

ILLINOIS POLLUTION CONTROL BOARD
February 20, 2003

LANDFILL 33, LTD.,)
)
 Petitioner,)
)
 v.) PCB 03-43
) (Third-Party Pollution Control Facility
 EFFINGHAM COUNTY BOARD and) Siting Appeal
 SUTTER SANITATION SERVICES,)
)
 Respondents.)

STOCK & CO.,)
)
 Petitioner,)
) PCB 03-52
 v.) (Third-Party Pollution Control Facility
) Siting Appeal
 EFFINGHAM COUNTY BOARD and) (Consolidated)
 SUTTER SANITATION SERVICES,)
)
 Respondents.)

STEPHEN F. HEDINGER OF HEDINGER LAW OFFICE APPEARED ON BEHALF OF LANDFILL 33, LTD.;

CHRISTINE G. ZEMAN OF HODGE, DWYER & ZEMAN APPEARED ON BEHALF OF STOCK & CO.;

EDWARD DEETERS OF THE EFFINGHAM COUNTY STATE'S ATTORNEY'S OFFICE APPEARED ON BEHALF OF THE EFFINGHAM COUNTY BOARD; and

CHARLES H. NORTHRUP AND DAVID A. ROLF OF SORLING, NORTHRUP, HANNA, CULLEN AND COCHRAN, LTD. APPEARED ON BEHALF OF SUTTER SANITATION SERVICES.

OPINION AND ORDER OF THE BOARD (by T.E. Johnson):

On October 10, 2002, Landfill 33, Ltd. (Landfill 33) filed a petition requesting the Board to review a September 19, 2002 decision of Effingham County Board (County Board) that granted Sutter Sanitation Services' (Sutter) application to site a solid waste transfer station in an unincorporated area of Effingham County. On October 21, 2002, Stock & Co. (Stock) filed a

petition requesting the Board review the same County Board decision, and Landfill 33 filed an amended petition.

The petitioners allege that (1) the County Board lacked jurisdiction over the siting application; (2) the procedures followed during the landfill siting public hearing were fundamentally unfair; and (3) that Sutter failed to satisfy six of the nine criteria listed in Section 39.2 of the Environmental Protection Act (Act). 415 ILCS 5/40.1 (2002).

After considering the evidence and arguments before it, the Board finds that the County Board had jurisdiction and followed fundamentally fair procedures. The Board finds that the County Board correctly determined that the landfill application satisfied the standards in Section 39.2(a) (i), (ii), (iii), (v) and (viii). 415 ILCS 5/39.2(a) (i), (ii), (iii), (v), (viii) (2002).

PROCEDURAL BACKGROUND

On November 7, 2002, the Board accepted Stock's petition and Landfill 33's amended petition and consolidated them for hearing. On December 19, 2002, a hearing in this matter was held. Sutter and Landfill 33 each presented witnesses. On December 30, 2002, Board hearing officer Bradley Halloran issued a hearing report that directed simultaneous opening briefs to be filed and served on or before January 10, 2003 and simultaneous reply briefs, if any, to be filed and served on or before January 17, 2003. Public comment was due to be filed on or before January 3, 2003.

Eight public comments were received. The parties filed briefs according to the set schedule.

REVIEW OF LOCAL SITING DECISIONS

Under Illinois law, local units of government act as siting authorities that are required to approve or disapprove requests for siting of new pollution control facilities, including new landfills. The process is governed by Section 39.2 of the Act. 415 ILCS 5/39.2 (2002). In addition, Illinois law provides that siting decisions made by the local siting authorities are appealable to this Board. The appeal process is governed by Section 40.1 of the Act. 415 ILCS 5/40.1 (2002).

Section 39.2(a) provides that the local siting authority, in this case the Effingham County Board, is to consider as many as nine criteria when reviewing an application for siting approval. 415 ILCS 5/39.2(a) (2002). Section 39.2(g) of the Act provides that the siting approval procedures, criteria, and appeal procedures provided for in Section 39.2 are the exclusive siting procedures for new pollution control facilities. However, the local siting authority may develop its own siting procedures, if those procedures are consistent with the Act and supplement, rather than supplant, those requirements. *See Waste Management of Illinois v. PCB*, 175 Ill. App. 3d 1023, 1036, 530 N.E.2d 682, 692-93 (2d Dist. 1988). Only if the local body finds that the applicant has proven by a preponderance of the evidence that all applicable criteria have been met can siting approval be granted. *Hediger v. D & L Landfill, Inc.*, PCB 90-163, slip op. at 5 (Dec. 20, 1990).

When reviewing a local decision on the nine statutory criteria, this Board must determine whether the local decision is against the manifest weight of the evidence. *McLean County Disposal, Inc. v. County of McLean*, 207 Ill. App. 3d 352, 566 N.E.2d 26 (4th Dist. 1991); *Waste Management of Illinois, Inc. v. PCB*, 160 Ill. App. 3d 434, 513 N.E.2d 592 (2nd Dist. 1987); *E & E Hauling, Inc. v. PCB*, 116 Ill. App. 3d 586, 451 N.E.2d 555 (2nd Dist. 1983), *aff'd* in part 107 Ill.2d 33, 481 N.E.2d 664 (1985). A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or indisputable from a review of the evidence. *CDT Landfill Corporation v. City of Joliet, PCB 98-60*, slip op. at 4 (Mar 5, 1998), *citing* *Harris v. Day*, 115 Ill. App. 3d 762, 451 N.E.2d 262, 265 (4th Dist. 1983).

This Board, on review, may not re-weigh the evidence on the nine criteria. Where there is conflicting evidence, the Board is not free to reverse merely because the lower tribunal credits one group of witnesses and does not credit the other. *Fairview Area Citizens Taskforce v. PCB*, 198 Ill. App. 3d 541, 550, 555 N.E.2d 1178, 1184 (3d Dist. 1990); *Tate v. PCB*, 188 Ill. App. 3d 994, 1022, 544 N.E.2d 1176, 1195 (4th Dist. 1989); *Waste Management of Illinois, Inc. v. PCB*, 187 Ill. App. 3d 79, 82, 543 N.E.2d 505, 507 (2nd Dist. 1989). Because the local government could have drawn different inferences and conclusions from conflicting testimony is not a basis for this Board to reverse the local government's findings. *File v. D & L Landfill, Inc.*, PCB 90-94, (Aug. 30, 1990), *aff'd*, 219 Ill. App. 3d 897, 579 N.E.2d 1228 (5th Dist. 1991).

In addition to reviewing the local authority's decision on the nine criteria, the Board is required under Section 40.1 of the Act to determine whether the local proceeding was fundamentally fair. In *E & E Hauling, Inc. v. PCB*, the appellate court found that although citizens before a local decision maker are not entitled to a fair hearing by constitutional guarantees of due process, procedures at the local level must comport with due process standards of fundamental fairness. *E & E Hauling, Inc. v. PCB*, 116 Ill. App. 3d at 596, 451 N.E.2d at 564; *see also Industrial Fuels & Resources v. PCB*, 227 Ill. App. 3d 533, 592 N.E.2d 148 (4th Dist. 1992); *Tate v. PCB*, 188 Ill. App. 3d at 1019, 544 N.E.2d at 1193. Due process requirements are determined by balancing the weight of the individual's interest against society's interest in effective and efficient governmental operation. *Waste Management of Illinois v. PCB*, 175 Ill. App. 3d 1023, 1037, 530 N.E.2d 682, 693 (2nd Dist. 1988). The manner in which the hearing is conducted, the opportunity to be heard, the existence of *ex parte* contacts, prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid elements in assessing fundamental fairness. *Hediger v. D & L Landfill, Inc.*, PCB 90-163, slip op. at 5 (Dec. 20, 1990).

STATUTORY BACKGROUND

Section 40.1(b) of the Act provides:

If the . . . governing body of the municipality . . . grants approval under Section 39.2 of this Act, a third party other than the applicant who participated in the public hearing conducted by the . . . governing body of the municipality may, within 35 days after the date on which the local siting authority granted siting approval, petition the Board for a hearing to contest the approval of . . . the governing body of the municipality. 415 ILCS 5/40.1(b) (2002).

According to Section 39.2(b) of the Act, no later than 14 days before requesting site approval from the County Board, Sutter was required to “cause written notice of such request to be served either in person or by registered mail, return receipt requested,” on owners of property within 250 feet of the site boundaries. 415 ILCS 5/39.2(b) (2002).

Before the County Board could approve Sutter’s application to site a transfer station within Effingham County, Sutter was required to submit sufficient details describing the proposed facility to demonstrate compliance with nine criterion provided in section 39.2(a) of the Act. 415 ILCS 5/39.2(a) (2002). Landfill 33 and Stock contend that the County Board’s conclusion that Sutter demonstrated compliance with criterion (i), (ii), (iii), (v), (vi), and (viii) was against the manifest weight of the evidence. Those criterion require:

- (i) the facility is necessary to accommodate the waste needs of the area it is intended to serve;
- (ii) the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;
- (iii) the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property;
* * *
- (v) the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents;
- (vi) the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows;
* * *
- (viii) if the facility is to be located in a county where the county board has adopted a solid waste management plan consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act, the facility is consistent with that plan. 415 ILCS 5/39.2(a) (i), (ii), (iii), (v), (vi) (viii) (2002).

