

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

STOP THE MEGA-DUMP,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 10-103
	)	(Pollution Control Facility Siting Appeal)
COUNTY BOARD OF	)	
DEKALB COUNTY, ILLINOIS	)	
AND WASTE MANAGEMENT	)	
OF ILLINOIS, INC.,	)	
	)	
Respondent.	)	

**NOTICE OF FILING AND PROOF OF SERVICE**

**PLEASE TAKE NOTICE** that on the 3<sup>rd</sup> day of January, 2011, I filed with the Clerk of the Illinois Pollution Control Board, **Brief and Argument of Petitioner, Stop the Mega-Dump** true and correct copies of which are attached hereto and herewith served upon you.

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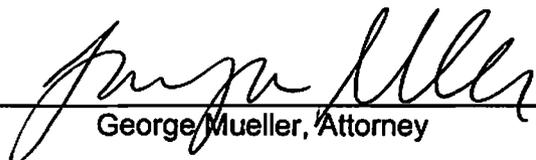
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WASTE MANAGEMENT OF	)	
ILLINOIS, INC.,	)	
	)	
Respondents.	)	

**BRIEF AND ARGUMENT OF PETITIONER,**

**STOP THE MEGA DUMP**

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**BRIEF AND ARGUMENT OF PETITIONER, STOP THE MEGA DUMP**

**I. INTRODUCTION**

This appeal arises out of the DeKalb County Board's ("the County") granting of local siting approval for vertical and horizontal expansion of the DeKalb County Landfill. Waste Management of Illinois, Inc. ("WMII") seeks to expand an existing leaking landfill, the expansion to include a vertical expansion over an unlined, pre-Subtitle D unit. The existing facility is documented as impacting ground water to both the east and south. Even though it has been receiving nominal amounts of waste for the last several years, the landfill has experienced hydrogen sulfite problems, which are a public concern, in large part because of the landfill's close proximity to an elementary school.

Stop the Mega-Dump ("STMD") opposes the decision to grant local siting approval for the expansion of this troubled facility as being against the manifest weight of the evidence. Moreover, as discussed below, STMD objects because the proceedings were not fundamentally fair, in that there were numerous

prejudicial *ex parte* contacts between the decision makers and the applicant, including WMII-sponsored private tours of another WMII facility, similar to the proposed expansion, for county board members and other county employees. Additionally, there was, prior to the actual public hearing in March 2010, a consistent effort to discourage public participation. Those efforts included a siting ordinance which improperly limited public participation, as well as implementation of unnecessary hurdles for the public in accessing and making copies of the siting application.

Lastly, numerous county board members made public and private expressions indicating that the siting issue had been pre-decided prior to the commencement of the public hearing. The reason for this in large part is that the County desperately needed the host fees from an expanded landfill to finance a long overdue jail expansion, and the County actually identified and ear-marked those host fees in advance as the only feasible means for financing the jail expansion, even before the siting application was filed.

## **II. THE PROCEDURES USED AND THE PROCEEDINGS WERE NOT FUNDAMNTALLY FAIR**

### **A. Standard of Review**

Section 40.1 of the Environmental Protection Act (“the Act”) requires the Board to conduct a hearing to determine whether the local siting proceedings and procedures used were fundamentally unfair. The Board’s review of the interim local decision is *de novo*. Fundamental fairness refers to the principles of adjudicative due process, and standards of adjudicative due process must be applied. *Industrial Fuels and Resources v. The Illinois Pollution Control Board*,

227 Ill.App.3d 533, 592 N.E.2d 148 (1<sup>st</sup> Dist. 1992). The manner in which the hearing is conducted, the opportunity to be heard, the existence of *ex parte* contacts, prejudgment of adjudicative acts and the introduction of evidence, are important elements in assessing fundamental fairness. *Hediger v. D & L Landfill Inc.*, PCB 90-163, slip op. at 5 (December 20, 1990). The minimum requirements of fundamental fairness include the right to engage in meaningful examination of adverse witnesses, *Daly v. Pollution Control Board*, 264 Ill.App.3d 698, 637 N.E.2d 1153 (1994); *see also Land and Lakes Co. v. Pollution Control Board*, 319 Ill.App.3d 41, 743 N.E.2d 188 (3d Dist. 2000).

Because the local siting hearing presents the only opportunity for the public to be heard, it is the most critical stage of the landfill site approval process. *Kane Cy. Defenders Inc. v Pollution Control Board*, 139 Ill.App.3d, 588, 487 N.E.2d 743 (2d Dist. 1985). This important connection between the opportunity for public participation and the critical nature of the local siting hearing was noted and emphasized by the Court in *Land and Lakes Co. Inc . v. Illinois Pollution Control Board*, 245 Ill.App.3d 631, 616 N.E.2d 349 (3d Dist. 1993).

B. Facts related to fundamental fairness

In the months prior to the filing of the siting application WMII had taken a number of steps to get its message across to the County and to familiarize them, in settings where the public could not comment or participate, with the proposed expanded landfill. This began with the negotiations for a host agreement in connection with the expansion. STMD does not claim that negotiating a host agreement is, *per se*, inappropriate, but WMII used these negotiations to make at

least two formal presentations to the County in which it described the proposed facility. WMII made an initial presentation on February 9, 2009, in which it discussed elements of its proposal, and then followed with another presentation on February 24, 2009, for the entire county board at something called a “Host Agreement Workshop”. (Adelman Dep. Pg. 8, 9)<sup>1</sup>. In these presentations, WMII used foam board visual aids depicting the landfill and the planned future expansion. (Bockman Dep. Pg. 12). The February 24, 2009, presentation lasted approximately ninety minutes. (Bockman Dep. Pg. 60). These presentations involved substantive questions from county board members and WMII answers to the same. However, no members of the public were present to ask questions. (Tobias Dep. Pg. 8). Even though these presentations were made in the context of host agreement negotiations, county board member Patricia Vary remembered that they were mostly about the landfill design. (Vary Dep. Pg. 9, 10)

WMII’s siting application was filed on November 30, 2009. Between July 2009 and November 2009, WMII conducted five private tours, during which fifteen of the twenty-four county board members visited WMII’s Prairie View Landfill in Will County (County Interrogatory Answer 4). In all cases transportation to and from the DeKalb County Government Offices in Sycamore, Illinois, was either provided by WMII or reimbursed by the company. WMII representatives accompanied county board members from door to door, lunch was provided, questions were answered, and once again, the public was

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<sup>1</sup> At the Board hearing on Nov. 22, 2010, STMD introduced and the hearing officer admitted into evidence without objection the transcripts of 15 depositions as substantive evidence in lieu of those individuals being called again to testify. The hearing officer also admitted into evidence the exhibits which were identified and used at those depositions. References to these depositions and exhibits will be by name of the person deposed.

excluded. WMII representative, Lee Adelman, who accompanied county board members on all the tours, succinctly described their purpose by stating, "The Prairie View facility located in Wilmington, Illinois, is our closest facility. It is a comparable size of comparable volume, and contains the design elements that are part of the proposal in DeKalb." (Adelman Dep. Pg. 16). County administrator, Ray Bockman, recalled that it was Adelman who had originally suggested that these private tours occur. (Bockman Dep. Pg. 20).

Mary Supple, administrative assistant to the County Administrator and to the county board Chairman, coordinated scheduling of the private tours. On July 6, 2009, she sent an email to all the county board members announcing, "If you would like to view a 2000 TPD working landfill facility, you are in luck!" (Bockman Dep. Ex. 1). Interestingly, Ms. Supple testified that she did not know that TPD meant tons per day, suggesting, of course, that someone else authored the email for her. (Supple Dep. Pg. 16, 17).

More about the content of these private tours and the reaction to the same by county board members will be presented in the Argument.

The De Kalb County Jail is badly in need of expansion (Tobias Dep. Pg. 27). The County spends \$600,000 per year for other counties to take overflow inmates. (Oncken Dep. Pg. 8). County board member, Steve Walt, testified that when he was elected to the county board, jail expansion was their number one priority. (Walt Dep. Pg. 8). County board chairman, Ruth Ann Tobias, acknowledged that expansion of the existing jail has been under discussion since 1994. (Tobias Dep. Pg. 27). The cost of an expanded jail would be

approximately \$29,000,000. (Bockman Dep. Pg. 34). In 2009 the County retained Scott-Balice Strategies to advise them on planning and funding jail and courthouse expansion. On October 21, 2009, the County adopted Resolution R2009-61, authorizing a capital improvement program incorporating the financing plan developed by Scott-Balice Strategies. (Tobias Dep. Ex. 2). That financing plan answers the question of where the money for the jail expansion will come from: "The County is working with WMII to enter into a contract starting in December of 2012 that will produce roughly \$120,000,000 for the County over thirty years. Given the current market, and certain credit assumptions, this revenue stream can accommodate a bond issuance in excess of the \$30,000,000 estimated project costs for the jail expansion. (Tobias Dep. Ex. 3). The Law and Justice committee, which had oversight over the courthouse and jail expansion, met on February 2, 2010, where, as part of providing an update on the courthouse and jail expansion, County administrator Ray Bockman, is noted as advising that the landfill application was filed on November 30, 2009. (Allen Dep. Ex. 1).

