BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To:
John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

Persons included on the
ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on this 15th day of February, 2011, I filed electronically with the Office of the Clerk of the Pollution Control Board the attached, **COUNTY BOARD OF DEKALB COUNTY, ILLINOIS' RESPONSE TO PETITIONER'S *DE FACTO* MOTION FOR SANCTIONS**, a copy of which is herewith served upon you.

Respectfully submitted,
THE COUNTY BOARD OF DEKALB COUNTY, ILLINOIS,

Amy Antoniolli

Dated: February 15, 2011

Renee Cipriano
Amy Antoniolli
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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 15th day of February, 2011, I have served electronically the attached, **COUNTY BOARD OF DEKALB COUNTY, ILLINOIS' RESPONSE TO PETITIONER'S *DE FACTO* MOTION FOR SANCTIONS,** upon the following person:

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

and by first class mail, postage affixed, upon persons included on the **ATTACHED SERVICE LIST.**

THE COUNTY BOARD OF DEKALB COUNTY, ILLINOIS,

Amy Antoniolli
Amy C. Antoniolli

Dated: February 15, 2011

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STOP THE MEGA-DUMP, Petitioner, v. COUNTY BOARD OF DEKALB COUNTY, ILLINOIS, and WASTE MANAGEMENT OF ILLINOIS, INC., Respondents.	)	PCB No. 10-103 (Third-Party Pollution Control Facility Siting Appeal)

THE COUNTY BOARD OF DEKALB COUNTY, ILLINOIS'
RESPONSE TO PETITIONER'S *DE FACTO* MOTION FOR SANCTIONS

Now comes the County Board of DeKalb County, Illinois, by and through its attorneys, and for its Response to Petitioner's *de facto* motion for sanctions, states as follows:

INTRODUCTION

Petitioner suggests in its "Reply Brief of Petitioner, Stop the Mega-Dump" ("Reply Brief"), dated January 31, 2011, that this Board "should consider sanctioning" the County Board of DeKalb County, Illinois (the "County Board"), for alleged misstatements of law. This request is entirely meritless, and, if construed by the Pollution Control Board ("Board") as a *de facto* motion for sanctions, should be denied.

ARGUMENT

Although Petitioner did not comply with this Board's procedural rules regarding the content and filing of motions, Petitioner's Reply Brief asks the Board to consider sanctioning the County Board. The Board may construe this request as a *de facto* motion for sanctions against the County Board because it seeks relief other than the ultimate disposition of the above-

captioned matter. (Pet. Reply Br., pp. 8-9). Accordingly, the County Board must respond to Petitioner's *de facto* motion pursuant to Section 101.500(d) of this Board's procedural rules. 35 Ill. Adm. Code 101.500(d). The County Board is aware that this response imposes on the Board's time constraints in this decision deadline proceeding. However, under the procedural rules, the Board may deem the County's failure to respond to a motion as a waiver of any objection to the granting of the motion. *Id.* Therefore, the County Board respectfully requests that the Board accept and consider this brief response.

It is difficult to tell what statements Petitioner considers sanctionable. Petitioner also does not specify how the Board should sanction the County Board. According to Petitioner, certain, unspecified statements in the County Board's opening brief "can now not be construed as anything other than an intentional misstatement of the law." (Pet. Reply Br., p. 9). In the immediately preceding paragraph, Petitioner references one sentence from the County Board's opening brief and one erroneous paraphrase of the County Board's position. These statements, therefore, seem to be the statements to which Petitioner is referring.

In its opening brief, the County Board stated that "[n]either this Board nor Illinois' courts, furthermore, have ever held that *pre*-filing contacts could constitute impermissible *ex parte* communications or could render post-filing siting proceedings fundamentally unfair." (County Br., p. 27). Petitioner argues that this statement is false because it allegedly "ignores" the holdings in *County of Kankakee* and *Land and Lakes Co. v. Pollution Control Board*, 319 Ill. App. 3d 41, 743 N.E.2d 188 (3d Dist. 2000). Contrary to Petitioner's contentions, the County Board's statements of the law are consistent with Illinois law and the Board should deny Petitioner's *de facto* motion for sanctions.

