BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STOP THE MEGA-DUMP,	)	
	)	
Petitioner,	)	
	)	
vs.	)	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 20th day of April, 2011, I electronically filed with the Clerk of the Illinois Pollution Control Board **Petitioner, STOP THE MEGA-DUMP's, Motion for Reconsideration**, a true and correct copy of which is attached hereto and served upon you.

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PETITIONER, STOP THE MEGA-DUMP'S, MOTION FOR CONSIDERATION

Now comes the Petitioner, STOP THE MEGA-DUMP, by its attorney, **George Mueller**, and for its Motion for Reconsideration of the Board's March 17, 2011 Final Order, pursuant to 35 Ill. Admin. Code Sec. 101.520, states as follows:

1. The Petitioner, STOP THE MEGA-DUMP, appealed from the Decision of the DeKalb County Board approving the application of WASTE MANGEMENT OF ILLINOIS, INC. for local siting approval of a pollution control facility, specifically for expansion vertically and horizontally of the DeKalb County Landfill. The appeal was based on the lack of fundamental fairness in the proceedings below and because the County Board's grant of siting approval was against the manifest weight of the evidence and contrary to law.

2. The denial of fundamental fairness in the siting approval proceedings included improper ex parte contacts in the form of mini-hearings before filing of the siting application, private tours of a comparable facility for County Board members, and an improper pre-filing review involving individuals who participated in and guided the County Board in reaching its final Decision. The denial of fundamental fairness also

included County Rules and Procedures for pollution control facility siting proceedings which on their face barred the vast majority of the public from active participation. The denial of fundamental fairness in the siting proceedings also included evidence of pre-judgment by multiple County Board members.

3. In its Decision, this Board overlooked the argument that Section 5 of the County Siting Ordinance Rules and Procedures is fundamentally unfair on its face in that it restricts almost all members of the public only to public comment. Fundamental fairness includes, at a minimum, the right to cross-examine adverse witnesses and Section 5 of the County Rules and Procedures reserves that right only for "participants," and participants are so narrowly defined as to exclude most of the public. This Board has repeatedly held that while local siting authorities are free to implement their own rules and procedures for siting hearings, the same must be consistent with the requirements of Section 39.2 of the Act and with fundamental fairness. Denial of the right of cross-examination is, on its face, fundamentally unfair. Moreover, Section 39.2 mandates a public hearing. Denial of meaningful participation to members of the public at that public hearing is contrary to the requirements of Section 39.2.

4. This Board's reliance on *Slates v. Illinois Landfills, Inc.*, PCB 93-106 (Sept. 23, 1993), for the proposition that local governments can establish "different requirements for those who wish to participate as parties, presenting testimony and evidence, than for members of the public who simply wish to comment and ask questions," is not dispositive, since *Slates* only established different timing requirements for registration and the filing of evidence and did not constitute an outright ban on participation for any class of citizens. Similarly, the Board's assertion that Petitioner

failed to establish a lack of prejudice is unpersuasive in that prejudice must be presumed when the written rules and procedures enacted by the County are fundamentally unfair on their face. Lastly, the possibility and fact of waiver of these fundamentally unfair rules is after the fact and does not mitigate the damage done by their existence. In that vein, the Board Decision comments on the failure of Petitioner to identify anyone who failed to participate due to the fundamentally unfair rules and procedures. This ignores the fact that it is logically impossible to prove the identity of the person in the empty chair who failed to attend and participate because he or she believed, based upon the published rules and procedures, that participation would be impossible. The very nature of chilling effects is that it is virtually impossible to identify those who were chilled and remain so.

5. This Board's finding that ex parte contacts cannot take place prior to the filing of a siting application represents a change in the law and is in direct conflict with prior precedent of this Board and the Appellate Courts. The Board's Decision now is in direct conflict with its previous decision in *County of Kankakee v. City of Kankakee*, PCB 03-31 (Jan. 9, 2003). It is also in conflict with the Appellate Court's holding in *Land & Lakes Company v. PCB*, 319 Ill.App.3d 41, 743 N.E.2d 188 (3rd Dist. 2000).

