

No. 2-11-0579

IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

STOP THE MEGA-DUMP,)	
)	
<i>Petitioner-Appellant,</i>)	Petition for Review from the
)	Illinois Pollution Control Board
v.)	
)	PCB No. 10-103
)	
COUNTY BOARD OF DEKALB)	
COUNTY, ILLINOIS, and WASTE)	
MANAGEMENT OF ILLINOIS, INC.,)	
and ILLINOIS POLLUTION CONTROL)	
BOARD,)	
)	
<i>Respondents-Appellees.</i>)	

BRIEF AND ARGUMENT

OF PETITIONER-APPELLANT STOP THE MEGA-DUMP

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

	<u>Page</u>
I. STANDARD OF REVIEW	18
<i>City of Belvidere v. Illinois State Labor Relations Board</i> , 181 Ill.2 nd 191 (1998).....	18
<i>AFM Messenger Service, Inc. v. Department of Employment Security</i> , 198 Ill.2 nd 380, 392 (2001).....	19
II. THE RULES AND PROCEDURES OF THE DEKALB COUNTY POLLUTION CONTROL FACILITIES' SITING ORDINANCE BARRING THE GENERAL PUBLIC FROM PARTICIPATING IN THE SITING HEARING WERE FUNDAMENTALLY UNFAIR	19
<i>E & E Hauling, Inc. v. PCB</i> , 116 Ill.App.3d 586, 596, 451 N.E.2d 555, 546 (2d Dist. 1983)...	19
<i>Land and Lakes Company v. PCB</i> , 245 Ill.App.3d 631 (3d Dist. 1993).....	20
<i>Kane County Defenders v. PCB</i> , 139 Ill.App.3d 588, 487 N.E.2d 743 (2d Dist. 1985).....	20
<i>Waste Management of Illinois, Inc. v. PCB</i> , 175 Ill.App.3d 1028, 530 N.E.2d 682 (2d Dist. 1988).....	20
<i>Daly v. Pollution Control Board</i> , 264 Ill.App.3d 698, 637 N.E.2d 1153 (1st Dist. 1994).....	21
<i>Waste Management of Illinois v. Pollution Control Board</i> , 123 Ill.App.3d 1075 (2d Dist. 1984).....	21
<i>Slates v. Illinois Landfills, Inc.</i> , PCB 93-106.....	22
<i>City of Geneva v. Waste Management of Illinois, Inc. v. PCB 94-58</i> , (July 21, 1994).....	22
<i>American Bottom Conservancy v. Village of Fairmont City</i> , PCB 00-200.....	24
<i>Board of Trustees of Casner Township v. County of Jefferson and Southern Illinois Landfill, Inc.</i> , PCB 84-175.....	25
III. WMII's PRIVATE TOURS FOR BOARD MEMBERS OF A SIMILAR FACILITY RENDERED THE PROCEEDINGS FUNDAMENTALLY UNFAIR	25
<i>Beardstown Area Citizens for a Better Environment v. City of Beardstown</i> , PCB 94-98.....	26

<i>Concerned Citizens for a Better Environment v. City of Havana</i> , PCB 94-44.....	26
<i>Southwest Energy Corp v. PCB</i> , 275 Ill.App.3d 84, 655 N.E.2d 304 (4 th Dist. 1995).....	27
<i>Tate v. PCB</i> , 188 Ill.App.3d 994, 554 N.E.2d 1178 (4 th Dist. 1989).....	27
<i>Residents Against a Polluted Environment v. County of LaSalle</i> , PCB 96-243.....	28
<i>Land and Lakes Co. v. PCB</i> , 319 Ill.App.3d 41, 743 N.E.2d 188 (3d Dist. 2000).....	28
<i>County of Kankakee v. City of Kankakee</i> , PCB 03-31 (January 9, 2003).....	29
<i>E & E Hauling</i> , 116 Ill.App.3d 586, (2d Dist. 1983).....	31
IV. THE COUNTY BOARD PREJUDGED THE APPLICATION.....	32
<i>E&E Hauling v. PCB</i> , 116 Ill.App.3d 586 (2d Dist. 1983) Affirmed by 107 Ill.2d 33 (1985).....	<i>passim</i>
<i>Residents Against a Polluted Environment v. Pollution Control Board</i> , 293 Ill.App.3d 219 (3d Dist. 1997).....	36
V. THE FUNDAMENTAL UNFAIRNESS OF THE PROCEEDINGS WAS NOT HARMLESS ERROR.....	37
<i>Waste Management of Illinois, Inc. v. PCB</i> , 175 Ill.App.3d 1023 (2d Dist. 1988).....	37
<i>Concerned Adjoining Owners v. PCB</i> , 288 Ill.App.3d 565 (3d Dist. 1997).....	37
<i>Girot v. Keith</i> , 212 Ill. 2d 372 (2004).....	37
<i>Danko v. Board of Trustees of City of Harvey Pension Board</i> , 240 Ill.App. 3d 633 (2st Dist. 1992).....	37
<i>Fox Moraine, LLC, v. United City of Yorkville</i> , 2-10-0017 (Nov. 8, 2011).....	37
<i>Town and County Utilities, Inc. v. PCB</i> , 225 Ill.2d 103, 120 (2007).....	39
<i>City of Belvidere v. State Labor Relations Board</i> , 181 Ill.2d 191 (1998).....	39

NATURE OF THE CASE

This Appeal is from an Order of the Pollution Control Board (“PCB”) affirming the decision of the DeKalb County Board (“County”) granting the application of Waste Management of Illinois, Inc. (“WMII”) for local siting approval of vertical and horizontal expansion of the DeKalb landfill. Stop the Mega Dump (“STMD”), a citizens’ group, claimed that the siting proceedings before the County Board were fundamentally unfair and that the decision of the County Board was against the manifest weight of the evidence. The PCB affirmed and denied STMD’s Motion for Reconsideration. No questions are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Did the PCB err in finding that the rules and procedures of the DeKalb County pollution control facility siting ordinance, which prohibited participation in the siting hearing by the general public, were not fundamentally unfair?
2. Did the PCB err in finding that WMII’s private tours for county board members to another similar landfill did not render the proceeding fundamentally unfair?
3. Did the PCB err when it found that the County Board did not actually prejudice the application?
4. Were the fundamentally unfair aspects of the siting proceedings harmless error?

STATEMENT OF JURISDICTION

The PCB issued its Order on March 17, 2011. STMD timely sought reconsideration on April 20, 2011, which the PCB denied on May 19, 2011. STMD timely appealed on June 16, 2011. This Court has jurisdiction pursuant to Supreme Court Rule 335 and 415 ILCS 5/41(a).

