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

NOTICE OF ERRATA--CLOSING BRIEF OF PETITIONER LANDFILL 33, LTD.

NOW COMES Petitioner, LANDFILL 33, LTD. (hereinafter "Landfill 33"), through its undersigned attorney, and hereby advises of errata identified by Petitioner following the filing of its closing brief, which was sent via FedEx to the Pollution Control Board on Thursday, January 9, 2002. In support of this pleading, Landfill 33 states as follows:

1. Landfill 33 submitted its closing brief via FedEx on Thursday, January 9, 2003, for filing with this Board, in compliance with hearing officer schedule on Friday, January 10, 2003.

2. Following the filing of the closing brief, Landfill 33 has identified a number of mistakes within the document submitted. These mistakes were inadvertent, in the nature of editing errors, and are not intended to substantively modify in any way the pleading earlier submitted by Landfill 33.

3. Attached hereto is a red-lined version of the closing brief, showing the errata modifications being made. This pleading is entitled "Corrected Closing Brief of Petitioner Landfill 33, Ltd." Also attached is a non-redlined version.

WHEREFORE, Petitioner, LANDFILL 33, LTD., requests that this Board accept this errata in the form of the attached "Corrected Closing Brief of Petitioner Landfill 33, Ltd."

Respectfully submitted,

LANDFILL 33, LTD.,
Petitioner,

By its attorney,

HEDINGER LAW OFFICE

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CORRECTED CLOSING BRIEF OF PETITIONER LANDFILL 33, LTD.

NOW COMES Petitioner, LANDFILL 33, LTD. (hereinafter "Landfill 33"), through its undersigned attorney, and as allowed by Hearing Officer Order entered at the time of hearing in this matter, hereby submits its closing brief.

This brief, consistent with Illinois law and Landfill 33's petition filed in this case, seeks reversal of the decision of Respondent EFFINGHAM COUNTY BOARD (hereinafter "County Board"), which affirmed an application submitted pursuant to 415 ILCS 5/39.2, of the Respondent SUTTER SANITATION SERVICES, INC. (hereinafter "Sutter Sanitation"), for approval of a transfer station to be located within Effingham County. Landfill 33 challenges the decision on the following grounds: (1) Sutter Sanitation failed to comply with statutory prerequisites to secure the jurisdiction of the County Board, and accordingly the County Board proceedings were a nullity; (2) the proceedings before the County Board deprived Landfill 33, and others, of fundamentally fair proceedings; and (3) the decision of the County Board is against the manifest weight of evidence with respect to criteria 1, 2, 5, 6, and 8, 415 ILCS 5/39.2(a)(i), (ii), (v), (vi), and (viii).

Jurisdictional Issues

An application for local siting approval pursuant to Section 39.2 of the Illinois Environmental Protection Act, 415 ILCS 5/39.2(b), must comply with certain statutory notice requirements, which have been held to be jurisdictional prerequisites. In other words, failure of a siting applicant to comply with the mandatory notice requirements results in the local siting body never obtaining jurisdiction over the proceedings, and thus any subsequent proceedings are null and void. See Browning-Ferris Industries of Illinois, Inc. v. Pollution Control Board, 162 Ill. App. 3d 801, 516 N.E. 2d 804 (5th Dist. 1987); Kane County Defenders, Inc. v. Pollution Control Board, 139 Ill. App. 3d 588, 487 N.E. 2d 743 (2d Dist. 1985); Concerned Boone Citizens, Inc. v. M.I.G. Investments, Inc., 144 Ill. App. 3d 334, 494 N.E. 2d 180 (2d Dist. 1986); Ogle County Board v. Pollution Control Board, 272 Ill. App. 3d 184, 649 N.E. 2d 545 (2d Dist. 1995). Each of these cases, as well as many others decided by this Board, have construed the notice requirements, including both the direct service of notice requirements and publication of notice requirements of Section 39.2(b), and without exception these decisions have held these requirements to constitute jurisdictional prerequisites.

In Land & Lakes Co. v. Pollution Control Board, PCB 91-7 (August 26, 1991), this Board held that the pre-hearing notice requirements set forth in Section 39.2(d) of the Illinois Environmental Protection Act, 415 ILCS 5/39.2(d), also constitute jurisdictional prerequisites applicable to a siting proceeding. This Board analogized the Section 39.2(d) requirements with those discussed in Illinois Power Co. v. Pollution Control Board, 137 Ill. App. 3d 449, 484 N.E.2d 898 (4th Dist. 1985), in which the Court held that the Board's failure the provide proper hearing notice pursuant to Section 40 rendered the decision invalid. Consequently, this Board held that "the requirements of Section 39.2(d) of the Act are jurisdictional...."

The Section 39.2(d) requirements include the following: "At least one public hearing is to be held by the County Board.... No later than 14 days prior to such hearing notice shall be published in a newspaper of general circulation published in the county of the proposed site, and

delivered by certified mail to all members of the General Assembly from the district in which the proposed site is located...."

In the Land & Lakes case, the siting authority, Village of Romeoville, was determined to be the party responsible for providing the notice, due to a village ordinance as well as the parties' actual practice in the case. In that August 26, 1991 order, this Board found that the Village had failed to provide required notice of the hearing (the Board found that two legislators had not been provided the statutory notice), and therefore ruled that the hearing was a nullity. (Later, upon a motion for reconsideration, this Board vacated that order upon revelation by the Village, as well as the Intervenor Will County, that the notices actually had been delivered to the legislators in accordance with the statute).

In this case, rather than the notice requirements falling upon the shoulders of the county, Sutter Sanitation undertook the responsibility to provide the statutory notice. The mailing notices are found in the record at C.339-C.350; in each instance, the "Sender" is identified as Sutter Sanitation. Moreover, the notices were accompanied by a letter, written on Sutter Sanitation letterhead and signed by Sutter Sanitation, identifying the date of the hearing[1] (C.353). See also C.184-C.186 (hearing testimony concerning notices).

The hearing was held on August 14, and pursuant to Section 39.2(d), delivery of these notices had to have been accomplished by July 31 ("No later than 14 days prior to such hearing notice shall be...delivered by certified mail..."). ~~See also C.184-C.186 (hearing testimony concerning notices).~~

Sutter Sanitation failed to comply with its statutory obligation.

Section 39.2(d) unambiguously requires that the notice be "delivered by certified mail to all members of the General Assembly from the district in which the proposed site is located...." In other words, by July 31, 2002 (14 days before the hearing), Sutter Sanitation was responsible to have the notice "delivered by certified mail" to the legislators. The record, though, reveals that Sutter Sanitation, while having complied with the statutory requirements in most instances (its letter

[1] The hearing had originally been scheduled for July 31, but was rescheduled for August 14.

was sent July 26, 2002), failed to assure that the notice was delivered to Senator N. Duane Noland until August 1, 2002. (C.345). In an apparent effort to remedy, Sutter Sanitation purports to have had someone from its lawyers' office hand-deliver the notice to Senator Noland on July 31, 2002 (C.352), but obviously that notice is ineffective as failing to have complied with the statute. (The statute does not permit hand delivery, but requires certified mail delivery; clearly the legislative intent is to avoid the necessity of probing into the bona fides of purported claims of service being made by the agents and employees of siting participants).

Because even a single instance of improper notice renders proceedings void, and because Sutter Sanitation bore responsibility for seeing to it that the notices were sent out in accordance with the statute[2], and because Sutter Sanitation failed to comply, these proceedings are void, and the County Board ruling must be vacated.

Fundamental Fairness

Pursuant to Section 40.1 of the Illinois Environmental Protection Act, this Board is authorized and obligated to consider the fundamental fairness of the local proceedings. Landfill 33 challenges the proceedings before the County Board as having violated rights to fundamental fairness, for the following reasons:

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[2] At this Board's hearing, the hearing officer only allowed Landfill 33 to present additional evidence on this issue (the testimony of Tracy Sutter, president of Sutter Sanitation, who was present in the hearing room) pursuant to an offer of proof, based upon Sutter Sanitation's objection. In the event Sutter Sanitation argues, in responding to this jurisdictional issue, that it did not have responsibility for the hearing notices, or that some other party (such as the County Board) did have that responsibility, then Sutter Sanitation has waived its objection and the offer of proof should be allowed in substantively. (Mr. Sutter's testimony, Tr. 62-Tr. 66, confirmed that Sutter Sanitation assumed and bore the responsibility for providing the hearing notice; compare C.184-C.186). Moreover, 35 Ill. Adm. Code 101.616(h) requires discovery amendment only when "the party learns that the response is in some material respect incomplete or incorrect;" counsel for Landfill 33 learned of the discovery incompleteness after 6:30 p.m. (i.e., after business hours), and the very next day, at hearing, informed all parties and the hearing officer. Finally, Sutter Sanitation was not prejudiced by Landfill 33's confirmatory questioning regarding a jurisdictional issue, and certainly not if it seeks to dispute that sworn testimony (again, this offer of proof confirms record evidence at C.339-C.350, C.353, and testimony at C.184-C.186).

