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 10-103 (Third-Party Pollution Control Facility Siting Appeal)

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on May 4, 2011, we filed with the Illinois Pollution Control Board, the attached **Response of Waste Management of Illinois, Inc. to Stop the Mega-Dump's Motion for Reconsideration** in the above entitled matter.

WASTE MANAGEMENT OF ILLINOIS, INC.

By: _____
One of Its Attorneys

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

RESPONSE OF WASTE MANAGEMENT OF ILLINOIS, INC.
TO STOP THE MEGA-DUMP'S MOTION FOR RECONSIDERATION

Now comes Waste Management of Illinois, Inc. ("WMII"), by and through its attorneys, pursuant to 35 ILL. ADMIN. CODE § 101.520(b), and for its Response to the Motion for Reconsideration filed by Stop the Mega-Dump ("STMD"), states as follows:

INTRODUCTION

STMD's motion is nothing more than a rehash of arguments already made to and rejected by this Board. STMD presents no new facts or new law and does not identify an error in the Board's previous application of the existing law. The motion should be denied.

ARGUMENT

"In ruling upon a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error." 35 ILL. ADMIN. CODE § 101.902. In *Citizens Against Regional Landfill v. County Board of Whiteside*, this Board observed that "the intended purpose of a motion for reconsideration is to bring to the court's attention newly discovered evidence which was not available at the time of hearing, changes in the

law or errors in the court's previous application of the existing law." PCB 93-156, slip op. at 7 (Mar. 11, 1993) (citing *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill.App.3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992)).

This Board did not "overlook" STMD's arguments regarding the County Siting Ordinance Rules and Procedures, as STMD claims. (Mot., ¶ 3). This Board, instead, explicitly rejected those arguments on pages 35-36 of its March 17 Opinion and Order ("the Order"). Just as in its initial briefing, STMD identifies no law supporting its claim that every member of the public must be afforded the right to cross-examine witnesses at a local siting proceeding. STMD also ignores the fact that every member of the public who wished to cross-examine witnesses was, in fact, afforded such an opportunity.

Contrary to STMD's suggestion, this Board was entitled to rely on *Slates v. Illinois Landfills, Inc.*, PCB 93-106 (Sept. 23, 1993), as persuasive authority, even if it was not dispositive of the precise issue before the Board. Reliance on persuasive authority is not legal error. STMD also overstates its case, equating "public comment" with "an outright ban on participation ... ." (Mot., ¶ 4).

Just as in its initial briefing, STMD identifies no law supporting its claim that "prejudice must be presumed" in this case. (Mot., ¶ 4). This claim runs directly counter to the appellate court's holding in *E & E Hauling, Inc. v. Pollution Control Board*, which stated: "It is settled that agency action will not be upset in the event of a harmless procedural error. This is especially true where the error was harmless because there was no resulting prejudice ... ." 116 Ill App. 3d 586, 604, 451

N.E.2d 555, 569 (1983) (hereinafter "*E & E Hauling I*") (citations omitted). Nor does STMD cite any law authorizing this Board to speculate about hypothetical prejudices to hypothetical persons, as STMD would have this Board do. (Mot., ¶ 4).

STMD continues to mis-state the holdings of *County of Kankakee v. City of Kankakee*, PCB 03-31, 03-33 & 03-35 (cons.) (Jan. 9, 2003), and *Land & Lakes Co. v. Pollution Control Board*, 319 Ill.App.3d 41, 743 N.E.2d 188 (3d Dist. 2000). (Mot., ¶ 5). These cases did not hold that pre-filing communications were subject to *ex parte* contact analysis and restrictions. Instead, they held that such communications could be probative of prejudgment. *County of Kankakee*, PCB 03-31, 03-33 & 03-35, (cons.) slip op. at 5; *Land & Lakes*, 319 Ill.App.3d at 49, 743 N.E.2d at 195. STMD cites no law to suggest differently.

This Board's holding did not "ignore" prior cases regarding facility tours, as STMD claims. (Mot., ¶ 6). Instead, it distinguished the cases cited by STMD — all of which concerned post-filing tours — from the pre-filing tours at issue here. (Order, pp. 45-46). STMD presents no law supporting its claim that when the tours occurred "is not germane to why such tours have been condemned in the past, namely that other parties are prejudiced... ." (Mot., ¶ 6). STMD fails to recognize that the only reason there were identifiable "other parties" in its cited cases was that the "other parties" had formally appeared in a siting proceeding to oppose a filed application.