Mr. Bockman testified that bonds for the jail expansion will not be authorized until a revenue stream that can guarantee them becomes available. (Bockman Dep. Pg. 35). County board member, Julia Fauci, acknowledged that the jail project is on hold, pending a determination of whether the host fees are going to be available. (Fauci Dep. Pg. 23). County board member, Riley Oncken, indicated that there were two possible sources for funding the jail expansion, tipping fees from the landfill expansion, or general obligation bonds. However,

Oncken did not know how general obligation bonds could be issued without raising taxes. (Oncken Dep. Pg. 7). County board member, Paul Stoddard, stated he did not know how realistic any alternatives other than the tipping fees (host fees) would be for funding the jail expansion. (Stoddard Dep. Pg. 15). He also indicated that he understood this during the time that the landfill siting proceedings were happening. (Stoddard Dep. Pg. 16).

Pursuant to its siting ordinance, the County conducted a pre-filing review of the WMII siting application. Chris Burger, a Vice President of Patrick Engineering, described the review process which took place between July and November 2009. The review focused on Criterion (ii), design, geology, hydro-geology, ground water monitoring, gas, storm water, leachate collection, and final cover. (Burger Dep. Pg. 11). Burger testified that in the review process he reported to County administrator, Ray Bockman, and that the review also included the county board attorney, Renee Cipriano, who he brought up to speed on issues and questions he had on pre-filing documents at a meeting on November 20, 2009. (Burger Dep. Pg. 10). Burger indicated that they would provide written comments to WMII and that WMII might or might not incorporate changes based on the comments. He indicated that WMII did incorporate suggested changes in the bottom liner location based on concerns expressed during the pre-filing review. (Burger Dep. Pg. 13).

After the siting application was filed, Burger participated in a county staff review of that application for preparation of the county staff report. Renee Cipriano, the county board Attorney, also participated, being actively involved in

the process with him. (Burger Dep. Pg. 15, 16). Cipriano was one of the principal authors of the county staff report. (Burger Dep. Pg. 17).

County board chairman, Ruth Ann Tobias, testified that Renee Cipriano was the attorney who also advised the county board with regard to the evidence, the application, and the procedures to be used. (Tobias Dep. Pg. 15). This was confirmed by Chris Burger, who also acknowledged that Ms. Cipriano was the attorney that advised the county board. (Burger Dep. Pg. 18). Burger, however, also acknowledged that Cipriano had worked with the county staff in review of the application and preparation of the staff report. (Burger Dep. Pg. 18).

The cost of the prefilling review was \$75,000.00 (Adelman Dep. Pg. 22). Ray Bockman is the chief executive of the County with the title of County Administrator. He reports directly, on a daily basis, to the chairman of the county board. (Brockman Dep. Pg. 5). Bockman testified that he participated in the prefilling review, progress information regarding the same was shared between him and Renee Cipriano, and the two of them met with Chris Burger on several occasions. (Bockman Dep. Pg. 23, 24). Bockman also acknowledged that Ms. Cipriano was also counsel to the county board, and her job was to assist the County Board in the siting process. (Bockman Dep. Pg. 25, 26).

At all times relevant hereto, the County had in force a pollution control siting ordinance which was accompanied by a set of rules and procedures. Article 3 §5 of the Rules and Procedures limited status as a participant to owners of property within four hundred feet of the subject site, attorneys representing the same, or officials or attorneys of municipalities located within one and one half

miles of the proposed facility. Section 5 specifically limits all other individuals and entities to public comment. (C 6802)<sup>2</sup>.

Prior to the start of the public siting hearing, WMII published a prehearing notice which stated in pertinent part, that to obtain a copy of the application, the public must submit a "proper request as outlined in the Freedom of Information Act..." (C 7555).

Upon commencement of the public hearing on March 1, 2010, the hearing officer, apparently deciding to ignore the County siting ordinance, and Articles of Pules and Procedures, allowed participation by everyone who had signed up. (C 6832) This included participation by representatives of STMD, a voluntary association of citizens. (C 6832). STMD was not represented by an attorney, but instead by two of its officers, Dan Kenney and Mac McIntyre.

The hearing officer ultimately allowed everyone who so desired, regardless of property ownership status, proximity to the landfill, or date of registration to actively participate. (C 6841, 6842) Even the County attorney, Renee Cipriano, admitted that state law regarding public participation could not be altered by the local ordinance. (C 6837).

At the outset of the public hearing, STMD filed a Motion to Dismiss and Disqualify, which preserved all fundamental fairness issues raised herein, including the alleged bias of all county board members who had gone on the WMII sponsored private tours, and all the county board members who were

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<sup>2</sup> References to the record filed by the County will be to C\_\_\_. References to the record of the Board hearing held on Nov. 21, 2010, will be to R\_\_.

known to have made statements evidencing prejudgment. (C 7550, 7551) This Motion was summarily denied.

STMD has only one issue with how the hearing officer conducted the hearing. His belated attempt to interject a modicum of fairness into a process that was already fatally flawed should be applauded. Unfortunately, the real damage was done before the public hearing began. However, the hearing officer did make one error which further rendered the proceedings fundamentally unfair. At the close of the public hearing on March 11, 2010, the hearing officer directed the parties, including STMD, to file their post hearing briefs within twenty-one days, on or before April 2, thereby depriving them of the benefit of the full thirty days of statutory post hearing public comment time provided at 415 ILCS 5/39.2(c). (C 7513).

Prior to the final decision being made by the County, the "County Staff", which included among others, Chris Burger, Ray Bockman and Renee Cipriano, issued a report with proposed findings of fact and law. Interestingly, the report did not even acknowledge the participation of STMD, leaving the citizens' group entirely out of the recited list of participants. (C 7825).

In defending the hearing officer's decision to require briefs by April 2, the county staff report noted that, "all evidence was entered into the record as of the close of the local siting hearings. While the public comment remains open until April 12, 2010, public comments are not given the weight of evidence." (C 7829) The report goes on to note that all "relevant evidence" has been entered into the record as of the close of the public hearings. (C 7830)(emphasis added).

The foregoing notwithstanding, the county staff report nevertheless discusses, at length, evidence entered into the record as public comment by WMII on April 9, 2010, consisting of hydrogen sulfide monitoring results at the site, conducted through April 6. (C 7850). It is inexplicable why this one particular public comment was deemed relevant and given “the weight of evidence” when apparently nothing else submitted after March 11, 2010, was considered.

In fairness to the county staff, they did subsequently prepare a supplement to their report, which supplement was, however, essentially a rebuttal to a written public comment from STMD’s hydrogeology expert, GeoHydro Inc. (C 7995-8001).

C. The County siting Ordinance barring most public participation, diminished access to the siting application and difficulties in copying the same rendered the proceedings fundamentally unfair.

If ever there was an issue that called for summary reversal, the local siting ordinance’s prohibition of most public participation in this case is such an issue. DeKalb County’s Regional Pollution Control Facility Siting Ordinance is found at C 6790 - C 6800. The Ordinance references and includes Articles of Rules and Procedures for the pollution control facility committee governing the conduct of the public hearing on a siting application. Article III, §5 of the Rules and Procedures states,

“for purposes of the hearing, a “participant” may only be one of the following, an owner of property subject to notification under §50-54(a)(3) of the Ordinance, an attorney representing said property owners, or an official or attorney representing a township or a municipality located within one and one half miles of the proposed facility. All other parties will be

limited to public comment during the public comment time of the public hearing or to written comment through the written comment period.” (C 6802)

Section 50-54(a)(3) essentially mirrors the property notice on adjoining owners requirement as set forth in §39.2(b) of the Act, and the section thereby effectively limits participation to property owners within four hundred feet of the subject site and municipalities within 1.5 miles of the subject site. In other words, for everyone else, the minimum standards of adjudicative due process do not apply.