In addition, even if Sutter Sanitation is able to argue that the Land & Lakes results should apply here, clearly such an argument must fail. The Land & Lakes result occurred due to the deadline for hearing, which is intended to protect and benefit the applicant, and it would be completely improper for this applicant to benefit by its own wrongdoing. Hence, the Land & Lakes "automatic approval" result simply is unavailable here; instead, the proper remedy for the jurisdictional violation is to vacate the proceedings--any other result would result in fundamentally unfair proceedings.

(1) Recycling Issues.

Landfill 33 was provided fundamentally unfair proceedings through the County Board's refusal to allow Landfill 33 to address recycling issues which had been discussed by Sutter Sanitation and more than one commenter, and were ultimately relied upon by the County Board in rendering its decision.

Specifically, early in the proceedings on August 14, the County Board chairman instructed the audience that the proceedings were to concern themselves with Sutter Sanitation's proposal to site a transfer station, and nothing else. (C.132-C.133). However, during his testimony Tracy Sutter spoke at length about his recycling center (which is operated at the same location as the transfer station), and in fact threatened the County Board that, if he were not granted the transfer station siting approval, he would close down the recycling center. (C.190-C.193). On the basis of that testimony, when Landfill 33 was given the opportunity to present evidence, they offered to present the testimony of Brian Hayes to address recycling issues that had been raised by Tracy Sutter. (C.289). The County Board chairman, though, instructed counsel for Landfill 33 to not proceed with any such testimony, but assured counsel that the County Board would not consider any aspects of recycling in their deliberations, and with that assurance Landfill 33 did not press the issue. (C.289-C.290). In point of fact, though, in its ruling approving Sutter Sanitation's proposal the County Board expressly considered this recycling issue, and in fact ruled in Sutter Sanitation's favor on the basis of the recycling program. (C.432). Indeed, at the hearing before this Board Ms. Nancy Daters, a vocal supporter of Sutter Sanitation's proposal insofar as it resulted in recycling (see C.414), indicated that the County Board's vote was only about the recycling issue--according to Ms. Daters, the recycling issue was the "elephant" in the room that everyone knew was present, but many weren't talking about. According to her, the County Board chairman was ignored by the other County Board members, who were present to concern themselves only with the recycling issue. (Tr. 37- Tr. 38).

Accordingly, the record reveals clearly that Landfill 33 was deprived of its opportunity to address an issue which was pivotal in the County Board's decision to grant approval to Sutter

Sanitation's proposal. Although the County Board chairman was correct in his statement that the recycling issue should have been largely irrelevant to the siting issue (save only for the issue of how those operations would effect the safety of the proposed facility), the fact that the County Board was concerned first and foremost with that issue resulted in absolutely unfair proceedings as to Landfill 33, which requested an opportunity to address the issue but was prevented from doing so, while at the same time being wrongly assured that no prejudice would occur. Prejudice clearly did occur, and Landfill 33 requests that these proceedings be reversed and remanded to the County Board for wholly new proceedings.

(2) Visits by County and/or Committee.

The record reveals that the County Board visited the transfer station site on Wednesday, July 31, at 6:30 p.m. (C.109). This visit was not publicly announced, and Landfill 33 was given no opportunity to attend. No record of that visit has been made at all, in fact. Moreover, Tracy Sutter revealed that the County's Waste Committee visited the site, and took notice of the facility's operations. (C.191). Pursuant to Southwest Energy Corp. v. Pollution Control Board, 275 Ill. App. 3d 84, 655 N.E. 2d 304 (4th dist. 1995) (Garman, J.), even if a site visit is acceptable, it must be accompanied with notice to parties, to allow them to attend as well. These site visits require a reversal and vacation of the siting decision by the County Board[3].

(3) Amendment of Application.

As discussed more fully below, Sutter Sanitation's application for siting approval contended that a need existed not because regional disposal capacity was inadequate (in fact, the application admitted that capacity "appears to be adequate to accommodate refuse capacities generated in Effingham County and the surrounding area in the near future"), but rather because there was some need to maintain "a method to transfer county generated waste to one or more of these facilities." (C.15). Sutter Sanitation also claimed that this need was supported by Effingham County's solid waste management plan. (Id.). After the hearing, though, and in fact at the end of the public

[3] See footnote 2 and the relief requested therein, which Landfill 33 requests also with respect to this issue in the event Sutter Sanitation challenges the record evidence on this issue.

comment period, and without giving notice to Landfill 33, Sutter submitted a public comment which for the first time contended that the proposed transfer station was necessary because Landfill 33 may have insufficient capacity. (See C.369-C.370; C.376-C.386).

Because this new basis for need was made at the close of the public comment period, Landfill 33 had no opportunity to respond, or to probe into Sutter Sanitation's intentions or assumptions, nor to present contrary evidence or argument.

Section 39.2(e) of the Illinois Environmental Protection Act, 415 ILCS 5/39.2(e), permits applicants to make only a single amendment to their application, and that must be made prior to completion of the applicant's presentation of evidence at hearing, and even then the decision deadline is to be extended by 90 days. Here, of course, Sutter Sanitation's amendment was made some 30 days after the hearing.

This behavior completely deprived Landfill 33 of the opportunity to address the scurrilous allegations made by Sutter Sanitation. Landfill 33 lost the opportunity to cross examine as well as to present its own evidence. This is highly improper; more than that, it was fundamentally unfair. These proceedings should be started anew, to allow all participants the statutory amount of time to consider the application which Sutter Sanitation, in the end, presented to the County Board.

Manifest Weight of the Evidence

The County Board's decision was also against the manifest weight of the evidence with respect to at least five siting criteria, and for that reason should be reversed, and Sutter Sanitation's proposal denied.

(1) The "Need" (Criterion 1) and Solid Waste Plan Consistency (Criterion 8) Criteria

Sutter Sanitation combines its criterion 2 analysis (requiring a showing that the proposed facility "is necessary to accommodate the waste needs of its intended service area") with its discussion of the consistency of its proposal with Effingham County's Solid Waste Management Plan, pursuant to the eighth siting criterion. 415 ILCS 5/39.2(a)(i) and (viii). Sutter Sanitation's application begins by asserting a service area of approximately 30 to 50 miles from the location of

the proposed 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." (C.14). Sutter Sanitation provided a map showing this distance, along with landfills and other solid waste management facilities located within that radius. (C.17). Sutter Sanitation then acknowledged that two landfills, the Salem Municipal Landfill and Landfill 33, Ltd., are located within 30 miles of the transfer station location (Landfill 33, Ltd., is so close that Sutter Sanitation didn't even identify the distance). (C.17; see also C.141). Six additional facilities, some with substantial capacities, are located within the 50 mile range, including the Coles County Landfill, the Wayne County Landfill, the D & L Landfill, the Litchfield Landfill, and the Five Oaks Landfill. (C.18; C.141-142). Based upon the Illinois Environmental Protection Agency's 2000 Annual Report, Sutter Sanitation identified the reported remaining capacities for these eight facilities. (C.14). The estimated lifespans of the facilities ranged from less than one year, all the way up to 45 years. The Application acknowledged that the Landfill 33, Ltd., lifespan was 7 years (later, though, Sutter Sanitation admitted that Landfill 33, Ltd., had recently received an expansion and consequent permitting, and that the current lifespan for the facility is 29 years).

