

AUG 20 2004

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

CITY OF KANKAKEE,)
Petitioner,)
v.)

PCB 03-125

COUNTY OF KANAKEE, COUNTY)
BOARD OF KANKAKEE, AND WASTE)
MANAGEMENT OF ILLINOIS, INC.)
Respondents.)

MERLIN KARLOCK,)
Petitioner,)
v.)

PCB 03-133

COUNTY OF KANAKEE, COUNTY)
BOARD OF KANKAKEE, AND WASTE)
MANAGEMENT OF ILLINOIS, INC.)
Respondents.)

MICHAEL WATSON,)
Petitioner,)
v.)

PCB 03-134

COUNTY OF KANAKEE, COUNTY)
BOARD OF KANKAKEE, AND WASTE)
MANAGEMENT OF ILLINOIS, INC.)
Respondents.)

KEITH RUNYON,)
Petitioner,)
v.)

PCB 03-135

COUNTY OF KANAKEE, COUNTY)
BOARD OF KANKAKEE, AND WASTE)
MANAGEMENT OF ILLINOIS, INC.)
Respondents.)

Consolidated Third-Party
Pollution Control Facility
Siting Appeal, *on appeal*,
3-03-0924 (3rd Dist.)

PCB 03-125, 133, 134, and 135:
This Notice of Filing and Proof of
Service is to replace those received
on August 20, 2004, marked as part of
PCB 04-186.

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on the 20th day of August, 2004, we filed with the Illinois
Pollution Control Board, the attached document entitled: **WATSON'S RESPONSE OBJECTING**

TO WMII'S MOTION FOR RELIEF FROM JUDGMENT, a copy of which is hereby served upon you.

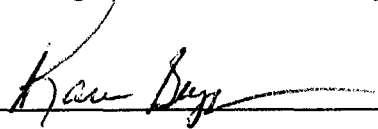
Intervener, Michael Watson

By: 
One of his attorneys

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

PROOF OF SERVICE

Karen Gryczan, a non-attorney, on oath, certifies that she served the foregoing Notice of Filing, and document set forth herein, on the attorneys named on the attached service list via U.S. Mail at 175 W. Jackson Blvd., Chicago, Illinois this 20th day of August, 2004, before the hour of 5:00 p.m.



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

Dorothy Gunn Illinois Pollution Control Board Clerk's Office James R. Thompson Center Ste. 11-500 100 W. Randolph Street Chicago, IL 60601 One Original and 9 copies	Kenneth A. Leshen One Dearborn Square Suite 550 Kankakee, IL 60901 Via U.S. Mail
Patricia O'Dell 1242 Arrowhead Drive Bourbonnais, IL 60914 Via U.S. Mail	L. Patrick Power 956 N. Fifth Avenue Kankakee, IL 60901 Via U.S. Mail
Bradley Halloran Illinois Pollution Control Board Clerk's Office James R. Thompson Center, Ste. 11-500 100 W. Randolph Street Chicago, IL 60601 Via Hand Delivery	Charles Helston Hinshaw & Culbertson 100 Park Avenue P.O. Box 1389 Rockford, IL 61105-1389 Via U.S. Mail
Donald Moran Pederson & Houpt 161 N. Clark Street, Suite 3100 Chicago, IL 60601-1149 Via U.S. Mail	Elizabeth S. Harvey, Esq. Swanson, Martin & Bell One IBM Plaza, Suite 2900 330 N. Wabash Chicago, IL 60611 Via U.S. Mail
Christopher W. Bohlen 200 E. Court Street, Suite 502 P.O. Box 1787 Kankakee, IL 60901 Via U.S. Mail	Kenneth A. Bleyer Attorney at Law 923 W. Gordon Terrace #3 Chicago, IL 60613-2013 Via U.S. Mail
Keith Runyon 1165 Plum Creek Drive Bourbonnais, IL 60914 Via U.S. Mail	Leland Milk 6903 S. Route 45-52 Chebanse, IL 60922-5153 Via U.S. Mail
George Mueller, P.C. 501 State Street Ottawa, IL 61350 Via U.S. Mail	

AUG 20 2004

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS
Pollution Control Board

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

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

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on the 20th day of August, 2004, we filed with the Illinois Pollution Control Board, the attached document entitled: **WATSON'S RESPONSE OBJECTING TO WMIP'S MOTION FOR RELIEF FROM JUDGMENT**, a copy of which is hereby served upon you.

