BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE
JAN 10 2003
STATE OF ILLINOIS
Pollution Control Board

LANDFILL 33, LTD., Petitioner, v. EFFINGHAM COUNTY BOARD and SUTTER SANITATION SERVICES, Respondents.	)	PCB 03-43 (Third-Party Pollution Control Facility Siting Appeal)
STOCK & COMPANY, LLC, Petitioner, v. EFFINGHAM COUNTY BOARD and SUTTER SANITATION SERVICES, Respondents.	)	PCB 03-52 (Third-Party Pollution Control Facility Siting Appeal) (Consolidated)

NOTICE OF FILING

TO: Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA AIRBORNE EXPRESS)

Bradley P. Halloran, Esq.
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA AIRBORNE EXPRESS)

(SEE PERSONS ON ATTACHED LIST)

PLEASE TAKE NOTICE that I have today served for filing with the Office of the Illinois Pollution Control Board an original and nine copies of STOCK & COMPANY, LLC'S BRIEF IN SUPPORT OF ITS PETITION FOR REVIEW OF THE EFFINGHAM COUNTY BOARD'S DECISION APPROVING SITING FOR SUTTER SANITATION

SERVICE, INC.'S TRANSFER STATION attached herewith, copies of which are herewith served upon you.

Respectfully submitted,

STOCK & COMPANY, LLC
Petitioner,

By: _____
One of Its Attorneys

Dated: January 9, 2003

Christine G. Zeman
David M. Walter
HODGE DWYER ZEMAN
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

CERTIFICATE OF SERVICE

I, David M. Walter, the undersigned, hereby certify that I have served the attached STOCK & COMPANY, LLC'S BRIEF IN SUPPORT OF ITS PETITION FOR REVIEW OF THE EFFINGHAM COUNTY BOARD'S DECISION APPROVING SITING FOR SUTTER SANITATION SERVICE, INC.'S TRANSFER STATION upon:

Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Bradley P. Halloran, Esq.
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

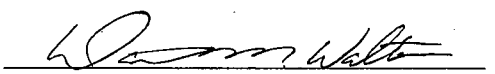
Edward C. Deters, Esq.
Effingham County State's Attorney
County Office Building
101 North Fourth Street, Suite 400
Effingham, Illinois 62401

via Airborne Express in Springfield, Illinois, on January 9, 2003, for delivery to the above-referenced persons on January 10, 2003, at 10:30 a.m., and will serve upon:

Charles Jones Northrup, Esq.
Attorney for
Sutter Sanitation Services
Sorling, Northrup, Hanna, Cullen &Cochran
Illinois Building, Suite 800
Post Office Box 5131
Springfield, Illinois 62705

Stephen F. Hedinger, Esq.
Attorney for Landfill 33, Ltd.
Hedinger Law Office
1225 South Sixth Street
Springfield, Illinois 62703

via hand-delivery on January 10, 2003.



David M. Walter

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

LANDFILL 33, LTD.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 03-43
	)	(Third-Party Pollution Control
EFFINGHAM COUNTY BOARD and	)	Facility Siting Appeal)
SUTTER SANITATION SERVICES,	)	
	)	
Respondents.	)	
	)	
STOCK & COMPANY, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 03-52
	)	(Third-Party Pollution Control
EFFINGHAM COUNTY BOARD and	)	Facility Siting Appeal)
SUTTER SANITATION SERVICES,	)	(Consolidated)
	)	
Respondents.	)	

STOCK & COMPANY, LLC'S BRIEF IN SUPPORT OF ITS PETITION FOR REVIEW OF THE EFFINGHAM COUNTY BOARD'S DECISION APPROVING SITING FOR SUTTER SANITATION SERVICE, INC.'S TRANSFER STATION

NOW COMES the Petitioner, STOCK & COMPANY, LLC, and in support of its Petition for Review of the Effingham County Board's Decision Approving Siting for Sutter Sanitation Service, Inc.'s Transfer Station, hereby states as follows:

I. FACTS

Duane Stock manages property, and is the registered agent, for Stock & Company, LLC ("Stock & Co."). Record ("R.") at C96. Stock & Co. is essentially a holding company for family interests, and it owns farmland in Effingham County, along County Road 25, which is commonly referred to as the Altamont-Farina blacktop. Tr. at

48; R. at C10, C42. Historically, a dwelling has been located on Stock & Co.'s property, although for several years, there was not. Tr. at 49.[1]

Like much of the fertile ground that is so characteristic of rural Central Illinois, the area near Stock & Co.'s farmland is predominately level and used as agricultural cropland. R. at C42. And, like most agricultural areas in rural Central Illinois, there are not many neighbors. R. at C11. The Stock and Wharton families, who separately own land, have long been farmers in this area, however, and feel strongly that the safety and agricultural character of their neighborhood should be preserved. R. at C424-C425.

A residence, grain elevator, grain bins, pole barns and sheds are located to the east, just across the road from Stock & Co.'s property on about three acres that are owned by the Hacker family. R. at C7, C77. The dwelling across the road from Stock & Co.'s property is a large two-story frame house, complete with front pillars and a swimming pool. R. at C65, C239. And, historically, during the harvest season, trucks filled with grain from area farms would bring the bounty of that year's harvest to the elevator. R. at C175. Now, Sutter Sanitation Service, Inc. ("Sutter") intends to bring garbage, rubbish, and waste from a 30-mile radius and including from the City of Effingham to the site instead. R. at C10, C14.

On March 21, 2002, Stock & Co received notice by certified mail that provided, in pertinent part, as follows:

---

[1] At the time of the hearing before the Effingham County Board ("County Board") that is the subject of this appeal, there had not been a residence on that property for several years. Tr. at 49. On September 16, 2002, however, Stock & Co. submitted a letter to the County Board by facsimile, in which it stated that the former dwelling site had been leased for residential purposes, and that a manufactured home would soon be delivered. R. at C431. This letter was seen by the County Board members, but was not considered by them in making their decision. See R. at C427.

> Sutter Sanitation proposes to develop and operate a waste transfer station (for non-hazardous solid waste only) on approximately 3.23 acres at this location.
>
> * * *
>
> The property will be used for purposes of transferring waste from refuse collection vehicles to transfer trailers, which will then be transferred to a solid waste landfill for waste disposal....
>
> * * *
>
> The probable life of the waste transfer station will be in excess of 20 years.

R. at C96-C98.

On April 19, 2002, Sutter filed its Application for Local Siting Approval For Proposed Solid Waste Transfer Station ("Application") with the County Board. R. at C4. The Application for Sutter's proposed transfer station is approximately 120 pages in length, and includes, among other things, some information regarding the criteria that are set forth in Section 39.2(a) of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/39.2(a)). See generally, R. C4-C123.

On August 14, 2002, a public hearing on Sutter's Application was held by the County Board. R. at C127. Testimony was presented by both those in support of, and opposed to, the transfer station. A certified shorthand reporter recorded the proceedings, and afterwards, by September 2, 2002, transcribed her notes into written form. R. at C127; C294. After the hearing, Stock & Co. became very concerned about Sutter's new plans for the neighborhood. R. at C415, C427-C431.

At the hearing, it became clear that Sutter has not even designed a transfer station building for this site. R. at C241. Instead, Sutter proposes to use an existing former grain storage building, with slight modification, as a transfer station. R. at C80. A

recycling center will be operated in another building on site. R. at C190-C191. Existing pathways at the former elevator will be used for the transfer station as well. R. at C176; C78. And, the grain elevator, numerous grain bins, and propane tank currently on site will remain. R. at C77; C147. Garbage trucks may be parked overnight, in one of the other buildings on-site. R. at C23. The two-story frame house with the front pillars and swimming pool will be used for an office. R. at C19.

The actual waste transfer will occur in a pole barn, which is located right next to three grain bins. R. at C242; C77. A propane tank and recycling building where cardboard is stored are also located nearby. R. at C77; C191; C20. The exterior of the waste transfer building is metal, but the interior is covered with wooden boards formerly used to contain the grain stored in the building. R. at C242; C265-C266.