The law is well settled that a siting authority may have its own procedures so long as they are consistent with the requirements of §39.2 of the Act, *Waste Mgmt. of Illinois, Inc. v. PCB*, 175 Ill.App.3d 1023, 530 N.E2d 682 (2d Dist. 1988). However, §39.2(g) states that the procedures provided for in the Act, “shall be the exclusive siting procedures.” This means that rules and procedures that are inconsistent with §39.2 will render the proceedings fundamentally unfair.

It is hard to imagine that either the County or WMII would argue that Article III §5 of the Rules and Procedures is not fundamentally unfair on its face. In light of all the case law defining adjudicative due process rights (including the right of cross examination) and pointing out that the opportunity for public participation makes local siting hearings the most critical stage in the proceeding, there is no doubt that the DeKalb County siting Ordinance is fundamentally unfair.

The County and WMII will undoubtedly argue that §5 was not applied and the hearing officer allowed everyone who wished to do so, to participate.

However, the damage was already done, and the bell cannot be unrung. The Articles of Rules and Procedures were published on the County's website (even though the siting application was not), and we will never know who looked at these, determined that they would not be allowed to participate, and went on to other things. The difficult thing about attempting to quantify the damage caused by a chilling effect is that we are trying to count people who are not present precisely because their participation was discouraged, and in fact, was for all practical intents and purposes, prohibited. Those that initially appeared and attempted to participate in this case did so in spite of the rules barring their participation. We will never know who or how many members of the public failed to participate because of the publicly published rules. An announcement on the first day of the public hearing that the rules barring participation by most members of the public would not be enforced, is not a cure.

Even those that did find out on the first day of the public hearing that they would be allowed to participate were deprived of any meaningful opportunity to prepare, since they would have believed up until that point that they would not have been allowed to participate except for giving public comment. Section 39.2 of the Act allows ninety days after a siting application is filed, before the public hearing, in order to give participants an opportunity to prepare. In *American Bottom Conservancy v. Village of Fairmont City*, this Board held that depriving a would-be participant of meaningful access to the siting application until two weeks before the siting hearing, rendered the proceedings fundamentally unfair. *PCB 00-200 slip op. at 12 (October 19, 2000)*. In the *instant* case, citizens,

believing that they would not be allowed to participate, would not have arranged for witnesses or taken other steps to prepare cross examination or evidentiary presentations. Telling these citizens on the first day of the public hearing that they would be allowed to cross examine and that they would be allowed to call their own witnesses, is hardly a cure and completely defeats the statutory intent to give participants a full ninety days to prepare.

The only possible motive for the County's limitation on participation is that the County wanted to discourage the public. This is completely at odds with the purpose of §39.2 and previous decisions of this Board in which the participatory rights of the public have been carefully guarded and protected.

In keeping with its desire to discourage public participation, the County also made access to and copying of the application difficult and frustrating. Mac McIntyre testified that when he went to the County Clerk's Office to view the siting application he encountered a very cramped condition and that there was only room for one of the two people viewing the application to actually sit down. (R 64). Danica Lovings testified at the Board hearing that she was told by the County Clerk to go to the Public Library to view and copy the application. (R 36)

With the exception of Danica Lovings, apparently everyone who wanted to view the application was able to do so. However, copying the application, or portions thereof was another matter altogether. The notice of public hearing placed in the paper by WMII contained an improper limitation on copying the application, requiring the formal submitting of a request as outlined in the Freedom of Information Act. This notice of public hearing was also placed on the

County's website. (Bockman Dep. Ex. 2). Section 39.2 of the Act does not require a request pursuant to the Freedom of Information Act in order to receive copies of a siting application. Pursuant to §39.2(c) of the Act, a person could anonymously receive copies of an application, but under the Freedom of Information Act, such anonymity is no longer available.

Moreover, the cost of and process for copying the application was never established by the County. County Administrator Ray Bockman testified that he never made arrangements for copying the siting application on public request. (Bockman Dep. Pg. 42). Sharon Holmes, the County Clerk, testified that she charged people twenty-five cents per copy, pursuant to custom in her office and not pursuant to any published schedule of copying costs. (Holmes Dep. Pg. 9). §39.2 limits the charge for copying a siting application to the actual cost of reproduction, but the County Clerk testified that she did not know what that cost would be in her office. (Holmes Dep. Pg. 12). Mary Supple, assistant to the County administrator and County board chairman, who also had a copy of the application in her office, testified that she would have charged between ten and fifteen cents a copy. (Supple Dep. Pg. 32).

What makes all of this unnecessary and troubling is the fact that WMII filed, in addition to hard copies, electronic copies of their siting application on DVDs which were given to all the county board members. After much clamor, two citizens were able to obtain copies of these DVDs, Ray Bockman, testified that it never occurred to him to make electronic copies of the application available to the public in lieu of the more expensive (and more cumbersome) hard copy.

(Bockman Dep. Pg 45). Moreover, he never arranged with anyone to provide such copies to the public. (Bockman Dep. Pg. 43, 44). The siting application itself was also not placed on the County's website, even though (ironically enough) the rules and regulations containing the improper restriction on participation were. Bockman's only explanation was that placing the siting application on the website was not required. (Bockman Dep. Pg. 38).

The difficulties in the record with members of the public viewing and copying the siting application might, by themselves, be deemed as harmless error, if the remainder of the record was pristine on fundamental fairness issues. However, in this case, these difficulties demonstrate a continuing pattern on the part of the County of discouraging public participation, and as such, their cumulative effect should be considered. The Board has previously held that fundamental unfairness can be cumulative. *American Bottom Conservancy v. Village of Fairmont City*, PCB 00-200, slip op. at 10 (October 19, 2000).

D. Extensive ex parte contacts caused prejudgment and rendered the proceedings fundamentally unfair.

1. Pre-filing *ex parte* contacts are relevant to a fundamental fairness determination.

*Ex parte* communications in the context of a siting proceeding are contacts between the siting authority and a party with an interest in the proceeding without notice to other parties in the proceeding. *Residents Against a Polluted Environment v. County of LaSalle*, PCB 96-243 (September 19, 1996). This is so without reference to when these *ex parte* contacts occurred. The Board in *Residents Against a Polluted Environment* stated,

“the impropriety of *ex parte* contacts in administrative adjudication is well established. Ex parte contacts are condemned because they: (1) violate statutory requirements of public hearings and the concomitant life of the public to participate in the hearings, (2) may frustrate judicial review of agency decisions, and (3) may violate due process and fundamental fairness rights to a hearing.” *Residents Against a Polluted Environment (slip op. at 8)*

The *ex parte* contacts in this case occurred in four distinct ways. The first is that WMII conducted a series of preliminary mini-hearings with the County in connection with the County’s approval of the Host Agreement. Secondly, WMII conducted private tours with county board members of another landfill with features similar to those in the proposed expansion. The third area of *ex parte* contacts is the pre-filing review conducted by WMII with the County, which review included participation by the county board administrator and County Attorney, both of whom the County relied upon for direction and advice on the siting decision. In addition, there were other *ex parte* contacts while this siting application was pending, and these contacts further establish the close (and improper) relationship between WMII and the County.

The first three areas of *ex parte* contacts all involve contacts taking place prior to the filing of the siting application. The County Staff Report, which contains an extensive discussion of legal issues that reads like it could have been written by WMII (C 7827-C7836), dismisses all arguments relating to pre-filing *ex parte* contacts by incorrectly stating, “restrictions on *ex parte* communications only apply after the applicant files its request for siting approval.” (C 7828) (emphasis added). The County cites *Residents Against a Polluted Environment v. County of LaSalle*, PCB 97-139 (June 19, 1997), in support of

this proposition. The County's reliance upon *Residents Against a Polluted Environment* is, however, misplaced, because, while the Board did not consider the innocuous and routine pre-filing *ex parte* contacts in that case, the Board certainly never intended to establish a bright line test whereby *ex parte* communications prior to the filing of a siting application can never be considered.

In *Land and Lakes Co. v. PCB*, 319 Ill.App.3d 41, 743 N.E.2d 188 (3d Dist. 2000), the Court did, in fact, consider pre-filing *ex parte* contacts on the issue of fundamental fairness. The apparent contradiction in the law was explained and reconciled by this Board in *County of Kankakee v. City of Kankakee*, stating,

"In *Land and Lakes*, the Third District Appellate Court explained that absent any pre-filing collusion between the applicant and the actual decision maker, the County Board, the pre-filing contact in that case, did not deprive the siting opponent of fundamental fairness. The *Land and Lakes* opinion implies that evidence of pre-filing contacts between the applicants and actual decision maker, in this case the City, may factor into the fundamental fairness calculus. This is so because pre-filing contacts may be probative of prejudgment of adjudicative acts, which is an element to be considered in assessing fundamental fairness. Consequently, the Board overrules the hearing officer's ruling, limiting evidentiary admissions of pre-filing contacts. The Board admits as evidence the County's offer of proof of pre-filing contacts between the *City and Town and County* as the evidence applies to the issue of fundamental fairness." PCB 03-31 slip op. at 5 (January 9, 2003) (emphasis added).

