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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
Pollution Control Board

LANDFILL 33, LTD.,)
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Petitioner)
)
vs.)
)
EFFINGHAM COUNTY BOARD)
& SUTTER SANITATION SERVICES)
)
Respondents)
)
AND)
STOCK & CO.,)
)
Petitioner)
)
vs.)
)
EFFINGHAM COUNTY BOARD and)
SUTTER SANITATION SERVICES,)
)
Respondents)

PCB No. 03-43

PCB No. 03-52
(Cases Consolidated)

**EFFINGHAM COUNTY BOARD'S REPLY BRIEF TO BRIEFS
OF LANDFILL 33, LTD., STOCK AND COMPANY, LLC
AND SUTTER SANITATION, INC.**

Now comes the Respondent, Effingham County Board, by and through its attorney, Edward C. Deters, State's Attorney for Effingham County, and hereby submits its reply to the other parties' briefs in this matter.

1. INTRODUCTION

This matter went to a hearing before a hearing officer of the Illinois Pollution Control Board on December 19, 2002. The parties were ordered to submit simultaneous opening briefs by January 10, 2003, which was done by the parties. The parties were

ordered to prepare and file reply briefs by January 17, 2003. This brief is Effingham County's reply brief.

2. ARGUMENT

A. Sutter Sanitation, Inc. Brief

The Effingham County Board adopts and approves the legal reasoning, arguments and factual representations made in the Sutter Sanitation, Inc. (Sutter) brief filed with the Pollution Control Board (PCB) on January 10, 2003.

B. Fundamental Fairness Issues

1. Landfill 33 Petition and Brief

Effingham County continues to maintain that Landfill 33, by its failure to specifically allege any issues of fundamental fairness in its Amended Petition of October 18, 2002, has waived these issues of fundamental fairness and the PCB should properly bar their argument now. If the PCB rejects our argument for waiver, Effingham County shall briefly address the issues raised as to fundamental fairness by Landfill 33.

a. Recycling Issue

Landfill 33 alleges that the proceedings were unfair to them as they were instructed to not proceed with their evidence on the recycling issue (Landfill 33 Brief p. 5). In reality, when advised by the County Board chairman that the Board understood that recycling had nothing to do with the Board's work, the attorney for Landfill 33 indicated satisfaction with the reply (R. C290). No objection was made to the ruling, no offer of proof made, and the issue is waived.

The brief further alleges that the County Board ruled in favor of Sutter on the basis of the recycling program offered by Sutter (Landfill 33 Brief p. 5). They cite for

this proposition only to Board member Charles Voelker's comment as reflected in County Board minutes that "recycling at this location is a valuable asset and needed in Effingham County." (R. C432).

Landfill 33's conclusory statement that this comment, apparently standing alone, is sufficient to show that the Effingham County Board ruled in Sutter's favor due to recycling is without merit. The County Board's minutes are not a verbatim transcript of all discussion held at the September 16, 2002 Board meeting. This was apparently just a prefatory comment made by Voelker, and was not addressed to any criteria, which the minutes reflect were discussed individually subsequent to Voelker's comment (R. C432). Landfill 33 has done nothing more than take a single comment out of hundreds of pages of the record, and claims from that Landfill 33 was treated unfairly. This inference or conclusion is simply not supported by evidence in the record.

b. Alleged Improper Contacts

Landfill 33 suggests that improper contacts, without proper notice to other parties, were made by the Effingham County Board with Sutter. To establish this, again Landfill 33 isolates one sentence from the record, from the July County Board meeting minutes, that indicates a time was established to view the site on July 31, 2002 (R. C109). Landfill 33 has presented no evidence that such a meeting took place. In fact, Landfill 33, at the PCB hearing on December 19, 2002, attempted to establish this. Landfill 33's attorney asked Tracy Sutter several times about the possibility of a July trip by the County Board to the site (PCB Tr. p. 73). Tracy Sutter testified the only meeting with the County Board he recalled was prior to the filing of his application in April (PCB Tr. p. 73). He specifically denied any knowledge of any July tour of the proposed waste transfer site

(PCB Tr. p. 73). Landfill 33 has presented no credible evidence on this issue, and their attempt to do so by inference or innuendo should be rejected by the Board.