STATUTES INVOLVED

Section 39.2 of the Environmental Protection Act (415 ILCS 5/39.2) sets forth the requirements for obtaining local siting approval of a pollution control facility. Section 39.2(a) establishes nine criteria which a siting applicant must prove before siting approval can be granted. Section 39.2(d) provides, in pertinent part, “at least one public hearing is to be held by the County Board or governing body of the municipality no sooner than 90 days, but no later than 120 days, after the date on which it received the request for site approval....” Section 39.2(g) provides, “the siting approval procedures, criteria and appeal procedures provided for in this Act for new pollution control facilities shall be the exclusive siting procedures and rules and appeal procedures for facilities subject to such procedures....” Section 40.1(a) of the Act requires the PCB in reviewing the local siting decision to consider “the fundamental fairness of the procedures used by the County Board or the governing body of the municipality in reaching its decision.”

STATEMENT OF FACTS

Background

WMII seeks to expand the DeKalb landfill. The existing landfill is located northeast of the intersection of Somonauk and Girler Roads in unincorporated DeKalb County. 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)¹. 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 using the in-situ clay liner. 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).

There are two areas near the existing landfill where groundwater has been negatively impacted by the landfill, and which are undergoing remedial/corrective action. As a result, two ground water management zones (GMZ) have been established. A ground water management zone is defined as “a three

¹ References to the record made before the DeKalb County board will be in accordance with the numbering system used by DeKalb County when it filed the record with the Pollution Control Board. That entire record is numbered sequentially from C0001 through C8549. References to the PCB Common Law Record will be with the letter “P.” References to the transcript of the public hearing conducted by the PCB will be with the letters “Tr.” References to STMD’s deposition exhibits submitted as Exhibit 16 in the PCB public hearing will be by reference to the page in Appendix 4 to this Brief, since the PCB did not number the pages in this Exhibit and did not specifically include it in its numbered Common Law Record. For ease of reference, Petitioner’s Exhibit 16 from the PCB hearing is therefore included in its entirety in the Separate Appendix hereto. References to the PCB decision appealed from will be to the page number in same.

dimensional region containing groundwater being managed to mitigate impairments caused by the release of contaminants from a site subject to corrective action approved by the EPA.” (C 146). One GMZ is immediately east of the north area and the second GMZ is south of the old area.

The proposed expansion would consist of the exhumation of the old fill area and disposal of the exhumed waste in a composite lined cell, development of a sixty-one acre waste disposal area above and adjoining the landfill’s existing eighty-eight acre waste footprint (vertical overlay) and the development of a one hundred seventy-nine acre waste disposal area east of Union Ditch. The expansion’s capacity is expected to be 23.2 million tons with a disposal life of forty-six years (PCB Decision at 2).

Fundamental Fairness

WMII and DeKalb County began negotiating a host agreement for the expansion in late 2008. WMII made an initial presentation to the County Board 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 a meeting called a “Host Agreement Workshop.” (P 1031,1032). In these presentations, WMII used foam board mounted visual aids depicting the landfill and the planned future expansion (P 1076). The February 24, 2009 presentation lasted approximately ninety minutes (P 1103). These presentations involved substantive questions from county members and WMII answers to the same. No members of the public were present to ask questions (P 1302). These presentations were made in the context of host agreement negotiations, but

county board member, Patricia Vary, remembered that they were mostly about the landfill design (P 1338).

The Host Agreement between WMII and DeKalb County was approved on March 18, 2009 (P 220,221).

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 (P 183). In all cases, transportation to and from the DeKalb County government offices in Sycamore, Illinois was either provided by WMII or reimbursed by them. WMII representatives accompanied county board members from door to door, lunch was provided, questions were answered, and the public was excluded. WMII representative, Lee Adelman, who accompanied county board members on all the tours, described their purpose by stating, "the Prairie View facility located in Wilmington, Illinois is our closest facility. It is of comparable size, of comparable volume and contains the design elements that are part of the proposal in DeKalb." (P 1036). County Administrator, Ray Bockman, recalled that it was Adelman who had originally suggested that these private tours occur (P 1077). 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." (A4-4). Ms. Supple testified that she did not know that TPD meant tons per day (P 1281,1282).

The landfill tours occurred at the invitation of their sponsor, WMII (A4-2). WMII representative, Lee Adelman, conceded that county board members were shown the Will County facility because of its design similarity to the proposed expansion and that during the tours various elements of the proposed expansion were discussed (P 1032).

The impact of these private tours on the attending county board members is well documented. 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 fieldtrip 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.” (A4-1) (emphasis added).

County board member, Marlene Allen, testified 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 (P 1059). Ms. Allen also indicated that she learned from WMII that garbage received at the expanded DeKalb County facility would be treated in the same manner as at the Prairie View facility (P 1060).

County board member, Julia Fauci, acknowledged that she used what she learned during the WMII private tour to understand what was being talked about at the subsequent siting hearings (P 1139). She acknowledged that WMII indicated during the tour that the expanded DeKalb County landfill, if built, would have design characteristics similar to what she saw on the tour.

County board member, Michael Haines, was the only one who drove himself to the tour, but acknowledged that he was reimbursed for his mileage claim (P 1162). 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 had toured (P 1164,1165).

County board member, Riley Oncken, testified that, in addition to lunch, during the tour he was given a sunglasses holder which attached to his rear view mirror (P 1235). Mr. Oncken indicated that he was also told the expanded landfill would have similar characteristics to the Prairie View facility (P 1240).

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...” (P 1253)(emphasis added). Mr. Stoddard was also told what he was seeing on the tour was similar to what was proposed for DeKalb County (P 1255). Mr. Stoddard further testified,

“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 ensure that the liner maintained its integrity throughout the life of the project.” (P 1256).

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 expansion of the DeKalb County landfill (P 1339). Ms. Vary found the tour very helpful in terms of understanding the subject matter of the siting application (P

1340). She testified that she used what she learned on the tour to understand the evidence presented at the siting hearing (P 1341,1342).

County board member, Anita Jo Turner, also testified that she used the information learned on the tour to understand the evidence at the subsequent siting hearing (P 1325).

At all times relevant hereto, the DeKalb County jail was badly in need of expansion (P 1312). DeKalb County pays \$600,000.00 per year for other counties to take their over flow jail inmates (P 1233). County board member, Steve Walt, testified that when he was elected to the County Board, jail expansion was the Board's number-one priority (P 1359). County board Chairman, Ruthann Tobias, acknowledged that expansion of the existing jail has been under discussion since 1994 (P 1312).

The cost of an expanded jail would be approximately \$29,000,000.00 (P 1088). In 2009, DeKalb County retained Scott-Balice Strategies to advise them on planning and funding jail and courthouse expansion. On October 21, 2009 the County Board adopted resolution R2009-61, authorizing a capital improvement program incorporating the financing plan developed by Scott-Balice Strategies. (A4-25). The approved financing plan states, "the County is working with WMII to enter into a contract starting in December of 2012 that will produce roughly \$120,000,000.00 for the County over 30 years. Given the current market and certain credit assumptions, this revenue stream can accommodate a bond issuance in excess of the \$30,000,000.00 estimated project cost for the jail expansion. (A4-28). The County Board 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, advised the Committee that the landfill expansion application was filed on November 30, 2009. (A4-21).