No sprinkler system will be installed. R. at C168. Although a well is presently the only source of water available for fire fighting purposes, a few fire extinguishers will also be available. R. at C247; C24; C168. In case of an emergency, employees are to contact a member of management, and call 911. R. at C23.

Waste will be dumped on the existing concrete floor of the building. R. at C20-C21. Cracks currently exist in the floor, but Sutter intends to fill those with sealant. R. at C268, C21. At the time of the hearing, Sutter did not know how thick the concrete floor was. R. at C266. Nevertheless, the building was previously used to store grain, and "they went in with somebody's trucks and loaded and unloaded their grain." R. at C266.

A submerged concrete loading pit will be constructed on one side of the building. R. at C79. Semi-trailers will be parked in this concrete pit addition during loading. R. at C19-C20. Waste and leachate will also be directed towards this concrete loading pit.

R. at C20-C21. That area will have a sump pump and leachate storage tank. R. at C21. There is nothing to prevent liquids from running out the doors of the transfer station. R. at C243-C244. Soil will be kept on site, however, and can be dumped in the path of any liquids that escape. R. at C22, C158.

The clearance between the floor and rafters in the building is sixteen feet. R. at C250. Sutter's packer trucks are newer and will be able to open their tailgates all the way when unloading. R. at C264. They will even have a few inches to spare. R. at C264. Older packer trucks and roll-offs will not be able to dump their loads as these collection vehicles are designed, because of the low clearance. R. at C250-C251; C264. Sutter will have someone watch such vehicles unload. R. at C265.

Duane Stock attended the hearing on behalf of Stock & Co, asked questions of witnesses, and made public comments. R. at C170. For example, Mr. Stock asked what happens when some hazardous waste does appear at the transfer station by accident. R. at C170. He was told that the waste gets dumped onto the floor, and spread out, and that if any items cannot be dealt with they are loaded back up on the truck and the truck is sent on its way. R. at C170. Mr. Stock asked Sutter's real estate appraiser if he would be willing to build a house across the road from the transfer station. R. at C183. In response, he was told, "I'd like to build where there's trees, so no." R. at C183.

Mr. Stock submitted a letter to the County Board expressing Stock & Co.'s concerns. R. at C415. These concerns include that the transfer station will have a negative environmental, psychological, and financial impact on the adjacent properties; that it will limit any future development of the adjacent properties; that the area water will be contaminated; that ownership of the transfer station may change and that the

facility may expand; that open dumping will occur on the neighboring agricultural fields owned by Stock & Co; that nothing in the design plans addresses how liquids dumped onto the floor will be contained. R. at C415-C416.

Doris Wharton Stock also expressed concerns, including that hazardous materials may be inadvertently brought to the site; that farm crops historically grown on the surrounding land may be contaminated; that the design of the floors contains no safeguards to prevent waste runoff from occurring; that an above-ground storage tank is located in close proximity to the building and driveways; and that open dumping will occur on the neighboring farmland. R. at C424-425.

Another concerned citizen asked what would happen if a fire occurred, and questioned the availability of water for fire-fighting purposes. R. at C427-C428. An adjoining property owner expressed great concern about the lack of design measures with regard to the building and ground water protection, the lack of ground water monitoring, and the rural challenges associated with emergency vehicle response times. R. at C426. Minimal, if any, evidence was presented by Sutter, however, with regard to these basic concerns.

On September 16, 2002, contrary to the manifest weight of the evidence, the County Board held that Sutter had demonstrated that all of the statutory criteria had been met. R. at C432-C434.

II. THE COUNTY BOARD'S DECISION TO APPROVE SITING IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE

Based upon evidence in the Record regarding, inter alia, the transfer station's design and proposed operation, it is clearly evident that the County Board erred in approving siting. Local siting approval was not properly granted because the applicant,

Sutter, did not submit sufficient details describing the proposed facility to demonstrate compliance with each of the nine criteria established by statute. See 415 ILCS 5/39.2(a). As the applicant, Sutter had the burden of demonstrating, by a preponderance of the evidence, compliance with all nine criteria. American Bottom Conservancy, et al., v. Village of Fairmont, et. al., No. 01-159, 2001 Ill. Env. Lexis 489 at *6 (IPCB, Oct. 18, 2001).

Here, not only did Sutter fail to make a *prima facie* case for compliance, undisputed credible evidence, as well as factual and expert opinion testimony, demonstrates that the transfer station did not meet the statutory criteria. This is not a case where conflicting testimony was simply resolved by the County Board. Instead, this is a case where siting approval was granted, even though the applicant failed to demonstrate compliance with the statutory criteria. This is a case where legitimate and basic questions about how the facility's design will protect public health, safety, and welfare went unanswered. This is a case where understandable concerns raised about the danger to the surrounding area from fire, spills, and other operational hazards, based upon the facility's design and operation, were not addressed. This is a case where incompatibility with the surrounding area was simply not minimized. As explained below, the County Board's decision is plainly against the overwhelming weight of evidence in the Record. It must therefore be reversed.

A. Standard of Review

A county's decision to approve siting is reviewed using the manifest weight of the evidence standard. File v. D&L Landfill, Inc., 219 Ill. App. 3d 897, 901, 579 N.E.2d 1228, 162 Ill. Dec. 414 (5th Dist. 1991). This standard is used to review each of the

criteria set forth in Section 39.2. Fairview Area Citizens Taskforce v. IPCB, 198 Ill. App. 3d 541, 550, 555 N.E.2d 1178, 144 Ill. Dec. 659 (3d Dist. 1990). 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. File at 901.

B. Criterion I

Section 39.2(a) of the Act (415 ILCS 5/39.2) sets forth nine criteria that must be met before local siting approval may properly be granted. The first of these criteria requires that the facility be necessary, providing, in pertinent part, as follows:

> An applicant for local siting approval shall submit sufficient details describing the proposed facility to demonstrate compliance, and the local siting approval shall be granted only if the proposed facility... is necessary to accommodate the waste needs of the area it is intended to serve....

415 ILCS 5/39.2(a)(i). (Emphasis added.)

The Illinois Pollution Control Board ("Board") has previously stated that an applicant for siting approval does not have to show absolute necessity. See American Bottom Conservancy, et al., v. Village of Fairmont, et. al., No. 01-159, 2001 Ill. Env. Lexis 489 at *54 (IPCB, Oct. 18, 2001). Nevertheless, "necessary" does connote a "degree of requirement or essentiality" and not just that a facility will be " reasonably convenient." Id. (Emphasis added.) Indeed, the applicant must demonstrate both an urgent need for, and the reasonable convenience of, the new facility. Id. (Emphasis Added.)

1. As a Matter of Law, Potential Convenience For Waste Haulers Does Not Demonstrate Need

In response to this first criterion, Sutter described the service area for the proposed transfer station "to include an approximate 30 to 50 mile radius from the

transfer station." R. at C14. At hearing, Sutter's expert witness, David Kimmle, noted that there are two landfills within a 30-mile radius of the proposed transfer station, and six more landfills within a 50-mile radius. R. at C141.

Mr. Kimmle (again, Sutter's own witness) then conceded that the "regional waste disposal capacity already appears to be adequate," stating, in pertinent part, as follows:

> Again, the two facilities that are within the 30-mile service area are identified as Landfill 33 [in Effingham County] and Coles County Landfill.... The other six facilities are within the 50-mile service area.... As can be noted, the regional waste disposal -- again, regional waste disposal capacity appears to be adequate.

Testimony of David Kimmle, Transcript, R. at C142.[2]

Similarly, in its application, Sutter also concedes that the present waste disposal capacity in the region is already adequate. R. at C15. Nevertheless, Sutter contends that the proposed waste transfer station is needed to "economically access out-of-county landfills." R. at C15.

At hearing, Mr. Kimmle explained Sutter's feeling that, although there is already a landfill in Effingham County, the transfer station is needed to transfer waste generated in Effingham County to one of the seven additional landfills that are located within a 50-mile radius of the transfer station's proposed site. R. at C142-C143; R. at C17.

