

JUL 01 2004

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

STATE OF ILLINOIS  
 Pollution Control Board

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

**MERLIN KARLOCK'S PETITION FOR LEAVE TO INTERVENE OR,  
 ALTERNATIVELY, FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF**

Now comes Merlin Karlock, (Karlock) by his attorney, George Mueller, P.C., and pursuant to Illinois Pollution Control Board (Board) Rule 101.402 requests this Board's leave to intervene as a party in this matter. In the alternative, and without waiving any rights including rights on appeal, should such Motion be denied, Karlock seeks leave to file an *amicus curiae* brief pursuant to 101.628(c) of the General Rules of the Board. In support of this Petition, Karlock states as follows:

1. On August 16, 2002, Waste Management of Illinois, Inc. (WMI) filed an application for site location approval of a regional pollution control facility, namely a vertical and horizontal expansion of an existing municipal solid waste landfill in Kankakee County, Illinois. The application was filed pursuant to Section 39.2 of the Environmental Protection Act. The Kankakee County Board subsequently granted siting approval, and the Pollution Control Board reversed on review, finding that the Kankakee County Board lacked jurisdiction to conduct the siting proceedings because WMI had not properly served all adjoining landowners with pre-filing

notice as required by the Act. WMI then filed a second application for site location approval, which application was denied by the Kankakee County Board on March 17, 2004.

2. Karlock participated actively as an objector, cross-examining witnesses, calling witnesses, and offering exhibits and evidence in both the first and second hearings on the WMI siting application. In addition, Karlock was a successful third-party petitioner in case PCB 2003-133 in which the siting approval granted by the Kankakee County Board on WMI's first application was reversed. Accordingly, Karlock has actively and successfully participated in these proceedings at every stage up to this point.

3. Karlock is the fee or beneficial owner of 160 acres of land immediately north of the proposed WMI site, and by reason of his owning real estate adjacent and contiguous to the subject WMI property, his property rights will be immediately and directly affected by the outcome of this case.

4. That there has been previously filed by Michael Watson, another adjacent property owner who participated actively in the prior proceedings herein, a Motion To Intervene And In The Alternative Motion For Leave To File An *Amicus Curiae* Brief. Karlock hereby adopts, as his own by reference as if fully set forth herein, all of the legal arguments made by Watson and all of the authorities cited by Watson in support of those arguments.

5. That not allowing adjoining landowners to participate as interveners in landfill siting appeals brought by unsuccessful applicants for local siting approval leads to both absurd and unjust results. For example, in the event that WMI is successful in this appeal on the argument that the County Board's denial of siting approval was against the manifest weight of the evidence, siting approval will be deemed to be granted by this Board's reversal of the local

decision-maker. At that point, however, none of the parties who participated as objectors in the local siting hearing will have the opportunity to file a Petition For Review with this Board contesting the County Board's jurisdiction to even conduct the local siting hearing, contesting the fundamental fairness of the procedures, or contesting the County Board's affirmative vote on those substantive siting criteria which are not at issue in WMI's instant appeal to the Board. Moreover, if this Board reverses the Kankakee County Board, none of the objectors who participated in the local siting hearing will have standing to appeal said reversal to the Appellate Court even though WMI will then have final siting approval just as if the County Board had granted local siting approval and the PCB had affirmed that local decision.

6. That, in fact, the Kankakee County Board's decision of March 17, 2004 finding that substantive siting Criterion ii had been met and that the facility was so designed, located, and proposed to be operated that the public health, safety, and welfare would be protected was against the manifest weight of the evidence. This argument is moot only if the PCB affirms the County Board's denial of siting, and the Appellate Court affirms the PCB. This point is not only relevant, but essential, to a complete determination of all the issues if either the PCB or the Appellate Court finds in favor of WMI in this case and, absent intervention, adjoining landowners who participated at the local siting hearing and made this argument at the local siting hearing will forever be barred from having the issue fully adjudicated or reviewed.