Mr. Bockman testified that bonds for the jail expansion cannot be authorized until a revenue stream that can guarantee them becomes available (P 1089). County board member, Julia Fauci, testified that the jail expansion project is on hold, pending a determination of whether the landfill host fees are going to be available (P 1140). County board member, Riley Oncken, identified two possible sources of funding the jail expansion, fees from the landfill expansion or general obligation bonds, but he did not know how general obligation bonds could be issued without raising taxes (P 1233). County board member, Paul Stoddard, stated that he did not know how realistic any alternative, other than the tipping fees (host fees) would be for funding the jail expansion (P 1257). Mr. Stoddard also indicated that he understood this during the time that the landfill siting proceedings were happening (P 1257).

The minutes of the County Board Law and Justice Committee meeting from February 2, 2010, one month before the start of the scheduled landfill siting hearing, 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." (A4-21, 22).

On March 18, 2009, the day the County Board approved the WMII Host Agreement for the expansion, Board Member, Oncken, wrote to a constituent stating, "The availability of a local facility which guarantees waste disposal for DeKalb County residents for the next 25 years is enticing." (A4-38). Several weeks later, on April 8, 2009, Mr. Oncken wrote, "Waste Management has been a good neighbor for a good many years and has reacted each time we have asked them to take action in response to odor, debris or other issues. We are confident they will continue the same level of responsiveness." (A4-38).

During the Summer of 2009, Dan Kenney, who ultimately became one of the officers of STMD, was told by county board member, Julia Fauci, that expansion of the landfill was, "pretty much a done deal," and that, "the good thing is we have negotiated some things for ourselves." (Tr 50). Mr. Kenney further testified that during the same conversation, board member, Fauci, told him positive things about the landfill expansion such as the availability of improved technology (Tr 51). Around the same time, on August 26, 2009, Ms. Fauci sent an email to a constituent stating, "We tried to attract other waste handlers, but no one would come in for the amount of waste we generate. If we send our waste to another county our bills would skyrocket, so yes I voted to allow them to expand. There was really no other choice." (A4-45) (emphasis added).

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." (A4-30, 32).

One week before the scheduled start of the landfill expansion hearing, Ms. Fauci again wrote to a constituent and 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.” (A4-46).

In March 2009, WMII representative, Lee Adelman, had sent county board member, Patricia Vary, a newspaper 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 of the County Board as well as the solid waste committee (A4-30, 32).

After the expansion siting hearings began, on April 1, 2010, county board member, Mike Haines, 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.” (A4-29). Around the same time, county board member, John Hulseberg, told a citizen, Rosemary Slavenas, that if

DeKalb County did not take the landfill, then Cortland might and it would get all the money (Tr 193).

On the first day of the public siting hearing on the proposed expansion, board member, Riley Oncken, 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 that they had too much time on their hands, because “we have already made up our minds.” (Tr 18). Mr. Oncken has subsequently denied making the statement about county board members’ minds being made up, but he did admit telling Ms. Sherman that the members of the opposition at the public hearing had too much time on their hands (P1236,1237). Mac McIntyre, however, testified that he also heard the statements that board member Oncken allegedly made to Paulette Sherman (Tr 69).

Mr. McIntyre also testified that during a break in the public hearings, he overheard board member, Anita Turner, state that she was a high school chemistry teacher and that Dr. Serewisz (an opposition expert witness) did not know anything and that his testimony should be disregarded (Tr 68).

On May 10, 2010, the day of the final County Board vote on the proposed expansion, board member, Steve Walt, sent an email to Rosemary Slavenas 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.” (A4-48). When asked why he would make such a statement to Ms. Slavenas, Mr. Walt testified, “I saw her act at the hearing – at the public hearing – you should have been there. It was priceless.” (P 1361). Mr. Walt added, “It didn’t

appear to me that the purpose of the hearings was for some wingnut to bloviate about how they thought things should be done.” (P 1361).

As is typical, DeKalb County had, prior to the start of the proceedings herein, adopted a pollution control facility siting ordinance and articles of rules and procedures to accompany the same (C 6801-6822).

Section 5 of the Rules and Procedures for Implementation of the Ordinance

states,

“for purposes of the hearing, a “participant” may only be one of the following, an owner of property subject to notification under Section 50-54(a)(3) of the Ordinance, an attorney representing said property owners, or an official or an attorney representing a township or a municipality located within one and one-half miles of the proposed facilities. 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” (C6802) (emphasis added).

On the first day of the public hearing the hearing officer waived the exclusion and announced that everyone who wished could be a participant.

Relevant evidence from the siting hearing

At the siting hearing which commenced on March 1, 2010, WMII called witnesses who testified in support of each of the nine statutory siting criteria in Section 39.2(a) of the Act. WMII’s witnesses concluded that in their expert opinions each of the criteria had been established.²

WMII presented four witnesses who testified regarding the design, location and proposed operation of the facility and how it relates to public health, safety,

² In the hearing before the PCB, Petitioners argued that the County Board’s Decision on three of the siting criteria was against the manifest weight of the evidence. In this appeal Petitioners only address the finding on criterion ii (Public Health Safety and Welfare), and therefore only the relevant facts pertaining to that criterion will be presented.

and welfare. STMD called one witness, Dr. Aubrey Serowitz, who testified regarding hydrogen sulfide problems at the existing facility.

Andy Nickodem, a professional engineer, is the proposed designer of the expansion (C 6853). The expansion will contain a composite liner system consisting of a three-foot thick compacted low permeability soil layer, a sixty mil double sided textured HDPE geomembrane and geotextile cushion. In addition, a geocomposite liner will be placed under each central leachate collection pipe and each sump (C 2002, 6863-64, 6973). Additionally, a leachate management system to collect leachate and keep it off the liner will be installed (C 6867). The proposed expansion will include a final cover system to minimize infiltration of rainwater, consisting of a one-foot soil layer, a grading layer, and a forty mil textured low-density polyethylene geomembrane, a geocomposite drainage layer, and three feet of protective soil (C 6868-69).

The facility will also have an engineered storm water collection system, a gas management system to control landfill gas and odor, and an environmental monitoring system to measure the performance of the engineered barriers (C 6981, 6872, 6874). Mr. Nickodem testified that the expansion has been designed to meet or exceed all applicable regulations and requirements of the Act (C 6842).

Dale Hoekstra, WMII's Director of Operations who oversees nine landfills, testified that the expansion will accept only municipal solid waste, construction and demolition debris, non-hazardous special waste and landscape waste (C 7093, 7094). Mr. Hoekstra described in detail the load checking procedures

which would be employed (C 7097, 7101). He explained that the disposal of waste exhumed from the old area of the existing landfill will be made into a new composite lined area of phase I of the west unit (C 7095). Mr. Hoekstra also described the proposed procedures for control of litter, odor, dust, and mud (C 7098-99).