2. Stock Petition and Brief

Stock and Company (Stock) has also alleged that the Effingham County proceedings on Sutter's application were "fundamentally unfair." Stock raises four issues as to fundamental fairness: 1) the unavailability of a transcript; 2) the recycling issue; 3) the non-disclosure of two familial relationships and their alleged impact on the Board's decision, and 4) the alleged ex parte contacts of Board members in July with Sutter at the proposed waste transfer site. These issues will be addressed in turn.

a. Transcript Unavailability

The first issue raised by Stock on the fairness of the proceedings relates to the unavailability of a transcript until October 24, 2002. Stock complains in its brief that the "transcript was not available through the county until after its deadline for appeal." (Stock Brief, p. 31). However, Stock did file its Petition for Review with this Board in a timely fashion, on October 18, 2002. The Petition alleges essentially the same issues that are still raised by Stock in its initial brief of January 10, 2003. Other than its conclusory claim of prejudice as stated in their January 10th filing, Stock has failed to specifically establish how it was prejudiced by the unavailability of the transcript. Finally, Duane Stock of Stock and Company, LLC has conceded that after his initial request for a transcript on October 2, 2002, he did not again request to view or copy a transcript from Effingham County until November 25, 2002 (PCB Tr. p. 47-48). Because Stock never requested a transcript until after the Board's vote on September 16, 2002, and because

Stock has not established prejudice in some specific way, due to its unavailability, the proceedings were fair to Stock on this issue.

b. Recycling Issue

The second issue raised by Stock on “fundamental fairness” relates to the recycling issue. As noted above with respect to this argument as briefed by Landfill 33, Stock too has done nothing more than jump to this conclusion based on inference and innuendo. Stock, like Landfill 33, offers little more than Board member Charlie Voelker’s single comment regarding recycling being an asset to the County. As noted above, this lone comment rings hollow as reason for this Board to reject the work of the Effingham County Board on the merits of this issue.

Stock also attempts to suggest that the comments of Nancy Deters show that the Board’s decision was based only on recycling. However, Mrs. Deters is not a decision-maker. Her own opinions as to it being “the elephant in the room” were not shared by the County Board. Chairman Leon Gobczynski repeatedly refocused the Board to the issues of the statutory criteria rather than recycling issues (See, e.g., R. C 225-226; R. C290). Stock’s suggestion that a resident of another county, Mrs. Deters, has greater insight to the Board’s own perspectives on the issues properly before it are totally without merit, and should be rejected by the Board.

c. Familial Relationship Issue

The third issue of unfairness raised by Stock involves the non-disclosure of two familial relationships, that of Carolyn Willenburg to Duane Stock and State’s Attorney Edward Deters to advocate and maker of public comment, Nancy Deters. The mere existence of a familial relationship between a hearing officer and an attorney for a party

has been found by the Board to be insufficient to constitute a disqualifying bias.

American Bottom Conservancy, et al v. Village of Fairmont City et al, 2000 Ill. Env. 665 at *41-42 (IPCB, Oct. 19, 2000). In essence, Petitioners are required to establish that prejudice or bias exists. Stock asks the Board to do so on nothing more than the existence of the two relationships, rather than showing any actual bias or prejudice.

With respect to the relationship between County Board member Carolyn Willenburg and Duane Stock of Stock and Company, LLC, the Stock brief barely addresses this issue. One sentence is the grand total of this relationship's mention in their brief, which is as much attention as it deserves. Instead, Stock suggests that the relationship per se and a failure to disclose the relationship alone made the proceedings unfair. This is the type of lazy logic expressly rejected by the Board in American Conservancy.

Stock now raises the new suggestion that because Effingham County State's Attorney Edward Deters is related to an advocate and giver of comment, Nancy Deters, that the proceedings were unfair. In American Conservancy, the Board did not even find bias when the Hearing Officer himself was related by marriage to the attorney for the municipality. The Board specifically noted that the hearing officer was not a decisionmaker. American Conservancy, at *42. Here, as someone simply making comment on the cause of recycling, Mrs. Deters is clearly not a decisionmaker.