6. This Board's finding that ex parte contacts cannot occur before the filing of a siting application as it is applied to the private tours conducted by WASTE MANAGEMENT for County Board members is arbitrary and ignores previous holdings of this Board and the Appellate Court. Whether or not these tours occurred before or after the filing of a siting application is not germane to why such tours have been condemned in the past, namely that other parties are prejudiced by being unable to

appropriately address all the impressions formed by decision makers who participated in the tours. *Beardstown Area Citizens for a Better Environment v. City of Beardstown*, PCB 94-98 (Jan. 11, 1995), *Concerned Citizens for a Better Environment v. City of Havana*, PCB 94-44 (May 19, 1994), *Southwest Energy Corp. v. PCB*, 275 Ill.App.3d 84, 655 N.E.2d 304 (4th Dist. 1995).

7. This Board's observation, admittedly dicta, that the tours offered by WASTE MANAGEMENT were general in nature and of short duration is not justified by the Record and does not mitigate the requirement in *Southwest Energy Corp. v. PCB* that all parties to the siting proceeding be given an opportunity to accompany the local governing body when it takes a facility tour.

8. Similarly, this Board's observation that the private tours sponsored by WASTE MANAGEMENT were a part of the host agreement negotiations is not supported by the Record. In fact, these tours started well after the host agreement had been executed and approved and terminated shortly before the filing of the siting application.

9. The Record in this case demonstrated unequivocally that Renee Cipriano participated in the pre-filing review and also assisted and advised the County Board in making its decision. The same is true for County Administrator Ray Bochman. This Board's finding that this did not violate fundamental fairness is contrary to this Board's previous decision in *Sierra Club v. Will County*, PCB 99-136 (Aug. 5, 1999), where a controlling distinction which made pre-filing review permissible, was that those who participated in the pre-filing review did not participate during the County Board's deliberations. This distinction is even noted in footnote 16 on page 46 of this Board's Opinion in this case, but the Board now fails to follow its own previous precedents.

10. This Board's decision creates a new and legally unwarranted standard for identifying pre-judgment and bias by decision makers. The Board states that the presumption of the validity of the actions of a public official will be overcome only by clear and convincing evidence, citing its previous decision in *Fox Moraine, LLC v. City of Yorkville*, PCB 07-146 (Oct. 1, 2009), a decision that is itself still on appeal in the Second District. This newly announced standard of clear and convincing evidence is significantly different from the previously prevailing standard which is whether a disinterested observer might conclude that a decision maker had in some measure adjudged the facts as well as the law of the case in advance of hearing it.

11. Similarly, this Board misapprehends the decision in *Residents Against a Polluted Environment v. Pollution Control Board*, 293 Ill.App.3d 219, 687 N.E.2d 552 (3rd Dist. 1997), when it states that this Decision requires that a showing of bias must depend on evidence of "actual bias." In fact, what the Court in *Residents Against a Polluted Environment* required was "at least a minimal showing of bias." (at 687 N.E.2d 557).

12. The Board's comparison of DeKalb County's desperate need for and commitment to financing a new jail based upon host fees and the County's position in *E & E Hauling, Inc. v. PCB*, 107 Ill.2d 33 (1985), is misplaced. *E & E Hauling, Inc.* stands only for the limited proposition that the receipt of host fees by the decision maker does not create inherent bias and does not address the point raised in this case, namely that the County Board had already committed to spend those host fees on a desperately needed project before ever considering the siting application.