The Board in *County of Kankakee* went on to note that the cases cited in support of the same position expressed in the County staff report here do not create a general prohibition against the admission of pre-filing contacts into evidence, as the nature of such contacts must be considered on a case-by-case basis. The critical misapprehension of the law contained in the County staff report is further compounded when the County incorrectly cites *County of*

*Kankakee* (consolidated with *Sandberg v. City of Kankakee*) for the proposition that, “a tour of existing facilities before the application is filed, for example, is not considered improper.” (C 7828, 29). To the contrary, what the Board actually stated in *County of Kankakee* is that the record in that case did not clearly indicate whether members of the public were invited to attend the trip to nearby landfills and therefore, “there is insufficient evidence to determine whether there was equal access to information obtained by the members, and the petitioners have failed to prove the bus trip was fundamentally unfair.” (PCB 03-31, slip op. at 21).

2. WMII’s mini hearing presentations to the County rendered the proceedings fundamentally unfair.

The pattern of pre-filing ex parte contacts between WMII and the County establishes a close relationship between the two entities, the sole purpose of that relationship being WMII’s desire to educate County board members concerning the details of the proposed landfill expansion, and to persuade them of the merits thereof, in advance of any public hearings or participation. This persuasion process began in earnest near the end of the Host Agreement negotiations when WMII made several presentations to the County in the form of mini hearings dealing with the details of the proposed landfill expansion. The first of these mini hearings occurred on February 9, 2009, to the ad hoc solid waste committee of the county board, where Mr. Adelman discussed details of the expansion and answered substantive questions related thereto. (Bockman Dep. Ex. 3).

The second mini hearing is the ninety minute presentation made by WMII to the entire county board at a so-called “host community agreement workshop”

meeting on February 24, 2009. (Bockman Dep. Ex. 4) The minutes of this meeting indicate that Mr. Adelman was joined at the presentation by one of WMII's consultants, Bill Plunkett, and Director of Operations, Dale Hoekstra. Among the points presented at this mini hearing were the impacts of the expanded landfill on Union Ditch, exhumation of the Old Area, ground water contamination, ground water monitoring wells, geologic conditions under the new proposed unit, the property value guarantee program, and the well water protection program. A conceptual end use plan (with illustrations) was also presented.

3. WMII's sponsored private tours for county board members of another similar WMII landfill rendered the proceedings fundamentally unfair.

These pre-filing mini hearings were clearly part of a pattern whereby WMII attempted to ingratiate itself to the County. The mini hearings were followed by five months of private tours with transportation and lunch provided, of WMII's landfill in Will County. There is no question that these tours were at the invitation of their sponsor, WMII. (Supple Dep. Ex. 1). Mr. Adelman conceded that county board members were shown the Will County facility because of its design similarity to the proposed expansion, and he admitted that during the tours, various elements of the proposed expansion were discussed. (Adelman Dep. Pgs. 8, 9).

The impact of these tours on the attending county board members was profound. In a July 20, 2009, email to all other county board members after returning from her tour, county board member, Anita Jo Turner, wrote,

“I just wanted to encourage everyone in the county government to go on the field trip to the Waste Management facility in Joliet. Besides having a fascinating history, it was the most fascinating educational activity that I have been to in quite a while. I feel that now when I attend the hearings in our county that I will know exactly what is being presented. I encourage you all to attend.” (Turner Dep. Ex. 1) (emphasis added).

County board member Marlene Allen noted that during her tour, WMII Operations Manager, Dale Hoekstra explained that the way they were preparing a new cell at the Joliet landfill was the way they would construct new cells in the DeKalb County expansion. (Allen Dep. Pg. 23). She stated that she had a lot of her questions answered, that WMII looked like they knew what they were doing, were professional about the way they were going about their business, and that she left the tour with a positive impression. (Allen Dep. Pg. 25). Allen also indicated that she learned from WMII that garbage received at the expanded DeKalb County facility would be treated in the same way as at Prairie View. (Allen Dep. Pg. 32).

County board member, Julia Fauci, admitted that she used what she learned during the tour to understand what was being talked about at the siting hearings. (Fauci Dep. Pg. 21). She acknowledged that WMII indicated that the expanded DeKalb County Landfill, if built, would have design characteristics similar to what she saw on the tour. County board member, Michael Hanes was the only one who drove himself to the tour, but acknowledged that he was reimbursed for his mileage claim. (Hanes Dep. Pg. 12). He added that he found the tour very informative and helpful and that Mr. Adelman represented to him, during the tour that the expanded landfill would operate very much like the facility he toured. (Hanes Dep. Pg. 15-16). County board member, Riley Oncken,

testified that in addition to lunch, during his tour he was given a sunglasses holder which attached to his rearview mirror. (Oncken Dep. Pg. 11). He also indicated that he was told the expanded landfill would have similar characteristics to the Prairie View Facility. (Oncken Dep. Pg. 19.)

County board member Paul Stoddard recalled that during his tour, “we got a little bit of -- it was an in classroom session where they sort of showed us plans of the facility...” (Stoddard Dep. Pg. 8) (emphasis added). Stoddard was also told that what he was seeing on the tour was similar to what was proposed for DeKalb County. (Stoddard Dep. Pg. 11). He concluded,

“I thought the description of how they were building the liner was impressive, the general facility in terms of building the liner and taking into account the future use of the liner, the trucks rolling over, etc., the precautions took -- that they took to insure that the liner maintained its integrity throughout the life of the project.” (Stoddard Dep. Pg. 12).

The connection between the private tours and evidence presented at the siting hearing is unquestionable. County board member Patricia Vary admitted that the tour was in anticipation of WMII’s filing an application and seeking an expansion of the DeKalb County Landfill. (Vary Dep. Pg. 11). She found the tour very helpful in terms of understanding the subject matter of the siting application. (Vary Dep. Pg. 12). She admitted that she used what she learned on the tour to understand the evidence presented at the siting hearing. (Vary Dep. Pg. 15). Similarly, Anita Turner admitted that she, too, used the information learned on the tour to understand the evidence at the hearing. (Turner Dep. Pg. 11).

As previously stated, the tours were private and for the county board and other county employees only. Information was presented which was obviously

not available to any other participant in the process. Not only did these tours leave county board members with a positive impression, but the tours were admittedly used by county board members as a substantive point of reference when interpreting evidence at the siting hearing. This point of reference was not available to anyone who did not go on the tour. We can never know exactly what was said, what was presented or what questions were answered. We do know, however, that WMII had the fifteen county board members who attended as a captive audience from door to door (except Haines) and in small groups for the better part of a day. All this made it possible for WMII to privately present another allegedly comparable facility to the decision makers, and make its case to them, in the best possible light, without any input or involvement of the public.

This Board has condemned private tours of an applicant's comparable facility. In *Beardstown Area Citizens for a Better Environment v. City of Beardstown*, PCB 94-98 (January 11, 1995), the Board held, "We find that petitioners were prejudiced by being unable to appropriately address all the impressions formed by the council members who participated in the tour." (*slip op.* at 5). In *Concerned Citizens for a Better Environment v. City of Havana*, PCB 94-44 (May 19, 1994), the Board found that,

"Applicant's sponsorship of and payment for a tour of a facility used as the model for the proposed facility, which included the council but not the public generally led to a fundamentally unfair proceeding. The petitioners were prejudiced. Petitioners were without benefit of seeing the model site and were thus unable to appropriately address all the impressions formed by the councilmen who toured Semass to view the model site as a reference used in these proceedings." (*slip. op. at 7*).

As already discussed, the fact that the tours in the *instant* case predated the filing of the siting application, is not a relevant distinction. The standard for whether or not a tour of another facility is fundamentally unfair was clearly set forth in *Southwest Energy Corp. v. PCB*, 275 Ill.App.3d, 84, 655 N.E.2d 304 (4<sup>th</sup> Dist. 1995), where the Court stated, “Fundamental fairness merely requires that representatives of all parties to the siting proceeding be given an opportunity to accompany the local governing body when it takes such a tour.” (655 N.E.2d at 310) (emphasis added). Interestingly, the Court in *Southwest Energy* distinguished the tour offered in *Tate v. PCB*, 188 Ill.App.3d 994, 544 N.E.2d 1176 (4<sup>th</sup> Dist. 1989), because the tour in *Tate* was a brief forty minute tour and was accompanied by a siting opponent.