Intervener, Michael Watson

By: Erin Keane
One of his attorneys

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

PROOF OF SERVICE

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Karen Gryczan

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

Dorothy Gunn Illinois Pollution Control Board Clerk's Office James R. Thompson Center Ste. 11-500 100 W. Randolph Street Chicago, IL 60601 One Original and 9 copies	Kenneth A. Leshen One Dearborn Square Suite 550 Kankakee, IL 60901 Via U.S. Mail
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RECEIVED
CLERK'S OFFICE

AUG 20 2004

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITY OF KANKAKEE,)	
Petitioner,)	
v.)	
)	
COUNTY OF KANKAKEE, COUNTY)	
BOARD OF KANKAKEE, AND WASTE)	
MANAGEMENT OF ILLINOIS, INC.)	
Respondents,)	PCB 03-125
_____)	
MERLIN KARLOCK,)	
Petitioner,)	
v.)	
)	
COUNTY OF KANKAKEE, COUNTY)	
BOARD OF KANKAKEE, AND WASTE)	
MANAGEMENT OF ILLINOIS, INC.)	
Respondents,)	PCB 03-133
_____)	
MICHAEL WATSON,)	
Petitioner,)	
v.)	
)	
COUNTY OF KANKAKEE, COUNTY)	
BOARD OF KANKAKEE, AND WASTE)	
MANAGEMENT OF ILLINOIS, INC.)	
Respondents,)	PCB 03-134
_____)	
KEITH RUNYON,)	
Petitioner,)	
v.)	
)	
COUNTY OF KANKAKEE, COUNTY)	
BOARD OF KANKAKEE, AND WASTE)	
MANAGEMENT OF ILLINOIS, INC.)	
Respondents,)	PCB 03-135
_____)	
COUNTY OF KANKAKEE, COUNTY)	
BOARD OF KANKAKEE, AND WASTE)	
MANAGEMENT OF ILLINOIS, INC.)	
Respondents,)	Consolidated Third-Party Pollution Control Facility Siting Appeal, <i>on appeal</i> , 3-03-0924 (3 rd Dist.)

**WATSON'S RESPONSE OBJECTING TO
WMII'S MOTION FOR RELIEF FROM JUDGMENT**

NOW COMES Michael Watson, by and through his attorneys at Querrey & Harrow, Ltd.
and in response to Waste Management of Illinois, Inc.'s Motion for Relief from Judgment sets
for the following objections:

1. Waste Management of Illinois, Inc. (WMII) states in its Notice of Filing that it filed, with the Illinois Pollution Control Board a Motion for Relief from Judgment. Such Motion was not received by Querrey & Harrow, Ltd. until August 11, 2004. The Motion seeks, without specifying what type, "relief" from the Illinois Pollution Control Board's (Board) August 7, 2003 Order which vacated the decision of the Kankakee County Board (County Board) to approve WMII's landfill expansion. The Board vacated the County Board's approval based on the fact that the County Board lacked jurisdiction, since WMII failed to follow the statutory requirements for providing pre-filing notice to Brenda Keller, an adjacent landowner as shown on authentic tax records.

2. WMII seeks unspecified "relief" from that judgment based on its assertion that a County Board member's recent testimony in a separate appeal, PCB 04-186, allegedly contradicts portions of Robert Keller's testimony. WMII seeks this unspecified "relief" pursuant to Section 101.904(b)(1) of the Board's Rules. WMII's Motion should be denied, as the Board has no jurisdiction over this matter (since WMII has appealed the Board's decision, which appeal is still pending); the County Board member's testimony on which WMII relies is nothing more than suspect, at best, hearsay; and, even if the Board were to consider, *in arguendo*, WMII's assertions, WMII clearly fails to meet the requirements for relief from judgment.

3. In the interest of efficiency, as respects the jurisdictional and hearsay arguments raised herein, Watson adopts, repeats and incorporates the Board's Response in Opposition to the Motion for Stay of Appeal which was filed by WMII in the Third District Appellate Court. A true and correct copy of the Board's Response is attached as **Exhibit A** hereto.

