LLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, INC. Petitioner, v. COUNTY BOARD OF KANKAKEE COUNTY, Respondent.	)	PCB 04-186 (Pollution Control Facility Siting Appeal)

PC#11

PUBLIC COMMENT OF MERLIN KARLOCK

NOW COMES Merlin Karlock, by his attorney, GEORGE MUELLER, P.C., and, for his public comment as authorized by statute and rules in this matter, attaches and makes a part hereof, his Brief as Petitioner/Appellant in Case No. 3-04-0649, pending before the Third District Appellate Court.

Respectfully submitted,

MERLIN KARLOCK

BY: _____
GEORGE MUELLER, his attorney

PROOF OF MAILING

The undersigned does hereby certify that a copy of the foregoing was filed this 15th day of April, 2005, to the following persons, by placing same in an envelope, properly addressed and sealed and placed in a mail box before 5:00 p.m. in Ottawa, Illinois, with proper first-class postage affixed thereon:

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No. 3-04-0649

IN THE APPELLATE COURT OF ILLINOIS
FOR THE THIRD DISTRICT

MERLIN KARLOCK, Petitioner vs. WASTE MANAGEMENT OF ILLINOIS, INC., COUNTY BOARD OF KANKAKEE COUNTY, and THE ILLINOIS POLLUTION CONTROL BOARD, Respondents	)	Petition for Review of an Order of the Illinois Pollution Control Board, entered July 22, 2004. Docket No. PCB 04-186

CONSOLIDATED WITH

NO. 3-04-0655

IN THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT

MICHAEL WATSON, Petitioner vs. WASTE MANAGEMENT OF ILLINOIS, INC., COUNTY BOARD OF KANKAKEE COUNTY, and THE ILLINOIS POLLUTION CONTROL BOARD, Respondents	)	Petition for Review of an Order of the Illinois Pollution Control Board, entered July 22, 2004. Docket No. PCB 04-186

BRIEF AND ARGUMENT OF PETITIONER/APPELLANT MERLIN KARLOCK

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ORAL ARGUMENT REQUESTED

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POINTS AND AUTHORITIES

and its procedural rules governing denial appeals, such hearing to be based exclusively on the record before the Agency. The burden of proof shall be on the petitioner. The Agency and the permit applicant shall be named co-respondents.

The provisions of this subsection do not apply to the granting of permits issued for the disposal or utilization of sludge from publicly-owned sewage works.

(c) Any party to an Agency proceeding conducted pursuant to Section 39.3 of this Act may petition as of right to the Board for review of the Agency's decision within 35 days from the date of issuance of the Agency's decision, provided that such appeal is not duplicative or frivolous. However, the 35-day period for petitioning for a hearing may be extended by the applicant for a period of time not to exceed 90 days by written notice provided to the Board from the applicant and the Agency within the initial appeal period. If another person with standing to appeal wishes to obtain an extension, there must be a written notice provided to the Board by that person, the Agency, and the applicant, within the initial appeal period. The decision of the Board shall be based exclusively on the record compiled in the Agency proceeding. In other respects the Board's review shall be conducted in accordance with subsection (a) of this Section and the Board's procedural rules governing permit denial appeals.

(d) In reviewing the denial or any condition of a permit issued by the Agency pursuant to rules and regulations adopted under subsection (c) of Section 9.1 of this Act, the decision of the Board shall be based exclusively on the record before the Agency including the record of the hearing, if any, held pursuant to paragraph (f)(3) of Section 39 unless the parties agree to supplement the record. The Board shall, if it finds the Agency is in error, make a final determination as to the substantive limitations of the permit including a final determination of Lowest Achievable Emission Rate or Best Available Control Technology.

(e) (1) If the Agency grants or denies a permit under subsection (b) of Section 39 of this Act, a third party, other than the permit applicant or Agency, may petition the Board within 35 days from the date of issuance of the Agency's decision, for a hearing to contest the decision of the Agency.

(2) A petitioner shall include the following within a petition submitted under subdivision (1) of this subsection:

(A) a demonstration that the petitioner raised the issues contained within the petition during the public notice period or during the public hearing on the NPDES permit application, if a public hearing was held; and

(B) a demonstration that the petitioner is so situated as to be affected by the permitted facility.

(3) If the Board determines that the petition is not duplicative or frivolous and contains a satisfactory demonstration under subdivision (2) of this subsection, the Board shall hear the petition (i) in accordance with the terms of subsection (a) of this Section and its procedural rules governing permit denial appeals and (ii) exclusively on the basis of the record before the Agency. The burden of proof shall be on the petitioner. The Agency and permit applicant shall be named co-respondents.

(f) Any person who files a petition to contest the issuance of a permit by the Agency shall pay a filing fee.

P.A. 76-2429, § 40, eff. July 1, 1970. Amended by P.A. 77-1948, § 1, eff. Oct. 1, 1972; P.A. 78-500, § 1, eff. Oct. 1, 1973; P.A. 81-856, § 1, eff. Jan. 1, 1980; P.A. 81-1444, § 2, eff. Sept. 4, 1980; P.A. 82-380, § 1, eff. Sept. 3, 1981; P.A. 83-431, § 1, eff. Sept. 17, 1983; P.A. 83-1057, § 2, eff. Jan. 5, 1984; P.A. 83-1362, Art. II, § 120, eff. Sept. 11, 1984; P.A. 84-1320, § 30, eff. Sept. 4, 1986; P.A. 85-1331, § 1, eff. Jan. 1, 1989; P.A. 85-1440, Art. III, § 3-32.1, eff. Feb. 1, 1989; P.A. 86-1409, § 1, eff. Jan. 1, 1991; P.A. 88-690, § 10, eff. Jan. 24, 1995; P.A. 90-274, § 5, eff. July 30, 1997; P.A. 92-574, § 5, eff. June 26, 2002.