The County and WMII are likely to argue that since all of the county board members who voted in favor of the expansion testified that they based their decision solely on the evidence, there is no prejudice from their having attended this private tour. While it is true that the members did, after the fact, as part of these proceedings, pay lip service to having based their decision on the evidence, this ignores the fact that such *ex parte* tours are, *per se*, prejudicial, regardless of what decision makers may say after the fact. Any other holding is logically and legally impossible, because what the Board must consider on the issue of prejudice, is whether the *ex parte* contacts represented by these private tours may have influenced the ultimate decision, not whether the decision makers admit it or not. Announcements by the county board members that they voted based solely on the evidence are self-serving, and completely disregard

the applicable standard which this Board must use. The question is whether, “A thoughtful observer, aware of all the facts... would conclude that (the *ex parte* communication) ...carries an unacceptable potential for compromising impartiality.” *Edgar v. K.L.*, 93 F.3d 256, 259-60 (7<sup>th</sup> Circuit 1996) (discounting judge’s assurances that, “he would have an open mind,” relying instead on whether, “an objective observer would doubt that.”). This is precisely the standard adopted by the Appellate Courts in reviewing fundamental fairness claims in siting appeals. That standard asks whether a disinterested observer might conclude that unfairness or the appearance of impropriety tainted the decision making process. *E&E Hauling v. PCB*, 116 Ill.App.3d 586, 451 N.E.2d 555 (2d Dist. 1983); *Rochelle Waste Disposal, LLC v. City of Rochelle*, PCB 03-218 (April 15, 2004). The disinterested observer test renders irrelevant the self-serving, presumably rehearsed, statements made by the county board members after the fact.

4. The pre-filing review in this case was a further *ex parte* communication which renders the proceedings fundamentally unfair.

While a pre-filing review between the County technical staff and WMII was authorized in the County Siting Ordinance, this does not render it necessarily appropriate. Although pre-filing reviews have been sanctioned in other cases, the review in this case was unlike those that have been sanctioned. Historically, the pre-filing reviews which have been sanctioned included complete separation between the reviewers and the decision makers. In *Residents Against a Polluted Environment v. County of LaSalle*, PCB 96-243 (Sept 19, 1996), the county’s expert consultants conducted a review of the siting application and prepared a

report thereon. This review was conducted after the filing of the application, but that distinction is not material for this analysis. In *Residents* the county's Environmental Director, Susan Grandone-Schroeder, also participated in the review process. The Board found that because she was an employee of LaSalle County, acted on behalf of the county at the hearing, and was responsible for advising county board members on the merits of the application, she was capable of *ex parte* contacts and could not acquire information beyond that in the record, or from outside the public hearing process. (*PCB 96-243 slip op. at 11*). Contrast that with *Sierra Club v. Will County Board*, PCB 99-136 (Aug 5, 1999), where this Board approved a pre-filing review, the Board expressly conditioned that approval on the fact that no one directly associated with the decision maker was involved in the review process, noting, "As the Will County Board notes, the County staff and consultants neither voted on the siting approval, nor participated during the Will County Board's deliberations." (*PCB 99-136, slip op. at 12*). Significantly, in *Sierra Club* the attorney for the county staff was not the attorney who advised the county board. Here, Ms. Cipriano actively participated in both the pre-filing review, as well as the siting hearing, in contravention of the rule of law announced in *Sierra Club*.

In the *instant* case the record reveals that both the County administrator, Ray Bockman, and the County Environmental Attorney, Renee Cipriano, actively participated in the pre-filing review. Moreover, Bockman testified that he reported on a daily basis to the county board chairman. The county board Chairman and Bockman both testified that Renee Cipriano was the county board's attorney and

her job was to advise the county board throughout the siting process. Since both Mr. Bockman and Ms. Cipriano enjoy at least the same degree of connection to the county board and the decision making process as Susan Grandone-Schroeder did to the LaSalle County Board in *Residents Against a Polluted Environment*, this pre-filing review is a prejudicial *ex parte* contact. To the extent that Bockman and Cipriano came into the possession of information not available to the general public during the pre-filing review, the contact is presumptively prejudicial.

5. The improper *ex parte* communications continued even after the siting application was filed.

While this alone may not be dispositive, there is evidence in this record that the close relationship between the County (and its employees) and WMII continued even after the siting application was filed. The administrator, Ray Bockman, indicated that after the application was filed, he continued to speak with WMII representative, Lee Adelman, sometimes several times a week, although he characterized these communications as essentially “procedural.” (Bockman Dep. Pg. 57). County Clerk, Sharon Holmes, testified that the sign-up sheets for would-be participants at the siting hearing, were picked up from her office by WMII attorney, Don Moran, who appeared there with Mr. Bockman. (Holmes Dep. Pg. 24). STMD makes these points only because of the cumulative prejudicial effects of *ex parte* communications. See *American Bottom Conservancy v. Village of Fairmont*, PCB 00-200 (Oct 19, 2000)

6. The County Board actually prejudged the application.

The cumulative effect of the mini hearings in 2009, the private tours of WMII's Prairie View Facility, and the pre-filing review had clearly won the County over before the official siting hearing ever began on March 1, 2010. In weighing the cumulative effect of the improper *ex parte* contacts previously discussed, the Board should consider those contacts in the context of the County's desperate need to obtain expanded landfill host revenues to fund the county jail expansion. The law is well established that the receipt of host revenues and other economic benefits is not, *per se*, fundamentally unfair. However, in this case, the County was all but spending those host revenues before the siting application was even filed. The County passed a resolution in the fall of 2009 expressing a need for the jail expansion and identifying host revenues from an expanded landfill as the only feasible means of funding that expansion. The County was spending \$600,000 per year to house its jail inmates in other counties due to its own inadequate jail. The minutes of the Law and Justice Committee meeting of February 2, 2010, (one week before the start of the landfill siting hearing) are extremely illustrative. Summarizing the report of the County administrator to the Law and Justice Committee, the minutes state, "Mr. Bockman said that in February 2010, we began the process, in March 2010 we will hold the public hearings, and in April there will be the resolution authorizing the bonds. We will then be in line to issue May 1, 2010, at historically low rates." (Allen Dep. Ex. 1). These statements were made after Mr. Bockman had advised the committee of the filing of the landfill application. Clearly, the landfill siting proceeding and the expansion of the jail were connected projects, proceeding on tandem timelines.

It is, therefore, not surprising that as early as a year before the start of the actual siting hearing, county board members were making statements that suggest the County had no choice but to approve a landfill expansion. For example, county board member, Riley Oncken, on March 10, 2009, sent an email stating,

“WM has committed to do everything feasible to be a good neighbor and their management of the landfill has evidenced their attempts to do just that in the past. I hope there will be no detrimental impact on those people living in its proximity, especially the young children you mentioned. I am reassured that IEPA and the EPA are highly regulative of landfills and, from what I have learned, WM has a track record of compliance and protecting homeowners, the water supply and generally being a good neighbor.” (Oncken Dep. Ex. 3)(emphasis added).

A few days later, on March 18, 2009, Oncken wrote to another constituent stating, “The availability of a local facility which guarantees waste disposal for DeKalb County residents for the next twenty-five years is enticing.” (Oncken Dep. Ex. 1) (emphasis added). A few weeks later on April 8, 2009, Oncken again wrote, “Waste Management has been a good neighbor for a good many years and have reacted each time we ask them to take action in response to odor, debris, or other issues. We are confident they will continue the same level of responsiveness.” (Oncken Dep. Ex. 2). The aforesaid statements were made shortly after the County had approved its Host Agreement with WMII, but the statements themselves are not about the Host Agreement, and instead go to the issues and concerns of an expanded landfill. They also clearly evidence the fact that WMII had used the mini hearings during the Host Agreement negotiations to persuade the County that it was a good and compliant landfill operator.

In the summer of 2009, Dan Kenney, who ultimately became one of the officers of STMD, met socially with his friend, county board member, Julia Fauci, who told him that expansion of the landfill was, “pretty much a done deal,” justifying that by stating, “well, the good thing is we’ve negotiated some things for ourselves.” (R 50). Kenney also recalled that during the same conversation Fauci told him positive things about the landfill expansion, such as the availability of improved technology. (R 51). Around the same time, August 26, 2009, Julia Fauci sent an email to another citizen stating,

“We tried to attract other waste handlers, but no one would come in for the amount of waste we generate. If we had to send our waste to another county, our bills would sky rocket, so yes, I voted to allow them to expand. There was really no other choice.” (Fauci Dep. Exhibit 1) (emphasis added).