Following presentation of this information, the application states: "As can be noted, the regional waste disposal capacity appears to be adequate to accommodate refuse capacities generated in Effingham county [sic] and the surrounding area in the near future, however, the current dilemma exists in maintaining a viable out of county waste disposal source and method to transfer county generated waste to one or more of these facilities. Again, it is noted that conventional refuse collection vehicles cannot routinely travel excessive distances without significant operation and maintenance costs. Therefore, it is common and practical for waste to be transferred from collection vehicles to transfers trailers [sic], or similar containers, which in turn are transported to the waste disposal location. This method of operation also allows more productive use of collection vehicles." (C.15). During its testimony, Sutter Sanitation's "needs" expert reiterated this theory of necessity: "As can be noted, the regional waste disposal--again, regional waste disposal capacity appears to be adequate. In other words, that waste capacity within the 50-mile radius appears to be

adequate to accommodate the refuse generated in Effingham County and the surrounding area in the near future. 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." (C.142-C.143--testimony of David Kimmle).

The "needs" analysis of Sutter Sanitation, from that point, shifted into a discussion of the Effingham County Solid Waste Management Plan; according to the application, the County Plan stated the preference "to support the disposal of waste generated in the county at in-county and out-of-county landfills. As stated above, to economically access out-of-county landfills, a waste transfer station is needed." (C.15). Mr. Kimmle's testimony similarly continued: "The regional waste management plan for Effingham that we referenced earlier dated 1995 is a plan, as I said earlier, developed and adopted by the county board to address the management of waste generated in Effingham County. Reference to that plan will indicate that is the county board's intention to support the disposal of waste generated in the county at in-county and out-of-county landfills. Economically, access out-of-county landfills, we feel that a waste transfer station is needed." (C.143).

Based upon Sutter Sanitation's own work product, it is clear that there is no "need" for this facility; the proposed transfer station is clearly not necessary to accommodate the waste needs of its intended service area. Indeed, Sutter Sanitation's own evidence acknowledges sufficient capacity to accommodate the waste needs. The only justification for the siting proposal is the purported "dilemma" to maintain "a viable out of county waste disposal source and a method to transfer county generated waste to one or more of these facilities." (C.15). Taken separately, this purported "dilemma" does not even exist, let alone constitute a basis for finding a "need" for the proposed facility. Nothing about Sutter Sanitation's proposal supports the view that without this transfer station, the out-of-county disposal facilities might not be "viable." Nothing in Sutter Sanitation's materials support the apparent assumption that these out-of-county facilities might fail, or otherwise become unviable, without this transfer station. To the contrary, in fact, Mr. Kimmle's

testimony acknowledged both that each of these out-of-county facilities have substantial airspace available, and that each already services a large service area. (C.143-C.144).

More to the point, though, is that Sutter Sanitation's burden was to prove that the service area needs the transfer station, not that the out-of-county facilities need it.

Furthermore, Sutter Sanitation's own evidence refutes its assertion that the transfer station is needed to provide "a method to transfer county generated waste to one or more of these facilities." Its assumption is that a 30 to 50 mile range is "the economical distance a refuse collection vehicle can travel on a routine basis." Its own evidence shows that these out-of-county facilities are each located 50 miles or less from the location of the transfer station. Thus, these facilities can already be economically accessed, without any reason for creating a transfer station.

Utilizing Sutter Sanitation's own assumptions and materials, Don Sheffer, a professional engineer who assisted Effingham County in drafting it Solid Waste Management Plan (see C.202-C.204), demonstrated that ~~from~~ virtually any location within the service area is within 30 miles of the largest of the landfills identified by Sutter Sanitation. (C.210; C.363). Indeed, even if, for some reason, Landfill 33, Ltd., was removed from the discussion (which apparently is Sutter Sanitation's intention), virtually every location within Sutter Sanitation's service area is located within less than 50 miles of one of those landfills. (C.210-C.211; C.364). (And of course, with Landfill 33, Ltd., the distances are <u>much</u> closer to the nearest landfill). Notably, though, even without the work product of Mr. Sheffer, Sutter Sanitation's own evidence reveals there is simply no "need" for this facility--this transfer station is not, by Sutter Sanitation's own evidence and admissions, necessary to accommodate the waste needs of its service area. Whether it might be convenient or handy for Sutter Sanitation, or more profitable for Sutter Sanitation, is not the issue. The service area simply does not need this facility.

Similarly, Sutter Sanitation's analysis of the eighth siting criterion is unsupportable. According to the application and Mr. Kimmle, the proposed transfer station is necessary because the Solid Waste Management Plan supports disposal of Effingham County waste at in-county and

out-of-county facilities, and Sutter Sanitation contends its transfer station is necessary to cost-effectively transport waste from Effingham County to these out-of-county facilities.

In the first place, though, Sutter Sanitation's apparent service area is not co-extensive with Effingham County, but to the contrary extends in a radius of 50 miles surrounding the proposed location of the transfer station (which is located in the extreme southwest corner of Effingham County). (See C.17). The service area accordingly incorporates portions of around twenty counties in addition to Effingham County. Hence, even if Effingham County's Solid Waste Management Plan said what Sutter Sanitation contends it says, that issue is not relevant to whether Sutter Sanitation's proposed service area needs this facility (and, as discussed above, Sutter Sanitation's own evidence reveals that it does not).

Second, Sutter Sanitation's assertion that the Effingham County Solid Waste Management Plan infers a need for a transfer station overlooks most of the Solid Waste Management Plan, and does not even focus on any language which clearly suggests a need for a transfer station. Nowhere in the plan, in fact, is such a need or desire asserted.

Sutter Sanitation's analysis consists of acknowledging the Solid Waste Management Plan's recognition that "all waste collection service in Effingham County is provided by private haulers. These haulers have the right to choose the landfill(s) at which they dispose of the waste they collect." (C.71, quoting page 6-41 of the Plan). Sutter Sanitation makes a leap of logic, and infers that due to the encouragement of the use of out-of-county waste facilities, "based on economics," to economically utilize an out-of-county facility "a solid waste transfer station is needed." (C.71). Of course, this is not true--the 50 mile "economical transport" radius established by Sutter Sanitation is easily met, without any transfer station.

With respect to the Plan, though, the more significant point is that Sutter Sanitation's analysis completely ignores the fact that the Plan expressly considered the possibility of transfer stations, and excluded those; the out-of-county facility recommendation is premised upon direct haul, not transfer station utilization. Indeed, the very page of the plan cited by Sutter Sanitation reveals that "[a]ll Effingham County waste that is disposed of in landfills is currently hauled

directly to either Landfill No. 33 in Effingham County or the ERC Landfill in Coles County," and "[t]he basic recommendation for landfill disposal of Effingham County waste over the twenty year planning period is to continue to use the two landfills discussed above." (Solid Waste Management Plan, at 6-41; see C.366). The specific yearly components, noted on the remainder of that page of the Plan as well as the following page, clearly indicate that direct haul to those two facilities is the County's preferred method of waste disposal, and that "[t]he Plan does not list any new programs or facilities to be developed during the years 2-4 and 5-10 period." (C.366-C.367)

The meaning of the Plan, in fact, is enhanced by consideration of an earlier portion of the Plan document, in which various Landfill Disposal options were discussed. Specifically, the Plan considered four separate mechanisms for Landfill Disposal--(1) "the continued direct hauling of waste to in-county and out-of-county landfills;" (2) "expansion of the existing in-county and/or out-of-county landfills;" (3) "construction of a new in-county landfill; and" (4) "construction of an in-county transfer station for transport of local waste to out-of-county landfills." (Plan, at 3-25; see C.365). Obviously, the proposal of Sutter Sanitation falls within the category (4) above (an in-county transfer station to transport waste out-of-county), but as Sutter Sanitation itself is forced to admit, the Plan rejected that proposal, and opted solely for the first option, along with ultimate adoption of the second (i.e., continued utilization through direct haul of both in-county and out-of-county landfills, along with expansion of existing facilities at the appropriate time). Again, nothing in any portion of the Plan in any way or to any degree supports a contention that the Plan supports an in-county transfer station to haul to out-of-county landfills.

This was explained by Don Sheffer, who was instrumental in developing the county Solid Waste Management Plan. (C.213-C.216). Mr. Sheffer explained, as discussed above, that although Effingham County considered the possibility of developing a transfer station to haul waste out of Effingham County, the Plan as adopted rejected that proposal, and instead proposed only the continued utilization of existing landfills through direct haul, along with expansion of those facilities as needed.

Sutter Sanitation's proposal is neither an expansion of an existing landfill facility, nor a continuation of existing disposal patterns. It is a brand new effort, one that the Effingham County planners considered but rejected. It should have been rejected this time by the Effingham County Board, for failing to comply with both criterion 1 and criterion 8; it is now up to this Board to rule that the County Board's decision on these two criteria was against the manifest weight of the evidence, and cannot stand.