Mr. Hoekstra acknowledged past hydrogen sulfide odors at the existing landfill and explained those as resulting from the disposal of ground gypsum board (C 7098, 7137, 7195). He indicated that WMII has adopted a policy against accepting ground gypsum board at its facilities and that WMII has added five additional gas extraction wells to the existing gas extraction system at the landfill (C 7099).

Joan Underwood, a professional geologist and hydro-geologist with extensive experience evaluating ground water issues, testified regarding the geologic and hydro-geologic conditions at the site (C 7200, 7205-7210). She testified that the site overlays the Silurian dolomite, a low yielding aquifer (C 7208-09). She testified the lower aquifer, which provides private drinking water supplies, is separated from the upper aquifer (C 7210). She described the proposed ground water monitoring system as protective of the public health safety and welfare (C 7213).

WMII proposes to vertically expand the north area of the existing landfill with a partial overlay of that unit (C 138). The old area of the existing landfill is impacting ground water (C 6878). Whether or not the north area is impacting ground water is disputed (C 6877). However, regional ground water flow under

the site is from the northwest to the southeast, meaning directly from the north area to the east groundwater management zone adjacent to the north area (C 191).

Danica Lovings, a citizen, in public comment, stated that she drives on a nearby highway every day and that, "on any one 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 landfill smell going across Cortland grade school (C 6897). WMII's engineer, Mr. Nickodem, acknowledged that he could understand why parents at Cortland Elementary School might wonder what their children are breathing when at school (C 6891).

Dr. Aubrey Serowitz, a 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 described hydrogen sulfide as extremely toxic (C 7389, 7391). He testified that when he drives by the existing landfill he rolls his window down and continues to smell hydrogen sulfide, and that there is insufficient protection to the public from hydrogen sulfide emissions from the facility (C 7399). Dr. Serowitz concluded that, in his expert opinion, the facility was not so designed, located or proposed to be operated that the public health, safety, and welfare would be protected (C

7400). He pointed out, from a toxicity standpoint, that if one can smell hydrogen sulfide, the concentration level is already harmful (C 7402).

Andy Nickodem, WMII's design engineer, testified regarding the proposed expansion's ability to withstand seismic events. He testified that the facility is 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 the expansion was designed and the siting hearings began, there had been an earthquake in the vicinity of the proposed facility which had caused the U.S. Geological Survey to raise the peak acceleration standard at the site location to .10g. The County Staff Report acknowledged this and indicated that the 1.38x factor of safety contained in the siting application will be reduced by virtue of the new standard and may, or may not, be under the required 1.3x regulatory factor of safety (C 8344).

ARGUMENT

INTRODUCTION

The Decision of the PCB below is seventy-four pages. This volume, however, does not equal substance. The PCB's Decision contains a laborious recitation of the procedural history and the arguments of the respective parties on each issue. This recitation of the arguments should not be confused with an analysis of the arguments, as there is none. Similarly, there is an extensive recitation of the facts, most of which are not disputed, particularly with respect to the fundamental fairness arguments.

The procedural and factual history as set forth by the PCB take up the first thirty pages of the Decision. The PCB's analysis of the issue regarding the County ordinance improperly prohibiting participation starts on Page 35 and takes up approximately one page. That analysis references one previous decision of the PCB and no Appellate case law. The analysis of the access to the application issue (not argued in this appeal) again takes up one page and references one previous decision of the PCB and no Appellate case law. The analysis of all of the issues related to *ex-parte* communications again is just under one page. The analysis of the private tours issue (the only one of the *ex-parte* communication issues carried forward into this appeal) is one paragraph and cites no authority whatsoever. The PCB's analysis of bias and pre-judgment is just over two pages.

The record in this case is approximately ten thousand pages. There are millions of dollars at stake from the County's and applicant's perspectives. From the public's perspective there are numerous issues of public health, safety, and welfare, including allegations supported by expert testimony that hydrogen sulfide emissions from the existing landfill are contaminating a nearby community and school, as well as allegations supported in the applicant's own materials that WMII proposes to vertically expand the landfill over a disposal unit that is already impacting ground water. There are significant legal principles at issue, as this decision represents perhaps the PCB's furthest departure yet from the real review of fundamental fairness mandated in Section 40.1 of the Act in favor of rubber stamping local action. The gravity of all of these issues merits some

actual and real analysis by the PCB, analysis with reference to controlling case law or, at least, controlling legal principles. The PCB's Decision is devoid of such analysis. After reading, and re-reading, the Decision, STMD understands only that the PCB rejected its arguments, but still does not understand why it did so, or why it abandoned well established rules regarding *ex parte* contacts and condemning applicant sponsored private tour for local decision makers.

I. STANDARD OF REVIEW

The standard of review of an administrative agency's decision depends on whether the Court is considering a question of law, a question of fact, or a mixed question of law and fact. *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill.2nd 191 (1998). Questions of law are reviewed *de novo*. Questions of fact are reviewed under the manifest weight standard.

Fundamental fairness issues are mixed questions of law and fact and are reviewed under the clearly erroneous standard. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill.2nd 380, 392 (2001). Courts reverse under the clearly erroneous standard when "left with a definite and firm conviction" that a mistake was committed. *Id.* at 395.

Although it is a fundamental fairness issue, consideration of whether the County ordinance prohibiting participation by the general public in the siting hearing was fundamentally unfair is a pure question of law in that no factual elements are involved, and the Court is asked merely to assess the meaning and impact of an ordinance. As such, this issue should be reviewed on a *de novo* basis.

**II. THE RULES AND PROCEDURES OF THE DEKALB COUNTY
POLLUTION CONTROL FACILITIES' SITING ORDINANCE
BARRING THE GENERAL PUBLIC FROM PARTICIPATING IN
THE SITING HEARING WERE FUNDAMENTALLY UNFAIR.**

Section 39.2(g) of the Act states that the procedures provided for in the Act for local siting approval “shall be the exclusive siting procedures.” Section 40.1(a) of the Act requires the PCB to review and consider the fundamental fairness of the procedures used by the local siting authority. Section 39.2(c) of the Act also requires a public hearing on the siting application. When these Sections are read together it is clear that the local procedures for granting siting approval must be fundamentally fair.

The PCB decision herein (at Pg. 31) correctly points out that participants in a local siting hearing do not have property interest at stake and the procedures at the local level must only comport with the adjudicative due process standards of fundamental fairness. *E & E Hauling, Inc. v. PCB*, 116 Ill.App.3d 586, 596, 451 N.E.2d 555, 546 (2d Dist. 1983). Fundamental fairness requires the “minimal standards of procedural due process, including the opportunity to be heard, the right to cross-examine adverse witnesses, and impartial rulings on the evidence.” *Land and Lakes Company v. PCB*, 245 Ill.App.3d 631 (3d Dist. 1993) (emphasis added). 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 County Defenders v. PCB*, 139 Ill.App.3d 588, 487 N.E.2d 743 (2d Dist. 1985).