STMD's request that this Board reconsider a statement of *dicta* provides no reason to reconsider this Board's Order as a whole, since *dicta*, by definition, played no role in this Board's underlying decision. (Mot., ¶ 7). STMD presents no new facts regarding the pre-filing tours, and its bald assertion that this Board's findings are "not justified by the record" cannot support a motion for reconsideration. STMD also fails to acknowledge that *Southwest Energy Corp. v. Pollution*

Control Board, 275 Ill.App.3d 84, 86-87, 655 N.E.2d 304, 306 (4th Dist. 1995), concerned a post-filing tour and did not create any "requirements" for pre-filing tours.

This Board's statement that "[t]he facility tours of the Prairie View Landfill were offered to the County Board Members during the course of the Host Agreement negotiations ... " is factually correct. (Order, p. 43; Mot. ¶ 8). The pre-filing tours were offered in March 2009, prior to the April 17, 2009, execution of the Host Agreement. STMD presents no new facts and, instead, misrepresents this Board's holding to suggest that the Board found the tours to have *occurred* during the Host Agreement negotiations. (*Id.*)

STMD makes the remarkable claim that the Record "demonstrated unequivocally" that Renee Cipriano both participated in the pre-filing review of the siting application and advised the DeKalb County Board in making its decision. (Mot., ¶ 9). To the contrary, the Record established precisely the opposite - Ms. Cipriano did not review any portion of the draft application, and did not advise the DeKalb County Board in making its decision. *See* County Board of DeKalb County, Illinois Response Brief, pp. 38-42, filed January 31, 2011.

In addition, STMD presents no new evidence to suggest that Renee Cipriano or Ray Bockman "assisted and advised the County Board in making its decision" and its false assertion that this claim is "demonstrated unequivocally" by the record cannot support reconsideration. (Mot., ¶ 9). Because neither Cipriano nor Bockman participated in the County Board's deliberations, this Board's Order does not contradict the holding in *Sierra Club v. Will County*, PCB 99-136 (Aug. 5, 1999).

STMD's argument regarding bias and prejudgment fails to appreciate the distinction between the matter to be proved and the evidentiary standard applied to that proof. In order to prove bias

or prejudgment of an adjudicative fact by an individual decision-maker or a decision-making body as a whole, a party must prove that "a disinterested observer might conclude that he, or it, had in some measure adjudged the facts as well as the law of the case in advance of hearing it." *E & E Hauling I*, 116 Ill.App.3d at 598, 451 N.E.2d at 565. This matter must be proved by "clear and convincing evidence." *Fox Moraine, LLC v. City of Yorkville*, PCB 07-146, slip op. at 60 (Oct. 1, 2009). This Board did not articulate a "new" standard regarding prejudgment and bias; instead, it faithfully applied existing precedents. STMD presents no law suggesting otherwise.

STMD also fails to appreciate that the requirement, articulated in *Residents against a Polluted Environment v. Pollution Control Board*, 293 Ill.App.3d 219, 225-26, 687 N.E.2d 552, 556-57 (3d Dist. 1997), that an appellant make "at least a minimal showing of bias" is, in fact, a requirement of proof of actual bias. (Mot., ¶ 11). The appellate court required such a "showing" in order to overcome the presumption that "[e]lected officials ... act objectively" and specifically distinguished them from "bare, unsupported allegations" of bias. *Id.* The opposite of a "bare, unsupported allegation" of bias would, under any reasonable reading, be "proof of actual bias." Surely, the *Residents* court, in requiring a "minimal showing of bias," did not seek a showing of merely imagined or hypothetical bias.

This Board made no finding, one way or another, as to whether the County Board had a "desperate need for and commitment to financing a new jail based upon host fees" and, accordingly, there is nothing for this Board to reconsider in that regard, contrary to STMD's claim. (Mot., ¶ 12). Again, this Board was entitled to rely on *E & E Hauling, Inc. v. Pollution Control Board*, 107 Ill.2d 33, 481 N.E.2d 664 (1985) (hereinafter "*E & E Hauling II*") as persuasive authority regarding the permissible and credible inferences to be drawn from the evidence, even if that case was not

dispositive of the precise issue here. (Order, p. 53). STMD cites no law, new or otherwise, to suggest differently.

Although STMD acknowledges that *Peoria Disposal Co. v. Pollution Control Board*, 385 Ill.App.3d 781, 800, 896 N.E.2d 460, 477 (3d Dist. 2008), rejected the argument that this Board should conduct a *de novo* review of the evidence presented to the County Board, STMD nevertheless asks this Board to re-weigh the evidence, resolve conflicts in testimony and assess the credibility of witnesses presented to the County Board. (Mot., ¶ 13). This would appear to be the very definition of a *de novo* review of the evidence. STMD cites no law to explain its claimed distinction between *de novo* review of the evidence and the review it asks this Board to conduct. All that *Town & Country Utilities v. Pollution Control Board*, 225 Ill.2d 103, 122-23 (2007), requires is for this Board to use its technical expertise to determine whether the County Board's decision was against the manifest weight of the evidence.[1] This Board was correct in relying on *Peoria Disposal* and correctly applied *Town & Country*. STMD cites no law to suggest otherwise.

