

~~JUN-22 2004~~

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD STATE OF ILLINOIS
Pollution Control Board

WASTE MANAGEMENT OF
ILLINOIS, INC., A Delaware
Corporation,

Petitioner,

VS.

COUNTY BOARD OF KANKAKEE,

Respondent.

Docket Number: **PCB 04-186**
(Pollution Control Facility
Siting Appeal)

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on this **22nd day of June, 2004**, we had filed with the Illinois Pollution Control Board, the attached document entitled: **MICHAEL WATSON'S MOTION TO INTERVENE, AND IN THE ALTERNATIVE, MOTION FOR LEAVE TO AN *AMICUS CURIAE* BRIEF**, a copy of which is hereby served upon you.

Intervener, Michael Watson

By: [Signature]
One of his attorneys

Jennifer J. Sackett Pohlenz
QUERREY & HARROW, LTD.
 175 West Jackson Boulevard, Suite 1600
 Chicago, Illinois 60604
 (312) 540-7000

PROOF OF SERVICE

Karen Gryczan, a non-attorney, on oath, certifies that she served the foregoing Notice of Filing, and document set forth herein, on the attorneys named on the attached service list via U.S. Mail at 175 W. Jackson Blvd., Chicago, Illinois this 22nd day of June, 2004, before the hour of 5:00 p.m.

[x] Under penalties as provided by law pursuant to IL. REV. STAT. CHAP 110 SEC 1-109 I certify that the statements set forth herein are true and correct.

SERVICE LIST

Illinois Pollution Control Board
Clerk's Office
James R. Thompson Center
Ste. 11-500
100 W. Randolph Street
Chicago, IL 60601
One Original and 9 copies

Charles Helsten
Hinshaw & Culbertson
100 Park Avenue
P.O. Box 1389
Rockford, Illinois 61105-1389
815-490-4901 Fax
***Representing County
Board of Kankakee
Via U.S. Mail***

Keith Runyon
1165 Plum Creek Drive
Bourbonnais, IL 60914
***Pro-Se
Via U.S. Mail***

Christopher W. Bohlen
Barmann, Kramer & Bohlen, P.C.
200 East Court Street, Suite 502
P.O. Box 1787
Kankakee, IL 60901
***Representing City of Kankakee
Via U.S. Mail***

Donald Moran
Pedersen & Houpt
161 North Clark Street, Suite 3100
Chicago, IL 60601-3242
312-261-1149 Fax
***Representing Waste Management of Illinois,
Inc.
Via U.S. Mail***

Elizabeth S. Harvey, Esq.
Swanson, Martin & Bell
One IBM Plaza, Suite 2900
330 North Wabash
Chicago, IL 60611
312-321-0990 Fax
***Representing County Board of Kankakee
Via U.S. Mail***

George Mueller
George Mueller, P.C.
501 State Street
Ottawa, IL 61350
***Representing Interested Party Karlock
Via U.S. Mail***

Kenneth A. Bleyer
Attorney at Law
923 W Gordon Terrace #3
Chicago, IL 60613-2013
***Representing Interested Party
Via U.S. Mail***

Printed on Recycled Paper

RECEIVED
CLERK'S OFFICE

JUN 22 2004

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, INC.,)
A Delaware corporation,)

Petitioner,)

v.)

COUNTY BOARD OF KANKAKEE)

Respondent.)

Docket Number: PCB 04-186
(Pollution Control Facility
Siting Appeal)

**MICHAEL WATSON'S MOTION TO INTERVENE, AND IN THE ALTERNATIVE,
MOTION FOR LEAVE TO AN AMICUS CURIAE BRIEF**

Now comes MICHAEL WATSON (Watson), by and through his attorneys, QUERREY & HARROW, LTD., pursuant to Illinois Pollution Control Board (Board) Rule 101.402, 35 Ill. Adm. Code Section 101.402, requests this Board's leave to intervene in this matter. In the alternative, without waiving and expressly reserving all rights (including rights on appeal) concerning Watson's motion to intervene, should such motion be denied, Watson seeks leave to file an *amicus curiae* brief pursuant to Section 1010.110(c), and in accordance with Section 101.628(c) of the General Rules of the Board. In support of this motion, Watson states as follows:

1. Waste Management of Illinois, Inc. (WMII) filed a site location application to expand Kankakee County Landfill WMII on August 16, 2002 (Application I). After siting proceedings were held, the County Board of the County of Kankakee, Illinois (Kankakee) approved Application I. However, on appeal to the Illinois Pollution Control Board (Board), that approval was vacated, as WMII failed to provide proper pre-filing notice.