Despite the foregoing, the siting authorities may have their own procedures to supplement the procedures in the Act, so long as they are

consistent with the requirements of Section 39.2. *Waste Management of Illinois, Inc. v. PCB*, 175 Ill.App.3d 1028, 530 N.E.2d 682 (2d Dist. 1988). This means that local procedures must be consistent with the requirements of fundamental fairness. Any procedures that are inconsistent with the requirements of Section 39.2 and 40.1 will render the proceedings fundamentally unfair.

Prior to the filing of the WMII siting application DeKalb County had adopted its own pollution control facility siting ordinance along with a set of rules and procedures to implement the same. Section 5 of the Rules and Procedures expressly forbade participation by anyone other than adjacent municipalities and those property owners entitled to notice of the filing of the siting application under Section 50-54(a)(3) of the County ordinances. Section 5 states:

“for purposes of the hearing, a “participant” may only be one of the following, an owner of property subject to notification under Section 50-54(a)(3) of the Ordinance, an attorney representing said property owners, or an official or an attorney representing a township or a municipality located within one and one-half miles of the proposed facilities. 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), referenced hereinabove, essentially mirrors the notice requirements for adjoining property owners as set forth in Section 39.2(b) of the Act, so that Section 5 of the Rules and Procedure thereby effectively limits participation only to property owners within 400 feet of the subject site and municipalities within 1.5 miles of the subject site. In other words, for concerned citizens, environmental groups, the general public and everyone else, the minimum standards of adjudicative due process do not apply in that they are

expressly forbidden by local ordinance from participation, and the most elemental fundamental fairness right, the right to cross examine adverse witnesses.

By excluding from participation and the right of cross-examination inherent in minimal due process, all but a select handful of individuals and neighboring municipalities, the DeKalb County Rules and Procedures are fundamentally unfair on their face. The right to engage in meaningful examination of adverse witnesses is a minimal requirement of fundamental fairness. *Daly v. Pollution Control Board*, 264 Ill.App.3d 698, 637 N.E.2d 1153 (1st Dist. 1994). In contrast, this Court has previously characterized the procedure for deciding landfill siting applications as one in which “public participation not only is encouraged, but is required by statute.” *Waste Management of Illinois v. Pollution Control Board*, 123 Ill.App.3d 1075 (2d Dist. 1984).

The PCB, in its 74 page, single spaced decision, almost all of which is devoted to a recitation of the evidence and arguments of the respective parties, devotes approximately one page to discussion of this critical issue. That discussion consists of an observation that the local hearing officer waived the application of Section 5 on the first day of the public hearing, thereby allowing everyone who wished to participate to do so, and a reference to an old PCB Decision that purportedly approved the principle of local governments creating “different requirements for those who wish to participate as parties, presenting testimony and evidence, then for members of the public who simply wish to comment and ask questions.” (PCB Decision Pg. 35).

The endorsement of different procedural requirements for different classes of participants was announced by the *PCB in Slates v. Illinois Landfills, Inc.*, PCB 93-106, Slip Opinion at 11, 16. The PCB's reliance on *Slates* is, however, entirely misplaced, as *Slates* does not address the issue before the Court now. *Slates* only endorses the concept of imposing registration, timing and pre-filing requirements (all procedural) on participants in order to promote an orderly hearing and to minimize the inevitable trial by ambush that occurs in public hearings where there is no previous discovery opportunity. *Slates*, however, does not disenfranchise or exclude, nor does it endorse exclusion, of any person or category of persons. Procedurally regulating participation, as occurred in *Slates*, does not provide any legal support for prohibiting participation.

Moreover, limiting the general public to public comment is a substantive deprivation of rights. It is well established that in landfill siting hearings, public comment is not given the same legal weight as sworn testimony. *City of Geneva v. Waste Management of Illinois, Inc. v. PCB 94-58, July 21, 1994*).

The PCB Decision's inference that the local hearing officer's decision to waive the exclusionary effect of Section 5 on the first day of the public hearing somehow cures the defect completely misses the point. The County's Articles of Rules and Procedures, unlike the siting application itself, were published on the County's website, and we will never know who looked at these, determined that they will not be allowed to participate and went on to other things. In lieu of legal analysis, the PCB Decision simply observes that STMD has failed to produce an individual who failed to participate because of the prohibition of Section 5 of the

Rules. This again misses the point and improperly attempts to shift the burden to STMD to prove unfairness, when the relevant ordinance is unfair on its face. The fundamentally unfair effect of Section 5 cannot be cured by waiving its application on the first day of public hearing, since those that have been kept away by the exclusionary rule will not be present to hear the waiver.

The PCB fails to acknowledge the inherent truth of the fact that it is impossible to identify the person who did not appear because he thought he would not be allowed to participate. What makes an Ordinance like this so pernicious is that we can never know how many people were kept away by the clear exclusionary language and its obvious chilling effect. The PCB Decision would suggest that petitioners need to identify or somehow account for those whose participation was discouraged and, in fact, was for all practical intents and purposes prohibited.

Those few that initially appeared and attempted to participate in this case did so in spite of the rules explicitly barring their participation. We will never know who or how many members of the public failed to participate because of the publically published exclusionary rules. An announcement on the first day of the public hearing that the prohibition on participation in Section 5 would not be enforced is not a cure for those that failed to appear on that first day.

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 reasonably 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 90 days after a siting application is filed before the public hearing in order to give participants an opportunity to prepare. Believing that they would not be allowed to participate except for mere public comment, potential participants would likely not have arranged for witnesses or taken other steps to prepare a cross-examination or evidentiary presentations. It is therefore not surprising that STMD was not represented by counsel during the local public hearing.

Not only does the PCB Decision not understand or analyze the problem with Section 5 of the Rules and Procedures, but the PCB's ultimate conclusion is contrary to its own prior decisions regarding public participation and the right to prepare that is inherent in such participation. In *American Bottom Conservancy v. Village of Fairmont City*, PCB 00-200, Slip Opinion at Pg. 12 (October 19, 2000), the Board held that depriving a would be participant of meaningful access to the siting application until two weeks before the actual siting hearing rendered the proceedings fundamentally unfair because it shortened available time that potential participants had to prepare for the public hearing.

Additionally, the PCB has consistently recognized that procedures which have a "dampening effect" on participation are fundamentally unfair. *Board of Trustees of Casner Township v. County of Jefferson and Southern Illinois Landfill, Inc.*, PCB 84-175, Slip Opinion at Pg. 9 (April 4, 1985). Full participation is one of the hallmarks of the pollution control facility's siting process. Anything that dampens or chills public participation or preparation cannot be tolerated and must be found fundamentally unfair as a matter of law.

