to become parties to the proceeding before it" and therefore finding that the objectors had no standing to appeal under section 41 of the Act).

18. It is clear that Mr. Watson's Motion to Intervene should be denied, as the IPCB has universally held that third-party objectors like Mr. Watson are not entitled to intervention when the local unit of government denies an applicant's request for site location approval. *See Rochelle Waste Disposal, L.L.C. v. City Council of Rochelle*, PCB 03-218 (July 10, 2003) (explaining that a third-party objector did not have special intervention rights, and therefore could not intervene); *Waste Management of Illinois, Inc. v. County Board of Kane County*, PCB 03-104 (Feb. 20 (2003) (same); *Land and Lakes Co. v. Randolph County Board of Commissioners*, PCB 99-69 (March 18, 1999) (finding that "allowing a third-party to intervene would be granting party status to someone who does not have party status under Section 40.1 of the Act"); *Lowe Transfer, Inc. v. County Board of McHenry County*, PCB 03-221 (July 10, 2003) ("It is well established that third-party objectors are precluded from intervention in an appeal from a denial of siting approval."); *Riverdale Recycling, Inc. v. IEPA*, PCB 00-228 (same); *Land and Lakes Co. v. Village of Romeoville*, PCB 94-195 (Sept. 1, 1994) (same)

19. Mr. Watson attempts to distinguish the long line of cases in which the IPCB has refused to allow intervention by asserting that his rights as a property owner are somehow unique

and, therefore, his interest warrants intervention. *See* Motion, paras. 12-16. However, Mr. Watson's argument is seriously flawed for two reasons.

20. First, Mr. Watson, an owner of property contiguous to the proposed landfill expansion is not unique, as many of the interveners in the cases cited above were owners of property adjacent to the proposed landfills, and claimed that they should be allowed to intervene based on that fact, but the PCB disagreed. *See Land and Lakes Co. v. Village of Romeoville*, 91-7 (Feb. 7, 1991) (finding that a forest preserve had not right to intervene because its interest was that of an adjacent landowner); *Land and Lakes v. Romeoville*, PCB 94-195 (finding that a forest preserve district that was an "adjacent landowner" had no right to intervene); *Lowe Transfer, Inc.* PCB 03-221 (denying intervention to a village located directly adjacent to a proposed landfill despite contentions that the landfill would have a "significant impact" on the village).

21. Furthermore, Mr. Watson has no right as an individual property owner to assert a private interest in a landfill siting review. In fact, as set forth above, the PCB rules clearly establish that it is only appropriate for an individual representing the public interest to intervene, which is why the PCB Rules specifically allow only the State's Attorney or Attorney General to intervene in an action such as this. *See Land and Lakes v. Romeoville*, PCB 91-7 (explaining that the State's interest in intervention is "to protect the public welfare"); *Land and Lakes v. Romeoville*, PCB 94-195 (explaining that "a state's attorney may intervene to represent the public interest"); *Land and Lakes v. Randolph County*, PCB 99-69 (same); *Lowe Transfer, Inc.*, PCB 03-221 (same); *Rochelle*, PCB 03-218 (same); *Waste Management*, PCB 03-104 (same).

22. In fact, it is appropriate for only the State's Attorney or Attorney General to intervene in the review of the denial of a site location application because "the Attorney General, 'as chief legal officer of this State, * * * has the duty and authority to represent the interests of

the People of the State to insure a healthful environment", and the "State's Attorney's 'rights and duties are analogous to those of the Attorney General." *Saline County Landfill, Inc. v. IEPA*, PCB 02-108 (April 18, 2002), citing *Pioneer Processing, Inc. v. IEPA*, 102 Ill.2d 119, 464 N.E.2d 238 (1984) and *Land and Lakes Co. v. PCB*, 245 Ill.App.3d 631, 616 N.E.2d 349 (3d Dist. 1993); see also *Land and Lakes Co v. Romeoville*, PCB 91-7 (Feb. 7, 1991) (explaining that the State's Attorney and Attorney General represent "a legitimate public interest").

23. Clearly, the PCB has determined that only an individual protecting the public interest is allowed to intervene when the PCB is reviewing a local government's decision to deny site location approval. Therefore, Mr. Watson, who is attempting to protect only his private interests, should not be allowed to intervene.

24. Moreover, Mr. Watson's private right as a property owner would not be affected by reversal of the County Board's denial, as Mr. Watson contends, because WMII submitted with its application a Property Value Protection Plan to protect the property value of Mr. Watson's land, as well as other property surrounding the landfill. If WMII somehow violates that Plan, Mr. Watson then will have a private right of action against the WMII. Clearly, such an interest is not relevant to a landfill siting appeal, such as this, but is more appropriately raised in a court of law if, in fact, Mr. Watson's property is actually harmed by the landfill expansion.

25. Mr. Watson also improperly asserts that his presence is necessary in this proceeding because the County Board may not raise certain arguments that he would like raised and because the County Board may not adequately defend its denial of site location approval. See Motion, para. 10.

26. Such assertions are simply incorrect, and do not warrant Mr. Watson's intervention in this case. It is well settled that "when a governmental entity is involved,

'interested parties legitimately may assume that their elected officials will adequately represent their interest as members of the general public." *People ex rel. Birkett v. City of Chicago*, 329 Ill.App.3d 477, 490, 769 N.E.2d 84, 96 (2d Dist. 2002), *rev'd in part on other grounds*, 202 Ill.2d 36, 779 N.E.2d 875 (2002). Furthermore, the "[a]dequacy [of representation] can be presumed when the party on whose behalf the applicant seeks intervention is a governmental body or officer charged by law with representing the interests of the proposed intervenor." *American Nat'l Bank and Trust Co. of Chicago v. City of Chicago*, 865 F.2d 144, 148 (7th Cir. 1989).