Formerly Ill.Rev.Stat.1991, ch. 111½, ¶ 1040.

5/40.1. Appeal of siting approval

§ 40.1. Appeal of siting approval.

(a) If the county board or the governing body of the municipality, as determined by paragraph (c) of Section 39 of this Act, refuses to grant or grants with conditions approval under Section 39.2 of this Act, the applicant may, within 35 days after the date on which the local siting authority disapproved or conditionally approved siting, petition for a hearing before the Board to contest the decision of the county board or the governing body of the municipality. The Board shall publish 21 day notice of the hearing on the appeal in a newspaper of general circulation published in that county. The county board or governing body of the municipality shall appear as respondent in such hearing, and such hearing shall be based exclusively on the record before the county board or the governing body of the municipality. At such hearing the rules prescribed in Sections 32 and 33 (a) of this Act shall apply, and the burden of proof shall be on the petitioner; however, no new or additional evidence in support of or in opposition to any finding, order, determination or decision of the appropriate county board or governing body of the municipality shall be heard by the Board. In making its orders and determinations under this Section the Board shall include in its consideration the written decision and reasons for the decision of the county board or the governing body of the municipality, the transcribed record of the hearing held pursuant to subsection (d) of Section 39.2, and the fundamental fairness of the procedures used by the county board or the governing body of the municipality in reaching its decision. The Board shall transmit a copy of its decision to the office of the county board or governing body of the municipality where it shall be available for public inspection and copied upon payment of the actual cost of reproduction. If there is no final action by the Board within 120 days after the date on which it received the petition, the petitioner may deem the site location approved; provided, however, that that period of 120 days shall not run for any period of time, not to exceed 30 days, during which the Board is without sufficient membership to constitute the quorum required by subsection (a) of Section 5 of this Act, and provided further, that such 120 day period shall not be stayed for lack of quorum beyond 30 days regardless of whether the lack of quorum exists at the beginning of such 120 day period or occurs during the running of such 120 day period.

(b) If the county board or the governing body of the municipality as determined by paragraph (c) of Section 39 of this Act, grants approval under Section 39.2 of this Act, a third party other than the applicant who participated in the public hearing conducted by the county board or governing body of the municipality may, within 35 days after the date on which the local siting authority granted siting approval, petition the Board for a hearing to contest the approval of the county board or the governing body of the municipality. Unless the Board determines that such petition is duplicative or frivolous, or that the petitioner is so located as to not be affected by the proposed facility, the Board shall hear the petition in accordance with the terms of subsection (a) of this Section and its procedural rules governing denial appeals,

such hearing to be based exclusively on the record before county board or the governing body of the municipality. The burden of proof shall be on the petitioner. The county board or the governing body of the municipality and the applicant shall be named as co-respondents.

The Board shall transmit a copy of its decision to the office of the county board or governing body of the municipality where it shall be available for public inspection and may be copied upon payment of the actual cost of reproduction.

(c) Any person who files a petition to contest a decision of the county board or governing body of the municipality shall pay a filing fee.

P.A. 76-2429, § 40.1, added by P.A. 82-682, § 1, eff. Nov. 12, 1981. Amended by P.A. 82-783, Art. IV, § 34, eff. July 13, 1982; P.A. 83-1355, eff. Sept. 9, 1984; P.A. 83-1522, § 1, eff. July 1, 1985; P.A. 84-832, Art. II, § 13, eff. Sept. 23, 1985; P.A. 85-1331, § 1, eff. Jan. 1, 1989; P.A. 92-574, § 5, eff. June 26, 2002.

Formerly Ill.Rev.Stat.1991, ch. 111½, ¶ 1040.1.

5/40.2. Application of review process

§ 40.2. Application of review process.

(a) Subsection (a) of Section 40 does not apply to any permit which is subject to Section 39.5. If the Agency refuses to grant or grants with conditions a CAAPP permit, makes a determination of incompleteness regarding a submitted CAAPP application, or fails to act on an application for a CAAPP permit, permit renewal, or permit revision within the time specified in paragraph 5(j) of Section 39.5 of this Act, the applicant, any person who participated in the public comment process pursuant to subsection 8 of Section 39.5 of this Act, or any other person who could obtain judicial review pursuant to Section 41(a) of this Act, may, within 35 days after final permit action, petition for a hearing before the Board to contest the decision of the Agency. However, the 35-day period for petitioning for a hearing may be extended by the applicant for an additional period of time not to exceed 90 days by written notice provided to the Board from the applicant and the Agency within the initial appeal period. If another person with standing to appeal wishes to obtain an extension, there must be a written notice provided to the Board by that person, the Agency, and the applicant, within the initial appeal period. Notwithstanding the preceding requirements, petitions for a hearing before the Board under this subsection may be filed after the 35-day period, only if such petitions are based solely on grounds arising after the 35-day period expires. Such petitions shall be filed within 35 days after the new grounds for review arise. If the final permit action being challenged is the Agency's failure to take final action, a petition for a hearing before the Board shall be filed before the Agency denies or issues the final permit.

The Agency shall appear as respondent in such hearing. At such hearing the rules prescribed in Sections 32 and 33(a) of this Act shall apply, and the burden of proof shall be on the petitioner.

(b) The Agency's failure to take final action within 90 days of receipt of an application requesting minor permit modification procedures (or 180 days for modifications subject to group processing requirements), pursuant to subsection 14 of Section 39.5, will be subject to this Section and Section 41 of this Act.

(c) If there is no final action by the Board within 120 days after the date on which it received the petition, the permit shall not be deemed issued; rather, the petitioner shall be entitled to an Appellate Court order pursuant to Section 41(d) of this Act. The period of 120 days shall not run for any period of time, not to exceed 30 days, during which the Board is without sufficient membership to constitute the quorum required by subsection (a) of Section 5 of this Act; the 120 day period shall not be stayed for lack of quorum beyond 30 days, regardless of whether the lack of quorum exists at the beginning of the 120 day period or occurs during the running of the 120 day period.

