BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, INC., a Delaware Corporation,	)	
Petitioner,	)	Docket No. PCB 04-186 (Pollution Control Facility Siting Appeal)
v.	)	
COUNTY BOARD OF KANKAKEE,	)	
Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

TO: See attached Service List

PLEASE TAKE NOTICE THAT on this 24th day of May, 2005, I filed, electronically, with the Illinois Pollution Control Board, the attached document entitled Amicus Curiae Brief of Merlin Karlock and Motion for Leave to File Amicus Curiae Brief of Merlin Karlock Instanter, as well as a copy hereof, which is hereby served upon you.

Respectfully submitted,

Merlin Karlock

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MOTION TO FILE *AMICUS CURIAE* BRIEF OF MERLIN KARLOCK INSTANTER

NOW COMES Merlin Karlock, by his attorney George Mueller, P.C., and moves for leave to file his *Amicus Curiae* Brief instanter and, in support thereof, states that:

1. By order of July 22, 2004, this Court granted Merlin Karlock leave to file an *Amicus Curiae* Brief herein.

2. The due date for the aforesaid Brief was May 20, 2005. This *Amicus Curiae* Brief is filed two business days late, on Tuesday, May 24, 2005.

3. The opening brief of Waste Management of Illinois, Inc., the petitioner in this matter, was scheduled to be filed on May 13, 2005. Waste Management of Illinois, Inc. did not serve a copy of its opening brief on Karlock and, as a result, the only access that Karlock had to said brief was on the Pollution Control Board's website. The brief did not appear on the website until the week of May 16, 2005, thereby delaying completion of the *Amicus Curiae* Brief.

4. There have been a number of recent late-breaking developments which are not even of record yet in this matter but which are clearly relevant to the case and to the content of the *Amicus Curiae* Brief. As set forth with more particularity in the *Amicus Curiae* Brief itself, on May 2, 2005, counsel for Waste Management of Illinois, Inc., sent a letter to counsel for Kankakee County, soliciting a settlement of the issues before this Board, wherein Kankakee County would abandon the defense of its previous denial of regional pollution control facility siting. Moreover, on May 19, 2005, Karlock's attorney received correspondence from counsel for Kankakee County, announcing a special Kankakee County Board meeting to consider Waste Management's settlement proposal and summoning representatives of Waste Management of Illinois, Inc., as well as representatives of Karlock and other would-be interveners to address the County Board with their thoughts on May 25, 2005. As it is, the role of an *Amicus Curiae* is to advise the Board regarding the applicable law and facts so that it might more readily do justice, the foregoing and the implications to be drawn therefrom are incorporated in the *Amicus Curiae* Brief of Merlin Karlock.

5. There will be no prejudice to any party from the granting of this motion and this motion is not brought for the purpose of delay.

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WHEREFORE, Merlin Karlock prays that this Court grant leave for the filing of his *Amicus Curiae* Brief instanter.

Respectfully submitted,

Merlin Karlock

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***AMICUS CURIAE* BRIEF OF MERLIN KARLOCK**

NOW COMES Merlin Karlock, (hereinafter "Karlock") by his attorney GEORGE MUELLER, P.C., and pursuant to the Order of the Illinois Pollution Control Board (hereinafter "the Board") dated July 22, 2004, granting him leave to file an *Amicus Curiae* Brief and without waiving, by doing so, his ongoing objection to the portion of the July 22, 2004, Order denying his Petition to Intervene, states that:

I. INTRODUCTION

This is the third and, hopefully, last attempt by Waste Management of Illinois, Inc., (hereinafter "WMII") to expand its existing landfill in Kankakee County, Illinois. WMII currently operates a one hundred seventy-nine (179) acre solid waste landfill in unincorporated Kankakee County, near the southern boundary of the City of Kankakee. The landfill predates Subtitle D regulations and portions of it are unlined. This landfill is nearing capacity and WMII seeks to expand the same into a six hundred sixty-four (664) acre regional facility.

On March 29, 2002, WMII filed its first Application for Local Siting Approval with the Kankakee County Board. The public hearing on said application commenced on July 22, 2002, at which time WMII withdrew the application because of an acknowledged failure to serve all adjoining property owners with the required statutory pre-filing notices. Merlin Karlock, as well as Michael Watson and Keith Runyon, participated actively in that proceeding.