7. Karlock fears that neither the County, nor its attorneys, will advocate as zealously or thoroughly as possible in defending the Kankakee County Board's denial of siting approval. That although the March 17, 2004 denial of siting approval by the County Board was by majority vote, WMI correctly points out in Paragraph 6 of its Petition For Hearing to this Board that at a

reconsideration on April 13, 2004 prompted by WMI's Motion for same, the County Board was deadlocked in a 13-13 vote. The inclination of the County Board to continue to defend its denial of siting is, therefore, not at all clear to Karlock. Moreover, the nature of the relationship between the County Board's attorneys, Hinshaw & Culbertson, and WMI was, itself, a fundamental fairness issue argued by Karlock in PCB case 2003-133. Because the PCB found a lack of jurisdiction in that case, this issue was never reached. Attached to this Petition, and made a part hereof as Exhibit "A", are Pages 13-16 of Karlock's Brief in chief to this Board in PCB case 2003-133.

These pages detail not only the fact that WMI offered to financially support the County's defense of its Solid Waste Management Plan (which defense is arguably the only basis for the County's opposition to the siting applications of Town & Country Utilities, Inc. and Kankakee Regional Landfill, LLC considered by this Board in cases PCB 2003-31 and PCB 2004-135), and that Hinshaw & Culbertson represented the County in those cases, thereby profiting from WMI's direct or indirect contributions. Additionally, Karlock's previous Brief points out that Hinshaw & Culbertson, from May, 2002 through September, 2002, addressed its bills for legal services to the "Kankakee County Landfill." It is believed that to date, Hinshaw & Culbertson has been paid in excess of \$700,000 for its representation of Kankakee County in connection with WMI's applications for siting approval and in connection with the closely related County opposition to the applications of Town & Country.

8. During the local siting hearings on WMI's application for siting approval, Hinshaw & Culbertson purported to represent the "Kankakee County staff." As such, they participated in authoring a report and recommendations which, in fact, recommended that siting approval be

granted. The County Board's denial of March 17, 2004 was, therefore, a rejection of its attorney's recommendation.

9. That Hinshaw & Culbertson, as the legal representative of Kankakee County, is advocating positions in at least two other cases which are legally inconsistent with the position which they are now required to advocate on behalf of Kankakee County. This Board's reversal of local siting approval in PCB case 2003-131 has been appealed to the Third District Appellate Court by WMI, and the County represented by Attorneys Hinshaw & Culbertson has argued in that case that local siting approval of WMI's application was properly granted and that the PCB's reversal should, itself, be reversed. This is so even though the County Board's action of March 17, 2004 denying siting approval on WMI's second application is clearly a legislative nullification and implied repeal of its prior grant of siting approval. Additionally, Hinshaw & Culbertson has argued in its Appellate Brief in case number 3-03-0025, wherein Town & Country Utilities, Inc. and Kankakee Regional Landfill, LLC seek reversal of the PCB's decision in PCB 2003-31 that Town & Country's Petition for local siting approval was inconsistent with the County Solid Waste Management Plan in that the County's preferred planning alternative was expansion of the existing WMI facility.

10. Precedent for the proposition that an attorney's inconsistent positions in different cases undermines the strength of his arguments is actually found in a brief submitted to the PCB by Kankakee County in which its authors assert that Karlock's arguments in case PCB 2003-133 are undermined by an inconsistent position expressed by Karlock's attorney in another case. A copy of Page 50 of Kankakee County's Brief in PCB 2003-133 is attached hereto and made a part hereof as Exhibit "B", and this Board is asked to review footnote 9 on that page. The law firm of

Hinshaw & Culbertson, of course, authored the County's Brief and advanced the creative argument about attorneys' positions being undermined by prior inconsistent positions in other cases.

**WHEREFORE**, Merlin Karlock prays that this Board grant him leave to intervene as an additional Respondent for the purpose of defending the decision of the Kankakee County Board denying WMI's request for siting approval and for the further purpose of filing a Cross-Petition seeking review of that portion of the proceedings which was fundamentally unfair and seeking review of those portions of the County's decision finding in favor of WMI and which are against the manifest weight of the evidence. Alternatively and without waiving the aforesaid prayer, Merlin Karlock seeks leave to file an *amicus curiae* brief herein.