PRELIMINARY MATTERS

The parties raised a number issues at hearing and in their post-hearing briefs that require the Board’s consideration. The Board will address each preliminary matter in turn.

Landfill 33’s Offer of Proof

At the Board hearing, Sutter objected to Landfill 33’s attempt to call Tracy Sutter as a witness because Landfill 33 did not indicate in its response to interrogatories that Mr. Sutter

would be called. Tr. at 57.¹ Landfill 33 argued that in the interrogatory response, it reserved the right to put on whatever case is necessary, and that the need to call Mr. Sutter as a witness did not arise until 6:30 p.m. the night prior to the hearing. Tr. at 58-59. Hearing Officer Halloran sustained the objection by Sutter, but allowed Landfill 33 to call Mr. Sutter as an offer of proof. Tr. at 59.

The Board finds that Sutter's objection is unfounded, and accepts the testimony of Mr. Sutter into evidence. Counsel for Landfill 33 stated that he did not realize the need to amend the interrogatory response until December 18, 2002 – the night prior to the hearing. All parties had the opportunity to cross-examine Mr. Sutter on the issues raised by Landfill 33, and were able to present additional arguments in their post hearing briefs. Accordingly, no material prejudice resulted from calling Mr. Sutter as a witness.

Respondents' Motions to Strike Landfill 33's Fundamental Fairness Arguments

In their post-hearing briefs, Sutter and the County Board both move to strike any fundamental fairness arguments raised by Landfill 33. Sutter at 5, County Board at 10. The respondents argue that Landfill 33 did not allege any specific grounds of fundamental fairness in their amended petition for review, but merely noted that the proceedings were fundamentally unfair. *Id.* Sutter also argues that Landfill 33 did not identify any specific facts demonstrating fundamental unfairness in response to Sutter's interrogatories. Sutter at 5.

Landfill 33 argues that the motions to strike are untimely, and should themselves be stricken. Landfill 33 Reply at 2. Landfill 33 asserts that the respondents never filed any written pleading with the Board or hearing officer on this issue until their closing briefs filed at the 11th hour. *Id.* Landfill 33 also argues that, because Sutter did not include a copy of the discovery request or response with its brief, Sutter has waived this issue. Landfill 33 at 3.

The Board will not grant the motions to strike. Motions attacking the sufficiency of a pleading filed with the Board must be filed within 30 days after service of the pleading unless the Board determines material prejudice would result. 35 Ill. Adm. Code 101.506. The respondents did not attack the sufficiency of Landfill 33's amended petition in a timely manner. The Board does not find that material prejudice will result if the motions are not accepted. Accordingly, the motions were not timely filed and will not be addressed by the Board.

Landfill 33's Notice of Errata

On January 14, 2003, Landfill 33 filed a notice of errata and a corrected closing brief. Landfill 33 asserts that a number of mistakes were identified with its closing brief filed on

¹ The County Board's record will be cited as "R. at ___"; the Board's hearing will be cited as "Tr. at ___"; Landfill 33's brief will be cited as "Landfill 33 at ___"; Stock's brief will be cited as "Stock at ___"; Sutter's brief will be cited as "Sutter at ___"; The County Board's brief will be cited as "County at ___"; "Reply" will denote a party's reply brief. Exhibits will be prefaced by the party's abbreviated or full name and "Exh. ___"

January 9, 2002. Landfill 33 asserts that the mistakes were inadvertent, and that the corrected brief is not intended to substantively modify the pleading in any way. Notice of Errata at 1. No response to the notice of errata was filed, and the Board accepts Landfill 33's corrected closing brief.

FACTS

On April 19, 2002, Sutter filed its application for local siting approval for a proposed solid waste transfer station with the County Board. C4. A public hearing on the application was held before the County Board on August 14, 2002. C127. Sutter called four witnesses – David Kimmle, Mark Reitz, James Bitzer and Tracy Sutter. Landfill 33 presented three witnesses in opposition to the application – Brian Hayes, Don Sheffer and Bryan Johnsrud.

The public comment period closed on Friday, September 13, 2002. The County Board met on Monday, September 16, 2002, and unanimously voted to approve the application. R. at C434.

Sutter proposed to site the transfer station on three acres of land owned by Hacker family located off County Highway 25 (Altamont – Farina Blacktop), just north of Township Road 200 East. R. at C7,77. The property currently contains a grain elevator, grain bins, pole barns, sheds and a two-story frame house. R. at C7, C65, C77, C239. Sutter proposes to use an existing former grain storage building, with modifications, as a transfer station. R. at C80. Existing pathways will be used for the transfer station. R. at C78,C176. The waste transfer is proposed to occur in a pole barn. R. at C242, C77.

The intent of the facility is to allow the transfer of waste from refuse collection vehicles such as packer trucks to transfer trucks. R. at C7. The waste transfer facility as proposed will consist of an enclosed tipping floor and loading bay. Waste delivered to the site will be deposited directly on to the concrete tipping floor, and then loaded into a transfer trailer using a rubber-tired end loader. *Id.* When full, the transfer trailer will be taken to a solid waste landfill for waste disposal. *Id.*

At the hearing, the following testimony was adduced:

To meet criterion (i), Sutter presented the testimony of Mr. Kimmle. Mr. Kimmle is a civil engineer who works for Hurst-Rosche Engineers. He has been an employee of Hurst-Rosche since 1986, and has experience with both applications for siting approval and design work on transfer stations. R. at C137. Mr. Kimmle testified that he utilized the Agency's annual report to identify landfill facilities located in a 30-50 mile radius from the proposed transfer station. R. at C140. He found that three current operating landfill facilities are within the 30-mile radius of the proposed transfer station. He categorized the disposal of those facilities as limited. R. at C141. Mr. Kimmle identified six other facilities within the 50-mile radius. He categorized the waste capacity within the 50-mile radius as adequate. R. at C142.

But, Mr. Kimmle identified a dilemma in maintaining a viable out-of-county waste disposal source and a method to transfer county-generated waste to one or more of these

facilities. Mr. Kimmle testified that to economically access out-of-county landfills, a waste transfer station is necessary. R. at C143. He testified that there has been a 50 % decline in the number of landfills since 1992 and a 40 % increase in the number of operating transfer stations since 1996. R. at C 143. Mr. Kimmle testified that the enhanced environmental regulations have caused a decline in the number of operational landfills, thereby forcing the remaining facilities to become larger and service a greater area. R. at C144.

Mr. Kimmle testified that by siting the proposed transfer station, and increasing the service area from a 30-mile radius to a 50-mile radius, the available landfill capacity has been increased from two to eight. R. at C144. Mr. Kimmle testified that Sutter's facility is necessary to accommodate the waste needs of the area it's intended to serve. R. at C144.

Mr. Kimmle testified that a house is located on the proposed site for the transfer facility, but that it is not inhabited and will be used as an office for the waste transfer facility. R. at C147. Mr. Kimmle also testified that proposed facility has been located a minimum of 1,000 feet from the nearest property zoned for primary residential use. *Id.*

Mr. Kimmle testified that the potential for leachate is minimal because the operations are indoors. But, he stated that any leachate generated will be collected and directed to a local sump that will then pump the water to a nearby leachate storage tank contained within a concrete containment dike prior to disposal off-site. R. at C150. Mr. Kimmle testified that the water resulting from washing the floor down will be contained within the building (in the lower elevation floor) and directed into the collection system. R. at C153-54.

Mr. Kimmle testified that the siting of the transfer station is consistent with the Effingham County Solid Waste Management Plan (Plan). R. at C162. Mr. Kimmle testified that the Plan indicates the County's intention to support the disposal of waste generated in the county at both in-county and out-of-county landfills. R. at C1443. He states that all waste collection in Effingham County is provided by private haulers that have the right to choose the landfill at which they dispose of waste. R. at C161.

Licensed real estate broker and appraiser James R. Bitzer testified that the proposed expansion met the requirements of criterion (iii). Bitzer has been a licensed broker since 1973, and has experience with transfer sites. R. at C178, 180. He testified that the proposed expansion minimized the incompatibility with the character of the surrounding area and minimized the effect on the value of the surrounding property. R. at C182. Bitzer testified that the character of the surrounding land is predominantly level agricultural cropland and that no significant expansion or urbanization is occurring in the area. R. at C181.

Tracy Sutter testified that he is a sanitation engineer and has been in the waste industry all his life. R. at C184. He said that Sutter Sanitation has been in existence for 34 years. *Id.* Mr. Sutter stated that Sutter primarily picks up residential trash, commercial trash and light industrial trash. *Id.* He testified that Sutter has never been cited or convicted for a violation in the field of solid waste management. R. at C186.

Mr. Sutter testified that if sited, the proposed facility would not hold waste overnight. R. at C197. He said that trucks typical to the industry today do not have problems opening their tailgates fully in the proposed transfer station. R. at C263-64. Although he acknowledged that issues do exist with the maximum available height for dumping roll-offs, he testified that on-site personal will always be present to assist drivers in this regard. R. at C265.