On August 16, 2002, WMII refilled its application. After a lengthy and contentious public hearing in which Karlock, Watson and Runyon, once again, actively participated as objectors, the Kankakee County Board granted siting approval on January 31, 2003. Karlock, Watson and Runyon as well as the City of Kankakee petitioned to the Pollution Control Board for review alleging that the County Board lacked jurisdiction, the County Board prejudged the application and was biased in WMII's favor and that the decision of the County Board on the substantive siting criteria was against the manifest weight of the evidence with respect to criteria i, ii, iii, v, vi, and viii. (415 ILCS 5/39.2(a)).

On August 7, 2003, the Pollution Control Board reversed the siting approval by the County Board, finding that Kankakee County lacked jurisdiction because, once again, WMII failed to serve all adjoining property owners with the required pre-filing notices. The August 7, 2003, decision did not address the fundamental fairness and manifest weight of the evidence arguments raised by Petitioners in that case. (PCB 03-125).

On September 26, 2003, WMII, for the third time in eighteen months, filed an application with the Kankakee County Board to expand its existing landfill. Once again, Karlock, Watson, and Runyon, among others, participated actively as objectors in a lengthy and contentious public hearing. On March 17, 2004, the County Board rejected the application, finding that siting criteria i, iii, and vi had not been met by the applicant. The County Board did find that criterion ii (public health, safety and welfare) had been satisfied, subject to fifty-four (54) enumerated special conditions. WMII appeals from that decision, alleging that the proceedings are unfair, that the County Board was biased against WMII and that the County Board's decision on criteria i, iii, and vi was against the manifest weight of the evidence.

Karlock, Watson and Runyon separately petitioned to intervene in this case, and in an Order dated July 22, 2004, this Board denied those petitions, but did grant leave to the would-be interveners to file Amicus Briefs. That Order is on appeal in the Third District Appellate Court in a case that is currently pending.

The foregoing are not the only landfill cases coming out of Kankakee County in the last several years. During the same time frame enumerated herein, Town & Country Utilities has twice sought and received from the City Council of the City of Kankakee, siting approval for a solid waste landfill to be located within the city boundaries, but only approximately two (2) miles from the WMII site. The Pollution Control Board reversed the City Council's first grant of siting approval, but affirmed the second decision by the City Council in favor of Town & Country Utilities. In both of those cases, Kankakee County and WMII appeared and participated at all stages, including appeals, presenting a united front in opposition to Town & Country and the

City of Kankakee. (PCB 03-031, PCB 04-033). This ongoing and unholy alliance between WMII and Kankakee County in their opposition to Town & Country and the City of Kankakee, an alliance that has continued even after the March 17, 2004, denial of the WMII application by the Kankakee County Board, has caused great concern to the would-be interveners and was raised by Karlock in his Petition to Intervene, wherein he expressed fear that the County Board would not zealously defend its previous denial of the WMII application.

As reflected in the written findings of the Kankakee County Board of March 17, 2004, as attached to WMII's Petition for Review, the vote to deny the application was by an 18 to 10 majority. WMII points out, in paragraph 6 of its Petition for Review without explaining its significance, that on April 13, 2004, the County Board deadlocked thirteen to thirteen (13-13) on WMII's Motion to Renew Consideration of the application.

The foregoing facts are necessary to understand the unique perspective that Karlock has on the true nature of these proceedings in general and on the lack of persuasiveness of WMII's current arguments in particular. The overwhelming evidence suggests that the Kankakee County Board has, at all times, been aligned with WMII, that this alliance is based on continuing improper ex parté contacts, and that the County Board has had a continuing, unlawful predisposition in favor of WMII. In support, Karlock incorporates by reference as if fully set forth herein all of the arguments made and facts cited in his opening Brief in PCB 03-125.

