

JAN 10 2003

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

LANDFILL 33, LTD.,)
)
)

Petitioner)

PCB No. 03-43

vs.)
)
)

EFFINGHAM COUNTY BOARD)
& SUTTER SANITATION SERVICES)
)

Respondents)
)
)

AND)

STOCK & CO.,)
)
)

Petitioner)

vs.)

PCB No. 03-52

(Cases Consolidated)

EFFINGHAM COUNTY BOARD and)
SUTTER SANITATION SERVICES,)
)

Respondents)

EFFINGHAM COUNTY BOARD'S
INITIAL POST-HEARING BRIEF

Now comes Respondent, Effingham County Board, by and through its attorney, Edward C. Deters, State's Attorney for Effingham County, and pursuant to the December 19, 2002 Order of the Hearing Officer in this matter, hereby submits its Initial Post-Hearing Brief.

I. INTRODUCTION AND PROCEDURAL HISTORY

On December 19, 2002, a hearing was conducted on the above-referenced appeals in front of the Pollution Control Board (PCB), in Effingham County. This brief is in response to the Hearing Officer's order for simultaneous briefs of all parties, to be filed with the PCB on January 10, 2003.

This matter was initiated in Effingham County by Sutter Sanitation, Incorporated's (Sutter) filing an application with the Effingham County Board for local siting approval of a proposed solid waste transfer station. A public hearing was held by the Effingham County Board, with notices as required by statute, on August 14, 2002. Sutter Sanitation presented witnesses, who were questioned by the Board, as well as by Landfill 33, Ltd. (Landfill 33). Landfill 33 also presented witnesses, who were questioned by the Board and by Sutter. After the hearing, the statutory period was open for written public comment, and several written comments were received, including by Petitioner Stock and Company, LLC (Stock).

On September 16, 2002, the Effingham County Board held its regularly scheduled meeting. On the agenda that evening was the Sutter application for approval. At the appropriate point in the meeting, Chairman Leon Gobiczynski called the Sutter matter for discussion. Discussion was held on each of the nine statutory criteria, and a vote was held on each criteria before the discussion of the next criteria began. Vice Chairman Bill Grunloh of the Board voted "nay" on two of the criteria and proposed a condition to a third criteria, a bond requirement for Sutter that was voted on by the Board. After votes on each of the 9 criteria, the County Board voted to approve Sutter's application.

On or about October 8, 2002, Landfill 33 filed an initial Petition appealing the County Board's decision granting approval to Sutter's application. On October 17TH, Landfill 33 filed the Amended Petition, now before the PCB. On or about October 16, 2002, Stock filed its Petition appealing the County Board's decision approving the application.

The two petitions before the PCB have been consolidated for appeal. A hearing date of December 19, 2002 was established by the PCB, and a hearing was held in Effingham County on that date before Hearing Officer Brad Halloran.

II. ARGUMENT

Petitioners Landfill 33, Ltd. and Stock and Company, LLC have alleged in their Petitions two main points. First, that the Effingham County Board's decisions on certain siting criteria were against the manifest weight of the evidence. Second, that the Board's proceedings were fundamentally unfair. The Effingham County Board will address both issues in the petitions in turn.

A. THE EFFINGHAM COUNTY BOARD'S DECISIONS ON THE STATUTORY CRITERIA FOR APPROVAL OF SITING WAS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

The Landfill 33 amended petition of October 18, 2002 cited four criteria that the Effingham County Board incorrectly found were met by Sutter Sanitation: 1) the "necessity" of the proposed facility; 2) that the facility design, location, and operation will protect the public safety, health, and welfare of our citizens; 3) that the facility's operational plan will minimize danger from fire, spill, and other operational accidents to the area; and 4) that the Board's decision was consistent with the solid waste management plan of the county.

The Stock petition of October 16, 2002 cited five criteria that the Effingham County Board incorrectly found were met by Sutter Sanitation: 1) the "necessity" of the proposed facility; 2) that the facility design, location, and operation will protect the public safety, health, and welfare of our citizens; 3) that the facility's location minimizes incompatibility with the character of the surrounding area and minimizes

the effect on the value of surrounding property; 4) that the facility's operational plan will minimize danger from fire, spill, and other operational accidents to the area; and 5) that the Board's decision was consistent with the solid waste management plan of the county.