This apparent lack of choice is something that WMII had conditioned the County to believe. On August 25, 2009, county board member, Patricia Vary, sent an email to Dan Kenney stating, “We are left with three options: expand the landfill, direct driving to very far landfills with great increase in cost for everyone and much more gas etc. used, find another place in the county to start a landfill. We opted for the first option.” (Vary Dep. Ex. 1). The statements of both county board members Fauci and Vary have subsequently been explained by them, in self-serving testimony, as referring to the Host Agreement. However, the plain meaning of the words cannot be disputed; these county board members were stating there was no choice but to approve expansion of the landfill.

Proof that Julia Fauci was referring to expansion of the landfill, not merely adoption of the Host Agreement, comes from an email she authored on February

22, 2010, one week before the landfill siting hearings were scheduled to begin, in which she stated:

“This was not an easy decision to make until all the facts were in. First of all, the current dump, when it is full has some environmental problems of its own. Before there were EPA regulations, a proper liner was not installed on a section of the landfill. This, the county would have to pay to have fixed to the tune of one million or so dollars. WMII has agreed to mitigate this problem if we give them the right to bring in outside garbage. ...we are in a horrible situation... The new Waste Management agreement allows for more rural recycling plus money for outside recycling education in our schools plus the end game of giving the site back to us for recreation, plus giving us the revenue to procure bonds to add to our crowded jail. Nothing is perfect in politics or life, but this solution a compromise, looks good to us.” (Fauci Dep. Ex. 2).

It is clear that WMII had long-since convinced the County that it had no choice but to expand the landfill by the time the siting hearing actually began. Lee Adelman had, in March 2009, sent to county board member, Patricia Vary, an article explaining the alleged negative impacts on Kankakee County after WMII closed its landfill there after unsuccessfully attempting to expand the same. Ms. Vary forwarded a copy of this email and attachments to the administrative assistant to the county board chairman with a request that she circulate it to all other members as well as the Solid Waste Committee. (Vary Dep. Ex. 2).

During the siting hearings, these expressions of prejudgment continued. On April 1, 2010, county board member, Mike Hanes, sent an email to a member of the public stating, “Our choices are: 1. Let the landfill close in 6.8 years and pay to ship garbage to some other county. (Watch your taxes double or more). 2. Work with Waste Management to expand the current landfill, keep our fees low, and let WM accept out of county garbage to make money.” (Hanes Dep. Ex. 1). On a similar note, county board member, John Hulseberg, between two

weeks and a month after the first public hearings, told Rosemary Slavenas that if DeKalb County did not take the landfill, then Cortland might and it would get all of the money. (R 193).

Lastly, there are the statements of county board member, Riley Oncken, who had so passionately defended WMII as a good neighbor a year earlier. On the first day of the public hearing, he told his friend Paulette Sherman that all of the people at the public hearing were just crazies with nothing better to do with their time or had too much time on their hands, because, "we've already made up our minds." (R 18)(emphasis added). While Oncken, at the Board hearing, denied making the statement about minds being made up, he had previously admitted telling Paulette Sherman that the opposition people at the public hearing simply had too much time on their hands. (Oncken Dep. Pg. 13, 14).

The County was apparently so intent on getting its increased host fees and expanding the jail, that statements of prejudgment actually turned into expressions of hostility toward citizens who expressed opposition to the expansion. Mac McIntyre testified at the Board hearing that he heard county board member, Anita Turner, during a break in the hearings, state that she was a high school chemistry teacher and Dr. Serewicz (an opposition expert witness) did not know anything and that his testimony should be disregarded. (R 68). McIntyre also stated that when Turner walked away from him, Ray Bockman then said to her, "Be careful. He'll probably stalk you." (R 68, 69). McIntyre also testified that he had overheard the statements from Riley Oncken to Paulette Sherman. (R 69).

Lastly, there are the insulting comments from county board member, Steve Walt, about Rosemary Slavenas, a landfill opponent. He wrote her an email on May 10, 2010, the day of the final County vote, stating, "I recommend that you don't put any time into preparing a speech, because you won't be giving it. You had your turn to speak, now it's our turn." (Walt Dep. Ex. 1). When asked at his deposition why he would make such a statement to Ms. Slavenas, Mr. Walt responded, "I saw her act at the hearing -- at the public hearing -- you should have been there. It was priceless." (Walt Dep. Pg. 12). Mr. Walt was apparently not impressed with the purpose of the public's participation in the siting hearing, as he stated, "It didn't appear to me that the purpose of the hearings was for some wing-nut to bloviate about how they thought things should be done..." (Walt Dep. Pg. 11).

The apparent hostility of county board members toward landfill opponents, as expressed at the public hearing may explain, in part, why the County staff report, co-authored with the staff by County attorney, Renee Cipriano and County administrator Ray Bockman, completely ignored STMD as an objector, even though STMD filed a Post-Hearing Brief. (C 7796, C 7806). This may also explain why other than the post hearing report of hydrogen sulfide testing submitted by WMII, the staff report chose not to even consider any of the other post hearing submittals, almost all of which were anti-expansion public comments, to be evidence.

### **III. THE SITING APPROVAL WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE**

#### **A. Standard of Review**

Only if a local siting body finds that the applicant has proven by a preponderance of the evidence that all applicable siting criteria have been met, can siting approval be granted. *Hediger v. D & L Landfill Inc.*, PCB 90-163, slip op. at 5 (December 20, 1990). If the local finding on any criterion is against the manifest weight of the evidence, interim siting approval must be reversed. In determining whether or not a decision is against the manifest weight in the evidence, Section 40.1 of the Act assigns the Board an important role in the permit process, requiring the PCB's "technically qualified members to conduct a „hearing." *Town & Country Util., Inc. v. Illinois PCB*, 225 Ill.2d 103, 120 (2007) ("*T&C*") (citing 415 ILCS 5/40.1). The Board is accordingly "required to make factual and legal determinations on evidence." *Id.* In so doing, it must "decide what weight to give to the evidence presented and to resolve any conflicts in the evidence." *City of Belvidere v. Il. State Labor Relations Board*, 181 Ill.2d 191, 205 (1998).

Accordingly, this Board's role should be something more than merely determining whether the record contains some scant evidence in support of the County's finding. Such an interpretation of the Act would be fundamentally flawed. As the Supreme Court held:

***To accord the Board no meaningful role in the process yet still require its participation would lack sense.*** This proposition is further belied by the Act, which states that there is a "burden of proof" by the petitioner before the Board, and...the Board is to conduct a "hearing" in accordance with sections 32 and 33(a) of title X. 415 ILCS 5/40.1, 32, 33(a) (West 2002). The fact that the Board undertakes consideration of the record prepared by the local siting authority rather than preparing its own record does not render the Board's technical expertise irrelevant. Instead, ***the Board***

***applies that technical expertise in examining the record to determine whether the record supported the local authority's conclusions.***

T&C, 225 Ill.2d at 123 (emphasis added).

- B. The finding 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.

The siting application filed by WMII indicates that the existing landfill consists of three sections, an Active Area, an Old Area, and the North Area. The Old Area consists of twenty-four acres which are believed to have operated between 1958 and 1974. (C 145). The North Area is immediately to the north of the Old Area and consists of approximately thirty-eight acres. It was permitted in 1974 and filling was accomplished by the trench-fill method up to the ground surface. The North Area was constructed with an in-situ clay liner (meaning no Subtitle-D standard liner at all). (C 145). The active area was permitted in 1989 and continues to receive waste.

The existing landfill is immediately west of Union Ditch, which drains an agricultural area of approximately thirty-two square miles in east-central DeKalb County and west-central Kane County. The Union Ditch system eventually flows into the Kishwaukee River. (C 144).

WMII's application reports that there are two areas near the existing landfill where ground water has been negatively impacted and which are undergoing corrective action. As a result, two ground water management zones (GMZ) have been established. A ground water management zone is defined as "a three dimensional region containing ground water being managed to mitigate

impairments caused by the release of contaminants from a site subject to corrective action approved by the IEPA.” (C 146). One GMZ is immediately east of the North Area and the second GMZ is south of the Old Area.

The existing landfill and its three areas are depicted in Figure 1-2 (C 137). WMII plans to exhume the waste in the Old Area and rebury the same in the new East Unit, which is east of Union Ditch. WMII also proposes to horizontally expand the existing landfill to the south and to vertically expand the same, including a vertical overlay over a portion of the unlined North Area. The proposed development is depicted on Figure 1-3 in the application. (C 138) Existing conditions, including the two GMZs are depicted in Drawing 4. (C 461)

A significant point of contention between the parties is the relevance of the undisputed fact that the existing landfill is impacting ground water in at least two areas, to the appropriateness of adding a vertical expansion over the existing facility. There seems to be no dispute that the Old Area is leaking and contaminating the ground water, as this point was readily conceded by WMII's engineer. (C 6878) There is, however, a dispute as to whether the North Area, over which there will be a vertical overlay, is leaking. WMII's engineer, in direct response to a question to that effect, stated, “There is no evidence of that.” (C 6877).