**III. WMII's PRIVATE TOURS FOR BOARD MEMBERS TO A
SIMILAR FACILITY RENDERED THE PROCEEDINGS
FUNDAMENTALLY UNFAIR.**

The facts of the private tours conducted and escorted, door to door, by WMII are uncontested. The admitted purpose of these tours was to provide county board members with information about another WMII landfill with similar design and operational characteristics to the proposed expanded landfill. These tours were conducted in a controlled environment and in small groups, which avoided open meetings and problems and which gave WMII ample opportunity for close one on one contact with the decision makers. The tours terminated shortly before the siting application was filed. During these private tours, 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 tours. We can never know exactly what was said, what was presented, or what questions were answered during the private tours. We do know, however, that WMII had the fifteen county board members who attended as a captive audience from door to door (except Board Member Haines, who drove his own car) and in small groups for the better part of a day. All of 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 light possible, without any input or involvement of the public.

The WMII sponsored private tours for Board Members are in the general category of *ex-parte* contacts. The PCB Decision recognized that *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 the other parties in the proceeding. (PCB Decision Pg. 40). The PCB Decision also recognized that one of the requirements of adjudicatory due process and fundamental fairness is the prohibition of *ex-parte* contacts. (PCB Decision Pg. 40).

Both the PCB and the Appellate Courts have previously 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 in finding an applicant sponsored tour to a comparable facility fundamentally unfair, "we find the petitioners were prejudiced by being unable to appropriately address all the impressions formed by the council members who participated in the tour.) (Slip Opinion at 5). Similarly, in *Concerned Citizens for a Better Environment v. City of Havana*, PCB 94-44 (May 19, 1994), the Board found that,

"Applicant 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 Opinion at 7).

The principle is clear and has been endorsed by the Appellate Court. The standard for whether or not a tour of another facility is fundamentally unfair was set forth in *Southwest Energy Corp v. PCB*, 275 Ill.App.3d 84, 655 N.E.2d 304 (4th 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). This determining principle, that the opponents of siting be given access to the same information, was the distinguishing factor in the only Appellate case where a facility tour was not condemned, because in that case a siting opponent participated in the tour. (*Tate v. PCB*, 188 Ill.App.3d 994, 554 N.E.2d 1178 (4th Dist. 1989).

The PCB Decision’s response to the argument is, to say the least underwhelming. Once again, the PCB provided no actual analysis. Their Decision disposes of this issue in one paragraph that contains no analysis and no legal authority, but does contain a significant factual misstatement. (PCB Decision Pg. 45).

The PCB summarily finds that the private facility tours sponsored by WMII were not *ex-parte* contacts because they predated the filing of the siting application. Interestingly, this unsupported conclusion comes immediately after the PCB Decision notes that the prohibition against *ex-parte* contacts is intended to protect the public and to ensure that each person has equal access to the ears of the decision makers and each person is aware of all the information that is being placed before the decision makers.

This finding that, as a matter of law, *ex-parte* contacts cannot occur prior to the filing a siting application, is apparently based on a single sentence in the PCB's 1996 Decision in *Residents Against a Polluted Environment v. County of LaSalle*, PCB 96-243, Slip Opinion at 9 (September 19, 1996). However, that holding has been overruled, or at least clarified, both by the Appellate Court and the PCB itself. There is certainly no logic in holding that the filing of a siting application triggers the clock on *ex-parte* contacts. The relevant consideration is the potential harm from private communication with decision makers on the substance of the adjudication, regardless of when that communication may have occurred. The fact that the communication may have occurred a day, a week, or a month prior to the physical filing of a piece of paper makes the communication no less potentially damaging. If anything, holding that private communications regarding the substance of a proposal are not *ex-parte* communications if made before a certain arbitrary date, encourages parties to engage in the very conduct which the historic ban on *ex-parte* communications is intended to prevent.

In *Land and Lakes Co. v. PCB*, 319 Ill.App.3d 41, 743 N.E.2d 188 (3d Dist. 2000), the Court acknowledged that prejudicial pre-filing *ex-parte* contacts could occur and did consider such contacts in its evaluation of fundamental fairness. Since this holding by the Appellate Court seemed at odds with the PCB's previous holding in *Residents Against a Polluted Environment*, the PCB had to subsequently address the apparent contradiction in the law, and it did so in *County of Kankakee v. City of Kankakee*, PCB 03-31 (January 9, 2003), where it stated,

“In *Land and Lakes*, the 3d 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 makers, in the case the City, may factor into the fundamental fairness calculus. This so because pre-filing contacts may be probative of pre-judgment of adjudicative facts 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 Country as the evidence applies to the issue of fundamental fairness.” (Slip Opinion at 5)(emphasis added).

The PCB, in *County of Kankakee*, went on to note that their previous decisions did 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 PCB concluded in *County of Kankakee* that the fact that *ex-parte* contacts occurred before an application was filed goes to their weight, rather than to the admissibility.

The decision of the PCB in this case is, therefore, a giant step backwards and an invitation to prospective siting applicants everywhere to use all their persuasive powers, privately and otherwise, prior to the filing of their siting application, because they can be confident that their actions, which would otherwise be condemned as inappropriate and grossly unfair, will not even be scrutinized.

In an apparent attempt to justify its holding, the PCB, in this case, notes that the local ordinance authorized the County to negotiate a host agreement with WMII, and that the facility tours of WMII’s Prairie View Landfill were offered to the county board members during the course of the Host Agreement

negotiations (PCB Decision Pg 45). This statement is totally incorrect. The Host Agreement between WMII and DeKalb County was finalized and approved on March 18, 2009. The private tours did not begin until July, 2009 and continued until almost the eve of the application being filed.

In a final attempt to justify its otherwise unsupported holding, the PCB Decision points out in a footnote that WMII's private tours, unlike the one condemned in *Southwest Energy*, "were general in nature, of short duration, and included only a modest lunch on site." (PCB Decision Pg 45). Petitioners take no issue with the modest lunch, but note that the facts contradict the PCB's other findings here. The tours were all day affairs and were specifically designed to show the county board members privately all the main aspects of landfill construction and operation. That is why several county board members testified during their depositions that they found these tours so informative and helpful.

The real truth, however, is that no one can ever really know what precisely was said during the tours or how specific the presentations, questions and answers might have been, because the opponents were not given an opportunity to participate. It goes without saying that the principles about equal access to information which guided the Appellate Court to the correct decision in *Southwest Energy* are equally applicable here and have nothing to do with whether the private presentation occurred before or after the siting application was filed.

Certainly, however, the PCB's ascertain that the private tours were associated with Host Agreement negotiations is factually incorrect. They had nothing to do with Host Agreement negotiations, and in fact, WMII's own

representative who attended all the tours, Lee Adelman, admitted as much when he stated that the county board members were shown WMII's Will County facility because of its design similarity to the proposed expansion and that during the tours various elements of the proposed expansion were discussed.

The PCB Decision in this case, citing to one of its earlier opinions states,

"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 right 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 to a hearing." (PCB Decision Pg 40).