This Board has explicitly distinguished pre-filing contacts from post-filing, *ex parte* communications in *County of Kankakee*, holding that a letter received the day before the application was filed "was a pre-filing contact rather than a post-filing *ex parte* contact." PCB 03-31, 03-33, 03-35, slip op. at 20. Furthermore, the Board never held that pre-filing contacts, in and of themselves, could render local siting proceedings fundamentally unfair in the way that post-filing, *ex parte* communications can. Instead, the Board held that *evidence* of pre-filing contacts is *admissible* if probative of actual prejudgment of the adjudicative facts, *i.e.*, the nine criteria set forth in Section 39.2 of the Act. *Id.* at 5. The *Land and Lakes* court, similarly, did not consider a pre-filing application review to constitute an impermissible *ex parte* contact and, instead, suggested in *dicta* that evidence of pre-filing contacts may be admissible to prove pre-filing collusion between the applicant and the decisionmaker. 319 Ill. App. 3d at 49, 743 N.E.2d at 195. The proceedings in both *County of Kankakee* and *Land and Lakes* were, ultimately, found to be fundamentally fair, despite the existence of pre-filing contacts. *County of Kankakee*, PCB 03-31, 03-33, 03-35, slip op. at 19-21; *Land and Lakes*, 319 Ill. App. 3d at 49, 743 N.E.2d at 195.

It is actual prejudgment, therefore, that may render a proceeding fundamentally unfair, not the mere existence of pre-filing contacts. Pre-filing contacts cannot, by themselves, render proceedings fundamentally unfair; rather, they may constitute *evidence* of actual prejudgment of the adjudicative facts which *can* render the proceedings fundamentally unfair. The County Board's discussion of *County of Kankakee* and *Land and Lakes* in its response brief, filed January 31, 2011, demonstrates that the pre-filing contacts in this case are not probative of actual

prejudgment of the adjudicative facts. (County Resp. Br., pp. 18-43).[1]

Petitioner also paraphrases the County Board's position, claiming that the County Board had stated that "*ex parte* contact can only occur after an application is filed and that pre-filing contacts without limitation 'are specifically permitted under Illinois law' ... . (County Brief, Pg. 26)." (Pet. Reply Br., p. 8). The County Board actually stated as follows:

> The only contacts between County Board members and the Applicant identified in the Petition for Review — tours of Waste Management's Prairie View landfill in Will County, Illinois — occurred prior to the filing of Waste Management's Application and are specifically permitted under Illinois law.
>
> No County Board member engaged in *ex parte* communications with the Applicant, in that no member communicated with the Applicant about the Expansion once the Application was filed and the local siting proceedings were, thereby, initiated.

(County Br., p. 26). Petitioner does not identify what specific authority or holding contradicts these statements and, instead, conclusively states that they are "simply wrong." (Pet. Reply Br., p. 8).

The County Board's statements are consistent with Board precedent and Illinois case law. In *County of Kankakee*, the Board held that pre-filing contacts do not constitute *ex parte* communications. *See County of Kankakee*, PCB 03-31, 03-33, 03-35 (consol.), slip op. at 20 (holding that a letter "received before the application was filed ... was a pre-filing contact rather than a post-filing *ex parte* contact."); *Residents against a Polluted Environment v. County of LaSalle*, PCB 97-139, slip op. at 7 (June 19, 1997) ("contacts between the applicant and the

[1] The County Board has never argued that pre-filing contacts "cannot be considered in assessing fundamental fairness," as Petitioner claims, nor has it relied on *Residents against a Polluted Environment v. County of LaSalle*, PCB 97-139 (June 19, 1997), for that proposition. (Pet. Reply Br., p. 9). The County Board relies on *Residents* for the proposition that pre-filing contacts do not, in and of themselves, constitute impermissible *ex parte* contacts.