The fact that the North Area has a GMZ immediately to the east, and the fact that the other GMZ is directly underneath Union Ditch suggests that, before finding that the facility is so located and designed as to protect the public health, safety and welfare, there would need to be a comprehensive understanding of

conditions at the site. That level of understanding is simply not present, and the applicant did much less than is customary in terms of characterizing the site. To begin, there are no soil borings through the critical North Area. Also, WMII's hydro geologist, Joan Underwood, appeared misinformed as to conditions at the North Area, as she testified that the North Area has "all the engineered design systems" including a liner. (C 7216). This is in direct conflict with the application and the admission of Mr. Nickodem that the North Area does not have a Subtitle D liner system. (C 6880)

Ms. Underwood also concluded that the North Area is not leaking. Perhaps this conclusion is predicated on her misunderstanding of the nature of the North Area. No one, including Underwood, could offer an explanation as to why the ground water immediately east of the North Area has been impacted sufficiently to warrant a State mandated ground water management system if the North Area is not leaking. Additionally the application indicates that regional ground water flow under the site is from the northwest to the southeast, meaning directly from the North Area to the east GMZ. (C 191) Ms. Underwood, on the other hand, depicted the local ground water flow pattern underneath the site as being from east to west, which also makes any conclusion that the east GMZ is somehow related to the Old Area completely implausible. (C 194).

The empirical evidence shows that the unlined North Area, which WMII seeks to vertically expand, must be leaking and impacting the ground water. The conclusory and dismissive answers of WMII to the contrary are simply not persuasive, especially given the absence of a thorough site investigation and

characterization. At this site, the uppermost aquifer is not even identified, although it appears that it is precariously close to the ground surface.

Moreover, the data that is reported in the siting application suggests that the subsurface earth and rock materials have generally very high permeability, enabling the rapid movement of ground water, and the concurrent rapid migration of contaminants that get into that ground water. A review of the slug test conductivities presented in Table 5-4 shows that most of the zones tested have hydraulic conductivities consistent with water bearing units of aquifer quality. (C 176)

In light of the foregoing, one would have expected extensive ground water flow modeling. None is reported in the application, and the ground water impact assessment ("GIA"), so commonly seen in other applications, is absent here. The fact that the county ordinance does not require a GIA is not an excuse for its absence, given the precarious nature of the geologic setting, and the fact that ground water contamination is known to be occurring in two different areas. The supplemental county staff report acknowledges the lack of a GIA and attempts to create some comfort for the public by noting that such an assessment will be required by the EPA before an operating permit can be obtained. (C 8345)

Deferring a public health safety and welfare determination to the EPA, however, is not sanctioned. In *County of Kankakee v. City of Kankakee (Town & Country 1)*, the City of Kankakee added a condition to siting approval that "adequate measures shall be taken to assure the protection of any and all aquifers from any contamination as required by the IEPA through its permitting

process.” This condition, even though issues contained therein would clearly be taken up by the Agency during permitting, was condemned by the Board as improperly deferring a public health and welfare determination to the Agency. *County of Kankakee v. City of Kankakee and Town & Country Util.*, PCB 03-31, slip op. at 27 (January 9, 2003). A county cannot abdicate its statutory siting responsibilities, including the duty to confirm ground water safety.

While the evidence on the issue was voluminous, the issue itself is quite simple, and WMII’s answer to the critical question seems patently wrong. When WMII’s Chief Engineer, Andrew Nickodem, was asked, “Do you believe expanding over a leaking landfill is a good idea?” he responded, “Yes...” (C 6880). In terms of public health, safety, and welfare, that certainly seems like the wrong answer.

A second public health, safety, and welfare, issue of major concern is the ongoing hydrogen sulfide problem at the existing landfill. Even though the facility only receives three hundred tons of waste per day, hydrogen sulfide has been a concern. WMII’s Operations Manager, Dale Hoekstra, acknowledged the same, admitting that there was an odor associated with the problem. (C 7196) Mr. Hoekstra identified the problem as having occurred in 2008 and 2009, and said that WMII has taken steps to remedy the same. (C 7098))

These steps do not appear to be particularly successful in light of testimony that the characteristic rotten-egg odor associated with hydrogen sulfide persists. Danica Lovings, in public comment, stated that she drives on a nearby highway (Route 38) every day and that, “on any warm day you smell the rotten

egg smell as soon as you hit Cortland from either the east or the west.” (C 6896) Cortland Elementary School is about one mile north of the existing landfill. (C 7077). Lisa Wilcox, in public comment, stated that she had a concern with the smell going across Cortland grade school. (C 6897). Even WMII’s Engineer, Mr. Nickodem, admitted that he could understand why parents at Cortland Elementary School might wonder what their kids are breathing when at school. (C 6891).

Even though WMII readily admitted at the siting hearing that there had been a hydrogen sulfide problem at the existing landfill in 2008-2009, they had not previously been so forthcoming. The minutes of the County Board Executive Committee meeting on March 10, 2009 contained an explanation by County administrator, Ray Bockman, that there had been methane problems at the DeKalb County Landfill, and all over northern Illinois because of the more than usual rainfall. Bockman then described the remedial steps which WMII allegedly took to correct the problem. (Bockman Dep. Exhibit 5). This explains why county board chairman, Ruth Ann Tobias, indicated that when she has driven by the landfill in the past, she has smelled the methane odors, even though methane is an odorless gas. (Tobias Dep. Pg. 21).

While the county staff report prepared for the County acknowledges the hydrogen sulfide problem in the past, it is dismissive of it as a current problem. However, a siting condition suggested in the staff report and adopted by the County suggests that ongoing hydrogen sulfide concerns may be very current and very real. Accordingly the County conditioned approval upon WMII

maintaining an ongoing and continuing monitoring program for hydrogen sulfide emissions around the perimeter of the operating landfill. (C 8539)

Aubrey Serewicz, a PhD chemist and retired professor from Northern Illinois University, testified at length about the dangers of hydrogen sulfide gas. He indicated he had done research work with the college of Health and Human Sciences at Northern Illinois University on sulfur compounds and had presented that work at Oregon State University in May 2009. (C 7389) Dr. Serewicz described hydrogen sulfide as extremely toxic. (C 7391) He also testified that when he drives by the landfill he rolls his windows down and continues to smell hydrogen sulfide. He further believed that there was insufficient protection to the public from hydrogen sulfide emissions from the facility. (C 7399) Dr. Serewicz concluded that in his expert opinion, the facility was not so design, located or proposed to be operated that the public health, safety and welfare would be protected. (C 7400) He also pointed out that from a toxicity standpoint, if one can smell hydrogen sulfide, the concentration level is already harmful. (C 7402)

The last concern regarding public health, safety and welfare was the factor of safety, or more appropriately, the lack of a safety factor in the design for seismic events. Mr. Nickodem testified that the facility was designed to withstand a peak horizontal ground acceleration of .08g and that the design had an adequate factor of safety for that peak acceleration. (C 6957) However, between the time that the expansion was designed and the siting hearing began, there had been an earthquake in the vicinity, which had caused the United States Geological Survey to raise the peak acceleration standard at the site location to

.1g. Accordingly, Mr. Nickodem's factors of safety were based on outdated standards.

This fact is recognized by the County staff in their report, where they indicated that the 1.38 factor of safety contained in the application will be reduced and may or may not be under the required 1.3 regulatory factor of safety. (C 8344). This demonstrates, on its face, that the applicant did not prove that the design would be protective of the public health, safety and welfare from a seismic stability standpoint, and as such, the County's finding to the contrary is against the manifest weight of the evidence. The county staff's conclusion that "the Illinois EPA will require the applicant to submit geotechnical evaluations that prove their designs and slopes meet the regulatory standards, including those for the seismic condition," is exactly the kind of improper delegation of a required public health, safety and welfare finding that is condemned by the Board in *County of Kankakee versus the City of Kankakee*. The county staff report even goes on to note that the Agency may require revision of the slopes in order to change the factor of safety so that the applicant meets or surpasses the regulatory standard.

C. The finding that the facility is necessary to provide for the waste needs of the area intended to be served was against the manifest weight of the evidence.