2. WMII filed a second site location application to expand Kankakee County Landfill on September 26, 2003 (Application II), and on March 17, 2004, Kankakee *denied* that application.

3. WMII now seeks review of Kankakee's denial of Application II in this Pollution Control Facility Siting Appeal.

4. The movant, Watson, seeks leave to intervene in the Pollution Control Facility Siting Appeal as he will be directly and adversely affected if WMII is successful on its appeal, if the Board reverses Kankakee's decision to deny Application II. Further, there is a new record being created during this appeal concerning allegations by WMII related to fundamental fairness and, as an adjacent property owner, Watson should have an opportunity to gather, respond to and present evidence related to the issues being raised by WMII, as a party to this proceeding.

5. Watson actively participated in the siting proceedings on both Application I and Application II. Further, Watson is a party to WMII's appeal to the Appellate Court for the Third District Board's ruling on Application I.

6. Watson owns over five hundred (500) acres of land surrounding the proposed expansion and is a beneficial owner of land adjacent to the proposed expansion site on at least two sides. If the Board overrules Kankakee's denial, and orders Application II approved, Watson's property rights will be directly and adversely impacted.

Watson Should Be Allowed to Intervene in the Board Proceeding

7. Board Procedural Rule 101.402 provides that the Board "may permit any person to intervene in any adjudicatory proceeding . . ." (Rule 101.402(a)). In determining whether to allow a motion to intervene, the Board Rule direct that it look at two factors: timeliness of the

motion and whether intervention will unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding. (Rule 101.402(b)).

8. Further, Section 101.402(d) of the Board's Procedural Rules provides that "... the Board may permit any person to intervene in any adjudicatory proceeding if: 1) The person has a conditional statutory right to intervene in the proceeding; 2) The person may be materially prejudiced absent intervention; or 3) The person is so situated that the person may be adversely affected by a final Board order."

9. Watson will be materially prejudiced absent intervention and he is so situated that he may be adversely affected by a final Board order. If Kankakee's decision denying Application II is reversed by the Board without Watson being allowed to be a party to the proceeding, such action deprives Watson of his property rights, as a landowner, without due process of law, to the extent that the adjoining and non-adjoining, but surrounding property of which he is a beneficial owner will be devalued, physically impaired, or otherwise impacted. As such, Watson has an ascertainable right and interest in the outcome of this appeal of Kankakee's denial of Application II.

10. Additionally, Watson will be prejudiced, as he will be unable, unless a party to this proceeding, to seek discovery from WMII concerning *ex parte* communications it may have had with Kankakee prior to Kankakee's decision in this matter (*i.e.*, if WMII is alleging unfairness and alleging *ex parte* communications by persons other than the applicant, discovery as to whether WMII had *ex parte* communications is likewise relevant). Likewise, Watson will be prejudiced if Kankakee does not raise arguments he would have raised in defense of the County Board's decision and since attorneys for Kankakee are representing it both in the appeal in

Application I and this appeal on Application II, Kankakee is representing two opposing positions concerning this proposed facility: one to allow it and the other to deny it. Allowing Watson intervenor status, allows him to seek discovery that is not sought by Kankakee and make legal arguments not raised by Kankakee.

11. Further, the Illinois Supreme Court has consistently held that adjacent landowners in zoning cases, which are analogous to the present type of case for purposes of this intervention argument, are entitled to intervene because their particular interests extend beyond the public's interest. *Elmhurst-Chicago Stone Co. v. Village of Bartlett* (1975), 26 Ill. App. 3d 1021, 325 N.E.2d 412(intervention denied, but Court distinguished landowners as being a "substantial" distance from the property for which zoning was contested); *Anundson v. City of Chicago* (1970), 44 Ill. 2d 491, 495-96, 256 N.E.2d 1; *Bredberg v. City of Wheaton* (1962), 24 Ill. 2d 612, 623-24, 182 N.E.2d 742.