Respectfully Submitted,  
Merlin Karlock, Intervener

BY: George Mueller  
His Attorney

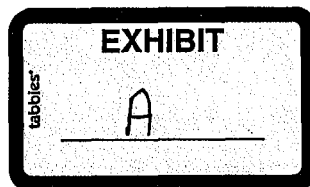
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requirements of the local siting ordinance and the decision maker's refusal to enforce that siting ordinance demonstrate collusion between the County and WMI and rendered the proceedings fundamentally unfair.

**V. The County And WMI's Actions, Both Before And After The Filing Of The Siting Application, Demonstrated Collusion And Pre-Determination Of The Issues.**

Before the Application for siting approval was ever filed, WMI and Kankakee County had a joint plan of action to grant siting approval for a WMI expansion and to oppose any facility sited by the City of Kankakee. This collusive joint plan differs from that alleged in the Residents Against A Polluted Environment case (PCB 97-139) in that here the evidence of collusion is not circumstantial, but exists in the words and deeds of the co-conspirators. The first amendment of the County Solid Waste Plan on October 9, 2001 contains a finding by the County Board that, "the present landfill and its owner have served the County and its residents well for 27 years" and that "the expansion of the present landfill would meet the needs of the residents of the County for waste disposal generated within the County for many years." (C-701). Worst of all, the County Board in this Resolution went on to find, without having heard any evidence regarding the merits of the proposed expansion that, "the expansion of the current landfill would have positive impacts on the County ..." This is nothing short of an unequivocal legislative finding about the merits of a siting application not yet filed. Moreover, the County Board found in this Resolution that, "A second landfill would have negative impacts on County residents near the facility ..."

This sentiment was reiterated in the second amendment to the County Solid Waste Management Plan adopted the day before Town & Country filed its siting Application with the



City of Kankakee where the County now found that, "A second non-contiguous landfill would have impacts upon County residents located near any such proposed new facility." (C-703). Kankakee County, in other words, committed itself legislatively to oppose any new landfill other than expansion of the existing WMI facility. How did the County Board know before reviewing siting Applications and hearing evidence that expansion of the WMI facility would be good, and that any other proposed facility would be bad?

In the meantime, WMI's representatives were in the thick of this process. WMI's Division Vice-President, Dale Hoekstra, wrote a letter on January 7, 2002 to every Kankakee County Board member stating in pertinent part that, "We have also confirmed our obligation to provide a full and complete defense for the County in the event its Solid Waste Management Plan is legally challenged, and furthermore, a legal challenge of this type will not impede our ability to expand our existing facility." (C-709). On March 11, 2002, the day before the County's second amendment of its Solid Waste Management Plan, Hoekstra once again wrote to every County Board member advising them that Waste Management representatives have informed the Board in the past, "We relief in good faith on the October 9, 2001 Resolution during the final negotiations that led to the amended Host Agreement" and "as we have informed the County Board in the past, Waste Management is prepared to take a leadership role in defending against any legal challenge to the County's one landfill Solid Waste Management Plan and contesting any other landfill development because it would be inconsistent with the County's Solid Waste Plan." (C-711). Kankakee County then retained both legal and technical consultants to assist it in its opposition to the Town & Country Application pending before the City of Kankakee. Bills to the County for these services were in excess of \$100,000 as of



November 18, 2002, well before the bulk of the work in the Town & Country appeal was performed. (C-698, 699; Also C-717-795).

At some point, WMI and the County and their consultants got so busy working together for their "common good" that they apparently lost sight of who was representing whom. As a result, we see all of the invoices for legal services from Hinshaw & Culbertson, the legal representatives for Kankakee County, from May 20, 2002 through September 30, 2002 being addressed to:

Kankakee County Landfill  
Ed Smith  
450 East Court St.  
Kankakee, IL 60901-3992 (C-699)

Ed Smith is the State's Attorney of Kankakee County. The invoices of Hinshaw & Culbertson further reveal that they worked for the County on solid waste planning issues, the opposition to Town & Country's Application, and the pending WMI Application. Some of the work performed by Hinshaw & Culbertson in opposing the Town & Country Application pending before the City of Kankakee was directly indicated on the invoices as being "chargeable to waste siting filing application fee." (C-699, 718, 719, 781, 783).