Testifying about criterion (i) for Landfill 33 was Mr. Don Sheffer. Mr. Sheffer is a registered professional engineer in the state of Illinois. R. at C203. He has been an engineer with Homer L. Chastain and Associates for approximately 40 years. He was the project manager for the preparation of the Effingham County Solid Waste Management Plan. R. at C204. He reviewed the application submitted to the county, the County's Plan, the five-year update of the Plan and information from the Agency on landfill capacities. R. at C205.

Mr. Sheffer testified that Sutter did not perform a traditional needs analysis, and failed to include current and projected waste generation rates. R. at C206. He testified that Landfill 33 has a recently issued permit that extends their life for an additional 22 years making the 7 year figure in Sutter's application inaccurate. R. at C207. Mr. Sheffer noted that D and L Landfill lists 45 years of remaining life, Wayne County has 30 years of remaining life, Lawrence County has 38 years of remaining life and the Five Oaks facility has 29 years of life. *Id.*

Mr. Sheffer said that even though there are fewer landfills, the capacity of those landfills is increasing. R. at C207. He testified that any hauler operating in the entire Effingham County area has at least one landfill available to him within 30 miles of the point where the hauler picks up at a house. R. at C210. He testified that a method to assess those landfills exists without the transfer station, and that the haul distances are not excessive to make it economically unfeasible. R. at C211.

Mr. Sheffer testified that the transfer station may be a convenience to the applicant, but not absolutely necessary to provide the proposed service area with adequate and economical landfill disposal through the direct haul method. R. at C212. He testified that the area has five large landfills available, and at least one of those is available within 50 miles indicating direct haul is the best choice. R. at C218.

Mr. Sheffer said that the proposed transfer station is an option of the Plan that was considered in 1994, but that the recommendations were that the county continue direct haul to in-county and out-of-county landfills. R. at C216. He testified that the five-year update continues the recommendations of the first plan. *Id.* He said that the county had the option to recommend the construction of an in-county transfer station but chose not to. R. at C217.

Mr. Sheffer testified that Landfill 33 has been granted a permit that would give them an additional 22 years of life. R. at C226.

Bryan Johnsrud, a professional engineer for Andrews Environmental Engineering in Springfield, testified on behalf of Landfill 33. He has been so employed for 12 years, and has been involved with solid waste management facilities the entire time. R. at C231-C232. Mr.

Johnsrud testified that there is a dwelling less than 200 feet from the building that Sutter wants to use for a transfer station. R. at C238.

Mr. Johnsrud said that the building intended to house the transfer station was not designed for that purpose. R. at C241. He said that the facility will probably have to be washed down on a daily basis generating a large amount of leachate that has to be pumped out and treated. R. at C249. He identified concerns about the floor slope and thickness, and the wooden structure of the building. R. at C245, C250. He also expressed concerns over the 16-foot clearance between the floor and the rafters. R. at C251. He asserted that an accident will happen and there is going to be physical damage and possible injuries. *Id.*

Mr. Kimmle testified that the Metropolitan Sewer District in St. Louis readily accepts leachate and provides contracts on short notice. R. at C267. He anticipates that, at least initially, the leachate would be hauled there. R. at C268. Mr. Kimmle testified that the application provides that any cracks in the concrete floor will be sealed with a sealer and maintained throughout the operation of the facility. R. at C268-69.

The Board received two public comments at the hearing. The first was by Nancy Deters. She was sworn in and subject to cross-examination. Tr. at 28. She was in favor of Sutter's proposed transfer station. Tr. at 28-29. Lloyd Stock made the second public comment. He, was not sworn in. Tr. at 39. He requested that the Board reverse the County's decision to grant siting approval to Sutter. Tr. at 42.

Public Comments

A number of public comments for and against the siting of the proposed transfer station were accepted at the local level. The Board finds that consideration of public comments during the siting process is appropriate. However, public comments are not entitled to the same weight as expert testimony submitted under oath and subject to cross-examination. Public comments receive a lesser weight. City of Geneva v. Waste Management Inc., PCB 94-58 (July 21, 1994); Browning Ferris Industries v. Lake County Board of Supervisors, PCB 82-101 (Dec. 2, 1982).

The public comments submitted by interested persons from the surrounding community at the local level and at the Board level are evidence in the record properly considered by the decision making body. But, these public comments are entitled to less weight than is sworn testimony subject to cross-examination. The Board will assess public comments in this light when deciding whether or not the County Board's decision is against the manifest weight of the evidence or fundamentally unfair.

LANDFILL 33 ARGUMENTS

Landfill 33 challenges the decision on three grounds: (1) that Sutter failed to comply with statutory jurisdictional prerequisites; (2) that the proceedings before the County Board were fundamentally unfair; and (3) that the decision of the County Board was against the manifest weight of the evidence with respect to criteria (i), (ii), (v), (vi), and (viii).

Jurisdictional

Landfill 33 asserts that Sutter did not comply with mandatory notice requirements in that it did not assure that the notice was timely delivered to all members of the General Assembly from the district in which the proposed site is located. L33 brief at 3. Landfill 33 contends that Section 39.2(d) of the Act requires notice to be delivered by certified mail to the appropriate legislators no later than 14 days prior to hearing – July 31, 2002. *Id.* Landfill 33 asserts that Senator N. Duane Noland did not receive his notice until August 1, 2002. L33 brief at 4. Landfill 33 argues that Sutter's attempt to hand-deliver notice to Senator Noland on July 31, 2002 is ineffective as failing to have complied with the statute. *Id.* Accordingly, argues Landfill 33, the proceedings are void and the County Board ruling must be vacated. *Id.*

Fundamental Fairness

Landfill 33 identifies three manners in which the proceedings were fundamentally unfair.

Recycling Issue

First, Landfill 33 asserts that it was provided fundamentally unfair proceedings through the County Board's refusal to allow Landfill 33 to address recycling issues which had been discussed by Sutter and more than one commenter, and were ultimately relied upon by the County Board in rendering a decision. L33 at 5.

Landfill 33 asserts that at least one County Board member, Voelker, expressly voted in favor of Sutter's proposal because Sutter claimed it would also operate a recycling center, but not without the transfer station. L33 Reply at 6.

Landfill 33 contends that: (1) early in the underlying proceedings, the County Board chairman instructed the audience that the proceedings were to concern themselves with Sutter's proposal and nothing else; (2) that Tracy Sutter spoke at length about the recycling center and in fact threatened the County Board that he would close down the recycling center if transfer station siting approval was not given; (3) that Landfill 33 offered to present testimony to address the recycling issue raised by Tracy Sutter but was instructed by the chairman not to proceed with such testimony; and (4) that the County Board expressly considered this recycling issue, and in fact ruled in Sutter's favor on the basis of the recycling program. L33 at 5.

Landfill 33 asserts that the recycling issue should have been largely irrelevant to the siting issue, but was actually a first and foremost concern of the County Board. L33 at 6. Landfill 33 concludes that it was deprived of an opportunity to address an issue that was pivotal to the County Board's decision, and was prejudiced as a result. L33 at 6. L33 asserts it was prejudiced because it was not given the same and opportunity as others to address the recycling issue. L33 Reply at 6. Landfill 33 contends that because no transcription of the September 16, 2002 meeting is in the official record it cannot be said, one way or another, whether more than one member of the County Board commented on the recycling issue. *Id.* Landfill 33 argues that the availability of public comment did not accomplish its purpose because it was not submitted under oath and is given less weight. *Id.*

Visits by the County

Landfill 33 asserts that the County Board conducted a visit to the transfer site on July 31, 2002, and that Landfill 33 was given no opportunity to attend. L33 at 6. Landfill 33 also asserts that just prior to filing the application, several County Board members visited the recycling center and got a “red carpet tour.” L33 Reply at 7. Landfill 33 argues that even if a site visit is acceptable, it must be accompanied with notice to the parties to allow them to attend as well. *Id.*

Amendment of Application

Landfill 33 asserts that at the end of the public comment period after the hearing, Sutter submitted a public comment that for the first time contended that the proposed transfer station was necessary because Landfill 33 may have insufficient capacity. L33 at 6. Landfill 33 claims that this new basis for need was made at the close of the public comment period thus not providing an opportunity to respond or present contrary evidence or argument. L33 at 7.

Landfill 33 argues that applicants are permitted to make only a single amendment to their application that must be made prior to completion of the presentation of evidence at hearing, and even in that case, the decision deadline is extended by 90 days. *Id.* Landfill 33 argues it lost the opportunity to cross-examine as well as present its own evidence on this issue as a result of the untimely amendment. *Id.*

Siting Criteria

Landfill 33 challenges five of the siting criteria. Their arguments on each issue will be summarized below:

Criterion (i)

Landfill 33 asserts that based on Sutter’s own work product, it is clear that there is no need for the proposed facility in that the transfer station is clearly not necessary to accommodate the waste needs of its intended service area. L33 at 9. Nothing about the proposal, argues Landfill 33, supports the view that without this transfer station the out of county disposal facilities might not be viable. *Id.* Further, asserts Landfill 33, Sutter’s burden was to prove that the service area needs the transfer station, not that out of county facilities need it. *Id.*

Landfill 33 argues that Sutter assumes that a 30-50 mile range is the economical distance a refuse collection vehicle can travel on a routine basis, and that the evidence shows that the out of county facilities are each located 50 or miles less from the location of the proposed transfer station. Thus, argues Landfill 33, these facilities can already be economically accessed without creating a transfer station. L33 at 10.