> [R]egional waste disposal capacity appears to be adequate. However, as we see it, the current dilemma is 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.
>
> * * *
>
> Reference to [the regional waste management plan for Effingham County] will indicate that [it] is the county board's intention to support the disposal of waste generated in the county at in-county and out-of-county landfills.

[2] A former County Board member also voiced his concerns that the transfer station was not needed. See R. at C419.

> Economically, [to] access out-of-county landfills, we feel that a waste transfer station is needed.

Testimony of David Kimmle, Transcript, R. at C142-C143. (Emphasis added.) See also R. at C15.

Mr. Kimmle also noted that there has been a 50 percent decline in the number of operational landfills since 1992, and an approximately 40 percent increase in the number of operating transfer stations since 1996. R. at C143.

> In essence, enhanced environmental regulations have caused a decline in the number of operational landfills, thereby forcing the remaining facilities to become much larger and service a much greater area. The service area of a regional landfill is increased in the use and the operation of waste transfer stations. Again, as pointed out earlier, in considering the service area of 30 miles, there are two facilities that can be accessed. In considering the service area of 50 miles, which could be utilized to [sic] a transfer station, we've increased the availability of landfill capacity to [sic] two to eight facilities.

Testimony of David Kimmle, Transcript, R. at C144. (Emphasis added.)

Waste collection vehicles like "packer trucks" are best for picking up trash, but semi-trailers are better at transportation. R. at C240. Waste haulers like Sutter find it economical not to drive their collection vehicles to a landfill, but to, instead, bring the waste to a transfer station. R. at C278. At the transfer station, the waste is transferred to other vehicles that transport the waste to a landfill. R. at C278. Waste haulers make money picking up garbage. R. at C223. By owning a transfer station, a waste hauler can decrease the amount of time its packer trucks spend traveling to a landfill, and increase the amount of time its packer trucks are available for picking up garbage. R. at C223. This results in more money for the waste hauler. R. at C223.

In describing the service area, Sutter conceded that refuse collection vehicles can economically travel on a routine basis within a 30-mile radius of a transfer station, stating in pertinent part, as follows:

> The service area…is expected to include an approximate 30 to 50 mile radius from the transfer station. This radius is based upon the economical distance a refuse collection vehicle can travel on a routine basis, in addition to the location of refuse disposal facilities outside of Effingham County.

R. at C14. (Emphasis added.)

This concession is important, because, in its application, Sutter acknowledges that an operational transfer station already exists in Shelbyville, Illinois.

> [O]perational transfer stations currently exist in Shelbyville, Pana, Greeneville, and Mt. Vernon.

R. at C15. (Emphasis added.)

In its attempts to explain why it felt that the proposed transfer station is necessary, Sutter argued that the Shelbyville transfer station and the other existing transfer stations are simply too far away.

> Due to haul distances, these are not viable facilities for the routine transfer of waste generated in Effingham County.

R. at C15. (Emphasis added.)

It is undisputed that the "haul distance" to the Shelbyville transfer station, however, which was identified by Sutter, as too far for the routine transfer of waste, is a travel distance of merely 35 miles.

> These communities [i.e., Shelbyville, Pana, Greeneville, and Mt. Vernon] are located approximately 35 miles (travel distance) to the north, 40 miles to the northwest, 55 miles to the west, and 60 miles to the south, respectively.

R. at C15.

Indeed, in its application, Sutter alternates between road miles (when referring to distances from existing waste disposal alternatives) and miles as a crow flies (when referring to distances from its own proposed facility). See R. at C14, C15. This inconsistent methodology artificially created an appearance that the current alternatives for waste disposal, e.g., the Shelbyville transfer station, are further away. When consistent units of measurement are used, however, Sutter's illusion that the Shelbyville transfer station is not a viable alternative for the routine disposal of waste generated in Effingham County, due to the "haul distance," quickly dissipates. Indeed, close examination of Sutter's own "Regional Service Area" map reveals that the Shelbyville transfer station and site of the proposed transfer station are actually within a 30-mile radius of each other. See R. at C17. And, as previously noted, Sutter itself has admitted that refuse collection vehicles can economically travel on a routine basis within a 30 mile radius of a transfer station. R. at C14.

Moreover, in its application, Sutter uses the City of Effingham as the starting point when describing the number of miles that must be traveled in order to reach a landfill. R. at C14. Sutter's map of the proposed transfer station site does not identify the location of the City of Effingham. R. at C17. Nevertheless, Sutter's map does show that Landfill 33 (which is located at Effingham) is well within a 30-mile radius of the Shelbyville transfer station. R. at C14, C17. Thus, Sutter's own evidence demonstrates that the existing Shelbyville transfer station is a viable facility for the routine transfer of waste generated in Effingham County.

Similarly, Sutter describes the travel distance "via primary roadways" from the City of Effingham to each of the eight landfills available as ranging from zero to 70

miles. R. at C14. Nevertheless, Sutter never identifies the travel distance from the City of Effingham to the proposed transfer station. According to the scant details that Sutter does provide on this issue, however, most of the collection vehicles are expected to travel to the remotely located transfer station on County Highway 25 from the I-70 interchange; a distance of seven miles by itself. R. at C63. Examination of Sutter's "Site Location Map" reveals that the additional travel distance from the I-70 interchange to the City of Effingham is apparently significantly greater than seven miles. See R. at C76.

An applicant for siting approval does not have to show absolute necessity. American Bottom Conservancy, et al. v. Village of Fairmont, et. al., No. 01-159, 2001 Ill. Env. Lexis 489 at *54 (IPCB, Oct. 18, 2001). Nevertheless, in this case, it is undisputed that regional waste capacity is adequate. Testimony that access to additional out of county landfills might be more economical for waste haulers, if a transfer station is also available, does not demonstrate that a transfer station is necessary. "Necessary" connotes a "degree of requirement or essentiality" and not just that a facility will be "reasonably convenient." Id. Here, Sutter failed to make even a *prima facie* case regarding necessity. Sutter presented evidence that it might be more economical for waste haulers if the transfer station was constructed. Nevertheless, Sutter did not and cannot demonstrate any urgent need for the facility. Id. Instead, Sutter only presented evidence regarding the possible economic benefit that the transfer station might provide to waste haulers.

Moreover, as demonstrated by certain health, safety, and welfare hazards in the Record, which are discussed further below, even if economically beneficial for Sutter and

other waste haulers, this transfer station is plainly not needed and, as proposed, would likely be very economically detrimental to neighbors and the surrounding community.[3] Apparently recognizing that the facility is neither essential nor urgently needed, Sutter asked the County Board to apply a different standard instead. Sutter asserted to the County Board that a reasonable convenience of expanding the facility was all that must be shown in order to "satisfy the need criterion."

> With respect to the need issue, and as some guidance to the Board on this issue, the Act requires that there be a showing of need, but not that there be an absolute necessity to accommodate the area's needs. [Citation omitted.] Rather, such factors as a reasonable convenience of expanding the facility may be demonstrated to satisfy the need criterion.

R. at C369. (Emphasis added.)

The Second District Appellate Court has noted that absolute necessity is too stringent a standard and has employed the terms "expedient" and "reasonably convenient" to describe the required level of proof. See, e.g., Waste Management of Illinois, Inc. v. IPCB, 123 Ill. App. 3d 1075, 1084, 79 Ill. Dec. 415, 422, 463 N.E.2d 969, 976 (2d Dist. 1984). Nevertheless, the Court has also clarified that an applicant must demonstrate more than that a facility will be convenient:

> An expedient is defined as "a means devised or used in an exigency" thereby connoting an element of urgency in the definition of need. * * * Reasonable convenience also requires a petitioner to show more than convenience. Recently, the Third District of our Appellate Court defined this higher level of proof as a showing that the landfill be reasonably

[3] Some of Sutter's apparent motives for transporting waste to its own transfer facility rather than to Landfill 33, for example, are also contained in the record. Sutter intends to sort loads of waste received at the transfer station in order to "reclaim metals and cardboard," which will be stored in a separate building for "recycled materials." R. at C20. Sutter presently operates a recycling drop-off in another building on the site, and has indicated that, without the transfer station, it will be economically impossible for it to continue recycling. R. at C190. Sutter has had loads rejected at some area landfills, including Landfill 33. R. at C360, C398. Other landfills charge less to dump than Landfill 33. R. at C417.