The Illinois Environmental Protection Act cites nine statutory criteria that must be met for counties to approve a siting request for a waste transfer station.

415 ILCS 5/39.2 (a). When reviewing the decision of the respective counties either granting or denying approval of local siting, the PCB must determine whether the County's decision is against the manifest weight of the evidence. See, e.g., American Bottom Conservancy et al v. Village of Fairmont City, et al., PCB No. 01-159, p. 2, (October 18, 2001). The burden of establishing that the county's decision was in error is squarely on the Petitioners. 415 ILCS 5/40.1 (b). County of Kankakee et al. v. The City of Kankakee, PCB No. 03-31, 03-33, and 03-35 (consolidated cases), p. 3, (October 3, 2002).

The Effingham County Board held its public hearing on local siting for the proposed waste transfer station on August 14, 2002. The hearing lasted over three hours (R. C290). Witnesses were presented by Sutter Sanitation, witnesses were presented by Landfill 33, and questions were allowed by the public. Questions were asked by County Board members and attorneys for both sides were also given the opportunity to ask questions of the other witnesses. Both sides presented credible evidence on each of the above-mentioned criteria, which will not be rehashed here (R. C125 – C293).

At the Effingham County Board meeting on September 16, 2002, the County Board discussed each of the nine criteria established by statute for consideration of siting approval (R. C437 – C438). Substantial discussion was had and consideration given to all of the evidence put on by both Landfill 33 and Sutter Sanitation. Vice-Chairman of the Board, Bill Grunloh, in particular, accepted certain parts of the Landfill 33 argument as noted in the minutes (R. C437). Grunloh voted “nay” to criteria involving the “necessity” of the site, and “nay” that the site was consistent with the County’s Solid Waste Management Plan (R. C437 – C438). Grunloh also suggested a modification to the Sutter application requiring the provision for a \$20,000 bond paid for by Sutter to help in clean-up if there were problems at the site (R. C437). This suggestion was adopted by the County Board and made part of the County’s approval of the site (R. C437 – C438). Finally, written comments were received by the Board, and those received in a timely manner were considered by the Board.

The Effingham County Board properly considered and weighed the evidence offered by all parties before it in reaching a decision on each criteria. The Board voted separately on each criteria, and time was allowed for discussion on each criteria before a vote was taken on that criteria. The Board’s careful consideration of each criteria is borne out particularly by Vice-Chairman Bill Grunloh’s “nay” votes on two criteria, and his introduction of the \$20,000 bond condition to a third criteria that was adopted by the County Board. Having considered all the evidence before it, the County Board simply voted that Sutter had met its burden in establishing the nine statutory criteria. To do so was not against the manifest weight of the evidence presented at the public hearing.

Landfill 33's Amended Petition to the Pollution Control Board raises the notion that approval of four criteria on local siting was against the manifest weight of the evidence. However, Landfill 33 offers no evidence or bases in its Petition to support its claim that the County Board's decision on any one criteria was against the manifest weight of the evidence. Landfill 33 has not met its burden, either in its Petition or at the PCB hearing, of establishing error in the approval of local siting by the Effingham County Board. Therefore, the People urge the Board to reject Landfill 33's contentions that the Board's decisions on these 4 criteria were against the manifest weight of evidence.

The Stock Petition contains the additional argument that the criteria regarding the character of the surrounding area and the effect on the value of surrounding property was not met by Sutter. Stock presented no evidence at the Public Hearing of its own on these issues. Sutter presented James Bitzer, real estate appraiser on this issue (R. C178 – C183). Mr. Bitzer indicated there would be zero or minimal impact to the surrounding properties by granting approval (R. C183). Sufficient evidence was heard for the County Board to find that this criteria was met.