Landfill 33 contends that professional engineer Don Sheffer demonstrated that virtually any location within the service area is within 30 miles of the largest of the landfills identified by Sutter. L33 at 10. Landfill 33 asserts that Sutter’s approach does not constitute a typical needs analysis, in that Sutter contends the need for the facility hinges on the dilemma in maintaining a

viable out of county waste disposal source and a method to transfer county generated waste to one or more of these facilities. L33 Reply at 8.

Landfill 33 claims that Sutter could have limited its proposed service area to Effingham County, but did not do so in its application and its amendment to modify the service area to one exclusive to Effingham County was made at the last day of public comments following the hearing and is, thus, too late. L33 Reply at 9, 10.

Landfill 33 asserts that even with the transfer facility, the eight facilities identified by Sutter as available for the disposal capacity for the service area are all easily within the range identified by Sutter as a reasonable hauling distance (30-50 miles). L33 Reply at 9. Landfill 33 argues that Sutter has admitted no need exists for the transfer station, but that it might be convenient for Sutter's own business purposes. L33 Reply at 10.

Criterion (ii)

Landfill 33 asserts that the County Board simply refused to accept un rebutted testimony concerning deficiencies of the proposed transfer station with respect to criterion (ii). L33 at 13. Landfill 33 notes that pursuant to Section 22.14 of the Act, it is unlawful for anyone to establish a transfer station within 1,000 feet of a dwelling. *Id.* Landfill 33 asserts that Sutter's own documentation reveals the existence of a dwelling less than 200 feet from the proposed transfer station. *Id.* Landfill 33 also contends that a dwelling exists across the road from this facility and that the County Board refused to accept evidence relating to that structure. L33 at 14.

Landfill 33 contends that the wood framing on the inside of the proposed transfer station is improper for a transfer station against which waste will be dumped, scraped and pushed during everyday operations. L33 at 14. In addition, Landfill 33 claims that the structure lacks walls within the facility against which a scraper can push waste in order to scoop it in to the appropriate receptacle. *Id.*

Criterion (v)

Landfill 33 contends that because of its wooden interior and rural location the proposed transfer station is at a greater risk of fire. L33 at 14. Landfill 33 asserts that the concrete floor in the building is crumbling thus posing an environmental hazard. L33 at 15. Landfill 33 also asserts that the door and ceiling heights in the proposed station pose a hazard for roll-off containers, and indicate that Mr. Johnsrud testified that the issue is not whether an accident will occur, but when and how bad it will be. L33 at 15.

Landfill 33 contends that Sutter made no efforts to calculate the amounts of leachate it will generate, nor what specifically it will do with that leachate. Landfill 33 at 16. Indeed, Landfill 33 states, Sutter is not even aware of whether it will be able to find someone to accept and treat the leachate. *Id.*

Landfill 33 asserts that the siting authority cannot simply defer to the Agency when there is insufficient evidence to support an applicant's siting requests. L33 Reply at 13. Accordingly,

Landfill 33 refutes Sutter's claim that the majority of the issues presented by Mr. Johnsrud should be part of the Agency application process. *Id.*

Criterion (vi)

Landfill 33 asserts that Mr. Johnsrud testified that when considering the small site, the close proximity of the scale house to the road, and the tight turning radiuses into and out of the proposed transfer station, traffic disruption and safety hazards are potential problems. L33 at 16. Landfill 33 claims that Sutter did not even provide a traffic count of the anticipated number of vehicles it would receive from its recycling business to compare with traffic issues relating to the transfer station. *Id.* Finally, Landfill 33 argues that Sutter did not address the impact of facility traffic during the road restriction months (January through April) for the roadway approaching the facility. *Id.*

Criterion (viii)

Landfill 33 asserts that nowhere in the Plan is the need for a transfer station asserted. L33 at 11. Landfill 33 refutes Sutter's claim that the station is needed to meet the Plan's encouragement of the use of out-of-county waste facilities, and asserts that the 50-mile economical transport radius established by Sutter is easily met without any transfer station. *Id.*

Landfill 33 argues that although the Plan considered transfer stations as an option in a preliminary step of the planning process, the Plan rejected the use of transfer stations and opted solely for the continued direct hauling of waste to in and out of county sites. L33 at 12, L33 Reply at 11. In short, asserts Landfill 33, Sutter is focusing upon components of the Plan that were proposed but not adopted by the County. L33 Reply at 11. Finally, Landfill 33 asserts that the Plan does not list any new programs or facilities to be developed during the 2-4 or 5-10 year period. *Id.*

STOCK'S ARGUMENTS

Stock challenges the decision on two grounds: (1) that the proceedings before the County Board were fundamentally unfair; and (2) that the decision of the County Board was against the manifest weight of the evidence with respect to criteria (i), (ii), (iii), (v), and (viii).

Fundamental Fairness

Stock identifies four ways in which the proceedings were fundamentally unfair.

Transcript Availability

Stock contends that when its registered agent, Duane Stock, contacted the Effingham County Clerk on October 2, 2002, to obtain a copy of the hearing transcript, he was told the transcript was not available through the County Board and was advised to contact counsel for the applicant. Stock at 30. Stock argues that a siting authority's failure to provide access to the transcript is enough to make the proceedings fundamentally unfair. *Id.* Stock contends that it

was legally entitled, pursuant to Section 39.2(c) of the Act, to review a copy of the transcript at the offices of the County Board before its appeal was due, but was denied that right. Stock Reply at 18. Stock asserts that the County Board's delegation of its record keeping responsibility to the attorney for the applicant is itself suggestive of collusion between the applicant and decision-maker. *Id.*

Stock asserts it was prejudiced because its arguments in the petition for review had to be based solely on the siting application and Duane Stock's attendance at the hearing. Stock at 30. Stock argues that this failure is egregious because the transcript was not available through the County Board until after the deadline for appeal – more than a month after the close of the public comment period and more than six weeks after it had initially been transcribed. Stock at 31.

Stock contends it was further prejudiced by misstatements about the testimony at hearing contained in a letter Sutter's attorney sent to the County Board's attorney that was relied upon by the County Board in making its decision. Stock at 32.

Recycling Issues

Stock argues that the County Board based its decision on Sutter's threat to close the recycling center instead of the statutory criteria in light of Sutter's threat at the underlying hearing to close the recycling center if the siting for transfer station was not approved. Stock at 33, 34. Stock asserts that the County Board was confused about the recycling issue in that the chairman stated the County Board could not accept comments at hearing based on recycling, but did accept public comments. Stock at 35, 36. Stock asserts that the minutes of the September 16, 2002 meeting reveal that County Board member Voelker said recycling at this location is a valuable asset needed in Effingham County, and that this statement was made immediately prior to the County Board's vote on the transfer station. Stock Reply at 21.

Further, Stock contends that Sutter was allowed to present evidence that the transfer facility was needed for recycling to take place in Effingham County, but those opposed to the facility were not allowed to present evidence of the other alternatives that are already available except as public comment. Stock at 36. Stock argues that bias or prejudice by the County Board because a disinterested observer might conclude the administrative body or its members had in some measure adjudged the facts as well as the law in advance of hearing it. Stock Reply at 24.

Stock argues that the claims made by the County Board that substantial discussion was had and consideration given to all of the evidence put on by both Landfill 33 and Sutter are unsupported by any citation to the record and should be stricken or otherwise not considered here. Stock Reply at 3.

Undisclosed relationships

Stock asserts that the fact that Duane Stock is the first cousin of County Board Member Carolyn Willenburg was not disclosed by the County Board. Stock at 36. More importantly, contends Stock, the mother-son relationship of State's Attorney Ed Deters, who provided legal counsel to the County Board, and Nancy Deters, an outspoken advocate for the recycling center

and thus the transfer station, was also never disclosed. *Id.* Stock asserts that Nancy Deters even vouched for Sutter's character, but that the fact that the decision-maker's legal counselor was her son was never properly disclosed. Stock at 37.

Tours of the Site

Stock contends the record indicates that *ex parte* contacts occurred between the applicant and the County Board thereby biasing the County Board and resulting in its decision to approve local siting even though the criteria had not been met. Stock at 38. At hearing, Stock asserts, Sutter admitted that County Board members toured the building to be used for the transfer station and that the expected operations of the transfer station was possibly in their minds. Stock at 39. Stock argues that fundamental fairness 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. *Id.*

Siting Criteria

Stock challenges five of the siting criteria. Their arguments on each issue will be summarized below:

Criterion (i)

Stock asserts that as a matter of law, potential convenience for waste haulers does not demonstrate need. Need, asserts Stock, connotes a degree of requirement or essentiality and not just reasonable convenience. Stock Reply at 5. Stock contends the applicant must demonstrate, at a minimum, an urgent need for, and the reasonable convenience of, the new facility. *Id.* Stock argues that the Board and the First District Appellate Court ruled that improvement in the efficiency of hauling operations is adequate to meet the statutory requirement of necessity. *Id.*, citing Waste Management of Illinois, Inc. v. PCB, 243 Ill. App. 3d 65, 69, 600 N.E.2d 55 (1st Dist. 1992).