4. In addition to those arguments correctly raised by the Board in its Response to the appeal Motion brought by WMII, even if the Board were to consider WMII's Motion under Section 101.904(b)(1), WMII fails to meet the elements for any relief from judgment. WMII argues that Section 101.904(b) relief requires the elements of 735 ILCS 5/2-1402 to be met. Assuming, *in arguendo*, that is the appropriate standard to apply (which only for purposes of this Response will not be contested), WMII fails to meet it.

5. As the Illinois Supreme Court long ago observed, "It cannot be the practice of courts to allow important matters to go to trial, and because one party is not satisfied with the results of it, let him go out and try to get facts which will enable him to do better at another trial, and rely upon such after-ascertained matters as a basis for a new trial." *Pritchett v. Steinker Trucking Co.*, 40 Ill. 2d 510, 512-513 (S.Ct. 1968), *citing*, *Chicago and Alton Railroad Co. v. Raidy*, 203 Ill. 310, 317.

6. WMII has the burden of proof to show the Board, among the other elements of Section 1402, that the evidence it presents in support of its Motion is "so conclusive" that it would probably change the outcome. WMII has not only has failed to show the Board "evidence" (opposed to hearsay), it also has failed to identify how the deposition of the subject County Board member is "conclusive."

7. WMII presents no evidence to show that the subject County Board member's testimony would change *the result* if considered by the Board. If the "result" to which WMII refers (since WMII fails to identify what relief it seeks) is the Board's decision, WMII is incorrect, as there were several other substantive issues raised during the Board's review of the County Board's approval that would likely result in the Board reversing the decision of the

County Board. Although WMII attempts to highlight that jurisdiction was the “sole” issue on which the Board vacated the County Board’s decision, as if there were not other issues in that appeal, that emphasis falls flat. The Board did not need to make findings and a decision with respect to the numerous other issues briefed by the parties, as the jurisdictional issue took precedence and any other findings of the Board in a decision based on jurisdiction would be *dicta*. As such, if somehow, the Board’s decision on the jurisdictional issue were to be reversed, the numerous other issues briefed would have to be decided and WMII has not shown how the outcome is likely (in fact it is unlikely) to be any different.

8. If the “result” to which WMII refers is a new local hearing, WMII is again incorrect. Since the County Board subsequently denied what WMII has asserted to be the same or essentially the same application for siting, the result, as shown, will not be different if a “new trial” or, in this case, new hearing, is granted. Thus, even if WMII were successful on its Motion, reversing the Board’s decision on jurisdiction, and defeating all other arguments in the petitioners’ briefs (none of which should occur), the “end game” which WMII seeks to replay will and has proven to not likely change the current result, as WMII’s re-filed application now on review in Case No. 04-186, was denied by the County Board.

9. Likewise, WMII presents no evidence that is “conclusive.” Without even looking outside of the subject County Board member’s transcript attached to WMII’s Motion, there are a host of inconsistencies and inaccuracies within her own statements that should call into question her veracity.

10. Additionally, WMII fails to show how, with due diligence, this could not have been discovered during or prior to (during the discovery phase of) the Board’s hearing. WMII

attempts to circumvent this obvious fault in its Motion by asking the Board to put blinders on and look only to the time frame of the local hearing. WMII had every opportunity to conduct discovery into the notice issues being reviewed by the Board in PCB 03-125, 133, 134 and 135, and choose not to. It could have taken the subject County Board member's deposition at that time; it could have drafted written discovery regarding notice for the parties, including the County, to answer; it could have subpoenaed other potential witnesses, such as Kirt Stevens (the houseguest of the Kellers), but, it simply choose to do none of these things.

11. Further, WMII fails to show how the subject County Board member's testimony is "material to issues," since whether or not there was a posting is immaterial to the Board's August 7, 2003 Order.

12. Finally, WMII fails to show how the subject County Board member's testimony is anything other than cumulative. Even on the irrelevant issue of whether there was a posting, which appears to be the "essence" of WMII's Motion, there is already differing evidence in the record. Certainly if discovery were re-opened additional testimony would be taken that would contradict the subject County Board member's allegations and, on information and belief some already has, under the guise of PCB 04-186 without the parties to PCB 03-125, 133, 134 and 135 noticed or present (to which Watson objects), that WMII has chosen not to show the Board, and which contradicts the subject County Board member's allegations.