Each of those three factors is obviously and completely applicable to WMII's pre-filing private tours for the decision makers. This Court has previously elaborated on how to evaluate the result of improper *ex-parte* contacts. In *E & E Hauling*, 116 Ill.App.3d 586, (2d Dist. 1983), this Court stated,

"A court must consider whether as a result of improper *ex-parte* communications, the agency's decision making process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either to an innocent party or to the public interest that the agency was obliged to protect. In making this determination a number of considerations may be relevant: the gravity of the *ex-parte* communications; whether the party making the improper contacts benefited from the agency's ultimate decision; whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond, and whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose."

The first four prongs of this test again are obviously and easily met by careful scrutiny of the private tours. The fifth prong, whether remand would serve a useful purpose, will be addressed in a separate argument.

IV. THE COUNTY BOARD PREJUDGED THE APPLICATION

The cumulative effect of the mini-hearing presentations given to the County Board by WMII during the host agreement negotiations and the private tours of WMII's Prairie View facility 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, this Court 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. While the receipt of host fee revenues is not in and of itself a disqualifying bias, the fact that the County Board had, months before the public hearing on the siting application, committed to fund its desperately needed jail expansion with those revenues is persuasive evidence of prejudgment. The County Board 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 \$600,000.00 per year to house its jail inmates in other counties due to its own inadequate jail. The February 2, 2010 Minutes of the County Law and Justice Committee contemplated authorizing the bonds for the jail expansion shortly after conclusion of the siting hearing. Clearly the landfill siting proceeding and the expansion of the jail were connected projects, proceeding on tandem timelines, with the jail expansion driving the outcome of the siting proceeding.

The comments of County Board members in the summer of 2009, after the Host Agreement had been approved, while the WMII private tours were going on and while the issue of the jail expansion was already on the table, that they

had no choice but to approve a landfill expansion and that the expansion was a “done deal” are completely consistent with a conclusion that prejudgment had occurred. Whether that prejudgment resulted from a sense of financial desperation, fear of the consequences of not approving expansion, or County Board members being won over during their private tours, is irrelevant. It is still prejudgment regardless of the motive behind it.

Prejudgment is also the only rational explanation for the dismissive comments of Board members Oncken, Haines, Hulseberg, Turner and Walt after the public hearing had begun and before the evidence was concluded. The final County Board vote on the siting application was sixteen for and eight against (C 8534, 8535). Adding to those comments the pre-hearing expressions of prejudgment by Board members Fauci and Vary, the net result is that almost half of the votes in favor of approval have documented expressions of prejudgment or bias against the opposition.

The PCB responded to these arguments in two ways. It first noted that “any inferences that potentially could be drawn about possible bias or predisposition from various comments made at various times by County Board members are more than negated by their sworn testimony. County Board members did testify during discovery in the PCB review and in the PCB hearing that they voted solely on the basis of the evidence and arguments concerning the Section 39.2 criteria as presented during the siting hearings. (PCB Decision Pg 53, 54). However, this conclusion is based upon the self-serving testimony of County Board members in response to questions posed to them by WMII’s

attorney. This conclusory testimony is of dubious credibility when compared to the testimony of the same County Board members about how impressed they were with their private tours of the WMII landfill in Will County, how much they learned and how that helped them at the siting hearing. Secondly, the testimony was elicited under circumstances which cast further doubt on its credibility. All but one of the County Board members who were asked this question by WMII's attorney acknowledged that they had met with him to prepare for their depositions (P 1065,1153,1169,1240,1269,1303,1330,1345).

The PCB's legal basis for rejecting STMD's allegation of prejudgment by the County Board is based on this Court's prior decision in *E&E Hauling v. PCB*, 116 Ill.App.3d 586 (2d Dist. 1983). The PCB's analysis however demonstrates a fundamental lack of understanding, both of the facts and the significance, of the holding by this Court in *E&E Hauling*.

First of all, the PCB misconstrues the standard for determining prejudgment, noting that the standard for proof of the same is high. Citing one of its own previous opinions, the PCB Decision notes that "the presumption of the validity of the actions of a public official will be overcome only where it is shown by clear and convincing evidence that the official has an unalterably closed mind in critical matters." (PCB Decision Pg. 52). The PCB then goes on to note that the standard for finding prejudgment of an adjudicative fact by a County Board member, or the County Board as a whole, is "if 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." (PCB Decision Pg 52). The PCB

Decision, therefore, seems to treat the unalterably closed mind test as a being equivalent to the disinterested observer test in terms of the quantum of proof required to establish prejudgment. In fact, this Court in *E&E Hauling* was confronted with those two very different standards and had to choose between them, with the Court ultimately rejecting the unalterably closed mind test and expressly adopting the disinterested observer test, plus noting that the two test were actually different. This Court concluded that the unalterably closed mind test is a standard used in administrative rule making proceedings and that the disinterested observer test is more appropriate for adjudicatory proceedings (116 Ill.App.3d 598).

The facts of *E&E Hauling* are also somewhat unique. In that case the County had, by ordinance, approved expansion of a landfill prior to the legislature adopting the Section 39.2 local siting hearing requirement. This requirement was adopted prior to a permit being issued by the IEPA, and the County then was required to conduct a formal Section 39.2 siting hearing, at which it, once again, approved the expansion. This Court found that the act of prior approval created inherent bias and prejudgment. The Court also found that, in light of the unique facts and the “inadvertent” nature of the inherent bias, the rule of necessity would be applied, and therefore the approval was not reversed. The Court, however, expressly limited its application of the rule of necessity to the unique fact pattern presented, and noted that if decision makers were aware at the time of their acts which evidence prejudgment, that they would later have to decide on a siting

application, invoking the rule of necessity would create genuine injustice and would effectively foster biased adjudication (116 Ill.App.3d. at 603).

The Supreme Court's further comment in affirming this Court's decision in *E&E Hauling* that the receipt of host fees does not create inherent bias (107 Ill.2d 33, (1985)), is not relevant to this appeal, since STMD does not argue that the bias in this case was inherent. Instead, STMD argues that the bias was real and demonstrable, not based upon the fact that the County had the possibility of receiving host fees from approving the expansion, but based upon the fact that the County had committed to spend those host fees to secure bonds for its jail expansion before the citing hearings ever began.

The PCB further demonstrates its misunderstanding of the standard for determining prejudice by citing to a 3d District case, *Residents Against a Polluted Environment v. Pollution Control Board*, 293 Ill.App.3d 219 (3d Dist. 1997), "for the principle that a showing of an unalterably closed mind in critical matters must depend on evidence of actual bias." (PCB Decision Pg 52). The Court in *Residents Against a Polluted Environment* factually found that Appellant had failed to provide evidence of prejudice only because it failed to show any pre-hearing contacts between the siting applicant and the County Board other than the allowable contacts during the process of the County Board amending its solid waste management plan (293 Ill.App.3d at 224). The Court then held that "elected officials are presumed to act objectively and at least a minimal showing of bias, if not a formal offer of proof, must therefore be made to warrant a remand." (293 Ill.App.3d at 225)(emphasis added). This actual holding from

Residents Against a Polluted Environment, contrary to the PCB's interpretation, is a far cry short of the standard the PCB imposed on STMD in this case.