In this context, WMII's current argument that the March 17, 2004, denial of siting was fundamentally unfair to WMII is almost incomprehensible. When the totality of the facts, including Kankakee County's opposition to the Petitions to Intervene and even the requested alternative relief of filing Amicus Briefs, because the interveners "will be advocating a point of view and urging this Board to find in favor of the County Board and against WMII" (Respondent's Objection to Michael Watson's Motion to Intervene…, July 7, 2004, Page 10), are considered, the March 17, 2004 denial is best understood as the County Board having a temporary fit of conscience in which they were, for once, guided by the evidence. While WMII does not hypothesize about the significance of the subsequent tie vote on reconsideration, it is best understood, in the foregoing context, as the start of the return to business as usual between the Kankakee County Board and WMII.

Kankakee County, in its motion opposing Watson's Petition to Intervene describes the role of an *Amicus Curiae* stating that he "is an impartial individual who suggests the interpretation and status of the law, gives information concerning it, and whose function is to advise in order that justice may be done." It is with that admonition in mind that Karlock presents these arguments and facts, hoping that an awareness by the Pollution Control Board of all of the facts and the complex interconnection between WMII and Kankakee County will insure that justice will be done.

It is also for the same reason that this Board needs to be advised of recent developments which are not yet part of the record in this matter. On May 2, 2005, Dennis Wilt, general counsel for WMII, wrote a letter to Charles Helsten, who represents Kankakee County in this matter, soliciting a so-called "agreement" by which the County

Board would abandon its defense of the siting denial and stipulate to the allegations in WMII's Petition for Review. (A copy of the letter is attached hereto as Exhibit "A"). Whether or not by coincidence, WMII, on the very same day, filed in the Third District Appellate Court, its Respondent's Brief in the denial of intervention appeal, alleging that there was absolutely no reason to believe that Kankakee County would not zealously defend its denial of siting approval (a copy of a portion of WMII's Brief in Third District Appellate Case No. 3-04-0649 is attached hereto as Exhibit "B").

WMII's disingenuous letter and shameless attempt to subvert the review process would have been of no consequence if the County of Kankakee had flatly and immediately rejected WMII's overture on the basis that it owed a duty to the general public to defend its previous siting decision. Such would have been consistent with the statement in its July 7, 2004, objection to Watson's Motion to Intervene that "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." (Respondent's Objection…, July 7, 2004, Page 9). Instead, however, Kankakee County has scheduled a special County Board meeting on May 25, 2005, to consider WMII's proposal. The letter announcing that meeting and summoning WMII's attorney to present his case is signed by Charles Helsten, the same attorney who signed the July 7, 2004, pleading to this Board in which the County of Kankakee promised to represent the interests of the would-be interveners and the general public and to vigorously defend its siting denial. (A copy of Helsten correspondence is attached hereto as Exhibit "C"). It is well settled that one must be a party in a Pollution Control Board proceeding in order to have standing to appeal to the Appellate Court

from an adverse decision of the Pollution Control Board (*McHenry County Landfill, Inc. v. IEPA*, 151 Ill.App.3rd 89, 506 N.E.2d 372 (2nd.Dist. 1987). The stark impact of that decision is that, if the County Board now abandons its defense of the siting denial and that denial is reversed based upon the County Board's stipulation that it should be reversed, the objectors who have participated actively at every stage of the proceedings, including WMII's two prior, unsuccessful attempts at siting, will not have standing to further appeal. It appears, therefore, that WMII and the County Board may be in the process of creating a method for granting site location approval while precluding all appeals by objectors.

II. Fundamental Fairness

Having been prevented from participating in the extensive discovery conducted by WMII in developing its fundamental fairness arguments, Karlock is unable to comment, in detail, on the meaning and significance of the facts developed. However, it is clear that no County Board member admitted that he or she was improperly influenced and the evidence of "political pressure" as WMII repeatedly uses that term in its Brief is circumstantial at best and non-existent, at worst. Moreover, the circumstantial case is undermined by WMII's fundamental misconception regarding the significance of Kankakee County's 2003 siting approval on the previous application.

WMII's entire argument can, in fact, by distilled down to a few sentences as follows:

1. The County Board's approval of the prior siting application on January 31, 2003, was proper.

2. The Application denied on March 17, 2004, and the evidence in support of that application, were identical to the 2003 application and evidence.