13. Therefore, first and foremost, WMII's Motion should be denied, as the Board does not have jurisdiction over this matter. However, even if the Board were to consider WMII's Motion, the Motion comes woefully short of WMII's burden and fails to meet almost every element required under a 735 ILCS 5/2-1402 review.

WHEREFORE, Michael Watson respectfully request the Illinois Pollution Control Board deny WMII's Motion and for whatever additional relief the Board deems appropriate.

Dated: August 20, 2004

Respectfully submitted,

PETITIONER MICHAEL WATSON

By: 
One of his attorneys

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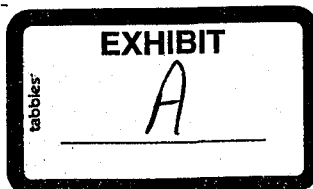
IN THE
APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT

WASTE MANAGEMENT OF)	Petition for Review of an Order of the
ILLINOIS, INC., a Delaware)	Illinois Pollution Control Board,
corporation,)	PCB 03-125, 03-133, 03-134 & 03-135
)	
Petitioner,)	
)	
v.)	
)	
ILLINOIS POLLUTION CONTROL)	
BOARD, COUNTY OF KANKAKEE,)	
COUNTY BOARD OF KANKAKEE,)	
CITY OF KANKAKEE, MERLIN)	
KARLOCK, KEITH RUNYON, and)	
MICHAEL WATSON,)	
)	
Respondents.)	

**RESPONSE IN OPPOSITION OF
THE ILLINOIS POLLUTION CONTROL BOARD
TO THE MOTION FOR STAY OF APPEAL AND
INSTANTER REMAND FOR PRESENTATION OF
NEWLY DISCOVERED EVIDENCE TO THE BOARD**

Respondent, ILLINOIS POLLUTION CONTROL BOARD, through its attorney, LISA MADIGAN, Attorney General of Illinois, responds in opposition to Petitioner's "Motion for Stay of Appeal and *Instanter* Remand" and states the following:

1. In its August 7, 2003 final decision, the Board vacated the Kankakee County Board's January 31, 2003 decision granting Waste Management of Illinois, Inc.'s application for expansion of its existing pollution control facility. The



Petitioner filed a petition for review, seeking this Court's review of that determination.

2. Petitioner has now filed a motion to stay its appeal, requesting that the Court remand the matter to the Board. It has contemporaneously filed a motion with the Board asking the Board to grant relief from the Board's judgment that the County Board of Kankakee lacked jurisdiction to review the siting application.

3. The Board lacks jurisdiction to rule on the motion currently pending before it: "It is fundamental that the proper filing of a notice of appeal causes the jurisdiction of the appellate court to attach *instantly* and deprives the trial court of jurisdiction to modify its judgment or to rule on matters of substance which are the subject of appeal." *Cain v. Sukkar*, 167 Ill. App. 3d 941, 521 N.E.2d 1292, 1294 (4th Dist. 1988) (citing *Montgomery Ward & Co. v. Wetzel*, 98 Ill. App. 3d 243, 423 N.E.2d 1170 (1st Dist. 1981)). This Court is the proper venue to address the substance of the motions.

4. Nevertheless, the Board respectfully submits that remand is inappropriate for two distinct reasons.

5. First, the new evidence that the Petitioner submits warrants remand is clearly hearsay, and the Petitioner has offered no applicable exceptions to the hearsay rule that would warrant the Board's consideration of that evidence.

6. Second, the new evidence is not relevant. The gist of petitioner's motion is that the new evidence indicates that Brenda Keller was aware of a posted notice of Petitioner's siting application, and that this would persuade the Board to change its

final decision in this matter. Petitioner misconstrues the rationale and findings in the Board's decision.