Stock focuses on the testimony of Sutter's witness Mr. Kimmle and the application itself. Both, asserts Stock, concede that the regional waste disposal capacity already appears to be adequate. Stock at 9. Stock contends that Sutter did not and cannot demonstrate any urgent need for the facility, but instead only presented evidence regarding the possible economic benefit that the transfer station might provide to waste haulers. Stock at 13.

Stock argues that in the application Sutter alternates between road miles when referring to distances from existing waste disposal alternatives and miles as the crow flies when referring to distances from its own proposed facility. Stock at 12. This, asserts Stock, artificially creates an appearance that the current alternatives for waste disposal such as the Shelbyville transfer station are further away. *Id.*

Stock contends that Sutter did not present evidence regarding waste production or waste generation of the area as is customary and required by the Second and Third District Appellate Courts. Stock at 15.

Criterion (ii)

Stock argues that upon consideration of all evidence, it is plain that Sutter failed to demonstrate that the public health, safety and welfare will be protected. Stock at 17. First, contends Stock, Sutter has not designed a waste transfer station, but has simply proposed slight modifications to one of three pole barns currently located at a site where a grain elevator used to be operated. *Id.*

Stock asserts that the application itself concedes that the closest dwelling is located on the property proposed for the transfer station, but that no evidence was presented that the two-story house will only be used as an office. Stock at 18, 19.

Stock contends that nothing is planned to prevent liquid wastes and leachate from running off the concrete floor and onto the ground surrounding the building; that older trucks used by other haulers will be unable to open their tailgates fully when unloading in the building because of inadequate clearance; that roll-offs will not be able to raise their beds to the full height as designed if unloading in the building; and that no safe alternatives were presented for when these vehicles cannot be unload as designed. Stock at 20. Stock asserts that the record demonstrates that, as designed, located and proposed to be operated, Sutter's facility would violate several regulatory standards. Stock Reply at 7.

Stock highlights the testimony of Tracy Sutter, who when asked about which direction the water that drains from the facility would go and whether the lake would be affected, responded he was assuming that the water does not go in that direction. Stock Reply at 8.

Stock argues that the County Board cannot simply defer to the Agency when there is insufficient evidence to support an applicant's siting request. Stock Reply at 10.

Criterion (iii)

Stock asserts that to satisfy this criterion, Sutter provided a letter from a certified residential real estate appraiser, but that the letter gives no bases for its conclusion that the property values will not be affected. Stock at 21. Stock argues that Sutter failed to provide any evidence as to how the facility will minimize incompatibility with the character of the area and that the decision of the County Board is, therefore, against the manifest weight of the evidence. Stock at 22.

Criterion (v)

Stock asserts that instead of being designed to minimize the danger to the surrounding area, Sutter's plan contains minimal designs to protect the surrounding area. Stock at 23. Stock contends that the transfer station is proposed to be located immediately adjacent to three existing grain bins and a nearby a large existing propane tank – both of which are know fire hazards. *Id.* Stock alleges that Sutter's contingency plan for fires is inadequate as it essentially only requires that calls be made to management and "911" in the event of an emergency. Stock at 23, 24.

Stock further asserts that the contingency plan contains no strategy for evacuating members of the public from the transfer station; contains no provisions for preventing the spread of fires to the propane tank and grain bins; does not address the recycling building in which reclaimed cardboard, among other items, are to be stored; does not identify fire-fighting equipment other than a handful of fire extinguishers; does not identify smoke alarms in any of the buildings; and contains no provisions to notify the owner/operator of a fire at night or on the weekend when the facility is closed. Stock at 24.

Thus, argues Stock, Sutter has simply not demonstrated it has done what is reasonably feasible to minimize the danger to the surrounding area. Stock at 25. Sutter's proposed transfer station is a disaster waiting to happen, contends Stock. Stock at 27.

Criterion (viii)

Stock argues that Sutter's own evidence shows that persons desiring to transfer waste to one of the out-of-county landfills referenced by Sutter can economically use the existing Shelbyville transfer station, and that the decision of the County Board on this criterion is, accordingly, against the manifest of the evidence. Stock at 28.

Stock asserts that the County's previous rejection of a proposal for a transfer station in its Plan is evidence that Sutter's proposed facility is not consistent with the County's Plan. Stock Reply at 13.

EFFINGHAM COUNTY'S ARGUMENTS

Criteria

Effingham County asserts that the County Board's decisions on the statutory criteria were not against the manifest weight of the evidence. Effingham County asserts that the burden of establishing the decision was in error is squarely on the petitioners, and that both sides presented credible evidence on each criteria. County Board at 4. The County contends that substantial discussion was had and consideration given to all of the evidence put forth by Landfill 33 and Sutter. County Board at 5.

As to criterion (iii), the County Board contends that testimony presented by James Bitzer, a real estate appraiser, indicated there would be zero or minimal impact to the surrounding properties if the County Board approved the proposal. County Board at 6.

Fundamental Fairness

The County Board disputes that the proceedings were not conducted in a fundamentally fair manner.

Transcript Availability

The County Board asserts that Duane Stock admitted that he did not request a transcript of the underlying hearing between the hearing date and the September 16, 2002 County Board meeting. County Board at 7. He also admitted, the County Board contends, that he made no effort between October 2, 2002 and November 25, 2002, to contact anyone in Effingham County to get a copy of the transcript. County Board at 8. The County Board argues that Stock was not prejudiced in any way by the transcript's unavailability. *Id.*

Undisclosed Relationships

The County Board next addresses the familial relationship between Duane Stock and Carolyn Willenburg. Nowhere, contends the County Board, is it established that the relationship adversely affected Stock. County Board at 8. The County Board highlights testimony where Duane Stock stated that Willenburg was a nice person, that they got along very well, and that he never asked her to step aside or recuse herself. *Id.* The County Board concludes that the mere suggestion that the relationship created unfairness is insufficient to support petitioners' claim of bias. County Board at 9.

Recycling Issue

The County asserts that the county board chairman properly focused the issues to the County Board, and that the recycling issue was not raised during the discussion on the criteria at the September 16 meeting. County Board at 10. The County Board concludes that the petitioners' have failed to establish that any County Board members' vote was affected or changed based on the recycling issue. *Id.*

SUTTER'S ARGUMENTS**Fundamental Fairness**

Sutter argues that any fundamental fairness arguments raised by Landfill 33 should be barred because Landfill 33 did not identify any specific facts demonstrating fundamental unfairness in the petition or in response to Sutter's interrogatories. Sutter at 5. Sutter asserts that it was significantly prejudiced by these non-disclosures in that it would have been able to gather evidence in rebuttal or undertake additional discovery had the allegations been properly disclosed. Sutter at 5, 6.

Transcript Availability

Sutter argues that only where the failure to make a transcript available results in prejudice to a party is the absence of the transcript fundamentally unfair. Sutter at 6. Sutter asserts that Stock did not attempt to obtain a copy of the transcript until October 2, 2002 – 16 days after the County Board's decision. Sutter at 7. Sutter further asserts that Stock made no further inquiries between October 2, 2002 and November 25, 2002, and that these facts clearly demonstrate that Stock suffered no prejudice by not having a copy of the transcript. *Id.*

Undisclosed Relationships

Sutter contends that nothing other than the existence of the Stock – Willenburg relationship is alleged, and that this is clearly insufficient to sustain a claim of bias. Sutter at 9. Bias, states Sutter, may only be shown if a disinterested observer might conclude that the administrative official had in some measure adjudged the facts as well as the law in advance of hearing it. Sutter at 10. Nonetheless, argues Sutter, Stock has waived this argument by failing to raise it at the County Board hearing.

Recycling Issue

Once again, Sutter argues that bias can only be shown where a decision maker has prejudged the facts or law. Sutter at 12. Sutter contends this showing has not been made. The comment by County Board Member Voelker, asserts Sutter, does not indicate that Voelker was acting out of fear of losing Sutter's recycling services, but is merely a statement that recycling is important to Effingham County. Sutter at 13.

Sutter contends that the statement by Tracy Sutter that Sutter could not economically continue recycling if siting were not approved is not a threat, but a simple statement of economic reality. Sutter at 13. Sutter discounts the statements of Ms. Deters at the Board hearing as she is not a decision-maker and does not even live in Effingham County. *Id.* Most important, asserts Sutter, is the recognition of the County Board that recycling issues could not be a part of the deliberations on the siting issue before it. Sutter at 14.

Finally, Sutter argues that the recycling issue has been waived because neither Stock nor Landfill 33 objected when the issue was brought up at the underlying hearing. Sutter at 15.

Site Visits

Sutter asserts that during the pendency of the application neither the County Board nor the waste committee visited the proposed transfer facility. Sutter reply at 7. Sutter contends there is no evidence in the record that any visit occurred, and that the only reference to a site tour is a notation in the County Board minutes that a proposed site visit had been scheduled. *Id.* Sutter does acknowledge that members of the waste committee visited the site of the proposed transfer station prior to the application being filed. However, Sutter asserts that the visit was to the recycling operation, is not prohibited by precedent and has not prejudged the petitioners. Sutter reply at 7, 8.