> required by the waste needs of the area including consideration of its waste production and disposal capabilities.

Id. (Emphasis added.)

Thus, Sutter's own evidence before the County Board demonstrated that the regional waste disposal capacity was adequate. Sutter's own evidence before the County Board demonstrated that a refuse collection vehicle can routinely and economically travel within a 30-mile radius of a waste disposal site. Sutter's own evidence before the County Board demonstrated that two landfills and a transfer station already exist within a 30-mile radius of the proposed facility. Sutter's own evidence before the County Board does not establish any more than that the transfer facility might be convenient for waste haulers.

Furthermore, the Record shows that Sutter presented no evidence whatsoever regarding waste production or waste generation of the area, as is customary and required by the Second and Third District Appellate Courts. Waste Management of Illinois, Inc. v. IPCB, 123 Ill. App. 3d 1075, 1084, 79 Ill. Dec. 415, 422, 463 N.E.2d 969, 976 (2d Dist. 1984); Waste Management of Illinois, Inc. v. IPCB, 122 Ill. App. 3d 639, 645, 77 Ill. Dec. 919, 923, 461 N.E.2d 542, 546 (3d Dist. 1984); see also, Waste Management of Illinois, Inc. v. Village of Bensenville, No. 89-28, 1989 Ill. Env. Lexis 45 at *22-23 (IPCB, Aug. 10, 1989) (need for transfer station not demonstrated where, inter alia, volume of waste taken to area landfills was not provided).

Based upon Sutter's evidence alone, it is plain from the Record that, if consistent methods are used when measuring distances, criterion one is not met. More importantly, when the proper standard of "requirement or essentiality" is applied, it is clearly evident that the need criterion is not met.

C. Criterion II

Again, as the applicant at the hearing before the County Board, Sutter had the burden of establishing by a preponderance of the evidence that all of the essential criteria were satisfied. American Bottom Conservancy, et al. v. Village of Fairmont, et. al., No. 01-159, 2001 Ill. Env. Lexis 489 at *6 (IPCB, Oct. 18, 2001). The second criterion that must be met before local siting approval can be properly granted requires that public health, safety, and welfare be protected, providing, in pertinent part, as follows:

> An applicant for local siting approval shall submit sufficient details describing the proposed facility to demonstrate compliance, and local siting approval shall be granted only if the proposed 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). (Emphasis added.)

The standard of review to be exercised by the Board is whether the decision of the County Board is contrary to the manifest weight of the evidence. File v. D&L Landfill, Inc., 219 Ill. App. 3d 897, 901, 579 N.E.2d 1228, 1232, 162 Ill. Dec. 414, 418 (5th Dist. 1991). The manifest weight of the evidence standard has long been used in Illinois to evaluate whether a party established its claim by a preponderance of the evidence. See, e.g., Western Cartridge Co. v. Industrial Commission, et al., 383 Ill. 231, 48 N.E.2d 938 (Ill. 1943) (reversing Industrial Commission's award of compensation as against manifest weight of the evidence, where the applicant did not demonstrate by a preponderance of the evidence that his conjunctivitis was caused by acid burns).

> Although there be in the record evidence, which if undisputed, would sustain a finding for the applicant, such evidence is not sufficient, if upon consideration of all of the evidence in the record it appears that the manifest weight of the evidence is against the claim made.

Id. at 233.

Where an applicant fails to demonstrate that the statutory criterion is satisfied, its application is properly denied. See, e.g., Waste Management of Illinois, Inc. v. IPCB, 123 Ill. App. 3d 1075, 1084, 79 Ill. Dec. 415, 422, 463 N.E.2d 969, 976 (2d Dist. 1984). Here, although Sutter presented evidence regarding the proposed transfer station's design, location, and operation, Sutter clearly failed to demonstrate that public, safety and welfare will be protected.

1. Upon Consideration of All of the Evidence, It Is Plain That Sutter Failed To Demonstrate That The Public Health, Safety And Welfare Will Be Protected

In an attempt to demonstrate that the second criterion was satisfied, Sutter did present approximately 21 pages in its application regarding the proposed transfer station's design, location, and operation. R. at C18-C39. At hearing, Sutter also presented testimony regarding the same. R. at C145-C146. Nevertheless, the evidence and testimony presented by Sutter is not sufficient to meet its burden, and the County Board's finding must be set aside because, upon consideration of all of the evidence, it is plain that Sutter has not demonstrated that the public health, safety and welfare will be protected.

Sutter has not designed a waste transfer station. R. at C241. Sutter has simply proposed slight modifications to one of three pole barns currently located at a site where a grain elevator used to be operated. R. at C77. The "Facility Plan" shows three large pole barns, six grain bins, a silo, a grain elevator, a large round top shed, a scale, a scale house, a residential structure to be used as the facility office, and a propane tank on the site. R. at C77. Sutter has no plans to demolish or remove any structures at the site. R. at C147.

As the Board is aware, Section 22.14(a) of the Act provides that no person may establish any pollution control facility for use as a garbage transfer station within 1000 feet of any dwelling. 415 ILCS 5/22.14(a). Nonetheless, Sutter's own application concedes that "the closest dwelling is located on the property" that is proposed for the transfer station. R. at C19. At hearing, Sutter did present evidence that the dwelling "is not inhabited," and "is to be used as the office for the proposed waste transfer facility." R. at C147. At hearing, however, Sutter specifically referred to the house on-site as a "dwelling." R. at C147. Moreover, the photographic evidence presented by Sutter demonstrates that the dwelling is a large two-story house. R. at C65. Testimony at the hearing also established that the on-site dwelling includes a swimming pool. R. at C239.

After the hearing, however, Sutter assured the Effingham County State's Attorney, Ed Deters, and then County Board Chairman, Leon Gobczynski,[4] that having a house at the site of the proposed transfer station presented no problems.

> The presence of this house, however, is no impediment to the approval of the transfer station. As noted at hearing and in the siting application, this house will serve as the office for the transfer station, and only that purpose. No person will be present at the house beyond operational hours of the facility and certainly no one will live in it. As merely a business office, the house does not constitute a "dwelling" as used in the Act. See People v. Bonner, 221 Ill. App.3d 887, 164 Ill. Dec. 502 (1st Dist. 1991)

[4] Subsequent to the hearing in the proceedings below, Chairman Leon Gobczynski resigned from the County Board.

(Where a house was not lived in and with no expectation that anyone would live in it, the court concluded it was not a dwelling).

R. at C374.[5]

Contrary to Sutter's assertions, however, no evidence was presented, either at hearing, or in the siting application, that the two-story house with a pool, which is located on the site, will only be used as an office. Evidence was presented that Sutter intends to either purchase the property eventually or to extend its lease; but, at present, Sutter has simply rented the property for one year. C10. Contrary to Sutter's assertions, no testimony was presented at hearing that no one will live in the house.

Sutter's apparent attempts to fix the Record after the fact, through "public comments" that are not subject to cross-examination, ring hollow and were entitled to little, if any, weight by the County Board. Sutter bore the burden of establishing that no dwelling was located within 1000 feet of the proposed waste transfer station. The overwhelming weight of the evidence in the Record, however, clearly demonstrates that Sutter completely failed to meet its burden.[6]

---

[5] People v. Bonner did not even concern the Act, and the decision contains no such conclusion by the Court. Instead, in People v. Bonner the Court reduced a sentence from residential burglary to burglary after the State conceded that a house which had been unoccupied for seven years was not a "dwelling" within the meaning of the residential burglary statute (now 720 ILCS 5/19-3), absent evidence that someone intended to reside there within a reasonable time. The Illinois Criminal Code broadly defines the phrase "dwelling" to include a building or portion thereof that is used or intended for use as a human habitation, home, or residence. 720 ILCS 5/2-6(a). For purposes of the residential burglary statute, however, the Illinois Criminal Code limits the phrase "dwelling" to a "house, apartment, mobile home, trailer or other living quarters in which at the time of the alleged offense the owners or occupants actually reside or in their absence intend within a reasonable time to reside." 720 ILCS 5/2-6(b). The Act contains no similar limitation on the definition of "dwelling."