12. Watson recognizes that, in some cases, third-party objectors have been precluded from intervening in an appeal from the denial of siting approval. *Lowe Transfer, Inc. v. County Board of McHenry*, PCB 03-221 (July 10, 2003); *Waste Management of Illinois, Inc. v. County Board of Kane County*, PCB 03-104, (March 20, 2003); *Rochelle Waste Disposal v. City council of the City of Rochelle*, PCB 03-218 (July 10, 2003); *Land And Lakes Company v. Village Of Romoeville*, PCB No. 94-195 (September 1, 1994); *Waste Management of Illinois, Inc. v. Pollution Control Board*, 160 Ill.App.3d 434, 513 N.E.2d 592 (2d Dist. 1987). However, Watson's interest is distinguishable from the facts of all of these cases, because, unlike the third-parties in these cases who had a generalized interest in the outcome of the siting proceeding;

Watson is an adjacent property owner who has specific property rights which will be affected by this proceeding.

13. Unlike *Waste Management of Illinois, Inc. v. Pollution Control Board*, 160 Ill.App.3d 434, 513 N.E.2d 592 (2d Dist. 1987) and *Rochelle Waste Disposal v. City council of the City of Rochelle*, PCB 03-218 (July 10, 2003), the third-parties seeking to intervene were citizen groups with generalized interests in the proceeding, Watson is a landowner adjacent on at least two sides of the proposed expansion. Watson is representing himself and a very direct and immediate impact to his property rights, as opposed to more indirect and varying rights asserted by the groups involved in the *Waste Management of Illinois, Inc.* and *Rochelle Waste Disposal* cases cited above.

14. Unlike *Lowz Transfer, Inc. v. County Board of McHenry*, PCB 03-221 (July 10, 2003) and *Waste Management of Illinois, Inc. v. County Board of Kane County*, PCB 03-104, (March 20, 2003), where the third-party objectors were villages with a generalized interest in the outcome of the siting approval and were denied leave to intervene, Watson is directly affected because he owns a large expanse of land surrounding the proposed landfill expansion and the adjacent to the proposed expansion on two sides.

15. Finally, Watson distinguishes *Land And Lakes Company v. Village Of Romoeville*, PCB No. 94-195 (September 1, 1994), where the Forest Preserve District brought the motion to intervene. The Forest Preserve District was an adjacent landowner, but its argument in support of its motion to intervene was that it had a "statutory obligation to protect and preserve the flora, fauna, and scenic beauties within the district." Watson's interests are not based on such a

general statutory obligation; rather, his interests are more immediate and direct and based on his ownership right and use of his property.

16. Simply put, Watson is an adjacent property owner whose due process and individual property rights stand to be substantially and adversely affected if the WMII prevails on Application II before the Board.

17. Despite the general rule established by the Board that it will not allow intervention of, at least, non-adjacent landowners, the Board has stated it will allow intervention for a state's attorney or the Attorney General's Office intervening to represent the public interest. *See, e.g., Land and Lakes*, slip op. at 3. Just as in zoning proceedings where the state's attorney or Attorney General's Office are allowed to intervene, so to are adjacent landowners, albeit for different reasons. *See, e.g., City of Elgin v. County of Cook*, 169 Ill. 2d 53; 660 N.E.2d 875 (S.Ct. 1995), *rehearing denied* (January 29, 1996). Thus, the Board should make the same exception from the general rule of law it has developed regarding intervention here as it has with respect to state's attorneys and the Attorney General's Office, and allow adjacent landowners, whose rights and interests are different from and more direct than those being represented by a government entity, to intervene.

18. The Illinois supreme court has consistently held that adjacent landowners are entitled to intervene because their particular interests extend beyond the public's interest, even though one factor considered in zoning cases when determining whether to allow a non-governmental entity's intervention, is whether local government unit adequately represents the health, safety and welfare interests of the general public and of distant landowners. *Anundson v. City of Chicago* (1970), 44 Ill. 2d 491, 495-96, 256 N.E.2d 1; *Bredberg v. City of Wheaton* (1962), 24

Ill. 2d 612, 623-24, 182 N.E.2d 742. Similarly, Watson's health and safety interest, by virtue of his ownership interest in adjoining property, is more tangible and immediate than the interest of the public at large. See, *City of Chicago v. John Hancock Mutual Life Insurance Co.*, 127 Ill. App. 3d 140; 468 N.E.2d 428 (1st Dist. 1984).