Criteria

Criterion (i)

Sutter addressed the need and the solid waste plan together. Sutter contends that in analyzing the needs issue, Sutter reviewed Agency documents including remaining capacities of area disposal facilities as well as the Effingham County waste disposal plan. Sutter at 18. Sutter argues that neither the Act nor case law suggests that the need be determined by application of a

standard of life expectancy of existing disposal facilities because such a standard would be arbitrary and inaccurate. Sutter at 19. Specifically, Sutter notes that Hearing Exhibit 4 reflects that Landfill 33's life expectancy was 25 years in 1995 but that Landfill 33 itself reported to the County Board in 1999 that it had less than ten years of expected life. *Id.*

Sutter asserts that the need criterion was clearly met by evidence and testimony of the rapidly diminishing capacity of Effingham County area landfills and the economic viability of the proposed waste transfer station. Sutter Reply at 11-12. Sutter contends that previously stated life expectancies have historically expired far quicker than anticipated. Sutter at 19.

Criterion (ii)

Sutter asserts that it is not required to guarantee a certain level of protection, but must minimize potential problems. Sutter at 21. Sutter argues that the County Board determination of this issue must be substantially guided by the evidence and testimony of the experts in this case. Sutter at 21. Sutter contends that Landfill 33's witnesses only testified to general issues of possible concerns, but that these concerns were not substantiated by any evidence and cannot be given significant weight by the Board. Sutter at 21.

Sutter acknowledges that it did not know the thickness of the floor, but asserts that since the time of the hearing its engineers have taken core samples showing the floor is 8.5 inches thick. Sutter at 22. These samples were attached as attachment 4 of Sutter public comment. Sutter asserts that the sampling also revealed that a moisture barrier currently exists under the concrete floor which will prevent water migration into the sub grade, and that the slope of the floor is towards the east which is where the transfer pit and sump will be located. Sutter at 22.

Criterion (iii)

Sutter asserts that the only evidence on this point shows the proposed transfer station will have no impact on incompatibility issues. Sutter at 23. Sutter asserts that testimony by Mr. Bitzer revealed that the proposed facility would not have an adverse impact on property values in the area nor would it be incompatible with the area. *Id.*

Criterion (v)

Sutter asserts that Mr. Kimmle, a professional engineer, testified that because combustible refuse would not be stored on site, the risk of fire is decreased. Sutter at 23. Sutter contends that the fire extinguishers as well as a contingency plan are in place to address an emergency situations. Sutter at 24. To minimize environmental impacts, Sutter asserts that leachate will be collected and stored on site in a 1,000 gallon concrete containment structure that will be periodically shipped off site for disposal. *Id.*

Sutter asserts that Mr. Kimmle testified that these measures are completely in accordance with industry standards. Sutter at 24. Sutter states that typical trucks, including all that it owns, have no height problem raising beds to dump the waste in the proposed transfer station, and that whenever any truck enters the building to unload waste, a Sutter employee will be there to assist.

Sutter at 24. Sutter contends that safeguards will be in place to minimize the chance of any contact with the building structure in the infrequent situations where a larger truck might be present. *Id.*

Criterion (viii)

Sutter contends that the Plan supports both in and out of county disposal. Consistent with the Plan, asserts Sutter, and in recognition of rapidly increasing waste needs of the county, the County Board approved Landfill 33's request for an expansion of its landfill some five to ten years earlier than anticipated. Sutter at 25. Sutter asserts that given the increased need of solid waste facilities and the greater pace at which landfill space is decreasing, out of county disposal options, as provided in the Plan, must also be put in place. *Id.* Sutter asserts that such out of county disposal was contemplated and recognized in the Plan. *Id.*

Sutter directs attention to table 15 of the Plan where the county adopted alternatives to consider. Sutter argues that consistent with the County Board recognizing the need is greater than originally identified in the 1995 or 1999 readoption of the 1995 Plan, the County Board can and should move forward with Alternative C which provides in the five to ten year period support for a new transfer station. Sutter at 19-20.

Sutter contends that the County recognized it might have to be more aggressive and that is why Alternative C was set forth in the table. Sutter at 20.

DISCUSSION

The Board will now assesses the merits of (1) Landfill 33's jurisdictional argument; (2) the petitioners' fundamental unfairness arguments; and (3) the petitioners' contentions that the County Board's determination that Sutter satisfied Section 39.2 of the Act is against the manifest weight of the evidence.

Jurisdiction

Landfill 33 asserts that Sutter did not comply with mandatory notice requirements in that it did not assure that the notice was timely delivered to all members of the General Assembly from the district in which the proposes site is located. Section 39.2(d) of the Act requires that no later than 14 days prior to hearing, notice shall be published and delivered by certified mail to all members of the General Assembly from the district in which the proposed site is located. 415 ILCS 5/39.2(d) (2002).

Senator Noland did not receive notice of the hearing by certified mail until August 1, 2002, but did receive notice by personal service on July 31, 2002 - 14 days prior to the hearing. C352.

The notice requirements of Section 39.2(b) are jurisdictional prerequisites, which must be followed to vest the City with the power to hear a landfill proposal. *See Kane County Defenders, Inc. v. PCB*, 139 Ill. App. 3d 588, 593, 487 N.E.2d 743, 746 (2nd Dist. 1985). The Board finds

that the notice requirements were met in this case. It is undisputed that Senator Noland did receive actual notice of the hearing 14 days prior to that hearing. The Board cannot find any substantive difference between personal service and service by certified mail. The use of personal service still provides a permanent record for the sending and receiving of notices. Accordingly, the Board finds that sufficient notice was provided to Senator Noland.

Fundamental Fairness

In an administrative hearing, due process is satisfied by procedures that are suitable for the nature of the determination to be made and that conform to the fundamental principles of justice. Waste Management of Illinois, Inc. v. PCB, 175 Ill. App. 3d 1023, 1036, 530 N.E.2d 682, 693 (2nd Dist. 1988). In reviewing a Section 39.2 decision on site approval, the Board must consider the fundamental fairness of the procedures used by the County Board in reaching its decision. 415 ILCS 5/40.1(a) (2002).

Availability of Hearing Transcript

Stock contends that it was prejudiced because its registered agent, Duane Stock, was unable to obtain a copy of the hearing transcript from the County Board on October 2, 2002. Stock asserts it was prejudiced because its arguments in the petition for review had to be based solely on the siting application and Duane Stock's attendance at the hearing.

The Board has addressed the issue of availability of the transcript before the local siting authority on a number of occasions. See Sierra Club v. City of Wood River, PCB 95-174 (Oct. 5, 1995); Spill v. City of Madison, PCB 96-91 (Mar. 21, 1996); American Bottom Conservancy v. Village of Fairmont City, PCB 00-200 (Oct. 19, 2000). In City of Wood River, the Board held that although Section 39.2(c) of the Act requires that the local hearing transcript hearing be made available to the public, unavailability of the transcript will render the siting proceedings fundamentally unfair only if such unavailability prejudiced petitioners. In City of Wood River, the Board found that even if the transcript was unavailable, it could not find that this error had made the proceeding fundamentally unfair, since the petitioners failed to demonstrate prejudice.

In both Spill and American Bottom, the Board found that the proceedings were fundamentally unfair because the petitioners were prejudiced as a result of the unavailability of the transcript. In Spill, the Board found petitioners were prejudiced because they were unable to file public comments. In American Bottom, the Board found petitioners timely took the appropriate steps to review the transcript, but were not provided the transcript until after the close of the public comment period, and were therefore prejudiced in their ability to file public comments. American Bottom, PCB 00-200, slip op. at 44.

The Board finds that Stock has not demonstrated prejudice due to the unavailability of the transcript. Stock did not attempt to obtain a copy of the transcript until October 2, 2002 – a full 16 days after the County Board's decision, and well after the close of the public comment period on September 13, 2002. Tr. at 44, 47. Stock did timely file a public comment after the County Board hearing. C415-C416. The Board is not convinced that Stock was prejudiced in the filing of his petition for review. Stock's petition was accepted by the Board and was effective in

preserving Stock's right to appeal the County's decision. Accordingly, the Board finds the County's failure to provide access to the transcript did not render the proceeding fundamentally unfair.

Recycling Issue

Petitioners both contend they were deprived of an opportunity to address a recycling issue that was pivotal to the County Board's decision, and were prejudiced as a result.

Public officials should be considered to act without bias. E & E Hauling, Inc. v. PCB, 107 Ill.2d 33, 42, 481 N.E.2d 664, 668 (1985). Furthermore, the appellate court has stated that where a municipal government "operates in an adjudicatory capacity, bias or prejudice may only be shown if a disinterested observer might conclude that the administrative body, or its members, had in some measure adjudged the facts as well as the law of the case in advance of hearing it." Concerned Adjoining Owners, 288 Ill. App. 3d at 573, 680 N.E.2d at 816.

The petitioners have not shown that the County Board, or members of the County Board, prejudged the facts or law in this instance. The record is clear that throughout the proceeding both the County Board chairman and Effingham County State's Attorney Deters informed the County Board that the decision about the transfer station must be based on the statutory criteria and not the recycling issue. *See* C128, C131, C290. The comment by County Board member Voelker does not lead a disinterested observer to conclude the prejudging of facts or law in this case, nor is it sufficient to overcome the presumption that public officials should be considered to act without bias. The Board finds that the testimony concerning the recycling center did not result in a fundamental unfair proceeding.