(d) Any person who files a petition to contest the final permit action by the Agency under this Section shall pay a filing fee.

(e) The Agency shall notify USEPA, in writing, of any petition for hearing brought under this Section involving a provision or denial of a Phase II acid rain permit within 30 days of the filing of the petition. USEPA may intervene as a matter of right in any such hearing. The Agency shall notify USEPA, in writing, of any determination or order in a hearing brought under this Section that interprets, voids, or otherwise relates to any portion of a Phase II acid rain permit.

P.A. 76-2429, § 40.2, added by P.A. 87-1213, § 50, eff. Sept. 26, 1992. Amended by P.A. 88-464, § 5, eff. Aug. 20, 1993; P.A. 88-690, § 10, eff. Jan. 24, 1995; P.A. 91-357, § 199, eff. July 29, 1999; P.A. 92-574, § 5, eff. June 26, 2002.

Formerly Ill.Rev.Stat., ch. 111½, ¶ 1040.2.

TITLE XI: JUDICIAL REVIEW

Section

5/41. Judicial review

§ 41. Judicial review.

(a) Any party to a Board hearing, any person who filed a complaint on which a hearing was denied, any person who has been denied a variance or permit under this Act, any party adversely affected by a final order or determination of the Board, and any person who participated in the public comment process under subsection (8) of Section 39.5 of this Act may obtain judicial review, by filing a petition for review within 35 days from the date that a copy of the order or other final action sought to be reviewed was served upon the party affected by the order or other final Board action complained of, under the provisions of the Administrative Review Law, as amended and the rules adopted pursuant thereto,[1] except that review shall be afforded directly in the Appellate Court for the District in which the cause of action arose and not in the Circuit Court. Review of any rule or regulation promulgated by the Board shall not be limited by this section but may also be had as provided in Section 29 of this Act.

(b) Any final order of the Board under this Act shall be based solely on the evidence in the record of the particular proceeding involved, and any such final order for permit appeals, enforcement actions and variance proceedings, shall be invalid if it is against the manifest weight of the evidence. Notwithstanding this subsection, the Board may include such conditions in granting a variance and may adopt such rules and regulations as the policies of this Act may require. If an objection is made to a variance condition, the board shall reconsider the condition within not more than 75 days from the date of the objection.

(c) No challenge to the validity of a Board order shall be made in any enforcement proceeding under Title XII of this Act [2] as to any issue that could have been raised in a timely petition for review under this Section.

NATURE OF THE CASE

This case began when Waste Management of Illinois, Inc. (hereinafter "WMII") filed an application with the Kankakee County Board for siting approval for a new regional pollution control facility (hereinafter "Landfill"), actually for expansion of their existing facility in Kankakee County. After a lengthy and contested public Hearing before the County Board, the County Board voted to deny the application. WMII subsequently appealed this denial to the Pollution Control Board and, on July 1, 2004, Merlin Karlock, an adjacent property owner who had actively participated as an objector in the Hearings before the County Board, filed with the Pollution Control Board a Petition for Leave to Intervene or, alternatively, for Leave to File an Amicus Curiae Brief. Both WMII and Kankakee County filed Responses, objecting to the Petition and, on July 22, 2004, the Pollution Control Board entered its Order, denying the Petition to Intervene, but granting Merlin Karlock leave to file an Amicus Brief. This appeal followed and was, subsequently, consolidated with the appeal of Michael Watson, another adjacent property owner who had, likewise, petitioned for leave to intervene in the Pollution Control Board proceedings and whose Petition was denied in the same Order that denied the Petition of Merlin Karlock.

ISSUES PRESENTED FOR REVIEW

I. **WHETHER THE AUTHORITY RELIED UPON BY THE POLLUTION CONTROL BOARD IN DENYING KARLOCK'S PETITION TO INTERVENE IS MINIMAL AND EASILY DISTINGUISHED.**

II. **WHETHER DENYING INTERVENTION IN THIS CASE LEADS TO ABSURD AND UNJUST RESULTS AND MAY BE INCONSISTENT WITH THE LEGISLATIVE INTENT.**

III. **WHETHER THE INCONSISTENT POSITIONS TAKEN BY KANKAKEE COUNTY'S ATTORNEYS REQUIRE ALLOWING INTERVENTION BY A PARTY WHOSE ONLY INTEREST IS THAT THE LOCAL DENIAL OF SITING BE AFFIRMED.**

JURISDICTIONAL STATEMENT

This is an appeal as of right, pursuant to 415 ILCS 5/41(a) as construed in *Citizens Against the Randolph Co. Landfill v. Pollution Control Board*, 178 Ill. App. 3d 686, 533 N.E.2d 401 (4th Dist. 1988). This Court's jurisdiction to entertain a direct appeal from a denial of a Petition to Intervene was the subject of previous Motions to Dismiss this appeal, filed by the Pollution Control Board on November 9, 2004, and by WMII on November 18, 2004. This Court denied said motions and directed the parties to further address the issue in their Briefs. On that issue Petitioner Karlock adopts and reiterates as if fully set forth herein, the arguments of Co-Petitioner, Michael Watson, in Watson's Brief.