[6] This house on-site will preclude permitting by the IEPA. R. at C238. As a practical matter, even if the house was not present on site, this provision of the Act will preclude the IEPA from issuing a permit for the transfer station anyway. Although not considered by the County Board below, public comment at the hearing on fundamental fairness, demonstrated that there is now another home located within 200 yards of the proposed site. See, Tr. at 40.

As the transfer station is proposed to be designed, waste materials will be dumped on the existing concrete floor of a pole barn. R. at C20. From there, the waste will be pushed by a rubber-tired loader into a trailer that will be parked in a concrete loading bay that is proposed to be added at one of the sides of the existing pole barn. R. at C20. Although a leachate collection system is proposed to be installed in the loading bay itself, nothing is planned to prevent liquid wastes and leachate from running off the concrete floor and onto the ground surrounding the building. R. at C244. The concrete floor is to be washed down, yet nothing is in place to prevent the contaminated wash water from flowing off the floor and onto the ground outside. R. at C244.

The clearance between the concrete floor and the rafters of the pole barn is 16 feet. R. at C250. Sutter's garbage trucks are newer models and can drive through the pole barn with their tailgates open. R. at C264. Nevertheless, the transfer station will not be limited to use by Sutter's trucks. R. at C177. Older trucks used by other haulers will be unable to open their tailgates fully when unloading in the building because of inadequate clearance. R. at C250-C251; C264. Moreover, roll-offs will not be able to raise their beds to the full height as designed, if unloading in the building. R. at C250-C251; C264. Although Sutter has indicated that it will have personnel watch such trucks unload, it has presented no evidence regarding what safe alternatives are available when these vehicles cannot be unloaded as designed within the pole barn. R. at C264.

Sutter presented evidence that the waste transfer operation will take place totally within the confines of the building. R. at C151. Nevertheless, the evidence demonstrates that some waste transport vehicles cannot unload, as the vehicles are designed, within the building. R. at C250-C251; C264. Thus, these vehicles will either have to be unloaded

in a different manner than designed or unloaded outside in contradiction to Sutter's plan of operation.

D. Criterion III

The third criterion that must be met before local siting approval can be properly granted involves the facility's compatibility with the character of the surrounding area, and its effect on the value of the surrounding property, providing, in pertinent part, as follows:

> An applicant for local siting approval shall submit sufficient details describing the proposed facility to demonstrate compliance, and local siting approval shall be granted only if the proposed facility... is located so as to minimize incompatibility with the character of the surrounding are and to minimize the effect on the value of the surrounding property....

415 ILCS 5/39.2(a)(iii). (Emphasis added.)

Criterion three is "two pronged." First, the applicant must demonstrate that the facility is located so as to minimize incompatibility with the character of the surrounding area. Second, the applicant must demonstrate that the facility is located so as to minimize the effect on the value of the surrounding property.

In support of this criterion, the applicant provided a letter from a certified residential real estate appraiser. R. at C42. This letter gives no bases, however, for the conclusion that property values will not be affected. The appraiser did not make use of comparables, which as the Board knows, is the standard measurement of how property values will be affected in siting cases. While the appraiser references visits to similar transfer stations, he provided no information on these other stations or how he concluded that these were similar.

In addition, the letter contains no discussion of how the applicant will minimize incompatibility with the character of the surrounding area as required. At hearing, Sutter's witness described the surrounding land as "predominately level agricultural cropland." R. at C181. There is no discussion whatsoever, however, as to how the facility will minimize incompatibility with the character of the area. R. at C178-C182.

> An applicant must demonstrate it has done or will do what is reasonably feasible to minimize incompatibility.

Waste Management of Illinois, Inc. v. IPCB, 123 Ill. App. 3d 1075, 1090, 79 Ill. Dec. 415, 426, 463 N.E.2d 969, 980 (2d Dist. 1984).

Here, Sutter simply failed to provide any evidence on one of the prongs or elements of criterion three. Thus, the decision of the County Board that this criterion has been met is against the manifest weight of the evidence.

E. Criterion Five

The fifth criterion that must be met before local siting approval can be properly granted relates to the danger to the surrounding area, providing, in pertinent part, as follows:

> An applicant for local siting approval shall submit sufficient details describing the proposed facility to demonstrate compliance, and local siting approval shall be granted only if... the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents....

415 ILCS 5/39.2(a)(v). (Emphasis added.)

1) Instead of Being Designed To Minimize The Dangers, Sutter's Plan Of Operations Contains Minimal Designs To Protect The Surrounding Area

As set forth above, a county board may not grant local siting approval unless the applicant has submitted sufficient details describing the proposed facility to demonstrate compliance with the following criterion:

> the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents;

415 ILCS 5/39.2(a)(v). (Emphasis added.)

In its application, however, Sutter apparently concedes that a fire hazard already exists at the proposed transfer station site, i.e., a former grain elevator operation, where six grain bins remain. See R. at C22, C49, and C77.

> There appears to be minimal increase in fire hazard as a result of the operation of the proposed facility.

See Sutter's Application, R. at C49.

It is generally known that grain storage areas can be fire hazards. Nevertheless, Sutter's transfer station is proposed to be located immediately adjacent to three existing grain bins. See R. at C77. Moreover, Sutter's own "Facility Plan" schematic shows that a large "existing propane tank" is located a short distance diagonally from the proposed transfer station. R. at C77. And, Sutter's plan of operations increases the risk of disaster by routing semi-tractor trailers and trash collection vehicles around both sides of this propane tank as they travel to and from the highway. See "Process Flow Diagram," R. at C78.

Nevertheless, Sutter's "contingency plan" for fires is essentially to call a member of management and "911" in the event of an emergency, and to write a report following

the incident. See "Contingency Plan" R. at C23-C27. Concerns regarding the rural challenges associated with emergency vehicle response times were not even addressed. R. at C426. The record demonstrates that Sutter's emergency equipment for responding to fires consists of the following:

> Fire: A fire extinguisher is to be located within the waste transfer building. Additional extinguishers are to be available at the site office and scale house.

R. at C24.

The contingency plan describes the facility's location, lists emergency contacts, and requires that a report be provided to the site manager. R. at C23-C27. Nevertheless, the "contingency plan" contains no strategy for evacuating members of the public from the transfer station or the on-site recycling center. A propane tank and numerous grain bins are located on the property, but the plan contains no provisions for preventing the spread of fire to these structures. Similarly, the "contingency plan" does not address the recycling building in which reclaimed "cardboard" and "metals" are to be stored. Other than a handful of fire extinguishers, no fire-fighting equipment is even identified. Not even a fire hydrant or pond from which water could be withdrawn to fight a fire is identified. No smoke alarms are identified as being present in any of the buildings. No provisions are in place to notify the owner/operator of a fire at night or on the weekend, when the facility is closed. The application explains that waste collection vehicles may be stored in other existing buildings on site. R. at C23. Nevertheless, no provision is made to provide those responding to any fire with safety information regarding the flammable and explosive materials that may be stored in and around the other buildings on site, e.g., the existing propane tank identified on the facility schematic.