Undisclosed Relationships

Stock asserts two undisclosed relationships have rendered the proceedings before the County Board fundamentally unfair. The first is the first cousin relationship between Duane Stock and County Board Member Carolyn Willenburg. The second involves the mother-son relationship of State's Attorney Ed Deters, who provided legal counsel to the County Board, and Nancy Deters, an outspoken advocate for the recycling center and the transfer station.

Sutter has argued that allegation concerning the impropriety of the relationship between Duane Stock and Carolyn Willenburg was waived because Stock never raised it at the County Board hearing. The Board agrees. The Illinois Supreme Court has held that a claim of disqualifying bias or partiality on the part of an administrative agency must be asserted promptly after knowledge of the alleged disqualification. E&E Hauling, Inc. v. PCB, 107 Ill.2d 33, 89 Ill. Dec. 821 (1985). Duane Stock participated in the underlying hearing and filed a public comment. No indication is found in the record that he raised the relationship issue prior to the filing of his petition for review filed before the Board. Fundamental fairness issues stemming from the Duane Stock – Carolyn Willenburg relationship are, therefore, waived.

Stock asserts the Ed Deters-Nancy Deters relationship was not discovered until the hearing before the Board on December 19, 2002, and has not been waived. The Board agrees.

Once again, in considering this relationship, the Board must decide whether a disinterested observer might conclude that the County Board, or its members, had in some measure adjudged the facts as well as the law of the case in advance of hearing it.

The Board finds that no bias resulted from the non-disclosure of the Deters' relationship. As referenced above, the standard for bias focuses on whether a *decision-maker* has prejudged facts or law. See E&E Hauling, emphasis added. Neither of the Deters was a decisionmaker in this matter. Nancy Deters attended the hearing and provided public comment. Ed Deters represented the County in this matter, but was not shown to be a decision-maker. He did not have a vote and or recommend any findings. Accordingly, the fact that his relationship with Nancy Deters was undisclosed did not render the underlying proceedings fundamentally unfair.

Site Visits

The petitioners contend that *ex parte* contacts occurred between the applicant and the County Board thereby biasing the County Board and resulting in its decision to approve local siting even though the criteria had not been met. Landfill 33 asserts that the County Board conducted a publicly unannounced visit to the transfer site on July 31, 2002. Sutter disputes this assertion stating that during the pendency of the application neither the County Board nor the waste committee visited the proposed transfer facility. Sutter Reply at 7.

Sutter contends there is no evidence in the record that the visit occurred, and that the only reference to a site tour is a notation in the County Board minutes that a proposed site visit had been scheduled. Sutter does acknowledge that members of the waste committee visited the site of the proposed transfer station prior to the application being filed. However, Sutter asserts that the visit was to the recycling operation, is not prohibited by precedent and has not prejudiced the petitioners.

Ex parte contacts between the local governing body and the applicant in the form of expense-paid tours of model facilities have been held to be fundamentally unfair. Southwest Energy Corp. v. PCB, 275 Ill. App. 3d 84, 92, 655 N.E.2d 304, 310 (4th Dist. 1995). In that case, opponents to the incinerator were not invited on the tour. The appellate court indicated that it encouraged the touring of existing facilities, but that fundamental fairness requires that representatives of all parties to the siting proceeding be given an opportunity to accompany the local governing body when it takes the tour. Southwest Energy, 275 Ill. App. 3d at 94, 655 N.E.2d at 310.

If a site visit did occur on July 31, 2002, it would have resulted in a fundamentally unfair situation. However, the record does not contain sufficient evidence that any trip occurred. The only testimony on the matter is that of Tracy Sutter during Landfill 33's offer of proof at the Board hearing. He did not recall any trip other than the visit of the waste committee prior to the filing of the application. Tr. at 73-74. The petitioners have not met their burden in showing that a visit took place on July 31, 2002.

As noted, a visit by the County Board's waste committee to Sutter's site did occur, but, the record clearly reveals the visit pre-dated the filing of the application. Consequently, the

Board finds that there is insufficient evidence to find that a site visit occurred on July 31, 2002, and the pre-application visit of April 19, 2002, did not result in an unfair proceeding.

Amendment of Application

Landfill 33 asserts that at the end of the public comment period after the hearing, Sutter submitted a public comment that for the first time contended that the proposed transfer station was necessary because Landfill 33 may have insufficient capacity. Landfill 33 considers this an improper amendment to Sutter's application. Sutter did not respond to this argument.

The Board finds that Sutter's public comment did not result in an amendment to Sutter's petition. The public comment in question addresses each of the criteria. *See* R. at C368-387. In addressing the first criterion, Sutter references various reported capacities of Landfill 33. However, a review of the record reveals that the comment does nothing more than expand on information presented in the application and at the hearing. As the public comment does not seek to amend the application, Landfill 33's argument is moot.

Siting Criteria

A party seeking siting approval for a pollution control facility must submit sufficient details of the proposed facility to meet each of the nine statutory criteria. 415 ILCS 5/39.2(a) (2002). Petitioners contend that Sutter failed to meet criteria (i), (ii), (iii), (v), (vi), and (viii).

The Board cannot reweigh the evidence. The Board may only reverse the County Board decision on the criteria if the decision was against the manifest weight of the evidence. Waste Management of Illinois, Inc. v. PCB (1987), 160 Ill. App. 3d 434, 513 N.E.2d 592. A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or indisputable from a review of the evidence. Harris v. Day, 115 Ill. App. 3d 762, 451 N.E.2d 262. Merely because the Board could reach a different conclusion, is not sufficient to warrant reversal. City of Rockford v. PCB and Frank's Industrial Waste, (2nd Dist. 1984) 125 Ill. App. 3d 384, 465 N.E.2d 996.

Criterion (i)

Section 39.2(a)(i) of the Act provides that local siting approval shall only be granted if the facility is necessary to accommodate the waste needs for the area it is intended to serve. The applicant is not required to show absolute necessity in order to satisfy criterion (i). Fairview Area Citizens 198 Ill. App. 3d at 551, *citing* Tate v. PCB, 188 Ill. App. 3d 994, 544 N.E.2d 1176 (4th Dist. 1989); Clutts v. Beasley, 185 Ill. App. 3d 543, 541 N.E.2d 844 (5th Dist. 1989). The Third District Appellate Court has construed "necessary" as a degree of requirement or essentiality, and found that a landfill must be shown to be reasonably required by the waste needs of the area intended to be served, taking into consideration the waste production of the area and the waste disposal capability, along with any other relevant factors. Waste Management, Inc., v. PCB, 122 Ill. App. 3d 639, 644; 461 N.E.2d 542 (3rd Dist. 1984).

After careful review of the record, the Board finds that the County Board's finding of need for Sutter's proposed transfer station is not against the manifest weight of the evidence. Although Sutter acknowledged that sufficient capacity to accommodate the waste needs of the service area consisting of the 50-mile radius around the proposed transfer station existed, the need criterion was met by evidence and testimony of the rapidly diminishing capacity of Effingham County area landfills and the economic viability of the proposed waste transfer station.

The applicant is not required to show absolute necessity in order to satisfy criterion (i). Sutter reviewed Agency documents including remaining capacities of area disposal facilities as well as the Effingham County waste disposal plan. Sutter's expert Mr. Kimmle testified that to economically access out-of-county landfills, a waste transfer station is necessary. R. at C143. The Board is instructed to considering the waste production of the area along with any other relevant factors. See Waste Management, Inc., v. PCB, 122 Ill. App.3d at 644. Sutter argues that the expected life of landfills in general and Landfill 33 in particular historically expire quicker than anticipated, and that based on Landfill 33's solid waste landfill capacity certification reports of 2001 and 2002, may only have ten years of expected life left.

The Board finds enough merit in Sutter's application and testimony so that a result opposite to the County Board's decision is not clearly evident, plain, or indisputable. Thus, the County Board's decision that Sutter met its burden of proof on the need criterion is not against the manifest weight of the evidence.

Criterion (ii)

Criterion (ii) of Section 39.2 of the Act requires the applicant to show that "the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected." 415 ILCS 5/39.2(a)(ii) (2002). After reviewing the record, the Board finds that the County Board's conclusion that the design of the transfer station is adequate to assure the lack of movement of contaminants is not against the manifest weight of the evidence.

The petitioners assert that Sutter failed to demonstrate that the public health, safety and welfare will be protected. Both petitioners argue that the transfer station will be within 1,000 feet of a dwelling. The Board disagrees. The record reveals that a house is located on the proposed site for the transfer facility. R. at C147. However, Sutter's expert Mr. Kimmle testified that the house is not inhabited and will be used as an office for the waste transfer facility. *Id.* Mr. Kimmle also testified that proposed facility has been located a minimum of 1,000 feet from the nearest property zoned for primary residential use. *Id.* The petitioners also argue that a house is located across the street from the proposed transfer station. Landfill 33 at 14, Stock at 19. However, the underlying record does not contain any evidence concerning this dwelling. The issue was not raised until the hearing before the Board, and is, accordingly, not properly before the Board in this proceeding.