STMD appears to misapprehend this Board's holding with respect to the supposed "urgent need" standard urged by STMD. (Mot., ¶ 14). This Board quite properly relied upon and echoed the conclusion in *Industrial Fuels & Resources/Illinois, Inc. v. Pollution Control Board*, 227 Ill.App.3d 533, 545-46, 592 N.E.2d 148, 156 (1st Dist. 1992), namely, that the debate over whether a finding under criterion (i) of Section 39.2 of the Act requires a finding of "urgent need" is primarily a "semantic battle" and that the various cases interpreting criterion (i) do not, in fact, apply substantively different standards. Thus, this Board was correct in holding that no court has adopted

[1] Indeed, *Town & Country* never even considered altering the scope of this Board's review of local siting decisions. The holding in *Town & Country* was limited to the issue of whether the appellate court was to review the decision of the local siting authority or the Pollution Control Board.

a new standard of "urgent need." (Order, p. 59). In any case, STMD presents no new facts or law to suggest that this Board must reconsider its holding that the County Board's determination was not against the manifest weight of the evidence, whatever standard of "need" or "necessity" is applied.

This Board did not "find" that the old area of the existing landfill is not leaking; this Board held that, given the uncontroverted evidence, the County Board's determination that the Application satisfied criterion (ii) was not against the manifest weight of the evidence. (Mot., ¶ 15; Order, p. 69). STMD has never presented evidence of leakage from the old or North areas, and does not do so now; the mere existence of groundwater management zones is not evidence of current problems with the existing landfill. More importantly, the presence of the groundwater management zones, by themselves, is not evidence that *the proposed facility* is not "so designed, located and proposed to be operated that the public health, safety and welfare will be protected," which is the only relevant issue here. 415 ILCS 5/39.2(a)(ii). Accordingly, STMD has presented no issue for reconsideration.

Instead, STMD continues to assert that the existence of groundwater management zones imposed a special burden on both the DeKalb County Board and this Board to acquire "an extraordinarily high and unequivocal level of understanding of groundwater, geology and current conditions at the existing landfill," even as the evidence in the record conclusively proved that the proposed facility satisfies criterion (ii). (Mot., ¶ 15). STMD cites no legal authority, and WMII is aware of none, imposing this special burden, particularly in the absence, as here, of any evidence of danger to the public health, safety or welfare.

STMD did not submit evidence to the DeKalb County Board that the seismic peak acceleration standard at the site had been increased to 0.1g by the United States Geological Survey's National Hazard Mapping Project. (Mot., ¶ 16). In fact, the evidence in the record, including the testimony of Mr. Nickodem, conclusively established that the United States Geological Survey did not increase the peak acceleration standard at the site to 0.1g. (C6944, 6957-58.) STMD's expert submitted, as a public comment, a report containing a redacted version of the "Preliminary Earthquake Report" for a particular seismic event on February 10, 2010. (C7995-96). STMD's expert redacted both the "Preliminary Earthquake Report" title and the text showing that the map related to a specific seismic event. In fact, the official Seismic Hazard Map for the State of Illinois remains unchanged, and shows a peak acceleration standard of 0.08g at the proposed site. *See* http://earthquake.usgs.gov/earthquakes/states/illinois/hazards.php. The County Staff fact-checked STMD's public comment and was unable to confirm its assertion concerning the peak acceleration standard. The results of that fact-check were included in the County Staff's Report, which was also submitted during the public comment period. Thus, STMD's evidence was not unrebutted, and STMD has presented no issue for reconsideration. Further, the County Board's reliance on the County Staff's fact-checking efforts does not elevate the County Staff report to the level of expert testimony any more than a judge who takes judicial notice of a publicly-available fact elevates his or her research staff's efforts to the level of expert testimony.

CONCLUSION

For all of the reasons state above, STMD's Motion for Reconsideration should be denied.

Dated: May 4, 2011

Respectfully submitted,

WASTE MANAGEMENT OF ILLINOIS, INC.

By: _____
One of Its Attorneys

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PROOF OF SERVICE

I, Tasha Madray, a non-attorney, on oath states that she served the foregoing **Response of Waste Management of Illinois, Inc. to Stop the Mega-Dump's Motion for Reconsideration** by electronic mail at the e-mail addresses indicated below and by enclosing same in an envelope addressed to the following parties as stated below, and by depositing same in the U.S. mail at 161 N. Clark St., Chicago, Illinois 60601, on or before 5:00 p.m. on this 4th day of May, 2011:

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