Further, the State's Attorney is not a decisionmaker, and has no vote. Stock erroneously alleges in its brief that the State's Attorney "suggested that he might even have a role in the decision-making process." (Stock Br. p. 38, citing R. C130). A review of page 130 of the record does not support this falsehood. If this leap is made by the

State's Attorney act of misspeaking, "if we—if the county Board decided to vote on it at the October meeting," then Stock is being grossly unfair in its legal analysis and representations to this Board. No fair reading of the transcript, at that page or any page of this record properly allows for Stock's innuendo that the State's Attorney "suggested" he might have a role in the County Board's decision.

d. Alleged Improper Contacts

The fourth point raised by Stock on fundamental fairness is again the claim that Sutter conducted ex parte contacts or tours with the County Board. This issue has been addressed above. Stock's claim that the Board viewed the facility prior to the Sutter application being filed is irrelevant. The County Board was apparently there in March or April reviewing the site as it applied to recycling. (PCB Tr. p. 67-68). As to a July tour of the facility, once again, only inference and innuendo support this claim of Stock, rather than evidence offered to this Board in support of the claim.

Between the two Petitions for Review, there is no single, credible claim that establishes the Effingham County proceedings were fundamentally unfair. The totality of the circumstances of the various claims of unfairness raised by Stock and Landfill 33 do not add up to a fundamentally unfair proceeding. For these reasons, the Board should find the Effingham County proceedings on the Sutter application were fair, and affirm the County Board's approval of local siting.

A. Statutory Criteria Issues

Both Landfill 33 and Stock have raised numerous issues regarding Sutter's evidence on the nine statutory criteria to be considered in granting siting approval for a waste transfer site. 415 ILCS 5/39.2. At the public hearing on August 14th, the County

Board heard numerous witnesses in a three-hour hearing. Specific aspects of the arguments of both petitioners will be addressed in rebuttal.

1. Landfill 33 Petition and Brief

Landfill 33's Petition alleges that the Effingham County Board's decision with respect to the 1, 2, 5, 6 and 8 criteria pursuant to 415 ILCS 5/39.2 were against the manifest weight of the evidence. It is the Petitioner's burden to establish the County Board's error. 415 ILCS 5/40.1 (b). As there was essentially no evidence presented by any party at the PCB hearing on December 19, 2002 regarding the criteria, the effort of Landfill 33 to show that the Board's decision was against the manifest weight of the evidence has been done solely by their review of the evidence from the August public hearing. Sufficient credible evidence was presented by Sutter to support the County Board's decision. Rather than address point by point each argument in Landfill 33's brief, the county will address several main points.

a. Criterion 1 and 8

Landfill 33 argues at great length that the waste transfer station is not a necessity, and thus fails the first criteria. However, Sutter's witness, David Kimmle, offered his opinion that the facility was necessary to accommodate the waste needs of Effingham County (R. C144). Kimmle indicated that the transfer station was consistent with the Effingham County waste management plan which required both in and out-of-county options for disposal of our waste (R. C143). While contrary views were expressed by witnesses called by Landfill 33 at the Public Hearing, Landfill 33 has failed to meet its burden of establishing to the PCB that the evidence presented by Sutter was insufficient.

b. Criterion 2

Landfill 33 also suggests that because a building that at one time constituted a residence, sits within 1000 feet of the site, that the criteria regarding location can not be met by Sutter. Though Landfill 33 presented no evidence to establish that the building remains a residence, it continues to advance this argument. The testimony at the public hearing indicated that Sutter would not use the building as a residence, but rather would be used as office space (R. C147). Though the County Board could have chosen not to accept the offer that the building would be used as an office, to do so was not against the manifest weight of the evidence.

c. Criterion 5

Landfill 33 called a witness at the public hearing, Brian Johnsrud, who testified in great detail about every imaginable problem that could afflict the waste transfer site. His testimony takes up nearly sixty pages of transcript, largely uninterrupted by questions, even from Landfill 33's attorney (R. C230-289). In all that discussion, Johnsrud did admit that only a minimization of risk was required by the criteria, not an elimination of risk (R. C285-286). While coy about it, Johnsrud acknowledged that he was a paid consultant to Landfill 33 (R. C288). For that reason, his potential bias could have been considered by the Board. The Board partially addressed concerns about potential dangers by requiring a bond to be posted by Sutter on their own initiative (R. C432). In light of contradictory opinions on the issue offered by witnesses for Sutter, it was not against the manifest weight of the evidence for the Effingham County Board to find these issues satisfied.

In summary, Landfill 33 has failed to meet the burden imposed on it by Illinois law, to establish that the Effingham County Board's approval of local siting for the waste transfer station was against the manifest weight of the evidence.

