

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, INC.,)	
and KENDALL LAND and CATTLE, L.L.C.)	
)	
Petitioners,)	No. PCB 09-43
)	
vs.)	(Pollution Control Facility
)	Siting Appeal)
)	
COUNTY BOARD OF KENDALL COUNTY,)	
ILLINOIS,)	
)	
Respondent.)	

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on March 4, 2009, we filed with the Illinois Pollution Control Board, via electronic filing, **PETITIONERS' MOTION TO STRIKE AND DENY DEMAND FOR BILL OF PARTICULARS** in the above entitled matter, which is attached hereto and herewith served upon you.

WASTE MANAGEMENT OF ILLINOIS, INC.
and KENDALL LAND and CATTLE, L.L.C.

By: s/Lauren Blair
One of Their Attorneys

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CERTIFICATE OF SERVICE

I, Victoria Kennedy, a non-attorney, on oath certify that I caused to be served the foregoing, **PETITIONERS' MOTION TO STRIKE AND DENY DEMAND FOR BILL OF PARTICULARS**, to be served upon the following parties listed below, both (1) electronically and (2) by U.S. Mail from 161 N. Clark Street, Chicago, IL 60601 on this 4th day of March 2009.

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**PETITIONERS' MOTION TO STRIKE
AND DENY DEMAND FOR BILL OF PARTICULARS**

Petitioners, WASTE MANAGEMENT OF ILLINOIS, INC. ("WMII"), and KENDALL LAND and CATTLE, L.L.C. ("KLC") (collectively "Petitioners"), by and through their attorneys, PEDERSEN & HOUP, P.C., move to strike and deny the Demand for Bill of Particulars filed by Respondent, COUNTY BOARD OF KENDALL COUNTY, ILLINOIS ("County Board"). In support thereof, Petitioners as follows:

1. The Petition for Hearing to Contest Site Location Denial ("Petition for Review") contests and objects to the County Board's November 20, 2008 decision denying Petitioners' request for site location approval for the proposed Willow Run Recycling and Disposal Facility ("Willow Run"). The denial was based on the County Board's finding that statutory criteria (ii) and (iii) were not met. The seven-paragraph Petition for Review challenges the denial on the grounds that the decision was fundamentally unfair and against the manifest weight of the evidence.

2. The Petition for Review sets forth allegations of two separate applications for site location approval, the 2007 Application and the 2008 Application. (Pet., ¶¶ 1-4 .) The Petition for Review alleges that the 2007 Application was withdrawn due to concerns of the County Board and the public. (Pet., ¶ 3.) The Petition for Review alleges that the facility proposed in the 2008 Application was substantially reduced in size and scope from the facility proposed in the 2007 Application, namely: the site was reduced from 669 to 368 acres, the waste footprint from 282 to 134 acres, the capacity from 35 to 14.5 years, and the high point from 235 to 180 feet. (Pet., ¶ 4.) The Petition for Review also alleged differences in the liner system. In the 2008 Application, no part of the double composite liner would be constructed in the bedrock aquifer, and that the bottom of the double composite liner and the top of the bedrock aquifer would be separated by a low permeability soil layer ranging in thickness from 5.2 to 24 feet providing further environmental protection. *Id.*

3. The Petition for Review contends that the County Board's denial of the 2008 Application on the grounds that criteria (ii) and (iii) were not met was fundamentally unfair, unsupported by the record, and against the manifest weight of the evidence. (Pet., ¶¶ 6, 7.)

4. On or about February 15, 2009, the County Board filed a Notice of Demand for Bill of Particulars claiming that the allegations in the Petition for Review are insufficient to meet the pleading requirements of 35 Ill. Adm. Code 107.208(c), thereby entitling it to a bill of particulars.

5. The Bill of Particulars contains a list of the County Board's twenty-four (24) "demands" for evidentiary facts so that it can "prepare its defense". Rather than make those requests through discovery, the County Board wants to require Petitioners to present fact

discovery in the context of a bill of particulars.

6. Section 107.208(c) of the Code provides that a petition for review must include:

a specification of the grounds for the appeal, including any allegations for fundamental unfairness or any manner in which the decision as to particular criteria is against the manifest weight of the evidence.