The other criteria cited by Stock in its Petition as not having been met were also argued by Landfill 33. While Stock alleged these issues with more particularity than Landfill 33, Stock has not met its burden in establishing how the Board's decision as to any of the criteria was against the manifest weight of the evidence. Therefore, Stock's Petition on the issue of the statutory criteria also must fail.

B. THE EFFINGHAM COUNTY BOARD'S PROCEEDINGS ON SUTTER'S APPLICATION WERE "FUNDAMENTALLY FAIR" TO PETITIONERS STOCK AND LANDFILL 33.

Both Landfill 33 and Stock also allege that the Effingham Co. Board proceedings on Sutter were "fundamentally unfair." The burden of proof on a "fundamental fairness" argument is on the Petitioner. 415 ILCS 5/40.1 (b). Stock and Company's Petition specifically alleges that the Effingham County proceedings were "fundamentally unfair" in several respects. Inference is made by Stock, though not established by their Petition or at the PCB hearing, three factors that effected the "fairness" of the Effingham County proceedings: 1) the availability of a transcript of the August 14th public hearing; 2) the existence of a family relationship between Duane Stock and County Board member Carolyn Willenburg; and 3) the suggestion that a recycling issue was improperly considered by the Board in granting approval. Each issue will be discussed in turn. Finally, Effingham County will argue that by failing to specifically allege how the proceedings were unfair, Landfill 33 waived this argument.

1. TRANSCRIPT AVAILABILITY

The first argument on the fundamental fairness issue by Stock is that a hearing transcript from the waste transfer site hearing was not available until October 24, 2002. This date was after the Effingham County Board held their vote on the nine criteria at their September 16, 2002 meeting.

Duane Stock of Stock and Company, LLC testified at the Pollution Control Board hearing in Effingham on December 19, 2002. During that hearing, Mr. Stock admitted that he did not request a transcript of the August 14th hearing between that hearing date and the September 16th County Board meeting (PCB Tr. 50). Stock

also admitted that he made no effort between October 2, 2002 and November 25, 2002 to contact anyone in Effingham County to see about getting a copy of the transcript (PCB Tr. 47-48). Stock conceded he never contacted any Effingham County officials or public bodies to identify himself as a party or participant to the proceedings prior to the Board's vote on September 16, 2002 (PCB Tr. 50-51).

For all of these reasons, Stock can not claim that these proceedings were fundamentally unfair to the company as it relates to the availability of a transcript. Only on October 2, 2002 was a request for a transcript even made, weeks after the decisive vote on approval of Sutter's application was made on September 16, 2002. No further request was made for a transcript until November 25th. Stock was not prejudiced in anyway by the transcript's unavailability, and that unavailability did not affect the essential fairness of Effingham County's proceedings herein.

2. FAMILIAL RELATIONSHIP BETWEEN DUANE STOCK AND CAROLYN WILLENBURG

Stock's second suggestion of unfairness is made of the existence of some bias to Stock and Company by Board Member Carolyn Willenburg's first cousin relationship to Duane Stock. Nowhere is it established by Stock that this familial relationship adversely affected the company, or that the company was prejudiced in some way. At the December 19, 2002 PCB hearing, on cross examination Duane Stock allowed that Carolyn Willenburg was a "nice" person, and more importantly, admitted that they got along very well (PCB Tr. 50). Further, he acknowledged that he never asked her to step aside or recuse herself from the Sutter issue due to their relationship, at any time prior to the filing of the Stock petition (PCB Tr. 51).

Surely Stock and Company should be required to prove or allege some actual prejudice to them by the familial relationship between Willenburg and Duane Stock. Instead, they apparently waited for one of two reasons. First, they perhaps thought the relationship would be to the company's benefit as to Willenburg's vote on approval of the site. Second, if things did not work out the way the Company hoped, they would have preserved an issue to argue on appeal. In no way did the relationship between Duane Stock and Carolyn Willenburg create "fundamentally unfair" proceedings on the waste transfer site for Sutter's benefit. The mere suggestion that the relationship itself created unfairness, without establishing ways in which it was unfair, is insufficient to support the Petitioner's claim of bias.