The statute requires that the danger from a facility be minimized. Nevertheless, it is plain that here, Sutter has reversed the emphasis and has simply taken minimal measures to address the danger of fires, spills, and operational accidents. The Second District Appellate Court has made it clear that when the General Assembly used the term "minimize" in Section 39.2 of the Act it was not referring to minimal efforts by applicants, stating in pertinent part as follows:

> Under [the applicant's] construction, any action, however small, taken by an applicant to minimize the landfill's incompatibility would satisfy the statutory requirement. Such a minimal requirement would render the criterion practically meaningless. Rather, we read section 39.2(a)(iii) as requiring an applicant to demonstrate more than minimal efforts to reduce the landfill's incompatibility.
>
> * * *
>
> An applicant must demonstrate it has done or will do what is reasonably feasible to minimize incompatibility.

Waste Management of Illinois, Inc. v. IPCB, 123 Ill. App. 3d 1075, 1090, 79 Ill. Dec. 415, 426, 463 N.E.2d 969, 980 (2d Dist. 1984).

Nevertheless, Sutter has simply not demonstrated that it has done what is reasonably feasible to minimize the danger to the surrounding area. When asked by a County Board member about a water sprinkler system, Sutter's expert stated that it was "not required" and that there was no intent to install one. R. at C168. Similarly, when asked by another County Board member whether any bodies of water were located close to the proposed transfer station for firefighting purposes, Sutter's expert witness responded as follows:

> [A]s far as a surface body of water, I'm – the – the body of water that I am knowledgeable of I would presume would not be available because of the distance for that purpose.

R. at C167.

It was undisputed that it is pretty common to receive a "hot load." R. at C246. Nevertheless, although the exterior of the pole barn, proposed to be converted into a transfer station, is metal, the interior is covered with wood – creating a fire hazard. R. at C245-246.

Sutter's expert concluded that the primary concerns with regard to this criterion were the storage of petroleum products on site and the storage of refuge on the property. R. at C158. Sutter's expert then concluded that there was no potential for petroleum spillages on site because there was no intent to store petroleum products at the facility. R. at C158. Sutter's expert also concluded that the refuse presents no danger either, because there is no intent to store refuse at the site. R. at C158.

Nevertheless, Sutter's own evidence demonstrates that contrary to the expert's statements, both petroleum products and refuse will be stored. The conclusions of Sutter's expert are based upon assumptions that are contradicted by the undisputed evidence in the Record. As previously noted, Sutter's own diagrams show a large propane tank on site. R. at C77. Similarly, Sutter's own witnesses testified that refuse will be stored on-site overnight whenever the transfer trailer is not filled. R. at C152. Garbage trucks filled with waste may also be stored on site. R. at C23. Moreover, reclaimed cardboard, metals, and recycled materials will be stored in a different building at the facility. R. at C20.

Sutter's expert also summarily dismissed the danger from spills, which he conceded could occur, stating that they would simply be addressed as follows:

> Obviously there is a potential of an accidental spill during that transfer process. However, the site is contoured in such a way that local drainage waste can be burned [sic]. Booms, portable booms, burns [sic] or dikes can also be constructed on the site so that any spillage that does occur can be contained on the site and appropriate – appropriately cleaned up.

R. at C158-C159.

Sutter's testimony regarding the traffic flow into the facility did not even address the number of vehicles that would be utilizing the recycling center also located on site. Moreover, Sutter admitted having received a noncompliance letter from the Illinois Environmental Protection Agency ("IEPA" or "Agency") for allowing uncovered roll-off boxes containing waste to sit on the site where he currently parks his vehicles for some period of time instead of being taken to a landfill. R. at C195-C196.

It is evident from the Record that Sutter's proposed waste transfer station/ recycling center/grain elevator facility is a disaster waiting to happen. Sutter has not demonstrated that it has done or will do what is reasonably feasible to minimize the danger to the surrounding area from fire, spills, or other operational accidents.

F. Criterion Eight

The eighth criterion that must be met before local siting approval can be properly granted is as follows:

> An applicant for local siting approval shall submit sufficient details describing the proposed facility to demonstrate compliance, and local siting approval shall be granted only if the proposed 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, [and] the facility is consistent with that plan....

415 ILCS 5/39.2(a)(viii). (Emphasis added.)

It is undisputed that Effingham County has adopted a regional waste management plan. R. at C71. Sutter argues that the plan's encouragement for haulers to find the most economical method of waste disposal supports its proposed transfer station. R. at C71. Sutter then argues that to economically transfer waste to one of the numerous out-of-county disposal facilities, the proposed transfer station is needed. R. at C142-C143. As previously explained with regard to criterion one, however, Sutter's own evidence regarding economic haul distances demonstrates that an economical alternative already exists. Indeed, as previously explained, based upon Sutter's own evidence, persons desiring to transfer waste to one of these out-of-county landfills can economically use the existing Shelbyville transfer station. Thus, the decision of the County Board is against the manifest weight of the evidence on this criterion as well.

G. Conclusion as to All Criterion

Section 39.2(a) of the Act sets forth criteria that must be met prior to the approval of a siting application for a waste transfer station. 415 ILCS 5/39.2(a). The General Assembly has charged the County Board with resolving the technical issues set forth therein, including the public health ramifications associated with the facility's design. Id. The applicant, Sutter, had the burden of proof and was required to demonstrate that the criterion was met. Sutter did not do so.

It is undisputed that the regional waste disposal capacity is already adequate. R. at C142. Sutter did not demonstrate that the transfer station is needed. At best, it demonstrated that the transfer station might be convenient. Sutter also failed to

demonstrate that the facility, an improvised design with minimal safeguards that is proposed to be retrofitted to a former grain elevator, is located so as to minimize incompatibility and the effect on the value of the surrounding property. More importantly, Sutter has failed to demonstrate that public health, safety, and welfare will be protected. Indeed, instead of being designed to minimize danger, it appears that Sutter's transfer station is a disaster as designed. The County Board's decision to approve local siting is against the manifest weight of the evidence and must be reversed.

III. THE COUNTY BOARD'S PROCEEDINGS WERE FUNDAMENTALLY UNFAIR

The proceedings before the County Board were not fundamentally fair as to Stock & Co. Examples of the lack of fundamental fairness, which are explained in greater detail below with citations to the record, include the following. Despite Stock & Co.'s request, the transcript of the hearing was not made available by the County Board until after the deadline for appeal of the County Board's decision, hampering Stock & Co. in its efforts to formulate the basis for its appeal of the County Board's decision. Following a threat from Sutter to close its recycling center, the County Board approved local siting, despite Sutter's failure to demonstrate that the statutory criteria had been met. At the hearing before the County Board, the mother of the County Board's attorney was a highly vocal advocate for the recycling center and hence siting approval -- yet this mother/son relationship was never disclosed. Members of the County Board toured Sutter's site at least once, and possibly twice, but the substance of those tours was not disclosed and persons opposed to the transfer station were not invited to participate. If the County Board's decision is not reversed because it is against the manifest weight of the evidence with regard to the statutory criteria, the numerous issues with regard to fundamental

fairness, especially, but not exclusively, when combined, mandate that the decision be reversed or remanded for a fair hearing.

A. Unavailability of the Hearing Transcript at the County

The County Board hearing took place on August 14, 2002. R. at C125. The hearing was transcribed and certified by September 2, 2002. R. at C294. Nevertheless, when Stock & Co., through its Registered Agent, Duane Stock, contacted the County Clerk on October 2, 2002, to obtain a copy of the hearing transcript, he was told that the transcript was not available through the County and was advised to contact counsel for the applicant. See Affidavit attached to Stock & Co.'s Petition for Review, and Transcript of Hearing ("Tr.") at 44-45. As the Board is aware, it has previously held that a siting authority's failure to provide access to the hearing transcript is enough to make the proceedings fundamentally unfair. Spill, et al. v. City of Madison and Metro-East, LLC, PCB 96-91, 1996 Ill. Lexis 250 at *22 (IPCB March 21, 1996); American Bottom Conservancy, et al., v. Village of Fairmont, et. al., No. 00-200, 2000 Ill. Env. Lexis 665 at *44 (IPCB, Oct. 19, 2000).