3. Based solely upon the foregoing, the March 17, 2004, denial must be either fundamentally unfair, against the manifest weight of the evidence, or both.

WMII's first premise, that the previous siting approval was proper, is unwarranted. The arguments by Karlock and others, in PCB 03-125, that the January 31, 2003, siting approval was both fundamentally unfair and against the manifest weight of the evidence were extensively developed but never ruled upon in that case because the County Board's lack of jurisdiction made further rulings unnecessary. In that context, whether or not the 2003 approval by the County Board was "overwhelming" as suggested by WMII or not is really irrelevant. Since, however, the fundamental fairness and manifest weight of the evidence issues raised in PCB 03-125 were never decided, this Board cannot know, at this time, whether the 2003 approval was proper. Accordingly, the Board can impart no significance to the fact that a prior application by WMII had been approved.

The fundamental fairness issues raised by WMII in this case must therefore stand on their own feet and cannot be buttressed by the fact of the County Board's prior approval.

In support of its smoke and mirrors argument on fundamental fairness, WMII, perhaps intentionally, does not fully set forth the prevailing standard of review for a fundamental fairness determination. It has been the law, for more than twenty years, that the conduct by a City or County, in its legislative capacity, does not overcome the presumption that the City or County will act without bias in its adjudicatory capacity.

E&E Hauling v. Pollution Control Board, 115 Ill.App.3rd 898, 415 N.E.2d 555 (2nd Dist. 1983). Accordingly, the Pollution Control Board has, on several recent occasions, declined to overrule the longstanding line of cases requiring an actual showing of prejudice to support the finding that ex parté contacts have caused proceedings to be fundamentally unfair. *Rochelle Waste Disposal v. City of Rochelle*, PCB 03-218, (Slip Opinion April 15, 2004), *Waste Management of Illinois, Inc. v. County Board of Kane County*, PCB 03-104, (Slip Opinion June 19, 2003).

Additionally, the Board has continued to acknowledge that regional pollution control facility siting proceedings are only quasi adjudicatory and in that regard, the Pollution Control Board has continued to cite with approval, the language from *Southwest Energy Corporation v. Pollution Control Board* that "a local governing body may find the applicant has met the statutory criteria and properly deny the application based upon legislative-type considerations (275 Ill.App. 3rd 84, 655 N.E.2d 304 (4th Dist.)). (See also *Rochelle Waste Disposal v. City of Rochelle, supra* and *Waste Management v. Kane County Board, supra*). If anything, this standard suggests that a County Board is free to deny any siting application without fear of reversal by the Pollution Control Board. WMII's argument then that, since the County Board had once previously granted siting approval, the only conclusion now is that some skullduggery by the absent Mr. Harrison or others must have rendered the subsequent denial fundamentally unfair must fail. Interestingly, Bruce Harrison was never deposed and never testified. However, the true standard of review enunciated above, renders WMII's rather novel use of the empty chair defense, a nullity.

WMII's second premise, that the application and evidence in the 2003 hearings were the same as in the 2002 hearings is an outright fabrication. In its opening Brief, WMII actually states with reference to the 2002 application and hearings compared to the 2003 application and hearings, "the information submitted to establish the nine criteria was the same; the evidence presented in support of the nine criteria was the same." (WMII opening Brief at Page 38). How does WMII reconcile that statement with the thirteen volume transcript developed over seven days on the second set of hearings? The undisputed facts are that at the second set of hearings, the witnesses were different, the cross-examination of those witnesses that were the same was different, the exhibits admitted into evidence were different. the public comments were different and the totality of the evidence was different. This is particularly true with regard to criteria i, iii, and vi, the criteria on which the County Board denied the application. For a more detailed statement of facts related to these criteria, Karlock defers to the Amicus Curiae Brief of Michael Watson and adopts as his own the Statement of Facts found in said brief.

III. The Decision Was Not Against the Manifest Weight of the Evidence

WMII's statement of the standard of review to determine whether a local siting decision is against the manifest weight of the evidence seems strangely vague and incomplete. WMII's opening brief suggests that a decision is against the manifest weight of the evidence if the decision maker's findings "appear to be unreasonable, arbitrary, or not based upon the evidence." (WMII opening brief at Page 29). WMII argues that "this Board's sole function is to determine whether the County Board's

decision is just and reasonable based on the evidence presented." (WMII opening brief at Page 29).