3. RECYCLING ISSUE

The third issue raised by Stock is that the issue of a small consumer recycling service offered by Sutter at the proposed site improperly influenced the Board's vote. The only offer of proof on that issue seems to be a statement taken from the minutes by Board member Charles Voelker at the September 16, 2002 Board meeting, before the vote, that "recycling is a valuable asset and needed in Effingham County." (R. C437).

However, Chairman Leon Gobczynski addressed the proper focus of the Board as voting on the nine criteria. At the August 14, 2002 public hearing he stated:

I think maybe it's appropriate that I make a comment or two. What we're trying to do here tonight, very clearly and very narrowly, is to judge this application based on the criteria before it. I would have to say that we have to be careful in the comments in – and opinion as to whether this is a good thing or a bad thing. Our job here is to be very narrow and

focused, and we will accept written comments as to why these criteria are – are good or bad, but I think we have to be very focused on what we're doing here tonight, or this would indeed be a very long night for all of us because we can't just accept comments based on – on business practices or ethics or routes or even recycling, as much as those are important issues to all of us in our daily life. So I would just ask that we all try and focus on – on what's at hand here and the work that we have. And address the comments – or not comments. Address questions to these criteria because that's truly what we're here for. (R. C225 – C226)

The County Board Chairman properly focused the issues to the Board.

During the discussion on each of the nine criteria, at the September 16th meeting, no mention of the recycling issue was again raised by a Board member. Petitioner Stock has failed to establish that any County Board member's vote on any of the nine criteria were affected or changed based on the recycling issue. They attempt to do so only by inference through one Board member's comment as reflected in the minutes. Stock has failed to meet its burden of establishing that any suggestion of the recycling issue made these proceedings "fundamentally unfair."

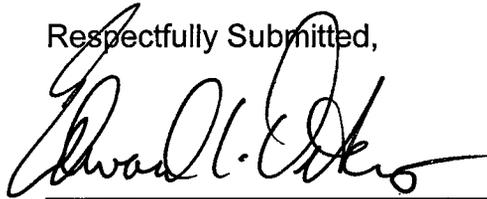
4. LANDFILL 33'S ALLEGATION OF FUNDMENTALLY UNFAIR PROCEEDINGS

The burden of proof on issues of fundamental fairness is on the Petitioner. Petitioner Landfill 33 has alleged Effingham County's proceedings in approving Sutter's application were "fundamentally unfair," yet have not in their Petition or in an obvious way at the PCB hearing raised specific issues of fairness. Failure to specifically allege in what ways the proceedings were "fundamentally unfair" should result in waiver of that issue before the PCB. If the issue is not waived, Effingham County at any rate can not address the issue further as Landfill 33 has not raised a fairness issue with sufficient specificity to provide for comment by Effingham County.

III. CONCLUSION

For the reasons set forth above, the Effingham County Board respectfully moves that this Pollution Control Board affirm the September 16, 2002 decision of the Effingham County Board approving local siting for Sutter Sanitation, Inc., for a waste transfer station in Effingham County.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Edward C. Deters", written over a horizontal line.

Edward C. Deters
State's Attorney
Effingham County

Edward C. Deters
Effingham County State's Attorney's Office
101 North Fourth Street, Suite 400
Effingham, IL 62401
(217)347-7741

PROOF OF SERVICE

The undersigned certifies that an original and nine copies of the foregoing document were served by placing same in a sealed envelope addressed to:

Dorothy Gunn, Clerk
Pollution Control Board
100 W. Randolph Street
Suite 11-500
Chicago, IL 60601

And one copy of the foregoing document was served by placing same in a sealed envelope addressed to:

Stephen F. Hedinger
Hedinger Law Office
1225 S. Sixth St.
Springfield, IL 62703

Christine Zeman
Hodge Dwyer Zeman
P.O. Box 5776
Springfield, IL 62705-5776

Charles J. Northrup
Sorling, Northrup, Hanna, Cullen & Cochran, Ltd.
P.O. Box 5131
Springfield, IL 62705

and by depositing same in the United States mail in Effingham, Illinois, on the 9th day of January, 2003, with postage fully prepaid.

Carla Wright