(2) Criteria 2 (Health/Safety/Welfare), 5 (Plan of Operation) and 6 (Traffic Patterns).

A number of points were raised by Landfill 33, Ltd.'s transfer station expert, Bryan Johnsrud, concerning deficiencies of the proposed transfer station facility with respect to criterion 2 (that the facility is so located, designed, and proposed to be operated that the public health, safety and welfare will be protected), criterion 5 (that the plan of operations will minimize the danger of fire, spills, or other operational accidents), and criterion 6 (that the traffic patterns to and from the facility will minimize impact upon existing traffic patterns). (See 415 ILCS 5/39.2(a)(ii), (v), and (vi)). This testimony was virtually unchallenged, unrebutted and unanswered by Sutter Sanitation, to the extent discussed below. Hence, this is not a situation where the County Board chose to accept certain testimony over other competing or contradictory testimony, but to the contrary this is a situation in which the County Board, for whatever reason, simply refused to accept unrebutted testimony. Their decision on these points, therefore, is unquestionably against the manifest weight of the evidence. See Industrial Fuels & Resources/Illinois, Inc. v. Pollution Control Board, 227 Ill. App. 3d 533, 592 N.E. 2d 148 (1st Dist. 1992).

Location Standards--Pursuant to Section 22.14 of the Illinois Environmental Protection Act, 415 ILCS 5/22.14, it is unlawful for anyone to establish a transfer station within 1,000 feet of a dwelling. Clearly a violation of Section 22.14 is, as a matter of law, a violation of the second siting criterion. Here Sutter Sanitation's own documentation reveals the existence of a dwelling less than 200 feet from the building that will house this proposed transfer station! (C.238). In fact, the house even has a swimming pool! (C.239). Sutter Sanitation has admitted the existence of this dwelling, but claims that it will not allow anyone to live there, but instead the building will be used as offices.

Clearly this is insufficient; the statute (Section 22.14) outlaws transfer stations near a "dwelling," and is silent upon any obligation that the dwelling be occupied. Indeed, the suggestion is nullified by the additional statutory prohibition on such transfer stations being located within 1,000 of property zoned for residential use--the statute clearly, in that instance, does not require actual buildings or occupancy, so clearly the legislature did not intend any such limitation with respect to the "dwelling" aspect of the setback rule. The structure was built to be a house, could at any time be utilized as a house, and is clearly a "dwelling," as is emphasized and underscored by the swimming pool gracing its properties. This is a prohibited location for this proposed transfer station. (In addition, it has come to light that a dwelling also exists across the road from this facility, although the County Board refused to accept evidence relating to that structure. (See Tr. 39-Tr. 42)). This would seem to rise to a jurisdictional level--the statute, after all, does not prohibit such a structure as a matter of siting, but rather prohibits anyone from establishing such a facility. As a matter of jurisdiction, fundamental fairness, and manifest weight of the evidence, this proposal should be disqualified.

Wood Framing. Sutter Sanitation has admitted that the interior of this building is made of wood. As Mr. Johnsrud testified, this is improper building materials for the interior of a transfer station, against which waste will be dumped, scraped and pushed in normal, everyday transfer station operations. As Mr. Johnsrud explained, this building was built and designed as a grain storage facility, and Sutter Sanitation's attempt to turn it into a transfer station has left numerous unacceptable features, including the wood framing. In addition, Mr. Johnsrud noted the absence of any "pushwalls" within the facility (hard walls against which a scraper can push waste, in order to scoop it into the appropriate receptacle). (C.245-C.246), Although Sutter Sanitation had opportunity to inform the County Board of either the existence of such push walls or the intention to install them, or of the intention to remedy the wooden members of the structure, Sutter Sanitation never did so.

Fire Dangers. In addition, the wooden interior of the structure poses a greater risk of fire, and the rural location of this former grain facility will make it much more difficult for fire

professionals to respond to any fire emergencies. In addition, the rural location reveals a lack of adequate water resources, another point that Sutter Sanitation has conceded. (C.246-C.247).

Floor Thickness. Mr. Johnsrud noted the absence of information in the application concerning the thickness of the floor of the former grain storage facility. (C.246). Incredibly, Mr. Sutter, president of Sutter Sanitation, had no idea how thick the floors were. (C.268). Subsequently, however, Sutter Sanitation submitted a "public comment" that asserts that borings of the concrete revealed a 9.5 inch thick concrete surface that slopes toward one direction (the direction Sutter Sanitation proposes for leachate to head). (C.387). As pointed out by Mr. Johnsrud, however, certain concrete at the facility has already began crumbling, and Sutter Sanitation never explained why it is crumbling or what it will do to avoid crumbling in other parts of this facility. A crumbling concrete floor at a grain storage facility probably poses little, if any, environmental hazard. A crumbling floor in a transfer station, where leachate is a fact of daily life (C.188), is quite another matter, and Mr. Johnsrud's testimony clearly discusses the environmental hazards posed by such a condition.

Door and Ceiling Heights. According to Mr. Sutter, he can drive one of his little packer trucks through this proposed facility with the bed fully raised, and have four or five inches to spare. (C.263). As Landfill 33's evidence shows, though, many other packer trucks would crash into rafters, ceiling beams, or the doorways of the facility. (C.393-C.397). Mr. Johnsrud explained that in fact the issue is not whether an accident will happen, but when and how bad it will be. (C.250-C.251). Indeed, even Mr. Sutter admitted that this small building poses a hazard for roll-off containers! (C.264). Again, as Mr. Johnsrud explained, the problem is Sutter Sanitation's attempt to "retrofit" the specialized needs of a transfer station facility into a grain storage facility. The attempt has failed; someone is going to get hurt.

Facility Staffing. In response to the significant issue concerning the ceiling and doorway height, Mr. Sutter blithely remarked that it is important to keep the facility fully staffed at all times. (C.264). Conspicuously absent, either from the application or from any testimony from Sutter Sanitation, is any specific indication of how many workers will be on site at what times. Absent this

information, Mr. Sutter's observation concerning the importance of facility staffing merely underscores Mr. Johnsrud's concern that no commitment has been made to assure the facility is adequately staffed. (C.252-C.254).

Leachate. Sutter Sanitation made no efforts to calculate the specific amounts of leachate it will generate, nor what specifically it will do with that leachate (Mr. Sutter did say he will wash the floor every day--C.188). Indeed, Sutter Sanitation is not even aware of whether, when the time comes, it will be able to find someone to accept the leachate and treat it! (C.268; see also C.267) Mr. Johnsrud pointed out that even at a small transfer station, the floors will need to be washed regularly, and washing the remains of small dumpings is no different than large dumpings, and can generate a significant amount of leachate requiring disposition. (C.254-C.255) Once again, this oversight, unanswered and unrebutted in the record, is a serious situation waiting to happen.

Traffic. Mr. Johnsrud pointed out that this small site, with the scale house in close proximity to the road, and the tight turning radiuses into and out of the proposed transfer station facility, will potentially cause problems, and perhaps both traffic disruption and safety hazards. (C.259). In the event, for instance, one truck is stopped on the scales at a particular time, another approaching truck will have no option but to wait on the road until the first truck is finished; there is simply no place to stage trucks on the site. Moreover, Sutter Sanitation did not even provide a traffic count of the anticipated number of vehicles it would receive from its recycling business; to compare with traffic issues relating to the transfer station. And Landfill 33, Ltd.'s attempted inquiries into recycling issues were universally rebuffed by the County Board.

Another traffic issue unaddressed by Sutter Sanitation's materials is the impact of facility traffic during the road restriction months (January through April) for the roadway approaching the facility. (C.260-C.261). Sutter Sanitation failed to discuss or identify any means of assuring that overweight vehicles would not come to or leave from its facility, even during the months when the roadway is posted as restricted weight limit. Indeed, Sutter Sanitation's response to these issues was to inquire why it would ever want to weigh outgoing trucks, as though the weight restriction would not be an issue for the semi-trailers leaving the facility!