7. The Board found that, under Section 39.2 (b) of the Environmental Protection Act (415 ILCS 5/39.2 (2002)), service on property owners specified in the section "must be effectuated using certified mail return receipt or personal service." (R. CL vol. 10, pp. 001547-1564, 1561.) The Board further found that Mrs. Keller was not served via certified mail and was not served personally. (slip op at 16.) Consequently, the Board found that the statutory notice requirements were not met.

8. The Board's decision in this case specifically addressed the issue of "posting" notice and found that such notice was inadequate under the statute. Specifically, the Board ruled:

Waste Management argues that both "posting" notice and notice by regular mail was sufficient notice of an impending landfill siting application. However, the Act envisions two and only two types of service: personal or certified mail return receipt requested. Therefore, the attempts by Waste Management to serve property owners by methods such as sending notice of an application by regular mail and "posting" notice are not authorized by the plain language of Section 39.2(b) of the Act. 415 ILCS 5/39.2(b) (2002). Waste Management cites one case (Greene) on the issue of posting notice as a means of service; however, the United States Supreme Court found in Greene that posting a notice was insufficient even though the statute at issue specifically allowed for posting. The Board has reviewed the case law and can find no case where posting notice was adequate in place of personal service except pursuant to specific statutory language. There are statutes which allow for notice to be posted. See 65 ILCS 5/11-19.2-4, 5/11-31.1-1 and 735 ILCS 5/9-104 and 5/9-107 (2002). However, the plain language of Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)) does not allow for posting of notice. Therefore, the Board finds that "posting" notice is not sufficient to meet the notice requirements

of Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)), and notice by regular mail is insufficient based on the plain language of Section 39.2(b) of the Act. 415 ILCS 5/39.2(b) (2002). (R. CL vol. 10, pp. 001547-1564, 1562.)

9. Therefore, even if the "newly discovered evidence" was true and admissible, the evidence would not alter the Board's decision in the underlying case.

10. Following its discussion of the adequacy of "posting notice", the Board addressed arguments based on dicta in one of its prior cases concerning whether notice requirements could be met through "constructive notice". The Board distinguished this case from its prior cases, all of which involved the mailing of notice. (R. CL vol. 10, pp. 001547-1564, 1563.) Here, the Board specifically found that mailing a certified letter to Brenda Keller's husband "was not sufficient to find constructive notice" on Brenda. (R. CL vol. 10, pp. 001547-1564, 1564.) Given the Board's finding that statutory notice requirements to a landowner could be met only through personal service or service by certified mail, return receipt requested, the Board's discussion of its prior "constructive notice" cases and dicta is mere surplusage. Constructive notice is not contained within the plain wording of Section 39.2.

11. The issue of what Section 39.2 of the Act requires is squarely before this Court. The issues have been fully briefed by both Petitioner (see Brief of Petitioner pages 18-19) and the Board (See Brief of Respondent pages 29-30). Therefore, granting Petitioner's motion would unnecessarily delay the ultimate resolution of this proceeding.

12. For these reasons, the Board respectfully requests that this Court deny petitioner's motion for stay and remand of this cause to the Board. Instead, in the interests of both judicial and administrative economy, the Board urges this Court to schedule oral argument and proceed to rendering its decision in this appeal.

Respectfully submitted,

LISA MADIGAN
Attorney General
State of Illinois

BY: 

JERALD S. POST for
KAREN J. DIMOND
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2274

STATE OF ILLINOIS)
)
COUNTY OF C O O K) SS.

PROOF OF SERVICE

The undersigned, being first duly sworn upon oath, deposes and states that a copy of the foregoing Response in Opposition of the Illinois Pollution Control Board to the Petitioners' Motion for Stay of Appeal and Instantaner Remand for Presentation of Newly Discovered Evidence was served upon each of the below-named parties on August 13, 2004, by depositing such copies in the United States mail at 100 West Randolph Street, Chicago, Illinois, 60601 in envelopes bearing sufficient postage.

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Pedersen & Houpt
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George Mueller
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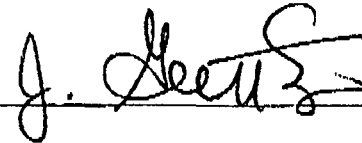
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L. Patrick Power, Esq.
956 North Fifth Avenue
Kankakee, IL 60901



SUBSCRIBED and SWORN to before me
this 13th day of August, 2004.