Siting criterion (i) in Sec. 39.2(a) of the Act requires an applicant to demonstrate need for a facility. This criterion has been much litigated. The Third District Appellate Court has construed "necessary" as a degree of requirement or essentiality and found that a landfill must be shown to be reasonably required by

the waste needs of the area intended to be served, taking into consideration the waste production of the area and the waste disposal capacity along with any other relevant factors. *Waste Management of Illinois, Inc., v. PCB*, 122 Ill.App.3d 639, 461 N.E.2d 542 (3d Dist. 1984). The Court in *Waste Management* specifically found that when other available facilities are sufficient to meet the future waste needs of the service area, expansion is not “reasonably required.” (461 N.E.2d 546, 547) The question then becomes how soon other available capacity will be exhausted in terms of establishing need. Courts have found that although a petitioner need not show absolute necessity, it must demonstrate an urgent need for the new facility. *Waste Management of Illinois, Inc. v PCB*, 123 Ill.App. 3d at 184, 463 N.E.2d at 976 (2d Dist. 1984).

The need report and presentation in this case did not even address urgency. The need analysis, instead, went in a different direction, focusing on whether there will be a net disposal capacity shortfall in the service area during the projected forty-six year life of the expanded facility. The report concluded that the waste needs of the service area exceed available capacity during the forty-six year period and accordingly, there is need. (C 75) The relevant data in support of this conclusion is found in Table 6 at page C 116, which shows that, depending on the capacity assumptions one makes, the overall shortfall during forty-six years will be between 283 million tons and 367 million tons. However, if one looks critically at the numbers in Table 6, it quickly becomes evident that there is sufficient remaining capacity in the service area for between twelve and nineteen years of disposal, depending on what capacity assumptions one makes. This

also does not include the Spoon Ridge Landfill which would add at least four years to the remaining capacity duration. Proving that there will be an ultimate capacity shortfall when there is ample, existing capacity for the next decade or two doesn't prove need as construed by the Appellate Courts.

The author of WMII's need report and the expert witness on the subject was Sheryl Smith, whose bias is more than a little obvious. She testified that she has prepared twenty-three need analyses, and that in the three instances where she found that there was no need, she was not working for the applicant, but that in the twenty situations where she did find need, she was working for the applicant. (C 6996).

Ms. Smith acknowledged that available landfill capacity in Illinois is at an all-time high, based upon the most recent capacity report from the Agency. (C 7003). She acknowledged that the WMII service area is partially in Region 1, which has a remaining disposal capacity of approximately ten years and partially in Region 2, which has a remaining disposal capacity of approximately seventeen years. (C 7003).

In light of the fact that Ms. Smith did not even consider urgency in her approach and in light of the large available remaining disposable capacity in the service area, it is not surprising that Ms. Smith refused to characterize the need for the expanded landfill as urgent. (C 6996). Therefore, WMII has failed to make a *prima facie* case that expansion is necessary. Their approach all but concedes the lack of urgency or even relative urgency for an expanded facility. This is undoubtedly because Courts have previously held that nine years of available

capacity, a time frame significantly shorter than the available capacity here, is sufficient to support a finding that there is no need. *Waste Management of Illinois, Inc. v. PCB*, 175 Ill.App. 3d 1023, 530 N.E. 2d 682 (2d Dist. 1988).

D. The finding that traffic patterns to and from the facility were so designed as to minimize the impact on existing traffic flows was against the manifest weight of the evidence.

In order to determine whether traffic patterns are designed to minimize impact on existing traffic flows, one needs, by definition, to understand existing traffic flows. The report prepared by WMII fails to demonstrate this understanding, and the testimony of their expert, David Miller, clearly indicates that significant traffic items were overlooked in preparing his conclusions. Mr. Miller admitted that the traffic impact of farm vehicles, particularly during the harvest when farm vehicular traffic is the greatest, was not considered in preparing his report or reaching his conclusion. (C 7270). This is particularly surprising in light of the fact that the facility is located in a rural area.

Mr. Miller also conceded that when they did their traffic counts, the Cortland Elementary School was not yet open, so traffic related to the school is not included in their baseline results. ( 7361). Given the fact that schools and farm traffic are the two most significant traffic elements in rural communities, the applicant failed to demonstrate sufficient understanding of traffic flows in order to draw any meaningful conclusion as to whether or not the traffic patterns will minimize impact on those flows.

#### **IV. CONCLUSION**

The purpose of a review on fundamental fairness issues is to preserve the integrity of the decision making process. *E&E Hauling Inc. v. PCB*, 116 Ill.App.3d 586, 451 N.E.2d 555 (2d Dist. 1983). The Court in *E&E Hauling* adopted a well-established test for determining whether *ex parte* communications irrevocably taint an administrative decision, so as to make the ultimate judgment of the administrative agency unfair to either an innocent party, or to the public interest that the agency was obliged to protect. The Board is now, in this review, the protector of the public interest because DeKalb County certainly gave it no regard.

The elements of the test announced in *E&E Hauling*, are the gravity of the *ex parte* communications, whether the contacts may have influenced the agency's ultimate decision, whether the party making the improper contacts benefitted from the agency's ultimate decision, and whether the contents of the communications were unknown to opposing parties. Each of those considerations is answered here in favor of the opposition and the public interest. With regard to the gravity of the *ex parte* communications, in the pre-filing mini hearings, the private landfill tours, and the pre-filing reviews, the parties talked at length and in detail about the proposed expansion. WMII got the vote they wanted so they benefitted from these communications. Certainly, no member of the public ever had an opportunity to respond to these communications or to even learn of them in any detail prior to this appeal. Clearly, these communications influenced the outcome. The self-serving statements by county board members notwithstanding, they all generally testified that they were

impressed with the WMII tour and that they used what they learned on the tour to understand issues at the siting hearing. While these admissions are important and counter their self-serving testimony that their decision was based solely on the evidence, the test here should be more objective. The presumption that public officials act without bias is overcome when, as here, “a disinterested observer might conclude” the administrative decision makers “had, in some manner adjudged the facts as well as the law of a case in advance of hearing it” or made a decision based on matters not appearing in the record. *Waste Mgmt. of Illinois, Inc. v PCB*, 175 Ill.App.3d 1023 (2d Dist. 1988), *Concerned Adjoining Owners v. PCB*, 288 Ill.App.3d 565 (3d Dist. 1997).

There are no harmless errors in this case. A tribunal must be fair and impartial. Even if only one of the decision makers is not completely disinterested, his participation “infects the action of the whole body and makes it voidable.” *Danko v. Board of Trustees of City of Harvey Pension Bd.*, 240 Ill.App.3d 633 (1<sup>st</sup> Dist. 1992). Thus, bias by a decision maker never constitutes harmless error, regardless of whether it can be shown to have directly changed the outcome of the proceedings. *Girov v. Keith*, 212 Ill.2d 372 (2004).

The most disturbing aspect of this case is the consistent pattern of WMII's effort to improperly influence the County, and the County's attempt, through its ordinances, officers, and employees, to discourage or eliminate public participation in the process. The private tours and the County Ordinance prohibiting participation by most members of the public are easily enough, by themselves, to warrant reversal. However, they are just two in a series of related,

unfair occurrences. Although an isolated act may not render proceedings unfair, the cumulative effect of a number of factors may result in an unfair hearing. *Williams v. Bd. of Trustees of Morton Grove Firefighters' Pension Fund*, 398 Ill.App.3d 680 (1<sup>st</sup> Dist. 2010).

When fashioning a remedy to the fundamental unfairness which occurred in this case, the Board is urged to remember *Concerned Citizens for a Better Environment v. City of Havana and Southwest Energy Corporation*, a decision which was reversed because of an improper private tour. Unfairness related to discouraging and frustrating public participation could be cured by a remand, but the *ex parte* contacts which tainted the County's decision, particularly the private tours, cannot be undone. We cannot expect the County to forget all that it has improperly learned and grown to believe. Accordingly, remand for new proceedings would serve no useful purpose. In this case, the City's "action was so patently not quasi-judicial that the limited first aid available under remand is incapable of rehabilitating the Record where the Record can support a proper decision." *Concerned Citizens for a Better Environment v. City of Havana and Southwest Energy Corporation*, PCB 94-44 (July 21, 1994, order on motion for reconsideration).

Should the Board reach the issue of whether the local decision was against the manifest weight of the evidence, the only possible relief is reversal.

For all the foregoing reasons, STMD respectfully prays that the interim decision of the DeKalb County Board granting the application of WMII for local siting approval of a landfill expansion be reversed.

RESPECTFULLY SUBMITTED,

By: \_\_\_\_\_

George Mueller, Attorney for  
Stop the Mega-Dump