siting authority prior to the filing of the siting application do not constitute impermissible *ex parte* contacts."); *Beardstown Area Citizens for a Better Environment v. City of Beardstown*, PCB 94-98, slip op. at 9 (Jan. 11, 1995) ("we reject petitioners' claims of impermissible *ex parte* contacts before the application was filed ... . Petitioners have cited no authority which would apply *ex parte* restrictions prior to the filing of an application for siting approval"); *E & E Hauling, Inc. v. Pollution Control Board*, 116 Ill. App. 3d 586, 598-99, 451 N.E.2d 555, 566 (2d Dist. 1983) (prohibition on *ex parte* contacts applies only to adjudicative functions of local siting authority).

Furthermore, the Board held, in *County of Kankakee*, that a pre-filing facility tour did not render the siting proceedings fundamentally unfair. PCB 03-31, 03-33, 03-35 (consol.), slip op. at 21. The County Board's interpretation that facility tours are allowed by Illinois law and are not impermissible *ex parte* contacts is entirely consistent with *County of Kankakee*, not a "gigantic leap from the Board's finding." (Pet. Reply Br. at 11).

It is Petitioner, not the County Board, who has misrepresented the holdings in that case, both with respect to the distinction between pre-filing contacts and post-filing *ex parte* contacts, and with respect to the approval of the facility tours based on their pre-filing timing. Petitioner's own interpretation of *County of Kankakee* can be construed as bad faith. Petitioner's counsel, George Mueller, represented the applicant in *County of Kankakee*. PCB 03-31, 03-33, 03-35 (consol.), slip op. at 2. Mr. Mueller himself sent the letter that the Board found did not constitute an *ex parte* contact because it was received prior to the application's filing. *Id.* at 20.

Petitioner's *de facto* motion for sanctions should be considered in the context of Petitioner's other misrepresentations of the law on fundamental fairness. As but one example,

Petitioner claims that the County Board misrepresented the holding in *City of Columbia v. County of St. Clair*, PCB 85-177, 85-220, 85-223 (consol.) (Apr. 3, 1986). Again, it is Petitioner who misstates the law. (Pet. Reply Br., pp. 6-7). The County Board stated, in its opening brief, that "[t]his Board held that neither the lack of capacity nor the restriction of public comment [present in *City of Columbia*] rendered the proceeding fundamentally unfair." (County Br., p. 21). This is correct. The Board held that the restrictions had a "dampening and prejudicial effect ... on the hearing attendees" but stopped short of finding that they rendered the proceedings fundamentally unfair. PCB 85-177, 85-220, 85-223 (consol.), slip op. at 14.

The County Board's reading is consistent with the Board's interpretation of *City of Columbia*. In *County of Kankakee*, the Board stated:

> In City of Columbia . . . [t]he Board held that neither the lack of capacity, the lack of sound amplification, nor the restriction of public comment rendered the proceeding fundamentally unfair, but the combination of the factors had a "dampening and prejudicial effect on the hearing attendees."

PCB 03-31, 03-33, 03-35 (consol.), slip op. at 23 (citations omitted). Petitioner relies on the Board's statement that, were the Board not required to vacate the decision because of notice defects, it would have remanded the decision in *City of Columbia* to cure the unfairness. However, the Board's statement was not based solely on the participation restrictions, but rather on the issue of fundamental fairness generally, which included an extensive record of *ex parte* contacts. *City of Columbia*, PCB 85-177, 85-220, 85-223 (consol.), slip op. at 14-17.

CONCLUSION

For the foregoing reasons, if the Board construes Petitioner's request for sanctions as a formal motion, Petitioner's *de facto* motion for sanctions should be denied.

Respectfully submitted,

THE COUNTY BOARD OF DEKALB COUNTY, ILLINOIS,

Amy C. Antoniolli

Dated: February 15, 2011

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