35 Ill. Adm. Code 107.208(c).

7. The factual allegations and legal challenges in the Petition for Review comply with Section 107.208(c), and are not "so wanting in details that the responding party should be entitled to a bill of particulars." 735 ILCS 5/2-607(a).

8. "A bill of particulars may be demanded in all actions where, by reason of the generality of the claim or charge, the adverse party is unable to know with reasonable certainty what he is required to meet." *American Rolling Mill Corp. v. The Ohio Iron & Metal Co.*, 120 Ill. App. 614, 615 (1st Dist. 1905). On the other hand, "[i]f the pleading contains facts which reasonably inform the opposing party of the claim that party is called upon to meet, the pleading is not bad in substance." *In re L.M.*, 205 Ill. App. 3d 497, 503 (4th Dist. 1990).

9. The Petition for Review is not vague or insufficient. From it, the County Board can determine that the bases for the appeal are: (1) the record evidence supports criteria (ii) and (iii), and therefore the County Board's denial was manifestly erroneous; and (2) the County Board's denial was fundamentally unfair, particularly in light of the sufficient evidence to support local siting approval.

10. The County Board's reliance on *Konicki v. Will County Board and Waste Management of Illinois, Inc.*, PCB 99-140 (May 6, 1999) is misplaced. In *Konicki*, WMII was granted local siting approval for the Prairie View Recycling and Disposal Facility. Land and

Lakes Company, an objector, filed a petition for review stating only that the basis of the appeal was that "the siting process used by the County was fundamentally unfair" and the "decision that WMII has satisfied all nine of the criteria set forth in Section 39.2 is against the manifest weight of the evidence." The County Board filed a Motion to Make More Definite the Petition for Review because Land and Lakes Company failed to allege any facts to support its fundamental fairness contention and failed to specify which siting criteria were not met. The County Board argued that the overly-broad allegations were insufficient to apprise it of the nature of the claims against it, thus impairing its ability to prepare a defense. *Id.*, slip op. at 2. Land and Lakes Company *agreed* to amend the petition to identify the specific siting criteria and plead facts relating to its fundamental fairness claim. *Id.* This is not the case here.

11. Here, there is nothing additional Petitioners need to allege to fairly apprise the County Board of the nature of the issues on appeal. The issue of whether the County Board's denial of criteria (ii) and (ii) was against the manifest weight of the evidence will be determined by the evidence in the record. At the pleadings stage, Petitioners do not need to allege every fact to prove that the denial of criteria (ii) and (iii) was unsupported by the record. Moreover, the Petition for Review did not just conclude that the denial of criteria (ii) and (iii) was erroneous, but specifically alleged that the 2008 Application contained significant reductions in size and scope that satisfied criterion (ii) and (iii).

12. Petitioners' fundamental fairness claim is also sufficient in the context of siting appeals. Given that fundamental fairness issues typically involve conduct, like *ex parte* communications and or improper bias and prejudice, the specifics of which are not known to the petitioner, these issues can only be alleged to a certain extent at the pleadings stage. The County

Board's Demand that Petitioners now identify "any and all activities of any of the County Board members, before during or after the site proceedings," along with twenty-three (23) other facts is an attempt to conduct discovery and obtain evidentiary facts, which are, at this stage, solely within the knowledge of the County Board.

13. The Petition for Review contains sufficient facts to reasonably inform the County Board of the issues raised on appeal that it is called upon to address. Thus, the Petition for Review is not insufficient and cannot be said to violate Section 107.208(c) of the Code. The County Board should seek discovery through the appropriate means at the appropriate time, and should not be permitted to use a demand for bill of particulars as a discovery tool.

WHEREFORE, WASTE MANAGEMENT OF ILLINOIS, INC., and KENDALL LAND and CATTLE, L.L.C. respectfully request that the Board strike and deny the County Board's Demand for Bill of Particulars, and grant such other and further relief as the Board deems appropriate.

Respectfully Submitted,

WASTE MANAGEMENT OF ILLINOIS, INC.,
and KENDALL LAND and CATTLE, L.L.C

By: Lauren Blair
One of Their Attorneys

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