It appears that WMII has unduly relaxed the standard of review for determination of whether a decision is against the manifest weight of the evidence. For a more accurate and comprehensive statement of the actual standard, one need only turn to WMII's brief in the previous siting appeal herein, when WMII was defending the Kankakee County Board's decision. (PCB 03-125). There WMII succinctly stated,

> "A decision of a local siting body regarding compliance with the statutory siting criteria will not be disturbed unless the decision is contrary to the manifest weight of the evidence. Land and Lakes, 743 N.E.2d at 197. A decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident and indisputable. Turlek v. Pollution Control Board, 274 Ill.App.3rd 244, 653 N.E.2d 1288 (1st Dist. 1995).
>
> The province of the County Board is to weigh the evidence, resolve conflicts in testimony and determine the credibility of the witnesses. Environmentally Concerned Citizens Organization v. Landfill LLC, PCB 98-98, Slip Opinion at 3 (May 7, 1998). Merely because there may be some evidence which, if accepted, would have supported a contrary conclusion, does not mean that the Board may reweigh the evidence and substitute its judgment for that of the County Board. Tate, 544 N.E.2d at 1197. This Board is not free to reverse merely because the County Board credited WMII's witnesses and did not credit Mr. Norris. Landfill 33, Ltd. v. Effingham County Board, PCB 3-43 and 3-52 (Cons.) Slip Opinion at 3 (February 20, 2003).
>
> If there is any evidence which supports the County Board decision and this Board finds that the County Board could reasonably have reached its conclusion, the decision must be affirmed. File v. D & L Landfill, PCB 9-94, Slip Opinion at 3 (August 30, 1990). That a different decision might also be reasonable is insufficient for reversal. The opposite conclusion must be clear and indisputable. Willowbrook Motel v. Pollution Control Board, 135 Ill.App. 3rd 343, 481 N.E.2d 1032 (1st Dist. 1985)."

Additionally, the Pollution Control Board, in reweighing the factual findings of the local decision maker, is not to reweigh the evidence or make new credibility

determinations. *Waste Management of Illinois, Inc. v. Pollution Control Board*, 160 Ill.App.3rd 434, 513 N.E.2d 592 (2nd Dist. 1987). If there is any evidence to support the local siting authority's decision, that decision must stand. *In Re Fairview Area Citizens Task Force v. Illinois Pollution Control Board*, 198 Ill.App. 3rd 541, 555 N.E.2d 1178 (3rd Dist. 1990). The Court in *File* reduced the manifest weight standard to its simplest form by holding that the determination of the substantive siting criteria "is purely a matter of assessing the credibility of expert witnesses." At 219 Ill.App. 3rd 897.

With regard to criterion vi, (minimizing impact on traffic) there actually was conflicting evidence in that objector Watson called a traffic engineer to testify in opposition to WMII's traffic engineer. The County Board's decision to assign more credibility to the testimony and conclusions of the objector's witness, Mr. Coulter, cannot be disturbed by this tribunal.

WMII does not directly argue but certainly suggests that the fact that the Kankakee County Regional Planning Commission recommended siting approval should be considered in determining whether the decision was fundamentally unfair and whether it was against the manifest weight of the evidence. Such an inference is inappropriate, since the Pollution Control Board has repeatedly held that a local decision maker is free to reject the findings or recommendations of its consultants. *Sierra Club, et al. v. Will County Board, et al.*, PCB 99-136 (August 5, 1999), Slip Opinion at Page 12.

