

ILLINOIS POLLUTION CONTROL BOARD

ENVIRONMENTAL RECYCLING AND)	
DISPOSAL SERVICES, INC.)	
)	
Petitioner,)	PCB 16-76
)	
v.)	
)	
WASTE MANAGEMENT OF ILLINOIS, INC.)	
WILL COUNTY AND WILL COUNTY BOARD)	
)	
Respondents.)	

NOTICE OF FILING

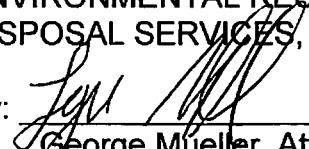
To: See attached Service List.

PLEASE TAKE NOTICE that on February 25, 2016, I filed with the Will County Clerk the attached **RESPONSE TO MOTIONS TO DISMISS**, a copy of which is attached hereto and herewith served upon you.

Dated: February 25, 2016

Respectfully Submitted,

ENVIRONMENTAL RECYCLING AND DISPOSAL SERVICES, INC.

By:  _____
George Mueller, Attorney

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RESPONSE TO MOTIONS TO STRIKE AND DISMISS

NOW COMES Environmental Recycling and Disposal Services (ERDS) by its attorney, George Mueller, and for its response to the motions filed by Will County and Waste Management, states as follows:

1. Both Respondents have filed essentially identical motions seeking dismissal of the Petition for Review filed by ERDS, or alternatively striking of the allegations regarding fundamental unfairness of the proceedings. ERDS files this single response to both Motions.
2. The gist of both Motions is that ERDS has pled insufficient facts. Both Respondents have lost sight of the fact that this is not an original complaint in the Circuit Court, but rather a statutory petition for review. Section 40.1 of the Act establishes the right to review of local siting decisions, requiring only that the review be timely perfected by filing a petition requesting a hearing. It would appear that this requirement is more in the nature of a jurisdictional and notice requirement than a pleading requirement.
3. Section 107.208 of the Board's procedural rules sets forth the content requirements for these petitions. This includes "a specification of the grounds for the appeal, including any allegations for fundamental unfairness or any manner in which the decision as to particular criteria is against the manifest weight of the evidence."

- Respondents read into this language a requirement of fact pleading, but the language does not contain a requirement that the petitioner include the specific facts relied upon. Conclusory statements or ultimate facts would seem to satisfy the plain meaning of the language in section 107.208, especially because allegations of bias and improper contacts tend by their very nature to be vague until more fully developed in discovery.
4. Section 107.502 of the Board's rules, specific to proceedings contesting local siting approval, provides the limited bases for dismissal of petitions on motion of third parties. These do not include failure to plead sufficient facts. The reason for this is clear, because the determination of the facial sufficiency of a petition is made by the Board, when it initially decides whether to accept the petition for hearing. Respondents bring their Motions pursuant to Section 101.506, the general rules of the Board. However, Section 107.502 controls as set forth in Section 107.100(b) which resolves conflicts between section 100 and section 107 requirements.
 5. Both Respondents emphasize that Illinois is a fact pleading state. That point is irrelevant since the petition here is not a pleading in the Circuit Court. Additionally, Section 101.100(b) specifically states that the code of civil procedure is not applicable to proceedings before the Board.
 6. Respondents rely upon *Sierra Club v. Wood River, PCB 98-43*, but that reliance is misplaced. In that case none of the paragraphs were stricken because of pleading inadequacies. The fundamental fairness allegations were stricken because of waiver. Moreover, the Board emphasized that fact pleading requirements are not to be strictly construed in Board actions, stating: "Despite the requirement of fact pleading, courts are to construe pleadings liberally to do substantial justice between the parties. (Classic Hotels, Ltd. v. Lewis, 259 Ill.App.3d 55, 60, 630 N.E.2d 1167 (1st Dist.1994).) However, case law is consistent in finding that pleading requirements for administrative review are less exacting than for other causes of action. (Mueller v.

Board of Fire and Police Commissioners of the Village of Lake Zurich, 267 Ill.App.3d 726, 643 N.E.2d 255 (2d Dist.1994).)" *Sierra Club and Jim Bensman v. City of Wood River and Norton*, 1997 WL 728170 (Ill. Pol. Control. Bd.), 2

7. Respondents also argue that the fundamental fairness allegations in the instant petition are frivolous and should be dismissed on that basis. The Board has defined frivolous as failing to state a cause of action upon which relief can be granted, and in this case has already determined that the petition is not frivolous. Reliance by Respondents on *WIPE v. PCB*, 55 Ill. App. 3rd 475, is inappropriate, since that was not a petition to review a local siting decision. The *WIPE* case generally was about failure to allege a cause of action, and in the instant case the cause of action is statutory, review of local siting approval. In that regard it is useful to note that section 40.1 of the Act mandates consideration of the fundamental fairness of the procedures used at the local level.
8. WMII relies on *Stop the Mega-Dump v. County Board*, 979 NE 2nd 574, for the proposition that a petition alleging improper *ex parte* contacts must specify the facts supporting the allegations. That is simply an untrue statement, as the appellate opinion discusses the proofs required to prevail and not the contents of the initial petition for review.
9. It is noteworthy, that neither Respondent claimed surprise or inability to prepare based upon the alleged factual inadequacy of the petition for review. The petition at issue is in fact like many filed with the Board and routinely allowed to proceed to hearing. To preserve its rights on review ERDS filed a detailed motion to disqualify and for other relief on the first day of the public hearing at the local level, which motion was supported by multiple exhibits. There is no surprise here. The bias alleged is also clear and obvious. Almost unanimous approval by the County Board of a siting

application that failed to even minimally meet two of the siting criteria creates almost a conclusive presumption of bias by the local decision maker.

WHEREFORE, for the foregoing reasons, ERDS respectfully prays that the Motions to Strike and Dismiss filed herein be denied.

Respectfully submitted,
Environmental Recycling and
Disposal Services, Inc.



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