27. Because it is clear that the County Board will adequately represent itself and vigorously defend its denial of site location approval, Mr. Watson's intervention is neither necessary or appropriate.

28. Finally, Mr. Watson cites to a number of zoning cases to support his position that his Motion to Intervene should be granted because he is an adjacent landowner. See Motion, paras. 11, 18. However, all of those cases are completely irrelevant because the intervention in those cases was not decided pursuant to the Illinois Environmental Protection Act or PCB Rules, but was decided pursuant to the Illinois Code of Civil Procedure.

29. As set forth above, the provisions relevant to intervention in this case are found in the PCB's Rules, located in the Illinois Administrative Code, not in the Illinois Code of Civil Procedure. In fact, the PCB Rules specifically provide that "[t]he provisions of the Code of Civil Procedure [735 ILCS 5] and the Supreme Court Rules [Ill. S. Ct. Rules] do not expressly apply to proceedings before the Board." 35 Ill. Adm. Code 101.100(b).

30. Therefore, the zoning cases cited by Mr. Watson have absolutely no bearing on this case, and should be entirely disregarded by this Board.

31. For the reasons set forth above, Mr. Watson's Motion to Intervene should be denied.

B. MR. WATSON'S MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF SHOULD BE DENIED.

32. Mr. Watson argues that he should be granted leave to file an *amicus curiae* brief if he is not allowed to intervene as a party in these proceedings; however, this Board should deny Watson's request to file an *amicus curiae* brief because, through his brief, Mr. Watson will be attempting to present wholly new arguments to this Board that have not been previously raised by the parties in the underlying action, as Mr. Watson has specifically admitted in his Motion. *See* Motion, para. 8.

33. As an *amicus*, Mr. Watson is specifically precluded from presenting new arguments. As explained by the Illinois Supreme Court, an *amicus curiae* is not a party to the action but is, instead a "friend" of the court, and, as such, the sole function of an *amicus* is to advise or make suggestions to the court. *People v. P.H.*, 145 Ill.2d 209, 234, 582 N.E.2d 700, 711 (1991). An *amicus* takes the case as he finds it, with the issues framed by the parties. *Id.*

34. Therefore, an *amicus curiae* has no right to present issues that are not raised by the parties to the proceeding.

35. In fact, issues addressed and arguments made only by an *amicus curiae*, and not by the parties, need not be considered. *See Archer Daniels Midland Co. v. Industrial Commission*, 138 Ill.2d 107, 117, 561 N.E.2d 623, 627 (1990); *P.H.*, 145 Ill.2d at 234, 582 N.E.2d at 711-12; *In re J.W.*, 204 Ill.2d 50, 73, 787 N.E.2d 747, 761 (2003).

36. Moreover, Mr. Watson should also be denied the right to become an *amicus curiae* because he is not a "friend" of the Board, but is attempting to become a part of this proceeding as a competitor of WMII.

37. Although Mr. Watson contends that he is simply interested in this action as a concerned landowner, Mr. Watson has failed to point out in his Motion that he is also a competitor to WMII.

38. As such, Mr. Watson does not fit within the definition of an *amicus curiae*, and he should, therefore, be denied the right to file an *amicus curiae* brief. See *Mines v. Olin Corp.*, 171 Ill.App.3d 246, 248, 524 N.E.2d 1203, 1205 (1st Dist. 1988) (explaining that "an *amicus curiae* is an impartial individual who suggests the interpretation and status of the law, gives information concerning it, and those function is to advise in order that justice maybe done") (emphasis added).

39. Additionally, Mr. Watson's Motion for Leave to File an *Amicus Curiae* brief should be denied because, through his brief, Mr. Watson will not simply be advising this Board regarding the law, but he will be advocating a point of view and urging this Board to find in favor of the County Board and against WMII. Such is not the role of an *amicus curiae*. See *Mines*, 171 Ill.App.3d at 248-49, 524 N.E.2d at 1205. Therefore, Mr. Watson's Motion should be denied. See *id.*

40. Furthermore, Mr. Watson's Motion for Leave to File an *Amicus Curiae* Brief should be denied because his presence in this case will unduly delay the proceedings.

41. Just as it is relevant for the Board to consider whether an intervener "will unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding" (35 Ill. Adm. Code 101.402(b)), this Board should also consider whether an *amicus curiae* will delay, prejudice or interfere with the proceeding.

42. In this case, Mr. Watson will delay and interfere with the Board proceeding as he has done in earlier proceedings between the same parties.

43. As Mr. Watson pointed out in his Motion, he was also involved in opposing the first application filed by WMII in August 16, 2002. That case is now pending in the Third District Court of Appeals, 03-03-0924. In that case, Mr. Watson has repeatedly delayed the proceedings by requesting extensions of time.

44. If Mr. Watson were allowed to become an *amicus* in this case, he will likely do the same and unduly delay these proceedings. As such, Mr. Watson's Motion for Leave to File an *Amicus Curiae* Brief should be denied.

III. CONCLUSION

WHEREFORE, Respondent, COUNTY BOARD OF KANKAKEE, ILLINOIS, respectfully requests that this Board deny Mr. Watson's Motion to Intervene and Motion For Leave to File *Amicus Curiae* Brief.

DATED: _____

7/6/04

COUNTY BOARD OF KANKAKEE COUNTY,
ILLINOIS

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PROOF 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 July 6, 2004, a copy of the foregoing was served upon:

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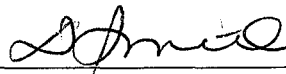
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By depositing a copy thereof, enclosed in an envelope in the United States Mail at Rockford,, Illinois, proper postage prepaid, before the hour of 5:00 P.M., addressed as above.



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