CONCLUSION

For the above reasons, Petitioner Landfill 33, Ltd., requests that this Board take the following action:

1. Rule that the Effingham County Board never obtained jurisdiction over the siting application of Sutter Sanitation Services, Inc., and so the proceedings before the County Board are null and void;

2. Rule that the procedures adopted and employed by the Effingham County Board deprived Landfill 33, Ltd., and other members of the public, of fundamental fairness of the proceedings, and remand for wholly new proceedings to provide all interested parties with an opportunity to fully and completely review Sutter Sanitation Services, Inc.'s application, prepare for the hearing and participate in the proceedings;

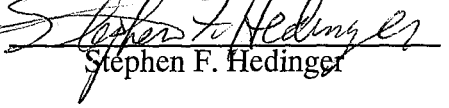
3. Find that the ruling of the County Board, affirming the proposal of Sutter Sanitation Services, Inc., was against the manifest weight of the evidence with respect to Siting Criteria (1), (2), (5), (6), and (8), 415 ILCS 5/39.2(a)(i), (ii), (v), (vi), and (viii)

Respectfully submitted,

LANDFILL 33, LTD.,
Petitioner,

By its attorney,

HEDINGER LAW OFFICE

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

CORRECTED CLOSING BRIEF OF PETITIONER LANDFILL 33, LTD.

NOW COMES Petitioner, LANDFILL 33, LTD. (hereinafter "Landfill 33"), through its undersigned attorney, and as allowed by Hearing Officer Order entered at the time of hearing in this matter, hereby submits its closing brief.

This brief, consistent with Illinois law and Landfill 33's petition filed in this case, seeks reversal of the decision of Respondent EFFINGHAM COUNTY BOARD (hereinafter "County Board"), which affirmed an application submitted pursuant to 415 ILCS 5/39.2, of the Respondent SUTTER SANITATION SERVICES, INC. (hereinafter "Sutter Sanitation"), for approval of a transfer station to be located within Effingham County. Landfill 33 challenges the decision on the following grounds: (1) Sutter Sanitation failed to comply with statutory prerequisites to secure the jurisdiction of the County Board, and accordingly the County Board proceedings were a nullity; (2) the proceedings before the County Board deprived Landfill 33, and others, of fundamentally fair proceedings; and (3) the decision of the County Board is against the manifest weight of evidence with respect to criteria 1, 2, 5, 6, and 8, 415 ILCS 5/39.2(a)(i), (ii), (v), (vi), and (viii).

Jurisdictional Issues

An application for local siting approval pursuant to Section 39.2 of the Illinois Environmental Protection Act, 415 ILCS 5/39.2(b), must comply with certain statutory notice requirements, which have been held to be jurisdictional prerequisites. In other words, failure of a siting applicant to comply with the mandatory notice requirements results in the local siting body never obtaining jurisdiction over the proceedings, and thus any subsequent proceedings are null and void. See Browning-Ferris Industries of Illinois, Inc. v. Pollution Control Board, 162 Ill. App. 3d 801, 516 N.E. 2d 804 (5th Dist. 1987); Kane County Defenders, Inc. v. Pollution Control Board, 139 Ill. App. 3d 588, 487 N.E. 2d 743 (2d Dist. 1985); Concerned Boone Citizens, Inc. v. M.I.G. Investments, Inc., 144 Ill. App. 3d 334, 494 N.E. 2d 180 (2d Dist. 1986); Ogle County Board v. Pollution Control Board, 272 Ill. App. 3d 184, 649 N.E. 2d 545 (2d Dist. 1995). Each of these cases, as well as many others decided by this Board, have construed the notice requirements, including both the direct service of notice requirements and publication of notice requirements of Section 39.2(b), and without exception these decisions have held these requirements to constitute jurisdictional prerequisites.

In Land & Lakes Co. v. Pollution Control Board, PCB 91-7 (August 26, 1991), this Board held that the pre-hearing notice requirements set forth in Section 39.2(d) of the Illinois Environmental Protection Act, 415 ILCS 5/39.2(d), also constitute jurisdictional prerequisites applicable to a siting proceeding. This Board analogized the Section 39.2(d) requirements with those discussed in Illinois Power Co. v. Pollution Control Board, 137 Ill. App. 3d 449, 484 N.E.2d 898 (4th Dist. 1985), in which the Court held that the Board's failure the provide proper hearing notice pursuant to Section 40 rendered the decision invalid. Consequently, this Board held that "the requirements of Section 39.2(d) of the Act are jurisdictional...."

The Section 39.2(d) requirements include the following: "At least one public hearing is to be held by the County Board.... No later than 14 days prior to such hearing notice shall be published in a newspaper of general circulation published in the county of the proposed site, and

delivered by certified mail to all members of the General Assembly from the district in which the proposed site is located...."

In the Land & Lakes case, the siting authority, Village of Romeoville, was determined to be the party responsible for providing the notice, due to a village ordinance as well as the parties' actual practice in the case. In that August 26, 1991 order, this Board found that the Village had failed to provide required notice of the hearing (the Board found that two legislators had not been provided the statutory notice), and therefore ruled that the hearing was a nullity. (Later, upon a motion for reconsideration, this Board vacated that order upon revelation by the Village, as well as the Intervenor Will County, that the notices actually had been delivered to the legislators in accordance with the statute).

In this case, rather than the notice requirements falling upon the shoulders of the county, Sutter Sanitation undertook the responsibility to provide the statutory notice. The mailing notices are found in the record at C.339-C.350; in each instance, the "Sender" is identified as Sutter Sanitation. Moreover, the notices were accompanied by a letter, written on Sutter Sanitation letterhead and signed by Sutter Sanitation, identifying the date of the hearing[1] (C.353). See also C.184-C.186 (hearing testimony concerning notices).

The hearing was held on August 14, and pursuant to Section 39.2(d), delivery of these notices had to have been accomplished by July 31 ("No later than 14 days prior to such hearing notice shall be...delivered by certified mail...").

Sutter Sanitation failed to comply with its statutory obligation.

Section 39.2(d) unambiguously requires that the notice be "delivered by certified mail to all members of the General Assembly from the district in which the proposed site is located...." In other words, by July 31, 2002 (14 days before the hearing), Sutter Sanitation was responsible to have the notice "delivered by certified mail" to the legislators. The record, though, reveals that Sutter Sanitation, while having complied with the statutory requirements in most instances (its letter was sent July 26, 2002), failed to assure that the notice was delivered to Senator N. Duane Noland

[1] The hearing had originally been scheduled for July 31, but was rescheduled for August 14.

until August 1, 2002. (C.345). In an apparent effort to remedy, Sutter Sanitation purports to have had someone from its lawyers' office hand-deliver the notice to Senator Noland on July 31, 2002 (C.352), but obviously that notice is ineffective as failing to have complied with the statute. (The statute does not permit hand delivery, but requires certified mail delivery; clearly the legislative intent is to avoid the necessity of probing into the bona fides of purported claims of service being made by the agents and employees of siting participants).

Because even a single instance of improper notice renders proceedings void, and because Sutter Sanitation bore responsibility for seeing to it that the notices were sent out in accordance with the statute[2], and because Sutter Sanitation failed to comply, these proceedings are void, and the County Board ruling must be vacated.

Fundamental Fairness

Pursuant to Section 40.1 of the Illinois Environmental Protection Act, this Board is authorized and obligated to consider the fundamental fairness of the local proceedings. Landfill 33 challenges the proceedings before the County Board as having violated rights to fundamental fairness, for the following reasons:

(1) Recycling Issues.

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[2] At this Board's hearing, the hearing officer only allowed Landfill 33 to present additional evidence on this issue (the testimony of Tracy Sutter, president of Sutter Sanitation, who was present in the hearing room) pursuant to an offer of proof, based upon Sutter Sanitation's objection. In the event Sutter Sanitation argues, in responding to this jurisdictional issue, that it did not have responsibility for the hearing notices, or that some other party (such as the County Board) did have that responsibility, then Sutter Sanitation has waived its objection and the offer of proof should be allowed in substantively. (Mr. Sutter's testimony, Tr. 62-Tr. 66, confirmed that Sutter Sanitation assumed and bore the responsibility for providing the hearing notice; compare C.184-C.186). Moreover, 35 Ill. Adm. Code 101.616(h) requires discovery amendment only when "the party learns that the response is in some material respect incomplete or incorrect;" counsel for Landfill 33 learned of the discovery incompleteness after 6:30 p.m. (i.e., after business hours), and the very next day, at hearing, informed all parties and the hearing officer. Finally, Sutter Sanitation was not prejudiced by Landfill 33's confirmatory questioning regarding a jurisdictional issue, and certainly not if it seeks to dispute that sworn testimony (again, this offer of proof confirms record evidence at C.339-C.350, C.353, and testimony at C.184-C.186).