Stock & Co. filed its Petition on October 21, 2002. As Stock & Co. had not been provided access to the hearing transcript by the County, however, its arguments in its Petition had to be based solely on the siting application and Duane Stock's attendance at the hearing. Tr. at 44-45. Indeed, the transcript was not even filed with the county clerk until October 24, 2002, after the deadline for filing an appeal had passed even though it had been transcribed as early as September 2, 2002, apparently for the applicant. R. at C124. In the American Bottom case, where the Board also found a lack of fundamental fairness, the transcript was not available until days after the public comment period

ended, but was provided prior to the deadline for appeal. American Bottom Conservancy, et al., v. Village of Fairmont, et. al., No. 00-200, 2000 Ill. Env. Lexis 665 at *10 and *34 (IPCB, Oct. 19, 2000). In that case, the Board noted that the transcript had been transcribed several days earlier than it had been filed with the Village Clerk and the Village had not offered an explanation for the delay. Id. at *45. The present case is even more egregious, however, because, the transcript was not available through the County 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.

Section 39.2(d) of the Act requires that a record of the public hearing be developed, and that the record be sufficient to form the basis of appeal. 415 ILCS 5/39.2(d). All such documents or other materials on file with the county board or governing body must be made available for public inspection and copying. 415 ILCS 5/39.2(c). The County Board's proceedings were fundamentally unfair and Stock & Co. was prejudiced by the County Board's failure to comply with its statutory obligations alone.[7]

As previously noted, when it attempted to obtain a copy of the transcript, Stock & Co was told to see Sutter's attorney. See Affidavit attached to Stock & Co.'s Petition for Review, and Transcript of Hearing ("Tr.") at 44-45. Stock & Co was further prejudiced by misstatements about the testimony at hearing, that were contained in a letter Sutter's attorney sent to the Effingham County State's Attorney, Ed Deters, and the then County

[7] See, e.g., by analogy, People v. Keeven, 68 Ill. App. 3d 91, 97, 385 N.E.2d 804, 808 (5th Dist. 1979) (holding that the violation of a statute obviated the need for the plaintiff to show irreparable harm or the absence of an adequate remedy at law, in order to seek an injunction).

Board Chairman Leon Gobczynski. R. at C368 to R. at C375A.[8] The County Board's misplaced reliance on this letter from Sutter's counsel is evidenced by its verbatim adoption of "Attachment 5" to the letter, even including the typographical errors (e.g., the word "staring" in paragraph 7(a)), as its findings of fact. Compare Attachment 5, R. at C375A, with "Finding of Fact," R. at C433.

This misplaced reliance was particularly prejudicial, since none of the County Board members who voted (including one member who did not attend the hearing) could verify the accuracy of the letter from Sutter's counsel against the transcript (which was unavailable).[9] Moreover, as explained further below, the County Board was not an unbiased decision maker.

B. The County Board Based Its Decision on Recycling Rather Than The Statutory Criteria

At the hearing before the County Board, Sutter threatened that it would have to close its recycling center, if siting for the waste transfer station was not approved. R. at C190. Sutter opened the door to the testimony regarding the interconnection between the recycling center and approval of the proposed transfer station as follows:

> Q. Okay. Are you planning on running another operation out there other than the transfer facility?
>
> A. We currently already do. We handle the – the recycling drop-off that was once implemented in Altamont. The equity done it. The equity can no longer house the recycling, so in doing this we do have the means and the –

---

[8] For example, contrary to assertions in the letter, no testimony was presented at hearing that the house on-site would only be used as an office. Compare the statement in the letter ("As noted at hearing and in the siting application, this house will serve as the office for the transfer station, and only for that purpose." R. at C374) with the testimony in the transcript.

[9] See County Board meeting minutes for September 16, 2002, indicating that County Board member Bob Shields voted to approve local siting (R. at C437-439); transcript of August 14, 2002, which shows appearances by County Board members, except for Bob Shields (R. at C127); and filestamp date on transcript indicating its filing by the County Clerk on October 24, 2002.

the buildings to be able to handle the recycling as a drop-off, so we are currently operating that right now, wish to continue operating that along with our transfer site.

Q. Is that – would that be a stand-alone process, the recycling, if you weren't doing the transfer station in the near future?

A. Economically impossible to continue recycling without the transfer facility.

Examination of Tracy Sutter by Mr. Rolf, R. at C190.

Instead of basing its decision on the statutory criteria, the County Board based its decision on Sutter's threat to close a recycling center it established at this location if siting approval for this transfer station was denied. See, e.g., County Board member C. Voelker's prefatory statement in the County Board's decision regarding recycling at this location. R. at C437. The significance that Sutter's threat played in the County Board's decision to approve local siting for the transfer station despite the manifest weight of the evidence, is perhaps best described by the recycling center's most ardent advocate, Nancy Deters:

Q. Do you remember reference by the county board chairman during both of those meetings that recycling really wasn't one of the issues here, although that's the issue that you care about?

A. I remember that Leon Gobczynski said that, but board members brought it up afterwards. And it was like the elephant in the room. Everybody knew that that was part of it.

Tr. at 37. (Emphasis added.)

Stock & Co is certainly not against recycling. Nevertheless, even operators of transfer stations who recycle must demonstrate that the requirements of Section 39.2(a) of the Act have been fulfilled. Recycling was the "elephant in the room" that apparently

caused the County Board to stray from its statutorily mandated criteria for decision making.

Even prior to the hearing, County Board members had traveled to the site of Sutter's proposed transfer station, and toured the recycling facility. R. at C191. Sutter's "Traffic Impact Study," however, makes no mention and does not even address the traffic from the recycling center already on-site. R. at 52-67.[10]

In his opening statements regarding procedure, then County Board Chairman Gobczynski explained that comments should be addressed towards the proposed siting of the transfer station. R. at C133. Nevertheless, Sutter quickly emphasized that it had no intention of continuing the recycling operation that it had begun just prior to submitting its application for local siting, unless the transfer station was approved by the County Board. R. at C190. See also Tr. at 67-68. A County Board member then sought assurances from Sutter that if local siting was granted, Sutter would continue recycling. R. at C192. Another County Board member inquired about whether Sutter intended to pick up any of the recyclables. R. at C193. And, Ed Deters, the County Board's counsel inquired as to what measures Sutter had taken to insure that persons dropping off recyclable materials did not become confused and go to the transfer station instead. R. C193-C194.

Later, however, after Sutter's discussion about his recycling center and during the testimony of an opponent, then County Board Chairman Gobczynski stated that the County Board could not accept comments based on recycling. R. at C226. When an opponent to the transfer station requested to be allowed to address some of the issues

[10] See also testimony that there will be a maximum of eight vehicles in and out of the site each day with no mention of the additional vehicles accessing the recycling center (R. at 174).

relating to recycling that Sutter had discussed, then County Board Chairman Gobczynski stated, in pertinent part, as follows:

> And an issue of -- myself personally, and I can only speak personally -- the issue of recycling has absolutely nothing to do with why I'm here tonight.

R. at C290.

Nevertheless, immediately after the parties moved their exhibits into evidence, another County Board member stated that public comments about recycling could be submitted. R. at C291.

> Mr. Grunloh: * * * [W]e still are going to accept any information, if somebody has a recycling standpoint to this, that can be submitted to us, I would think.
>
> Mr. Gobczynski: That's a great point. And -- and we -- we certainly will take that and make that all part of the record....

R. at C291.

The fact that Section 39.2(c) of the Act mandates that the County Board shall consider any comment timely received, further adds to the confusion regarding the role that the recycling center played in its decision-making here. 415 ILCS 5/39.2(c). In her public comment, Ms. Deters colorfully describes what happened, stating in pertinent part, as follows:

> Even though recycling per se may not have been officially on the agenda, the question whether Sutter Sanitation Service receives its permit (for a solid waste transfer station) and the continuation of the fledgling recycling service they provide, are bound together – like it or not. Package deal. No permit, no recycling. As I recall Mr. Grunloh verified that with a question to Tracy Sutter. Also, it seemed to me that Mr. Hedinger, attorney for Landfill 33, was about to get into the "recycling act" before time ran out, atho [sic] I don't know what he had in mind.