The petitioners raise a number of issues concerning the design of the proposed transfer facility. For example, the petitioners contend that nothing is planned to prevent liquid wastes and leachate from running off the concrete floor and onto the ground surrounding the building,

that older trucks used by other haulers will be unable to open their tailgates fully when unloading in the building because of inadequate clearance, and that roll-offs will not be able to raise their beds to the full height as designed if unloading in the building.

Sutter presented testimony concerning the potential for leachate generation at the facility. Mr. Kimmle testified that the potential for leachate is minimal because the operations are indoors. R. at C150. But, he stated that any leachate generated will be collected and directed to a local sump that will then pump the water to a nearby leachate storage tank contained within a concrete containment dike prior to disposal off-site. *Id.* Mr. Kimmle testified that the water resulting from washing the floor down will be contained within the building (in the lower elevation floor) and directed into the collection system. R. at C153-54.

Sutter also presented testimony regarding concerns about inadequate clearance in the proposed transfer station. Tracy Sutter testified that trucks typical to the industry today do not have problems opening their tailgates fully. R. at C263-64. Although he acknowledged that issues do exist with the maximum available height for dumping roll-offs, he testified that on-site personnel will always be present to assist drivers in this regard. R. at C265.

The Board finds that there is evidence in the record to support the County Board's decision on criterion (ii), and, therefore, the decision is not against the manifest weight of the evidence.

Criterion (iii)

Criterion (iii) requires the applicant to minimize the incompatibility of the facility on the surrounding area and to minimize the effect on property values. This criterion requires an applicant to demonstrate more than minimal efforts to reduce the landfill's incompatibility. File, 219 Ill. App. 3d at 907; Waste Management, 123 Ill. App. 3d at 1089. An applicant must demonstrate that it has done or will do what is reasonably feasible to minimize incompatibility. Waste Management, 123 Ill. App. 3d at 1090. However, an applicant cannot establish compatibility based upon a pre-existing facility, and the compatibility of an expansion must be considered as a new and separate regional pollution control facility. Waste Management, 123 Ill. App. 3d at 1088.

Stock argues that Sutter failed to provide any evidence as to how the facility will minimize incompatibility with the character of the area and that the decision of the County Board is, therefore, against the manifest weight of the evidence. At the hearing before the County Board, Sutter presented testimony by licensed real estate broker and appraiser James R. Bitzer that the proposed expansion met the requirements of criterion (iii) in that it minimized the incompatibility with the character of the surrounding area and minimized the effect on the value of the surrounding property. R. at C182. Bitzer testified that the character of the surrounding land is predominantly level agricultural cropland and that no significant expansion or urbanization is going on in the area. R. at C181.

The Board finds that the County Board decision on criterion (iii) was not against the manifest weight of the evidence. Sufficient evidence exists on the record to support the County

Board's decision that no impact will result from the siting of the proposed transfer station. An opposite result is not clearly evident or indisputable from a review of the evidence. The Board, thus, concludes that the City's decision on criterion (iii) is not against the manifest weight of the evidence.

Criterion (v)

Criterion (v) of Section 39.2 of the Act requires that the application's "plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operations accidents." 415 ILCS 5/39.2(a) (2002).

Both petitioners argue that the County Board's decision is against the manifest weight of the evidence on this criterion. Landfill 33 contends the wooden interior and the rural location of the proposed transfer station pose a greater risk of fire, and that the door and ceiling heights in the proposed station pose a hazard for roll-off containers. Stock contends that the transfer station is proposed to be located immediately adjacent to three existing grain bins and a nearby a large existing propane tank – both of which are known fire hazards. Stock further raises a number of shortcomings in the contingency plan it contends render the County Board decision on this criterion against he manifest weight of the evidence.

Sutter asserts that Mr. Kimmle testified that the measures proposed to satisfy the requirements of this criterion are completely in accordance with industry standards. Sutter contends that the fire extinguishers as well as a contingency plan is in place to address an emergency situations, and that environmental impacts will be minimized in part due to the leachate will be collection procedures.

Much of the issues raised in regards to this criterion were also discussed during the Board's analysis of criterion (ii). The Board finds that the County Board's decision that Sutter satisfied the requirements of this criterion are not against the manifest weight of the evidence. At the siting hearing, Mr. Kimmle testified that the plan of operations is designed to minimize the danger to the surrounding area from fire, spill, or other operational concerns. R. at C160. He testified that the primary concerns in addressing this criterion for solid waste transfer facilities are the storage of petroleum products and refuse on site, and that there is not into to store either at this facility. R. at C158. Mr. Kimmle further testified about the leachate collection provisions, and that the contour of the site is such that potential accidental spill during the transfer process can be contained on site and appropriately cleaned up. R. at C159.

Stock focuses much of its argument on Sutter's contingency plan. However, the contingency plan is not the sole issue to be considered. In its application, and at hearing, Sutter provides detailed information about the plan of operations. The majority of this information is submitted under criterion (ii), and, in addition to the contingency plan, includes provisions for site operation, methods of transfer or disposal of waste generated at the site, information on the leachate containment system, and litter, vector and odor control. R. at C19-25.

Sutter has presented aplan of operations as required by criterion (v). Ample evidence exists in the record to support the County Board's decision that Sutter satisfied criterion (v). The

Board finds that the County Board decision is not against the manifest weight of the evidence.

Criterion (vi)

Landfill 33 raised concerns about the site size, the close proximity of the scale house to the road, and the tight turning radiuses into and out of the proposed transfer station. Landfill 33 claims that Sutter did not even provide a traffic count of the anticipated number of vehicles it would receive from its recycling business to compare with traffic issues relating to the transfer station, and did not address the impact of facility traffic during the road restriction months (January through April) for the roadway approaching the facility.

Neither of the respondents responded to Landfill 33's assertion that the County Board's decision on this criterion was against the manifest weight of the evidence. Landfill 33 did not seek to review this criterion in their amended petition filed with the Board on October 21, 2002.

Section 107.208 of the Board's procedural rules provides the petition content requirements for a petition to review a pollution control facility siting decision. *See* 35 Ill. Adm. Code 107.208. Such a petition must include, *inter alia*, a specification of the grounds for the appeal, including any manner in which the decision as to particular criteria is against the manifest weight of the evidence. 35 Ill. Adm. Code 107.208(c).

As noted, Landfill 33 does not allege that the County Board decision on criterion (vi) is against the manifest weight of the evidence in its amended petition. Landfill 33 never attempted to amend its petition, and did not request the Board to review criterion (vi) until the filing of its post-hearing brief. No attempt to challenge criterion (vi) is contained in any hearing officer order in this matter.

The Board will not entertain argument on this criterion. Landfill 33 did not meet the requirements of Section 107.208(c) that clearly provide that the petition must specify any manner in which the decision as to particular criteria is against the manifest weight of the evidence. Landfill 33 had the opportunity to amend the petition at any point before the hearing, and even during the hearing itself, but never attempted to do so. Landfill 33's late attempt to challenge criterion (vi) before the Board resulted in prejudice to the respondents, who did not address this issue through the pendency of the case.

Criterion (viii)

Criterion (viii) requires the applicant to show that the proposed expansion is consistent with the County Solid Waste Management Plan. To satisfy this criterion, the local body must apply the County Solid Waste Management Plan to the proposed facility and make a determination whether the application is drafted in such a way as to be consistent with the plan. City of Geneva v. Waste Management of Illinois, Inc., PCB 94-58, (July 21, 1994)

In reviewing the evidence, the Board finds that the County Board's decision regarding this criterion is not against the manifest weight of the evidence. The County Board presented extensive evidence and expert testimony finding the proposed transfer station is consistent with

the Effingham County Plan. Mr. Kimmle stated that the proposed station is consistent with the County's intention to avail itself to both in-county and out-of-county landfills. Landfill 33 did present expert testimony in opposition that although the Plan considered transfer stations as an option in a preliminary step of the planning process, the Plan rejected the used of transfer stations.

The County Board considered the testimony from both experts on this issue. The Plan does contemplate the use of an in-county transfer station. The County Board's decision cannot be found to be against the manifest weight of the evidence merely because it valued the testimony of one expert over another. The Board may not re-weigh the evidence. The Board therefore, upholds the decision and finds that the County Board decision was not against the manifest weight of the evidence on criterion (viii).

CONCLUSION

After our careful review of the record, the Board concludes that the County Board had jurisdiction over Sutter's application for a new solid waste transfer station, and that the procedures the County Board followed to address the merits of the application were fundamentally fair. Additionally, the Board finds that the County Board's determination Sutter met the requirements of criteria (i), (ii), (iii), (v), and (viii) of Section 39.2 of the Act was not against the manifest weight of the evidence.

This opinion and order constitutes the Board's findings of facts and conclusions of law.

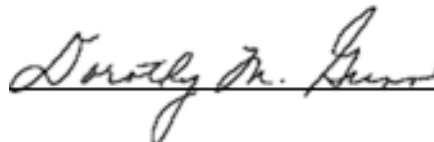
ORDER

The decision of the Effingham County Board approving Sutter's application to site a new solid waste transfer station is affirmed.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2002); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill.2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on February 20, 2003, by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", is written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board