STATEMENT OF FACTS

This is the fourth, and hopefully the last, in a series of related cases before this Court, all dealing with landfill siting in Kankakee County, Illinois. They are related in that WMII, Kankakee County, and the Pollution Control Board are parties to all four cases. A brief review of those cases is essential to set the background for the arguments made in this appeal. In the first of those cases (3-03-0025) Town & Country Utilities, Inc., and Kankakee Regional Landfill, LLC, (hereinafter "Town & Country") sought siting approval for a new landfill from the City of Kankakee. After a lengthy public hearing, the Kankakee City Council unanimously approved the siting application. WMII and Kankakee County, who both appeared as objectors at the siting hearing, appealed the decision to the Pollution Control Board and the PCB reversed, finding that the City Council's decision that the proposed facility was so-designed, located, and proposed to be operated as to protect the public health, safety and welfare was against the manifest weight of the evidence. Town & Country appealed to this Court, from that reversal, and both WMII and

Kankakee County cross-appealed, arguing among other issues, that the PCB erred in finding that the Town & Country application was consistent with the Kankakee County solid waste management plan, since that plan allowed for no landfills, other than the expansion of the existing WMII landfill. That case has been fully briefed and argued and is pending decision.

The second in the series of cases is 3-03-924. In this case, WMII applied to the Kankakee County Board for expansion of their existing landfill in Kankakee County. After another lengthy public hearing, at which both Petitioners herein, Merlin Karlock and Michael Watson, as well as the City of Kankakee appeared and participated actively as objectors, the County Board granted the application. The objectors, including Karlock and Watson, appealed this decision to the Pollution Control Board, which, once again, reversed the underlying local decision, finding in this case that the County Board lacked jurisdiction due to WMII's failure to comply with the statutory pre-filing notice requirements. WMII appealed that reversal to this Court, which, in an Order dated February 4, 2005, affirmed the decision of the Pollution Control Board. In that case, Kankakee County argued that its original decision, granting siting approval, should be reinstated. That case is now pending before the Illinois Supreme Court on WMII's Petition for Leave to Appeal.

After the Pollution Control Board's reversal of the City of Kankakee's decision granting it siting approval, Town & Country, concurrently with its appeal to this Court, filed a second application for local siting approval with the City of Kankakee. Once again, Kankakee County and WMII appeared and participated as objectors and, once again, the City Council approved the application of Town & Country, this time on August 19, 2003. Kankakee County and WMII both appealed this decision to the Pollution Control Board, which affirmed the City Council in an opinion of March 18, 2004. WMII and Kankakee County both appealed that decision to this

Court, as Case No. 3-04-0271, which is partially briefed and remains pending. In its Brief recently filed, Kankakee County argued, among other things, that the City of Kankakee's siting decision was inconsistent with the County's solid waste management plan, which intended that no new landfills be sited, other than expansion of the existing WMI facility. (County of Kankakee Brief at Page 33 in Case No. 3-04-0271).

After the Pollution Control Board reversed Kankakee County's initial grant of siting approval, WMII, concurrent with its appeal of that reversal to this Court, filed a new application for siting approval with Kankakee County on September 26, 2003. (C3). Public hearings on this application occurred from January 12 to January 21, 2004. Merlin Karlock is the owner of one hundred sixty (160) acres of land immediately adjacent and contiguous to the proposed WMII site. (C71). He participated actively as an objector during the local public hearings, cross-examining witnesses, calling witnesses of his own, offering exhibits into evidence, and making arguments against the application. (C71).

On March 17, 2004, the County Board, by majority vote, denied WMII's application for siting approval on the basis that statutory siting criteria i , iii and vi had not been satisfied (C16. 415 ILCS 5/39.2(a)). The three criteria which the County Board found to be unsatisfied are generally referred to as need, land use compatibility/property values and traffic. The County Board did find, however, subject to certain conditions, that the facility was so-designed, located and proposed to be operated that the public health, safety and welfare would be protected (C7-C14).

WMII subsequently filed a Motion to Renew Consideration with the County Board and the County Board was deadlocked 13-13 on the motion on April 13, 2004. (C4).

WMII then appealed the County Board's denial of its siting application to the Pollution Control Board, alleging that the decision was fundamentally unfair, unsupported by the record, and against the manifest weight of the evidence. WMII noted in its Petition that the County Regional Planning Commission, which physically conducted the siting hearing, had recommended approval of the siting application. That appeal remains pending before the Pollution Control Board, and is the case in which Petitioners seek to intervene.

In all four of the related appellate cases listed herein, as well as the remaining pending case before the Pollution Control Board, the Kankakee County Board has been represented by Charles Helsten of the law firm of Hinshaw & Culbertson.

On July 1, 2004, Merlin Karlock petitioned the Pollution Control Board for Leave to Intervene or, in the Alternative, to file an Amicus Curiae Brief in the WMII appeal. Karlock alleged that he wished to contest the Board's finding of March 17, 2004 that the proposed facility was so-designed, located and proposed to be operated that the public health, safety and welfare would be protected and that this finding by the County Board was, in fact, against the manifest weight of the evidence. (C72). Karlock also alleged here that the County Board and its attorneys would not zealously advocate in defense of the County Board's denial of siting approval. In addition to the 13-13 vote on the reconsideration, Karlock expressed concern about the nature of the relationship between the County Board's attorneys and WMII, based upon WMII's previous offer to financially support the County's defense of its solid waste management plan in opposing the City of Kankakee's siting decisions. He additionally pointed out that, for a long period of time, the County Board's attorneys, Hinshaw & Culbertson, had addressed their invoices for legal services to the "Kankakee County Landfill." (C73-76-79). Lastly, Karlock pointed out that the attorneys who represented the County Board in WMII's Pollution Control

Board case, had represented the County "staff" during the siting hearings and, as such, had co-authored a report recommending approval of the siting application. (C73-74).