In addition, even if Sutter Sanitation is able to argue that the Land & Lakes results should apply here, clearly such an argument must fail. The Land & Lakes result occurred due to the deadline for hearing, which is intended to protect and benefit the applicant, and it would be completely improper for this applicant to benefit by its own wrongdoing. Hence, the Land & Lakes "automatic approval" result simply is unavailable here; instead, the proper remedy for the jurisdictional violation is to vacate the proceedings--any other result would result in fundamentally unfair proceedings.

Landfill 33 was provided fundamentally unfair proceedings through the County Board's refusal to allow Landfill 33 to address recycling issues which had been discussed by Sutter Sanitation and more than one commenter, and were ultimately relied upon by the County Board in rendering its decision.

Specifically, early in the proceedings on August 14, the County Board chairman instructed the audience that the proceedings were to concern themselves with Sutter Sanitation's proposal to site a transfer station, and nothing else. (C.132-C.133). However, during his testimony Tracy Sutter spoke at length about his recycling center (which is operated at the same location as the transfer station), and in fact threatened the County Board that, if he were not granted the transfer station siting approval, he would close down the recycling center. (C.190-C.193). On the basis of that testimony, when Landfill 33 was given the opportunity to present evidence, they offered to present the testimony of Brian Hayes to address recycling issues that had been raised by Tracy Sutter. (C.289). The County Board chairman, though, instructed counsel for Landfill 33 to not proceed with any such testimony, but assured counsel that the County Board would not consider any aspects of recycling in their deliberations, and with that assurance Landfill 33 did not press the issue. (C.289-C.290). In point of fact, though, in its ruling approving Sutter Sanitation's proposal the County Board expressly considered this recycling issue, and in fact ruled in Sutter Sanitation's favor on the basis of the recycling program. (C.432). Indeed, at the hearing before this Board Ms. Nancy Daters, a vocal supporter of Sutter Sanitation's proposal insofar as it resulted in recycling (see C.414), indicated that the County Board's vote was only about the recycling issue--according to Ms. Daters, the recycling issue was the "elephant" in the room that everyone knew was present, but many weren't talking about. According to her, the County Board chairman was ignored by the other County Board members, who were present to concern themselves only with the recycling issue. (Tr. 37- Tr. 38).

Accordingly, the record reveals clearly that Landfill 33 was deprived of its opportunity to address an issue which was pivotal in the County Board's decision to grant approval to Sutter Sanitation's proposal. Although the County Board chairman was correct in his statement that the

recycling issue should have been largely irrelevant to the siting issue (save only for the issue of how those operations would effect the safety of the proposed facility), the fact that the County Board was concerned first and foremost with that issue resulted in absolutely unfair proceedings as to Landfill 33, which requested an opportunity to address the issue but was prevented from doing so, while at the same time being wrongly assured that no prejudice would occur. Prejudice clearly did occur, and Landfill 33 requests that these proceedings be reversed and remanded to the County Board for wholly new proceedings.

(2) **Visits by County and/or Committee.**

The record reveals that the County Board visited the transfer station site on Wednesday, July 31, at 6:30 p.m. (C.109). This visit was not publicly announced, and Landfill 33 was given no opportunity to attend. No record of that visit has been made at all, in fact. Moreover, Tracy Sutter revealed that the County's Waste Committee visited the site, and took notice of the facility's operations. (C.191). Pursuant to Southwest Energy Corp. v. Pollution Control Board, 275 Ill. App. 3d 84, 655 N.E. 2d 304 (4th dist. 1995) (Garman, J.), even if a site visit is acceptable, it must be accompanied with notice to parties, to allow them to attend as well. These site visits require a reversal and vacation of the siting decision by the County Board[3].

(3) Amendment of Application.

As discussed more fully below, Sutter Sanitation's application for siting approval contended that a need existed not because regional disposal capacity was inadequate (in fact, the application admitted that capacity "appears to be adequate to accommodate refuse capacities generated in Effingham County and the surrounding area in the near future"), but rather because there was some need to maintain "a method to transfer county generated waste to one or more of these facilities." (C.15). Sutter Sanitation also claimed that this need was supported by Effingham County's solid waste management plan. (Id.). After the hearing, though, and in fact at the end of the public comment period, and without giving notice to Landfill 33, Sutter submitted a public comment which

[3] See footnote 2 and the relief requested therein, which Landfill 33 requests also with respect to this issue in the event Sutter Sanitation challenges the record evidence on this issue.

for the first time contended that the proposed transfer station was necessary because Landfill 33 may have insufficient capacity. (See C.369-C.370; C.376-C.386).

Because this new basis for need was made at the close of the public comment period, Landfill 33 had no opportunity to respond, or to probe into Sutter Sanitation's intentions or assumptions, nor to present contrary evidence or argument.

Section 39.2(e) of the Illinois Environmental Protection Act, 415 ILCS 5/39.2(e), permits applicants to make only a single amendment to their application, and that must be made prior to completion of the applicant's presentation of evidence at hearing, and even then the decision deadline is to be extended by 90 days. Here, of course, Sutter Sanitation's amendment was made some 30 days after the hearing.

This behavior completely deprived Landfill 33 of the opportunity to address the scurrilous allegations made by Sutter Sanitation. Landfill 33 lost the opportunity to cross examine as well as to present its own evidence. This is highly improper; more than that, it was fundamentally unfair. These proceedings should be started anew, to allow all participants the statutory amount of time to consider the application which Sutter Sanitation, in the end, presented to the County Board.

Manifest Weight of the Evidence

The County Board's decision was also against the manifest weight of the evidence with respect to at least five siting criteria, and for that reason should be reversed, and Sutter Sanitation's proposal denied.

(1) The "Need" (Criterion 1) and Solid Waste Plan Consistency (Criterion 8) Criteria

Sutter Sanitation combines its criterion 2 analysis (requiring a showing that the proposed facility "is necessary to accommodate the waste needs of its intended service area") with its discussion of the consistency of its proposal with Effingham County's Solid Waste Management Plan, pursuant to the eighth siting criterion. 415 ILCS 5/39.2(a)(i) and (viii). Sutter Sanitation's application begins by asserting a service area of approximately 30 to 50 miles from the location of the proposed 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." (C.14). Sutter Sanitation provided a map showing this distance, along with landfills and other solid waste management facilities located within that radius. (C.17). Sutter Sanitation then acknowledged that two landfills, the Salem Municipal Landfill and Landfill 33, Ltd., are located within 30 miles of the transfer station location (Landfill 33, Ltd., is so close that Sutter Sanitation didn't even identify the distance). (C.17; see also C.141). Six additional facilities, some with substantial capacities, are located within the 50 mile range, including the Coles County Landfill, the Wayne County Landfill, the D & L Landfill, the Litchfield Landfill, and the Five Oaks Landfill. (C.18; C.141-142). Based upon the Illinois Environmental Protection Agency's 2000 Annual Report, Sutter Sanitation identified the reported remaining capacities for these eight facilities. (C.14). The estimated lifespans of the facilities ranged from less than one year, all the way up to 45 years. The Application acknowledged that the Landfill 33, Ltd., lifespan was 7 years (later, though, Sutter Sanitation admitted that Landfill 33, Ltd., had recently received an expansion and consequent permitting, and that the current lifespan for the facility is 29 years).

Following presentation of this information, the application states: "As can be noted, the regional waste disposal capacity appears to be adequate to accommodate refuse capacities generated in Effingham county [sic] and the surrounding area in the near future, however, the current dilemma exists in maintaining a viable out of county waste disposal source and method to transfer county generated waste to one or more of these facilities. Again, it is noted that conventional refuse collection vehicles cannot routinely travel excessive distances without significant operation and maintenance costs. Therefore, it is common and practical for waste to be transferred from collection vehicles to transfers trailers [sic], or similar containers, which in turn are transported to the waste disposal location. This method of operation also allows more productive use of collection vehicles." (C.15). During its testimony, Sutter Sanitation's "needs" expert reiterated this theory of necessity: "As can be noted, the regional waste disposal--again, regional waste disposal capacity appears to be adequate. In other words, that waste capacity within the 50-mile radius appears to be adequate to accommodate the refuse generated in Effingham County and the surrounding area in

the near future. 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." (C.142-C.143--testimony of David Kimmle).