13. Once again, this Board has declined to apply its technical expertise to the substantive evidence received by the County Board. The Board states at page 69 of its Opinion that it is the "sole province" of the County to weigh the evidence, resolve conflicts in testimony, and assess the credibility of witnesses. This ignores the mandate of our Supreme Court in *Town & Country Utilities v. PCB*, 225 Ill.2d 103 (2007), that the Board must apply its technical expertise and review the evidence in conducting a hearing in order to determine whether that evidence legitimately supports the conclusion for which it was relied upon by the local decision maker. Furthermore, the Board's reliance on *Peoria Disposal Company v. PCB*, 385 Ill.App.3d 781 (2008), for the proposition that this argument has been rejected is misplaced, since the Court in *Peoria Disposal Company* misconstrued the argument as being that this Board must conduct a de novo hearing on the evidence.

14. The Board's statement that need for a pollution control facility merely requires that the same be "reasonably convenient" and that the "urgent need" requirement expressed by the Second District in a 1984 case has not been adopted anywhere else is simply incorrect. The urgent need requirement was reiterated by the Second District in *ARF Landfill, Inc. v. PCB*, 174 Ill.App.3d 82 (2nd Dist. 1988), was adopted by the Fourth District in *Tate v. PCB*, 188 Ill.App.3d 994 (4th Dist. 1989) and was again reiterated by the Second District in *File v. D & L Landfill, Inc.*, 219 Ill.App.3d 897 (2nd Dist. 1991). "Urgent need" and "reasonably convenient" are not synonyms but instead are separate requirements.

15. The Board's finding that the old area is not leaking is not supported by the Record and ignores the definition of a groundwater management zone, which is a three

dimensional area intended to mitigate groundwater impacts from the release of contaminants. Whether or not a release is a leak is a simple semantic issue. Whether or not that leak is current or in the past is speculative. There is no question, however, that in two areas at the existing landfill, one adjacent to the north area, which WASTE MANAGEMENT has defined as having a subtitle D equivalent liner, the State has found it necessary to mitigate groundwater impacts from the release of contaminants. The Board's Decision completely overlooks the argument that given this reality there should have been an extraordinarily high and unequivocal level of understanding of groundwater, geology and current conditions at the existing landfill. Instead, the Board merely concludes that "there was no testimony or other evidence presented that clearly refuted WMII's proof that criterion II has been satisfied." (p. 69). This conclusion, in light of the ongoing impacts to groundwater, is further evidence that the Board has failed to abide by the mandate of the Supreme Court in *Town & Country*.

16. The finding of the Board that the County staff failed to confirm the USGS reclassification of the seismic risk at the site location is troubling. The evidence submitted by STOP THE MEGA-DUMP that the peak acceleration standard at the sited location had been increased to 0.1 g is unrebutted. For the Board to require that this evidence be confirmed by the County staff indicates that opposition evidence is subject to a different level of scrutiny than applicant evidence. Moreover, the County staff was not a witness, and for this Board to elevate the report of the County staff to expert testimony constitutes a clear endorsement by the Board of a procedure whereby what has apparently become the most important evidence, namely the County staff report, is not subject to cross-examination. This would be fundamentally unfair.

WHEREFORE, for the reasons set forth above, Petitioner, STOP THE MEGA-DUMP, respectfully requests that the Board reconsider and modify its Final Order to hold that the local siting application proceedings were not fundamentally fair, and that the County Board's Decision to grant siting was against the manifest weight of the evidence.

DATED: April 20, 2011

Respectfully submitted,

STOP THE MEGA-DUMP, Petitioner

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CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES THAT THE FOREGOING INSTRUMENT-DOCUMENT WAS SERVED UPON THE AFOREMENTIONED PARTIES, BY HAND DELIVERY, ELECTRONIC FILING, FACSIMILE OR DEPOSITING A TRUE AND CORRECT COPY OF SAME INTO THE U.S. MAIL LOCATED AT 750 E. ETNA ROAD, OTTAWA, ILLINOIS 61350, IN A PROPERLY ADDRESSED, FIRST CLASS POSTAGE PREPAID ENVELOPE, THIS 20th DAY OF APRIL, 2011, AT OR BEFORE THE HOUR OF 5:00 P.M.

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