19. Intervention is appropriate to protect a private interest notwithstanding the participation of a public entity. For example, in *Natural Resources Defense Council v. Costle*, 561 F.2d 904 (D.C. Cir. 1977), the court held that applicants, rubber and chemical companies, should have been allowed to intervene in a suit brought by environmentalists to force the Environmental Protection Agency to promulgate regulations. The court recognized the Environmental Protection Agency's good faith efforts in defending the suit, however, stated that the differing scope of interests by the rubber and chemical companies justified intervention. *Id.* 561 F.2d 904, 912.

20. As such, Watson requests this Board's leave to intervene in this matter and to participate fully as a party in support of Respondent Kankakee's decision to deny Application II because WMII did not meet its burden of proof with respect to Criteria 1, 3 and 6.

21. This motion is not brought to unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding.

Alternatively, Watson Should Be Allowed to File an Amicus Curiae Brief

22. In the alternative, should the Board determine to deny Watson's intervention request, Watson seeks leave to file an *Amicus Curiae Brief* pursuant to Section 1010.110(c), and in accordance with Section 101.628(c) of the General Rules of the Board. An *Amicus Curiae Brief* can be filed by any interested person, provided permission is granted by the Board. In *Lowe*

Transfer, Inc. v. County Board of McHenry County, PCB 03-221 (August 7, 2003); the Board denied the Village of Cary's motion to intervene in the siting appeal, but allowed Cary to file an *Amicus Curiae Brief*.

23. Although Watson seeks, as an alternative remedy in this motion, to be allowed to file an *amicus* brief, he is not waiving any argument on appeal that this remedy insufficiently protects his rights. In *People v. P.H.*, 145 Ill. 2d 209, 164 Ill. Dec. 137, 582 N.E.2d 700 (S.Ct.1991), the Illinois Supreme Court explained the role of *amicus curiae* in an appeal: "An *amicus curiae* is not a party to the action but is, instead, a 'friend' of the court. As such, the sole function of an *amicus* is to advise or to make suggestions to the court." The Court further provided that an *amicus* takes the case as he finds it, with the issues framed by the parties, he is not a party to the action, and arguments made by him, but not espoused by the parties, have no binding effect on the parties. *P.H.*, 145 Ill. 2d at 234.

24. A new record is being developed during the course of this appeal on the issue of fundamental fairness, Watson's participation as an *amicus* fails to provide him with the standing to partake in the discovery process. Further, relegating his role in the appeal to a *amicus*, and thus, excluding his arguments and evidence he may have obtained during discovery, which may not be raised by Kankakee from any binding effect and consideration, respectively, is insufficient to protect his property rights at interest in the outcome of this proceeding.

25. Without waiving this argument, Watson, however, seeks status as an *amicus*, in the alternative that the Board denies that portion of this Motion related to intervention. In support thereof, Watson states that he is a non-party participant as set forth in Section 101.628(c) of the Board Rules, because he has taken part in the facility siting procedure in several ways including

but not limited to, participating, through counsel, at the public hearing and filing a public comment for Application II which is a subject of this appeal.

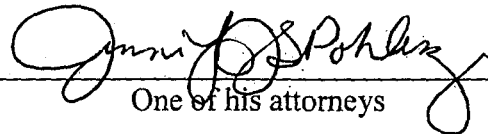
26. In addition, Watson has an interest on the outcome of the appeal as a non-party, as he is a beneficial owner of well over five hundred (500) acres of land surrounding the proposed expansion site and adjacent to the proposed expansion site on at least two sides. Accordingly, and if denied status as an intervener, the Board should grant Watson permission to file an *Amicus Curiae Brief*.

WHEREFORE, MICHAEL WATSON respectfully prays that the Illinois Pollution Control Board grants his Motion to Intervene, or in the alternative, grants permission to Watson to file an *Amicus Curiae Brief* in this matter.

Dated: June 22, 2004

Respectfully Submitted,

MICHAEL WATSON

By: 
One of his attorneys

Jennifer J. Sackett Pohlenz
Querrey & Harrow, Ltd.
175 W. Jackson Blvd., Suite 1600
Chicago, Illinois 60604
Phone: (312) 540-7000
Facsimile: (312) 540-0578