The "needs" analysis of Sutter Sanitation, from that point, shifted into a discussion of the Effingham County Solid Waste Management Plan; according to the application, the County Plan stated the preference "to support the disposal of waste generated in the county at in-county and out-of-county landfills. As stated above, to economically access out-of-county landfills, a waste transfer station is needed." (C.15). Mr. Kimmle's testimony similarly continued: "The regional waste management plan for Effingham that we referenced earlier dated 1995 is a plan, as I said earlier, developed and adopted by the county board to address the management of waste generated in Effingham County. Reference to that plan will indicate that is the county board's intention to support the disposal of waste generated in the county at in-county and out-of-county landfills. Economically, access out-of-county landfills, we feel that a waste transfer station is needed." (C.143).

Based upon Sutter Sanitation's own work product, it is clear that there is no "need" for this facility; the proposed transfer station is clearly not necessary to accommodate the waste needs of its intended service area. Indeed, Sutter Sanitation's own evidence acknowledges sufficient capacity to accommodate the waste needs. The only justification for the siting proposal is the purported "dilemma" to maintain "a viable out of county waste disposal source and a method to transfer county generated waste to one or more of these facilities." (C.15). Taken separately, this purported "dilemma" does not even exist, let alone constitute a basis for finding a "need" for the proposed facility. Nothing about Sutter Sanitation's proposal supports the view that without this transfer station, the out-of-county disposal facilities might not be "viable." Nothing in Sutter Sanitation's materials support the apparent assumption that these out-of-county facilities might fail, or otherwise become unviable, without this transfer station. To the contrary, in fact, Mr. Kimmle's testimony acknowledged both that each of these out-of-county facilities have substantial airspace available, and that each already services a large service area. (C.143-C.144).

More to the point, though, is that Sutter Sanitation's burden was to prove that the service area needs the transfer station, not that the out-of-county facilities need it.

Furthermore, Sutter Sanitation's own evidence refutes its assertion that the transfer station is needed to provide "a method to transfer county generated waste to one or more of these facilities." Its assumption is that a 30 to 50 mile range is "the economical distance a refuse collection vehicle can travel on a routine basis." Its own evidence shows that these out-of-county facilities are each located 50 miles or less from the location of the transfer station. Thus, these facilities can already be economically accessed, without any reason for creating a transfer station.

Utilizing Sutter Sanitation's own assumptions and materials, Don Sheffer, a professional engineer who assisted Effingham County in drafting it Solid Waste Management Plan (see C.202-C.204), demonstrated that virtually any location within the service area is within 30 miles of the largest of the landfills identified by Sutter Sanitation. (C.210; C.363). Indeed, even if, for some reason, Landfill 33, Ltd., was removed from the discussion (which apparently is Sutter Sanitation's intention), virtually every location within Sutter Sanitation's service area is located within less than 50 miles of one of those landfills. (C.210-C.211; C.364). (And of course, with Landfill 33, Ltd., the distances are much closer to the nearest landfill). Notably, though, even without the work product of Mr. Sheffer, Sutter Sanitation's own evidence reveals there is simply no "need" for this facility--this transfer station is not, by Sutter Sanitation's own evidence and admissions, necessary to accommodate the waste needs of its service area. Whether it might be convenient or handy for Sutter Sanitation, or more profitable for Sutter Sanitation, is not the issue. The service area simply does not need this facility.

Similarly, Sutter Sanitation's analysis of the eighth siting criterion is unsupportable. According to the application and Mr. Kimmle, the proposed transfer station is necessary because the Solid Waste Management Plan supports disposal of Effingham County waste at in-county and out-of-county facilities, and Sutter Sanitation contends its transfer station is necessary to cost-effectively transport waste from Effingham County to these out-of-county facilities.

In the first place, though, Sutter Sanitation's apparent service area is not co-extensive with Effingham County, but to the contrary extends in a radius of 50 miles surrounding the proposed location of the transfer station (which is located in the extreme southwest corner of Effingham County). (See C.17). The service area accordingly incorporates portions of around twenty counties in addition to Effingham County. Hence, even if Effingham County's Solid Waste Management Plan said what Sutter Sanitation contends it says, that issue is not relevant to whether Sutter Sanitation's proposed service area needs this facility (and, as discussed above, Sutter Sanitation's own evidence reveals that it does not).

Second, Sutter Sanitation's assertion that the Effingham County Solid Waste Management Plan infers a need for a transfer station overlooks most of the Solid Waste Management Plan, and does not even focus on any language which clearly suggests a need for a transfer station. Nowhere in the plan, in fact, is such a need or desire asserted.

Sutter Sanitation's analysis consists of acknowledging the Solid Waste Management Plan's recognition that "all waste collection service in Effingham County is provided by private haulers. These haulers have the right to choose the landfill(s) at which they dispose of the waste they collect." (C.71, quoting page 6-41 of the Plan). Sutter Sanitation makes a leap of logic, and infers that due to the encouragement of the use of out-of-county waste facilities, "based on economics," to economically utilize an out-of-county facility "a solid waste transfer station is needed." (C.71). Of course, this is not true--the 50 mile "economical transport" radius established by Sutter Sanitation is easily met, without any transfer station.

With respect to the Plan, though, the more significant point is that Sutter Sanitation's analysis completely ignores the fact that the Plan expressly considered the possibility of transfer stations, and excluded those; the out-of-county facility recommendation is premised upon direct haul, not transfer station utilization. Indeed, the very page of the plan cited by Sutter Sanitation reveals that "[a]ll Effingham County waste that is disposed of in landfills is currently hauled directly to either Landfill No. 33 in Effingham County or the ERC Landfill in Coles County," and "[t]he basic recommendation for landfill disposal of Effingham County waste over the twenty year

planning period is to continue to use the two landfills discussed above." (Solid Waste Management Plan, at 6-41; see C.366). The specific yearly components, noted on the remainder of that page of the Plan as well as the following page, clearly indicate that direct haul to those two facilities is the County's preferred method of waste disposal, and that "[t]he Plan does not list any new programs or facilities to be developed during the years 2-4 and 5-10 period." (C.366-C.367)

The meaning of the Plan, in fact, is enhanced by consideration of an earlier portion of the Plan document, in which various Landfill Disposal options were discussed. Specifically, the Plan considered four separate mechanisms for Landfill Disposal--(1) "the continued direct hauling of waste to in-county and out-of-county landfills;" (2) "expansion of the existing in-county and/or out-of-county landfills;" (3) "construction of a new in-county landfill; and" (4) "construction of an in-county transfer station for transport of local waste to out-of-county landfills." (Plan, at 3-25; see C.365). Obviously, the proposal of Sutter Sanitation falls within the category (4) above (an in-county transfer station to transport waste out-of-county), but as Sutter Sanitation itself is forced to admit, the Plan rejected that proposal, and opted solely for the first option, along with ultimate adoption of the second (i.e., continued utilization through direct haul of both in-county and out-of-county landfills, along with expansion of existing facilities at the appropriate time). Again, nothing in any portion of the Plan in any way or to any degree supports a contention that the Plan supports an in-county transfer station to haul to out-of-county landfills.

This was explained by Don Sheffer, who was instrumental in developing the county Solid Waste Management Plan. (C.213-C.216). Mr. Sheffer explained, as discussed above, that although Effingham County considered the possibility of developing a transfer station to haul waste out of Effingham County, the Plan as adopted rejected that proposal, and instead proposed only the continued utilization of existing landfills through direct haul, along with expansion of those facilities as needed.

Sutter Sanitation's proposal is neither an expansion of an existing landfill facility, nor a continuation of existing disposal patterns. It is a brand new effort, one that the Effingham County planners considered but rejected. It should have been rejected this time by the Effingham County

Board, for failing to comply with both criterion 1 and criterion 8; it is now up to this Board to rule that the County Board's decision on these two criteria was against the manifest weight of the evidence, and cannot stand.

(2) Criteria 2 (Health/Safety/Welfare), 5 (Plan of Operation) and 6 (Traffic Patterns).