R. at C414.

It is evident that the County Board was confused about the recycling issue and whether testimony on that issue could be considered. As a result of this confusion, Sutter was allowed to present evidence that the transfer facility was needed in order for recycling to take place in Effingham County. Nevertheless, those opposed to the facility were not allowed to present evidence of the other alternatives that are already available, except as public comment. See, e.g., R. at C403. Thus, a remand with instructions to the County Board on how to proceed with this issue in a fundamentally fair manner would be appropriate at a minimum. The proceedings were also potentially affected by bias stemming from familial relationships that were not disclosed.

C. Potential Bias Due to Non-Disclosure of Familial Relationships

For example, it is undisputed that Duane Stock is the first cousin of County Board member Carolyn Willenborg. Tr. at 45. Nevertheless, nowhere in the Record of the proceedings below was that relationship disclosed by the County Board. More importantly, however, the son/mother relationship of the State's Attorney, Ed Deters, who provided legal counsel to the County Board on this matter, and Nancy Deters, the above-referenced outspoken advocate for the recycling center and thus also for the transfer station, was also never disclosed. See Tr. at 28-39. By not disclosing these relationships, participants were precluded from considering options they may otherwise have pursued and the public was prevented from fully ensuring that the decision-making process was unbiased.

The Illinois Rules of Professional Conduct, provide guidance as to what may be considered a conflict of interest, providing, in pertinent part, as follows:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities...to a third person, or

by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and
(2) the client consents after disclosure.

Illinois Rules of Professional Conduct, Rule 1.7(b).

Here, there is at least an impression that Ed Deters' representation of the County Board may have been materially limited by his responsibilities to his mother, or by his own interests in not taking a position in opposition to that of his mother. For this reason alone, this relationship should have been disclosed and recusal considered. See, e.g., Statements of Ed Deters at Hearing. Tr. at 51.

This is not a case of brother-in-laws who share office space acting as hearing officer and counsel to the municipal decision maker, respectively. Contra, American Bottom Conservancy, et al., v. Village of Fairmont, et. al., No. 00-200, 2000 Ill. Env. Lexis 665 (IPCB, Oct. 19, 2000). This a case where the mother of the attorney who was to advise the County Board on evidentiary and other legal issues took an active role in support of the applicant. For example, Ms. Deters (who incidentally does not even reside in Effingham County) described concerns raised by an opponent of the transfer station as a "sad commentary" and the "relentless use of scare tactics." R. at C414; Tr. at 36. Ms. Deters gathered about 240 signatures to a petition asking that the County Board "cooperate with Sutter Sanitation Service in continuing its recycling program in Effingham County." R. at C404-C413. Ms. Deters even vouched for Sutter's character. R. at C414. Nevertheless, the fact that the decision-maker's counselor-at-law was her son was never properly disclosed.

Moreover, at hearing, Mr. Deters suggested that he might even have a role in the decision-making process. R. at C130. And, Mr. Deters did take an active role during the hearing, including asking leading questions of Sutter's witnesses, which resulted in one witness suggesting that any technical concerns would be considered by the IEPA, and that the County Board need not trouble itself with them. R. at C269, C193-C194. A remand with disclosure of this relationship is therefore required at a minimum. The participants and the public at large had the right to know about such relationships, especially the one between the recycling center and transfer station's most ardent supporter and the attorney on whom the decision-maker relied for its counsel.

D. Tours Of The Site By The County, Without All Parties Invited

In addition, 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. For example, meeting minutes of the County Board refer to a decision to tour the site, and nowhere does the Record reflect that this tour did not occur.

> Chr. Gobczynski suggested that the Board set a date to go through the Solid Waste Transfer Station. * * * It was decided to tour the transfer station site on Wednesday, July 31, 2002 at 6:30 PM.

Minutes of Effingham County Board Meeting on May 20, 2002. R. at C.109.

Furthermore, at the hearing before the County Board, during the examination of Tracy Sutter by then Chairman Mr. Gobczynski, the following exchange took place:

> Q. We've seen – we've seen a slide of the operation. Could you point out which building currently houses the – the recycling operation on ...
>
> A. If you give me a minute to look at these for a minute, make sure I've got the right one.

Q. Yeah. I think that one's it.

A. This one here's a little better. The recycling operation, the traffic comes in through this area right here, which is also the scale house and the scale. They continue forward to this part and make a left and go through. * * * I was also visited by the waste committee of Effingham County prior to when I started this operation, and they had the chance to visit how we run our recycling drop-off facility.

[Examination of Tracy Sutter by] Mr. Gobczynski, R. at C191. (Emphasis added.)

At the hearing on fundamental fairness, Tracy Sutter took the stand in an offer of proof. Tr. at 60-74. Mr. Sutter admitted that the Waste Committee of the County Board had been to the site approximately one month prior to Sutter's application being filed. Tr. at 67-68. Sutter admitted that the 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 mind." Tr. at 69-70. Sutter said that he did not recall whether he talked to the County Board members about the transfer station during this visit, stating in pertinent part as follows:

> I don't recall that we ever had -- I'm not saying I didn't, you know, have some conversations in regards to it, to that. I don't recall.

Tr. at 71.

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. Spill, et al. v. City of Madison and Metro-East, LLC, PCB 96-91, 1996 Ill. Env. Lexis 250 at *26 (IPCB March 21, 1996). Here, Stock & Co. and other opponents of the transfer station were prejudiced by the fact that the general public was excluded from the tour and not given equal access to information obtained from the tour by the

participating County Board members. The County Board's failure to include the information regarding the tour (or tours) in the record and make it available to the public for comment or response rendered the process fundamentally unfair. See, Spill at *29.

As explained above, the manifest weight of the evidence demonstrates Sutter's transfer station endangers the public health, safety, and welfare, and is not needed. Similarly, the manifest weight of the evidence demonstrates that Sutter's "Plan of Operations" contains minimal, and, in some cases, no measures to address the danger to the surrounding area from fire, spills, and other operational accidents, to protect the value of the surrounding properties, or to minimize incompatibility with the surrounding area.

The County Board's decision to approve local siting despite Sutter's failure to demonstrate that the criteria had been satisfied is the result of fundamentally unfair proceedings. At least one and possibly two *ex parte* site visits by the County Board occurred. And, the fact that the primary advocate for the transfer station is the mother of the County Board's attorney was never disclosed. The County Board was confused as to the proper procedure to apply, and thus, the threatened closure of the recycling center was allowed to override Sutter's failure to satisfy the statutory criterion. Moreover, an adequate record for appeal was not made, because the transcript of the hearing before the County Board was not made available. Thus, the lack of fundamental fairness in these proceedings requires reversal of the siting approval, or in the alternative, a remand.

IV. REVERSAL (OR, AT A MIMIMUM, REMAND) OF THE COUNTY BOARD'S DECISION IS REQUIRED

Due to the failure of the applicant to provide sufficient information on the above statutorily mandated criteria, the County Board's decision to grant siting approval for the proposed transfer station is against the manifest weight of the evidence. As a result, the

County Board's decision must be reversed. The lack of fundamental fairness surrounding the hearing, decision, and preparation of the record for appeal requires reversal of the siting approval, or in the alternative, that the matter be remanded to the County Board for a new hearing.

WHEREFORE, for the above-listed reasons, Petitioner, STOCK & COMPANY, LLC, asks that the Illinois Pollution Control Board reverse the Effingham County Board's approval of the siting of a solid waste transfer station requested by the applicant, Sutter Sanitation Services, and grant in favor of STOCK & COMPANY, LLC, any other relief that the Illinois Pollution Control Board deems appropriate.

STOCK & COMPANY, LLC,
Petitioner,

BY: _____
One of Its Attorneys

Dated: January 9, 2003

Christine G. Zeman
David M. Walter
HODGE DWYER ZEMAN
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

STOK:001/Fil/Brief of Stock & Co.