Lastly, WMII suggests that, with regard to criteria i (need) and iii (land use compatibility and property values), the County Board's decision is against the manifest weight of the evidence because the testimony was unrebutted and the County Board was not free to disregard the same. WMII suggests that the County Board must accept as true uncontradicted facts not withstanding the existence of contrary unsupported allegations. The authority sited by WMII for this statement is *Flannery v. Lin*, a medical malpractice case in which one of the parties appealed from a contempt finding related to a discovery violation. The specific issue dealt with motions supported by affidavits and the exact language of the Court in that context is, "when the facts within an affidavit are not contradicted with a counteraffidavit, they must be taken as true, not withstanding the existence of contrary unsupported allegations." *Flannery v. Lin*, 176 Ill.App. 3rd 652, 531 N.E.2d 403 (2nd Dist. 1988). The other case sited by WMII in support of this proposition, *Webb v. Mount Sinai Hospital*, 347 Ill.App. 3rd 817, 807 N.E.2d 1026 (1st Dist. 2004) is also a medical malpractice case involving the use of affidavits to support motions related to discovery.

Clearly, WMII's statement of the law is wrong. The mere fact that an opposing party does not call witnesses does not mean that the testimony of the presenting party is uncontradicted. The whole purpose of cross-examination is for an opposing party to probe testimony to see if it is consistent, if it is believable, and whether conclusions are supported by underlying facts. The Pollution Control Board and Appellate Court have previously affirmed a denial of siting based upon failure to prove criterion i, even when there was no contradicting expert testimony, because the testimony of the applicant's expert did not take into consideration sufficient facts and circumstances. *Waste*

Management v. PCB, 234 Ill.App. 3rd 65, 600 N.E.2d 55 (1st Dist. 1992). Recently, the Pollution Control Board found that a local decision that criterion iii had not been established, even though no witnesses testified in opposition to the applicant's witnesses, was not against the manifest weight of the evidence. The Board found, "because an opposite result is not clearly evident or indisputable from a review of the evidence, the Board, thus concludes that the city's decision on criterion iii is not against the manifest weight of the evidence." *Rochelle Waste Disposal v. City of Rochelle*, PCB 03-218 (April 15, 2004, Slip Opinion at 44). In the instant case, a review of the testimony of WMII's real estate value expert, Ms. McGarr, reveals that a significant amount of her cross-examination of dealt with inconsistencies in her Résumé and her apparent misrepresentation of her credentials. In light of this it is not at all surprising or unreasonable that the County Board chose to discredit and disbelieve her testimony.

The WMII opening brief continuously refers to the siting denial as a reversal of the County Board's prior approval. This misstatement deserves comment because it is intended to convey the impression that the evidence at the second siting hearing was the same and, therefore, some outside force must have intervened to cause the County Board to reverse that which they had previously approved. In fact, the record is uncontradicted that the second proceeding was a new, separate and different proceeding, albeit on a substantially similar application. The common law record filed by the Kankakee County Board of this new and separate, second proceeding consists of over 4,000 pages. (Record on Appeal, June 30, 2004). The transcript of the public hearing is in excess of 1,600 pages and the exhibits admitted into evidence by just objectors Karlock, Watson and Runyon are in excess of 1,800 pages. Interestingly,

Webb v. Mount Sinai Hospital sited by WMII for an opposite conclusion actually qualifies that conclusion by noting that an affidavit may be contradicted by other documentary evidence. (Webb at 347 Ill.App. 3rd 826).

IV. Criterion Two (Whether the Facility is So-Designed, Located and Proposed to be Operated that the Public's Health, Safety and Welfare Will be Protected) was Met, Subject to in Excess of Fifty Special Conditions, is Against the Manifest Weight of the Evidence

Had Karlock been allowed to intervene, this argument could have been raised by way of cross-petition for review. This Amicus Brief is not the place to argue why the County Board's decision on criterion ii was against the manifest weight of the evidence, but Karlock merely wishes to make the point so as to preserve the issue and to avoid future argument by others that the same may have been waived. Given the current state of the law, if this board were to reverse the decision of the Kankakee County Board, Karlock and other participants at the original siting hearing would have no standing to appeal that reversal. What that means is that siting approval would effectively have been granted without there ever being consideration at any appellate level of whether the proposed facility actually was so-designed, located and proposed to be operated that the public health, safety and welfare would be protected.

V. Conclusion

For the foregoing reasons, your Amicus Curiae respectfully hopes that the facts and law recited herein will assist the Pollution Control Board in doing justice.

Respectfully submitted,

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