A number of points were raised by Landfill 33, Ltd.'s transfer station expert, Bryan Johnsrud, concerning deficiencies of the proposed transfer station facility with respect to criterion 2 (that the facility is so located, designed, and proposed to be operated that the public health, safety and welfare will be protected), criterion 5 (that the plan of operations will minimize the danger of fire, spills, or other operational accidents), and criterion 6 (that the traffic patterns to and from the facility will minimize impact upon existing traffic patterns). (See 415 ILCS 5/39.2(a)(ii), (v), and (vi)). This testimony was virtually unchallenged, unrebutted and unanswered by Sutter Sanitation, to the extent discussed below. Hence, this is not a situation where the County Board chose to accept certain testimony over other competing or contradictory testimony, but to the contrary this is a situation in which the County Board, for whatever reason, simply refused to accept unrebutted testimony. Their decision on these points, therefore, is unquestionably against the manifest weight of the evidence. See Industrial Fuels & Resources/Illinois, Inc. v. Pollution Control Board, 227 Ill. App. 3d 533, 592 N.E. 2d 148 (1st Dist. 1992).

Location Standards--Pursuant to Section 22.14 of the Illinois Environmental Protection Act, 415 ILCS 5/22.14, it is unlawful for anyone to establish a transfer station within 1,000 feet of a dwelling. Clearly a violation of Section 22.14 is, as a matter of law, a violation of the second siting criterion. Here Sutter Sanitation's own documentation reveals the existence of a dwelling less than 200 feet from the building that will house this proposed transfer station! (C.238). In fact, the house even has a swimming pool! (C.239). Sutter Sanitation has admitted the existence of this dwelling, but claims that it will not allow anyone to live there, but instead the building will be used as offices. Clearly this is insufficient; the statute (Section 22.14) outlaws transfer stations near a "dwelling," and is silent upon any obligation that the dwelling be occupied. Indeed, the suggestion is nullified by the additional statutory prohibition on such transfer stations being located within 1,000 of

property zoned for residential use--the statute clearly, in that instance, does not require actual buildings or occupancy, so clearly the legislature did not intend any such limitation with respect to the "dwelling" aspect of the setback rule. The structure was built to be a house, could at any time be utilized as a house, and is clearly a "dwelling," as is emphasized and underscored by the swimming pool gracing its properties. This is a prohibited location for this proposed transfer station. (In addition, it has come to light that a dwelling also exists across the road from this facility, although the County Board refused to accept evidence relating to that structure. (See Tr. 39-Tr. 42)). This would seem to rise to a jurisdictional level--the statute, after all, does not prohibit such a structure as a matter of siting, but rather prohibits anyone from establishing such a facility. As a matter of jurisdiction, fundamental fairness, and manifest weight of the evidence, this proposal should be disqualified.

Wood Framing. Sutter Sanitation has admitted that the interior of this building is made of wood. As Mr. Johnsrud testified, this is improper building materials for the interior of a transfer station, against which waste will be dumped, scraped and pushed in normal, everyday transfer station operations. As Mr. Johnsrud explained, this building was built and designed as a grain storage facility, and Sutter Sanitation's attempt to turn it into a transfer station has left numerous unacceptable features, including the wood framing. In addition, Mr. Johnsrud noted the absence of any "pushwalls" within the facility (hard walls against which a scraper can push waste, in order to scoop it into the appropriate receptacle). (C.245-C.246), Although Sutter Sanitation had opportunity to inform the County Board of either the existence of such push walls or the intention to install them, or of the intention to remedy the wooden members of the structure, Sutter Sanitation never did so.

Fire Dangers. In addition, the wooden interior of the structure poses a greater risk of fire, and the rural location of this former grain facility will make it much more difficult for fire professionals to respond to any fire emergencies. In addition, the rural location reveals a lack of adequate water resources, another point that Sutter Sanitation has conceded. (C.246-C.247).

Floor Thickness. Mr. Johnsrud noted the absence of information in the application concerning the thickness of the floor of the former grain storage facility. (C.246). Incredibly, Mr. Sutter, president of Sutter Sanitation, had no idea how thick the floors were. (C.268). Subsequently, however, Sutter Sanitation submitted a "public comment" that asserts that borings of the concrete revealed a 9.5 inch thick concrete surface that slopes toward one direction (the direction Sutter Sanitation proposes for leachate to head). (C.387). As pointed out by Mr. Johnsrud, however, certain concrete at the facility has already began crumbling, and Sutter Sanitation never explained why it is crumbling or what it will do to avoid crumbling in other parts of this facility. A crumbling concrete floor at a grain storage facility probably poses little, if any, environmental hazard. A crumbling floor in a transfer station, where leachate is a fact of daily life (C.188), is quite another matter, and Mr. Johnsrud's testimony clearly discusses the environmental hazards posed by such a condition.

Door and Ceiling Heights. According to Mr. Sutter, he can drive one of his little packer trucks through this proposed facility with the bed fully raised, and have four or five inches to spare. (C.263). As Landfill 33's evidence shows, though, many other packer trucks would crash into rafters, ceiling beams, or the doorways of the facility. (C.393-C.397). Mr. Johnsrud explained that in fact the issue is not whether an accident will happen, but when and how bad it will be. (C.250-C.251). Indeed, even Mr. Sutter admitted that this small building poses a hazard for roll-off containers! (C.264). Again, as Mr. Johnsrud explained, the problem is Sutter Sanitation's attempt to "retrofit" the specialized needs of a transfer station facility into a grain storage facility. The attempt has failed; someone is going to get hurt.

Facility Staffing. In response to the significant issue concerning the ceiling and doorway height, Mr. Sutter blithely remarked that it is important to keep the facility fully staffed at all times. (C.264). Conspicuously absent, either from the application or from any testimony from Sutter Sanitation, is any specific indication of how many workers will be on site at what times. Absent this information, Mr. Sutter's observation concerning the importance of facility staffing merely

underscores Mr. Johnsrud's concern that no commitment has been made to assure the facility is adequately staffed. (C.252-C.254).

Leachate. Sutter Sanitation made no efforts to calculate the specific amounts of leachate it will generate, nor what specifically it will do with that leachate (Mr. Sutter did say he will wash the floor every day--C.188). Indeed, Sutter Sanitation is not even aware of whether, when the time comes, it will be able to find someone to accept the leachate and treat it! (C.268; see also C.267) Mr. Johnsrud pointed out that even at a small transfer station, the floors will need to be washed regularly, and washing the remains of small dumpings is no different than large dumpings, and can generate a significant amount of leachate requiring disposition. (C.254-C.255) Once again, this oversight, unanswered and unrebutted in the record, is a serious situation waiting to happen.

Traffic. Mr. Johnsrud pointed out that this small site, with the scale house in close proximity to the road, and the tight turning radiuses into and out of the proposed transfer station facility, will potentially cause problems, and perhaps both traffic disruption and safety hazards. (C.259). In the event, for instance, one truck is stopped on the scales at a particular time, another approaching truck will have no option but to wait on the road until the first truck is finished; there is simply no place to stage trucks on the site. Moreover, Sutter Sanitation did not even provide a traffic count of the anticipated number of vehicles it would receive from its recycling business to compare with traffic issues relating to the transfer station. And Landfill 33, Ltd.'s attempted inquiries into recycling issues were universally rebuffed by the County Board.

Another traffic issue unaddressed by Sutter Sanitation's materials is the impact of facility traffic during the road restriction months (January through April) for the roadway approaching the facility. (C.260-C.261). Sutter Sanitation failed to discuss or identify any means of assuring that overweight vehicles would not come to or leave from its facility, even during the months when the roadway is posted as restricted weight limit. Indeed, Sutter Sanitation's response to these issues was to inquire why it would ever want to weigh outgoing trucks, as though the weight restriction would not be an issue for the semi-trailers leaving the facility!

CONCLUSION

For the above reasons, Petitioner Landfill 33, Ltd., requests that this Board take the following action:

1. Rule that the Effingham County Board never obtained jurisdiction over the siting application of Sutter Sanitation Services, Inc., and so the proceedings before the County Board are null and void;

2. Rule that the procedures adopted and employed by the Effingham County Board deprived Landfill 33, Ltd., and other members of the public, of fundamental fairness of the proceedings, and remand for wholly new proceedings to provide all interested parties with an opportunity to fully and completely review Sutter Sanitation Services, Inc.'s application, prepare for the hearing and participate in the proceedings;

3. Find that the ruling of the County Board, affirming the proposal of Sutter Sanitation Services, Inc., was against the manifest weight of the evidence with respect to Siting Criteria (1), (2), (5), (6), and (8), 415 ILCS 5/39.2(a)(i), (ii), (v), (vi), and (viii)

Respectfully submitted,

LANDFILL 33, LTD.,
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By its attorney,

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