Michael Watson, another adjoining property owner who participated as an objector in the underlying local siting hearings, also filed a Petition to Intervene in the Pollution Control Board case. The County Board filed a response in opposition to that Petition and it also opposed Watson's alternative Motion for Leave to File an Amicus Curiae Brief. In opposing Watson's participation as an Amicus, Kankakee County noted that "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." (SR1-10). The County Board of Kankakee County also opposed Karlock's Petition to Intervene or, alternatively, for Leave to File an Amicus Curiae Brief. The twelve (12) page objection, filed by the County and signed by Charles Helston, is largely a vitriolic, name calling, personal attack on the attorney for Merlin Karlock, where Karlock's arguments are characterized in various places therein as "standard mantra...tired arguments...nonsense...mean-spirited sensationalism...time-worn...hide bound ...and generic." (C113-115). The County's response also urged rejection of Karlock's alternative prayer that he be allowed to file an Amicus Brief, stating that such Brief would be "advocating a self-interested, biased, and highly subjective point of view." (C121, 122). Finally, the County argued,

> "Mr. Karlock should also be denied the right to become an Amicus Curiae because he is not a "friend" of the Board as is made clear through Mr. Karlock's Petition, which presents untruths to this Court in a hostile and unprofessional manner. The County respectfully submits that Mr. Karlock's Petition is only a small harbinger of the biased intemperate rhetoric that would follow if he and his attorney were allowed to proceed." (C121).

Without commenting on the substantive arguments raised by Merlin Karlock, and on very narrow legal grounds, mainly relying on it's own past decisions, the Pollution Control Board denied the Petition for Leave to Intervene. (C128-129).

ARGUMENT

Introduction

In order to avoid repetition and duplication, Petitioner Karlock hereby adopts in their entirety, as if fully set forth herein, the arguments raised by Petitioner Michael Watson in his Brief. However, Karlock asserts as additional grounds for reversal of the Pollution Control Board's decision, the following:

I. THE AUTHORITY RELIED UPON BY THE POLLUTION CONTROL BOARD IN DENYING KARLOCK'S PETITION TO INTERVENE IS MINIMAL AND EASILY DISTINGUISHED.

The opposing parties in this case all appear to operate under the conception that it is well-settled and established that a third-party does not have the right to intervene in Pollution Control Board appeals brought by an unsuccessful siting applicant. This is a misconception. Certainly, the Pollution Control Board has consistently denied every Petition to Intervene by a third-party brought in similar circumstances, but reiterating a precedent that is, at best, thinly supported by case law, does not add to the weight which should be given to the Pollution Control Board's position. As pointed out correctly in Michael Watson's brief, this Court's review is in fact de novo. In denying Karlock and Watson's Petitions to Intervene, the Pollution Control Board relies on a number of its own previous decisions, all of which are best understood as prior consistent statements. Only two appellate decisions are cited by the Pollution Control Board, both 1987 decisions from the Second District. One of these, *Waste Management of Illinois, Inc. v. PCB*, 160 Ill. App. 3d 434, 513 N.E.2d 592 (2nd Dist. 1987) simply defers to the precedent

announced by that same Court in the other decision, *McHenry County Landfill, Inc. v. IEPA*, 154 Ill. App. 3d 89 506 N.E.2d 372 (2nd Dist. 1987). The decision in *McHenry County* is the sole and entire basis for the denial of the Pollution Control Board of intervention by a third-party. A careful reading of *McHenry County* shows that that decision is based on two simple principles, that due process does not necessarily include the right to appeal administrative decisions and that landfill siting is statutory so that one cannot create rights not explicitly granted by the legislature. As expressed, those principles are, however, so general that they lack real meaning, unless the context is known. In *McHenry County*, the Pollution Control Board did allow third-parties to intervene and, when the issue was addressed to the Appellate Court, the Pollution Control Board had already affirmed the underlying local decision denying siting approval. It is, therefore, with perfect hindsight, that the Appellate Court was able to note that objectors that opposed the landfill did not need to be granted leave to intervene because they would not be adversely affected by the Pollution Control Board's decision affirming the local denial. The *McHenry County* Court relied in this regard on *Dolnick v. Redmond*, 4 Ill. App. 3d 1037, 283 N.E.2d 113 (First Dist. 1972). In *Dolnick*, Plaintiffs were denied the right to intervene because the Court correctly pointed out that they were asserting rights held by others and not by themselves.

It becomes clear then, in reviewing the legal analysis supporting the denial of intervention by a third-party in Pollution Control Board appeals that we quickly get away from the factual situation presented by Petitioners Watson and Karlock. In *McHenry County* the party intervening was Landfill Emergency Action Committee, a citizens group of objectors, and it was easy for the Appellate Court to find that their rights had not been adversely affected when the Pollution Control Board had already ruled in their favor. The Court relied on another case where intervention was properly denied because the would-be interveners were not asserting their own rights, but rather the rights of others. In this case, both Watson and Karlock are adjacent,

contiguous real estate owners whose property rights stand to be immediately impacted by the final outcome. It is often said that good facts make bad law and one cannot help but wonder whether the *McHenry County* Court would have made the same decision, if it had contemplated that the precedent it announced would one day be applied against the property rights of an adjacent contiguous landowner.

II. DENYING INTERVENTION IN THIS CASE LEADS TO ABSURD AND UNJUST RESULTS AND MAY BE INCONSISTENT WITH THE LEGISLATIVE INTENT

The legislative scheme for appealing local siting decisions is set out in 415 ILCS 5/40.1 which, in subpart (a) describes the procedures for an applicant appealing from a denial of a siting application and in subpart (b) the procedures for third-parties, other than the applicant, appealing from local approval of a siting application. These two subparts are best viewed as mirror images of each other in that they lay out what happens in the event of denial and what happens in the event of approval. In the event that a siting application is approved, all parties to the local siting hearing are automatically parties in the Pollution Control Board review. It only makes sense then that the legislature would have intended that all participants at the local siting hearing be parties in an applicant's review of a denial. It makes no sense that the legislature would determine that a third-party's interests can be adequately represented by the local decision maker, when an applicant appeals from denial, but that an applicant's interests cannot be adequately represented by the local decision maker when a third-party appeals from approval.