The County can argue that the foregoing is a mistake, but it is still a fact and mistakes are often the most telling evidence of a party's true intentions. The Board is asked to apply the same reasoning it used in Concerned Citizens for a Better Environment vs. City of Havana and Southwest Energy Corporation, PCB 94-44, May 19, 1994) where it found great fault with the hearing officer sending her invoices directly to the siting applicant. The Board in that case did

not find that the hearing officer was, in fact, biased, but was critical because the extensive contacts between the applicant and the hearing officer showed a "continued disregard on the part of the applicant and the City of Havana for adjudicatory due process." (94-44 at page 12).

Common sense in this case dictates that neither Kankakee County nor WMI had any real concern about adjudicatory process, nor that they made any real attempt to hide their collusive behavior. The amendments of the Solid Waste Plan, finding even before an application was filed that the WMI expansion would be beneficial, the parties' mutual disregard for the local siting ordinance requirements, the parties' joint efforts while WMI's Application was pending to oppose the Town & Country siting Application, and the County's Attorneys' billing practices all lead to the inescapable conclusion that the proceedings were fundamentally unfair.

**VI. The County's Decision That The Proposed Facility Is So Located, Designed, And Proposed To Be Operated As To Protect The Public Health, Safety And Welfare Was Against The Manifest Weight Of The Evidence.**

**A. Statement of Facts**

Joan Underwood, a licensed professional geologist employed by WMI's consultant, Earthtech, testified regarding the geologic and hydro-geologic investigation at the site. (Cy. Hrg. Volume 19, Pages 81, 82). She described three geologic layers at the site, the silurian dolomite bedrock overlain by unconsolidated glacial materials from the Wedron group and the Mason group. (Cy. Hrg. Volume 19, Page 101). She described the glacial materials as being generally fine-grained and having lower permeability than a recompacted clay liner. (Cy. Hrg. Volume 19, Page 105). The silurian dolomite bedrock is considered the uppermost aquifer beneath the site. (Cy. Hrg. Volume 19, Page 93). She opined that the uppermost aquifer was probably 200 feet deep, but acknowledged that in past studies and permit modifications, WMI had characterized

demonstrate that criterion two was met. C1349. In some limited areas, the County staff recommended conditions to remedy areas with less information than others. The County Board imposed those conditions. Finally, it is important to note that even Mr. Norris, Karlock's expert witness, did not testify that the proposed facility did not meet criterion two. Mr. Norris simply believed that the information was insufficient to make a determination on compliance with criterion two. C1268 at 51-52. Thus, there is no expert testimony in the record stating that the proposed facility does not satisfy criterion two.

3. **The IPCB has not rejected the location of the proposed facility.**

Finally, Karlock asserts that the location of the proposed facility is "functionally the same" as the location found unsafe by the IPCB in *County of Kankakee v. City of Kankakee*, PCB 03-31 (January 9, 2003). Like the other arguments regarding criterion two, this claim fails.<sup>9</sup> First, the IPCB's reversal of siting in the *City* case was based on fairly narrow grounds. The applicant had performed only a single fifty foot boring in the entire proposed 256 acre waste footprint, yet asserted that the results from that single boring trumped published regional geological information and specific well log data for 89 wells in the vicinity of the proposed facility. The IPCB found that the paucity of the applicant's evidence regarding the geologic and hydrogeologic features could not adequately rebut research which demonstrated that the Silurian dolomite (upon which the proposed landfill would rest) is an aquifer. Under such circumstances, the IPCB determined that the City's approval on criterion two was against the manifest weight of the evidence. The IPCB did not, in any way, indicate that the area in which the WMII facility is

<sup>9</sup> The County Board notes that Karlock's attorney represented Town and Country Utilities, the applicant in *City of Kankakee*, during which he argued that the location was safe and protective of the public health, safety, and welfare. In the instant case, Karlock's attorney argues that the "functionally" same location of the proposed WMII facility is unsafe. This is especially ironic because Mr. Karlock's attorney continues to represent Town and Country in its refilled application, currently pending before the City of Kankakee after the IPCB's reversal of the prior siting. In that refilled application before the City of Kankakee, Karlock's attorney asserts that the location is protective of the health, safety, and welfare. Apparently, whether the location is actually unsafe is a function of which client one is representing on a given day.