V. THE FUNDAMENTAL UNFAIRNESS OF THE PROCEEDINGS WAS NOT HARMLESS ERROR.

All parties to a landfill siting hearing are entitled to a fundamentally fair proceeding, which includes at a minimum an unbiased decision based on the evidence. *Waste Management 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). Historically, an unfair and biased proceeding has been deemed to mandate remand or reversal and could never be considered harmless error. (*Girov v. Keith*, 212 Ill. 2d 372 (2004), *Danko v. Board of Trustees of City of Harvey Pension Board*, 240 Ill.App. 3d 633 (2nd Dist. 1992)). The reason for this is that it is essentially impossible to discern how the bias or prejudice of some may have infected the decision making of the rest. This Court, in a very recent decision, however, found that errors which are traditionally thought of as the kind that may render proceedings fundamentally unfair were harmless error or did not warrant disturbing the end result. In *Fox Moraine, LLC, v. United City of Yorkville*, 2-10-0017 (Nov. 8, 2011), this Court found that the PCB's failure to compel production of a secret report which was considered by the city council members in coming to their final decision was harmless error (at Pg. 33). This Court also found that the bias of several council members was insufficient to render the proceedings fundamentally unfair in their entirety, since the disqualification of those members would not have changed the outcome (at Pg. 44).

Therefore, in an over-abundance of caution, STMD now argues that the fundamental fairness errors which occurred in this case are not harmless errors. The basis for this argument is that this Court can take no comfort from the record below that the right decision on the merits of the siting application was made, and that there are significant contested and close issues which demand a full and fair hearing.

STMD previously argued before the PCB that the local decision on three of the siting criteria was against the manifest weight of the evidence. The PCB rejected that argument, and arguably, there was probably sufficient evidence and argument on both sides that neither an approval nor a denial would have been against the manifest weight of the evidence.

While the PCB Decision, extensively reciting the evidence and argument on both sides of the issues related to the contested siting criteria, suggests that there may be a rational basis to affirm either an approval or a denial, the PCB's Decision below is as devoid of actual analysis of the siting criteria as it is of analysis of fundamental fairness arguments. The role of the PCB is, however, clearly more than to merely search for minimal evidence in support of a finding so that the finding can be affirmed. Yet that is exactly what the PCB did in this decision.

The most important siting criterion is set forth in Section 39.2(a)(ii) of the Act, whether the facility is so designed, located, and proposed to be operated that the public health, safety, and welfare will be protected. The PCB's analysis of all of the issues raised with regard to this criterion consists of approximately

one page where the PCB concluded, “It was more than reasonable for the County Board to find that the expansion was designed, located, and proposed to be operated so that the public health, safety, and welfare will be protected.” (PCB Decision Pg. 69). This falls a far cry short of the Supreme Court’s mandate to the technically qualified PCB to conduct a hearing and to use that technical expertise to examine the record to determine whether the same actually supports the local decision. *Town and County Utilities, Inc. v. PCB*, 225 Ill.2d 103, 120 (2007). In conducting such a hearing, the PCB, an administrative agency, would be “required to make actual 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. State Labor Relations Board*, 181 Ill.2d 191 (1998).

The inquiry mandated by *Town and County* did not occur in this case. If this Court accepts the proposition that the local decision was based on prejudice for one reason or another, rather than on the evidence presented at the hearing, it can draw no comfort from the cursory, non-technical review by the PCB that the right decision was even inadvertently reached.

What is clear on this record is that, even without the assistance of an attorney, the citizens opposing the expansion raised significant public health, safety, and welfare concerns which remain unresolved.

The fact that the north area, over which WMII proposes to vertically expand, has a groundwater management zone immediately to the east and down gradient of it and the fact that the other groundwater management zone is

directly underneath Union Ditch suggest that, before finding that the facility is so located and designed as to protect the public health, safety and welfare, there needs to be a comprehensive understanding of geologic and hydro geologic conditions at the site. That level of understanding is simply not present. To begin, there were no soil borings through the critical north area. Additionally, WMII's key witness on the issue, Joan Underwood, appeared misinformed as to the actual conditions in the existing north area as she testified incorrectly that the north area has "all the engineered design systems" including a liner (C 7216). This is in direct conflict with the siting application and the admission of Mr. Nickodem that the north area does not have a Subtitle D engineered liner system (C 6880).

WMII argued that the east groundwater management zone, which is adjacent to the north area, is actually the result of groundwater impacts coming from the old area which they propose to exhume. However, this conclusion is implausible, because the direction of ground water flow is from the east ground water management zone toward the old area (C 194). The empirical evidence suggests strongly that the unlined north area must be leaking and impacting ground water.

Additionally, the uppermost water bearing geologic unit is precariously close to the ground surface. What is known is that the subsurface earth and rock materials at the proposed site have generally very high permeability (hydraulic conductivity), enabling the rapid movement of ground water and the concurrent rapid migration of contaminants that get into that ground water. A review of

WMII's test results shows that most of the zones tested underneath the site 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 siting application, and the usually expected ground water impact assessment, so commonly seen in other applications, is absent here. The County staff report even acknowledges the absence of a ground water impact assessment by WMII (C 8345). In summary then, the question of whether WMII is proposing to vertically expand on top of an outdated landfill unit which may already be impacting ground water remains unresolved.

A second public health, safety, and welfare issue dealt with hydrogen sulfide. What is known is that the proposed facility is very close to the Village of Cortland and to the elementary school in Cortland. WMII acknowledges previous hydrogen sulfide problems at the site but indicates the same have been resolved. Nonetheless, multiple citizens and Dr. Serowitz testified that hydrogen sulfide odors in the vicinity of the existing landfill remain pervasive. It is interesting that while the County Board dismissed the citizens' hydrogen sulfide complaints and seemed to accept WMII's explanation, siting approval was conditioned upon WMII maintaining an ongoing and continuing monitoring program for hydrogen sulfide emissions around the perimeter of the landfill (C 8539).

Lastly, it is undisputed that the seismic safety factors relied upon by the design engineer were increased by government regulators due to an earthquake after the siting application had been written. Even the County Staff report

acknowledges that whether or not the design still maintains an adequate seismic safety factor with the new regulatory standards is speculative.

Given the close and contested issues in this case and the lack of definitive understanding with respect to three critical public health, safety and welfare issues, a problem compounded by the PCB's refusal to apply any technical expertise, the prejudgment in this case, can hardly be considered a no harm, no foul situation. It must be emphasized that WMII aided and encouraged the County Board's prejudgment. For that reason, WMII hardly has cause to complain about unfairness or harmless error if the local decision is reversed.

CONCLUSION

For the foregoing reasons, Stop the Mega Dump prays that the Decision of the Pollution Control Board affirming the local approval of the siting request be reversed.

Respectfully submitted,

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RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 42 pages.

George Mueller