In construing a statute, the first and most fundamental principle of construction is to ascertain and to give affect to the intention of the legislature. *In re Application of County Collector of DuPage County for Judgment for Delinquent Taxes for the Year 1992*, 181 Ill.2d 237, 692 N.E.2d 264 (1998). Seemingly inconsistent statutory pronouncements should be

construed harmoniously whenever possible, so as to give them both affect. *Lily Lake Road Defenders v. County of McHenry*, 156 Ill.2d 1, 619 N.E.2d 137 (1993). §40.1(a) of the Environmental Protection Act does not expressly grant standing to third-party objectors when an applicant appeals from a local denial of siting. However, it does not, either expressly or by implication, deny standing to such third-party objectors. When that subsection is read in conjunction with subsection (b) which deals with appellate procedures when siting approval is granted, the most harmonious reading of the entire statute is that the legislature intended all participants at the local siting hearing to have standing in subsequent Pollution Control Board appeals, regardless of which party initiates the appeal.

To find a different legislative intent would lead to absurd and unjust results. If the Board had granted siting approval, Karlock and Watson clearly could have appealed to the Pollution Control Board and, if the Pollution Control Board had affirmed the local decision, Karlock and Watson would have standing to appeal before this Court. However, if the Pollution Control Board reverses the local siting denial in this case, Karlock and Watson, by virtue of their not being participants in the Pollution Control Board case, would not have standing to appeal that reversal to this Court. Accordingly, we could have a scenario where, despite siting approval granted by the Pollution Control Board (through reversal of the local siting decision), the third-parties who are directly affected have no standing for further appeal solely because they did not initiate the appeal. Moreover, Karlock has indicated in his Petition to Intervene that he wished to contest the Board's decision that the proposed facility was so-designed, located, and proposed to be operated as to protect the public health, safety and welfare. Had the Board found in favor of WMI on all of the other statutory siting criteria, Karlock would clearly have been able to raise this issue in a Pollution Control Board appeal. Now, however, Karlock is faced with a situation where his potentially meritorious argument may never be raised. If the Pollution Control Board

reverses the City Council's denial on the other criteria, the correctness of the City Council's decision on the public health, safety and welfare criterion becomes paramount.

There is clearly no legal or logical reason to foreclose arguments based solely upon which party initiates an appeal in the first instance. Accordingly, to avoid unjust and absurd results, §40.1 of the Environmental Protection Act must be read to allow all participants at the local siting hearing to participate in appeals, regardless of the outcome at the local siting hearing.

III. THE INCONSISTENT POSITIONS TAKEN BY KANKAKEE COUNTY'S ATTORNEYS REQUIRE ALLOWING INTERVENTION BY A PARTY WHOSE ONLY INTEREST IS THAT THE LOCAL DENIAL OF SITING BE AFFIRMED.

The facts as recited earlier point to a long litigious history where Kankakee County opposed the siting of a landfill by the City of Kankakee in favor of expanding the existing Waste Management landfill which was subject to the jurisdiction of the County. Accordingly. Kankakee County opposed, and continues to oppose, the affirmative siting decisions by the City of Kankakee and the decision by the Pollution Control Board affirming the City of Kankakee. Karlock has alleged and, for purposes of this appeal, it must be deemed as true, that WMII offered to and did financially support those efforts on the part of Kankakee County.

Everything was consistent and everyone knew their roles throughout two siting hearings by the City of Kankakee and two siting hearings by the County of Kankakee until Kankakee County, on March 18, 2004, denied WMII's second application for siting approval. At the time of that denial, WMII was appealing the Pollution Control Board's reversal of the County Board's approval of its initial siting application. Petitioner Karlock, who was also a party to that appeal, filed a Motion to Dismiss that appeal (Case No. 3-03-0924) on the grounds that the Kankakee County Board's denial of the Request for Siting Approval in March of 2004, acted as a repeal by

implication of its previous approval of an essentially identical siting application. Kankakee County's attorneys objected to that motion and actually argued, in a pleading filed September 14. 2004, that the initial grant of siting approval and subsequent denial, are not inconsistent and can be reconciled.

Petitioner Karlock is troubled that Kankakee County's attorneys would, after the County had denied WMII's second application for siting approval, continue to argue in favor of reinstating the original approval. Case No. 3-03-0924 is now concluded by this Court affirming the Pollution Control Board, but had Kankakee County, which was in that appeal aligned with WMII, prevailed; it would have rendered the County Board's later denial of siting approval moot. Petitioner Karlock is further concerned that the County attorneys would continue to argue, as they have in Case No. 3-04-0271, that the City of Kankakee's approval of the Town & Country siting application is inconsistent with the County's solid waste management plan because that plan contemplates expansion of the Waste Management facility as the only acceptable landfill alternative.

Mostly, however, Petitioner Karlock is concerned that Kankakee County would oppose intervention in a case by parties who support the County's denial of siting. The vitriol with which the County opposed those Petitions only adds to the concern. If the County's attorneys were interested in supporting the County's decision, they should welcome new ideas, another point of view and arguments on their behalf which they might not have thought of. Instead the County's attorneys come right out and state that they oppose Watson's participation, even as an Amicus, because "he will be advocating a point of view and urging this Board to find in favor of the County Board and against WMII." Given the previous history (inadvertent, or not) of these same attorneys, addressing their invoices for legal services rendered on behalf of Kankakee

County to the "Kankakee County Landfill," a reasonable person would have reason for concern about the quality and zealousness with which the County Board's denial of siting will be defended.

Kankakee County, in its objection to Watson's Petition to Intervene, points out that the attorney general has a duty to represent the interests of "the people" and that a state's attorney's rights and duties are analogous to those of the attorney general. Petitioners Karlock and Watson are part of "the people" and, if anything is clear from the pleadings filed in this case, it is that the Kankakee County State's Attorney has no interest, whatsoever, in representing their rights. Similarly, Kankakee County's Response points out that it is presumed that elected officials would adequately represent the interest of the public. That presumption, however, is thoroughly rebutted by the fact that the attorneys for these same elected officials would oppose intervention by members of the public who support the decision of the elected officials.

CONCLUSION

For the foregoing reasons, Petitioner Merlin Karlock respectfully prays that the decision of the Pollution Control Board, denying his Petition for Leave to Intervene be reversed and this matter be remanded to the Pollution Control Board with direction for further proceedings consistent with the Order of the Court.

Respectfully submitted,
MERLIN KARLOCK

BY: _____
GEORGE MUELLER
Attorney for Petitioner, Merlin Karlock

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(815) 433-4705

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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)
vs.	)	
COUNTY BOARD OF KANKAKEE,	)	
Respondent.	)	

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 number3-03-0025, 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

GEORGE MUELLER, P.C.
Attorney at Law
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Ottawa, IL 61350
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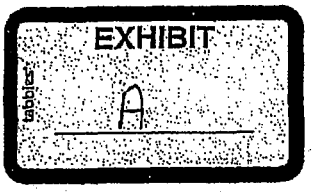
requirements of the local siting ordinance and the decision maker's refusal to enforce that siting ordinance demonstrate collusion between the County and WMI and rendered the proceedings fundamentally unfair.

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

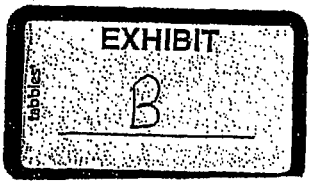
Joan Underwood, a licensed professional geologist employed by WMI's consultant, Earthtech, testified regarding the geologic and hydro-geologic investigation at the site. (Cy. Hrg. Volume 19, Pages 81, 82). She described three geologic layers at the site, the silurian dolomite bedrock overlain by unconsolidated 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.[9] 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

[9] 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.



ILLINOIS POLLUTION CONTROL BOARD
July 22, 2004

WASTE MANAGEMENT OF ILLINOIS, INC.,	)	
Petitioner,	)	
v.	)	PCB 04-186
	)	(Pollution Control Facility
COUNTY BOARD OF KANKAKEE COUNTY,	)	Siting Appeal)
Respondent.	)	

ORDER OF THE BOARD (by G.T. Girard):

On June 22, 2004, Michael Watson (Watson) filed a motion to intervene in the proceeding. On July 1, 2004, Merlin Karlock (Karlock) also filed a motion to intervene. On July 1, 2004, and July 9, 2004, Waste Management of Illinois, Inc. filed responses to the motions. On July 7, 2004, County Board of Kankakee County (Kankakee County) filed a response to Watson's motion. On July 12, 2004, Watson filed a motion to strike portions of Kankakee County's response. On July 15, 2004, Kankakee County filed a response to Karlock's motion and Karlock filed a "reply" to Watson's motion. For the reasons expressed below, the Board denies both motions to intervene. The Board also denies Watson's motion to strike.

The Board and the courts have addressed the issue of third-party appeals and third-party intervention in proceedings where the applicant is appealing the denial of siting. Both the courts and the Board have consistently held that a third party cannot appeal or intervene in such a proceeding. *See* Lowe Transfer, Inc. v. County Board of McHenry County, PCB 03-221 (July 10, 2003); Waste Management v. County Board of Kane County, PCB 03-104, slip op. at 3 (Feb. 20, 2003); Land and Lakes Co., *et al.* v. Village of Romeoville, PCB 94-195, slip op. at 4 (Sept. 1, 1994); citing Waste Management of Illinois, Inc. v. PCB, 160 Ill. App. 3d 434, 513 N.E.2d 592 (2nd Dist. 1987); McHenry County Landfill, Inc. v. IEPA, 154 Ill. App. 3d 89, 506 N.E.2d 372 (2nd Dist. 1987). A third party may intervene only when the third party is 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.

The plain language of Section 40.1(a) of the Act provides that if the county board denies siting "the applicant may" appeal the decision. 415 ILCS 5/40.1(a) (2002). The Board has also adopted procedural rules that reiterate that the applicant is the only party that may appeal a denial of siting approval. *See* 35 Ill. Adm. Code 107.200(a). As stated by the court, the Board "is powerless to expand its authority beyond that which the legislature has expressly granted" to the Board. McHenry Landfill 154 Ill. App. 3d 89, 506 N.E.2d 372, 376. The Board has also stated "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." Land and Lakes Co. v. Randolph County Board, PCB 99-69 (Mar. 18, 1999).

The parties have presented the Board with no new arguments which convince the Board to alter the long-standing precedent that at third party may not intervene in a siting denial appeal. Accordingly, the motions to intervene are denied. Watson and Karlock may, however, contribute oral or written statements at hearing in this matter in accordance with Sections 101.628 and 107.404 of the Board's procedural rules, but may not examine or cross-examine witnesses. 35 Ill. Adm. Code 101.628(a), (b); 35 Ill. Adm. Code 107.404. Watson and Karlock may also participate through public comments or *amicus curiae* briefs pursuant to Section 101.110(c), and in accordance with Section 101.628(c). 35 Ill. Adm. Code 101.110(c); 35 Ill. Adm. Code 101.628(c).

IT IS SO ORDERED.

Chairman J.P. Novak abstained.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 22, 2004, by a vote of 4-0.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

IN THE APPELLATE COURT OF ILLINOIS
FOR THE THIRD DISTRICT

MERLIN KARLOCK,	)	
	)	
Petitioner,	)	**Petition for Review**
	)	**of Order of the Illinois Pollution**
v.	)	**Control Board**
	)	**Docket number: PCB 04-186**
WASTE MANAGEMENT OF ILLINOIS,	)	
COUNTY BOARD OF KANKAKEE COUNTY,	)	
and THE ILLINOIS POLLUTION CONTROL	)	
BOARD,	)	
	)	
Respondent.	)	

PETITION FOR REVIEW

MERLIN KARLOCK, pursuant to 415 ILCS 5/41(a) and Illinois Supreme Court Rule 335, hereby petitions the Court for review of that part of the July 22, 2004 Order of the Illinois Pollution Control Board which denies the Motion To Intervene filed by Merlin Karlock on July 1, 2004.

Respectfully submitted,
MERLIN KARLOCK,

BY: _____
His Attorney

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3-04-0655

ILLINOIS POLLUTION CONTROL BOARD

MICHAEL WATSON	)	
	)	
	)	
	)	
	)	
	)	
v.	)	PCB 04-186
	)	
WASTE MANAGEMENT OF ILLINOIS, INC., COUNTY BOARD OF KANKAKEE COUNTY, ILLINOIS and the ILLINOIS POLLUTION CONTROL BOARD	)	APPELLATE COURT NO. 03-04-0655

CERTIFICATION OF RECORD

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, do hereby certify that I have the custody and control of all Board files and the records of the said Pollution Control Board; that the following listed items constitute the entire record of the Pollution Control Board on the above-captioned matter; and that the listed items transmitted herewith are either the true originals from the files of the Pollution Control Board or are true and exact copy of said original item;

1. Waste Management of Illinois' Petition for Hearing to Contest Site Location Denial (pp. 1 - 16)

2. County Board of Kankakee County, Illinois' Answer to Waste Management's Petition for Hearing to Contest Site Location Denial (pp. 17 – 20)

3. Appearance of Charles F. Helsten on behalf of the County Board of Kankakee County, Illinois (pp. 21 – 22)

4. Order of the Board by G.T. Girard dated May 20, 2004 (pp. 23 – 24)

5. Revised Appearance of Charles F. Helsten on behalf of the County Board of Kankakee County, Illinois (pp. 25 - 26)

6. Hearing Officer Order dated May 25, 2004 (p. 27)

7. Hearing Officer Order dated June 2, 2004 (p. 28)

8. Respondent County Board of Kankakee's Appearance by Elizabeth S. Harvey and Motion for Extension of Time and for Leave to File Reduced Number of Copies (pp. 29 – 36)

9. Appearance of Donald J. Moran for Waste Management of Illinois, Inc. (p. 36)

10. Waiver of Statutory Decision Deadline until October 4, 2004 (p. 37)

11. Subpoena Duces Tecum to Robert Keller (pp. 38 - 40)

12. Subpoena Duces Tecum to Ronald Thompsen (pp. 41 - 43)

13. Michael Watson's Motion to Intervene and in the Alternative Motion For Leave to File an Amicus Curiae Brief (pp. 44 - 54)

14. Subpoena Duces Tecum to Michael Watson (pp. 55 - 57)

15. Hearing Officer Order dated June 28, 2004 (p. 58)

16. County of Kankakee's Certification of Record on Appeal and County of Kankakee's Motion for Leave to File a Single Copy of Portions of the Record (pp. 59 – 69)

17. Merlin Karlock's Petition for Leave to Intervene or Alternatively for Leave to File an Amicus Curiae Brief (pp. 70 - 80)

18. Waste Management of Illinois, Inc.'s Objection to Michael Watson's Motion to Intervene (pp. 81 - 86)

19. Subpoena Duces Tecum to Michael Watson (pp. 87 - 89)

20. Hearing Officer Order dated July 9, 2004 (p. 90)

21. Waste Management of Illinois, Inc.'s Objection to Merlin Karlock's Petition for Leave to Intervene (pp. 91 – 97)

22. Michael Watson's Motion to Strike Portions of the County Board's Response To His Motion to Intervene/File Amicus Brief (pp. 98 – 104)

23. Waiver of Statutory Decision Deadline to November 18, 2004 (p. 105)

24. Merlin Karlock's Reply to Kankakee County's Response to Michael Watson's Motion to Intervene or in the Alternative to File an Amicus Brief (pp. 106 – 109)

25. County Board of Kankakee County, Illinois' Objection to Merlin Karlock's Petition to Intervene or Alternatively for Leave to File an Amicus Curiae Brief (pp. 110 – 127)

26. Order of the Board by G.T. Girard dated July 22, 2004 (pp. 128 – 129)

27. Keith Runyon's Motion to Intervene and in the Alternative Motion for Leave to File an Amicus Curiae Brief (pp. 130 – 134)

28. Waste Management of Illinois, Inc.'s Objection to Keith Runyon's Motion to Intervene (pp. 135 – 139)

29. Subpoena Duces Tecum to Robert Keller (pp. 140 – 145)

30. Robert Keller and Brenda Keller's Motion to Quash Subpoena (pp. 146 – 160)

31. Subpoena Duces Tecum to Kurt Stevens (pp. 161 – 163)

32. Hearing Officer Order dated August 3, 2004 (pp. 164 – 170)

33. Hearing Officer Order dated August 5, 2004 (p. 171)

34. Michael Watson's Motion Submitted to the Hearing Officer to Limit the Scope and Duration of Subpoenaed Deposition (pp. 172 – 201)

35. Hearing Officer Order dated August 9, 2004 (pp. 202 – 206)

36. Waiver of Statutory Decision Deadline to December 2, 2004 (p. 207)

37. Order of the Board by G.T. Girard dated August 19, 2004 (pp. 208 – 209)

38. Hearing Officer Order dated September 9, 2004 (p. 210)

39. **Waiver of Statutory Decision Deadline to January 20, 2005 (p. 211)**

Dorothy M. Gunn

Dorothy M. Gunn

SUBSCRIBED AND SWORN TO BEFORE ME THIS

29TH DAY OF SEPTEMBER 2004.

Sandra L Wiley

Notary Public