1. Stock Petition and Brief

Stock has also raised several points that it feels shows the County Board's determinations on the statutory criteria were against the manifest weight of the evidence. They specifically argue that criteria 1, 2, 3, 5 and 8 of the Act were not met. The Effingham County Board makes the following arguments in rebuttal.

a. Criterion 1

As acknowledged by Stock, there is no requirement that an applicant be able to show "absolute necessity" to meet criterion one. See e.g. American Bottom Conservancy, at *54. Substantial testimony was offered by David Kimmle, an engineer testifying for Sutter, that such a transfer site met the necessity requirement. Kimmle stated that to give effect to the County's stated preference for accessing out-of-county landfills, the transfer station was necessary (R. C142-143). Kimmle testified as to the various out-of-county options in a 30-mile and 50-mile radius of Effingham. He opined that to economically access a waste transfer site, and move waste to out-of-county landfills, the site was necessary.

Stock concedes that for waste haulers such as Sutter, the economic feasibility of accessing out-of-county landfills is enhanced by the transfer site. Stock just argues that economic realities do not create "necessity." However, the Board members (all of whom are Effingham County residents) heard the testimony about the various sites available to Sutter in the 50-mile radius. It was not only permissible, but logical for them to consider

the logistics and economics of trash hauling to Shelbyville or Coles County from some of the rural outposts of Sutter's service area. The County Board's decision that these economic realities and the County's waste management plan made an Effingham County Waste Transfer site necessary was not against the manifest weight of the evidence.

b. Criterion 2

Stock also alleges that criterion two regarding the location and design of the facility did not properly protect the public health, safety and welfare. Stock, as did Landfill 33, claims that the location of an unoccupied dwelling within 1000 feet of the site precludes approval. Stock also attempts to raise the issue of a new dwelling plopped on Stock and Company property after the Board's decision as being relevant to the Board's decision here (Stock Brief at p. 19, fn. 6).

Neither building precluded siting approval. The Stock property building was only put on that location after the Board's vote, presumably to create another argument for Petitioners. The building at the waste transfer station, according to testimony at the hearing, will only be used as an office (R. C147). While argument is made regarding the design specifics of the site, conflicting testimony was heard from the various witnesses from each side. Based on all the information before it, the County Board's determination was not against the manifest weight of the evidence.

c. Criterion 3

With respect to criterion three, the Stock argument falls particularly flat. Sutter presented a witness, James Bitzer, who testified as to his opinion on compatibility of the site to the character of the surrounding area and to the values of real estate. The site will not accept hazardous waste (R. C160). The site itself is converting an existing site, a

grain elevator in a remote location in Effingham County, to a new use. Stock failed to meet its burden in showing the board's decision on this criterion was erroneous.

d. Criterion 5

Next, Stock complains that Sutter has not done enough to minimize dangers at the site. The Stock brief cites, even adding emphasis as Petitioner sees fit, to Waste Management of Illinois, Inc., v. IPCB, 123 Ill. App.3d 1075, 1090 (2nd Dist. 1984), for this proposition. The Waste Management decision addresses issues regarding the incompatibility of the site to the area, pursuant to 415 ILCS 5/39.2 (a) (iii), rather than Section 39.2 (a) (v). This Board should reject Stock's efforts to expand the rationale of Waste Management to criterion five.

Regardless, the County heard substantial evidence from Sutter's witness, David Kimmle, upon which to conclude the criterion was met. Kimmle advised the Board that he had reviewed Sutter's proposed site for issues such as leachate, fire, spills and traffic issues. Sutter proposed a pit and a 1,000 gallon leachate tank (R. C150). Description was given on how the facility would deal with spillage and leaks (R. C149-150; C158). Finally, he reassured the Effingham County Board that the Illinois Environmental Protection Agency would also review the proposed site from a "technical stand point." (R. C154). For these reasons, it was not against the manifest weight of the evidence for the Board to conclude that this criteria was met.

e. Criterion 8

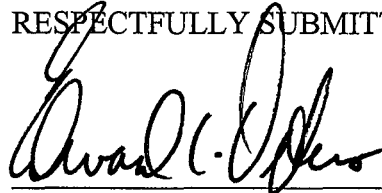
Finally, the Stock brief raises criterion eight, consistency with the County waste management plan, as not being met. Stock again raises the availability of the Shelbyville transfer station as proof on this point, that it is economically viable for Sutter. However,

the County Board members may consider their own views on ease of access to Shelbyville, as well as Mr. Kimmle's opinion, on the real economic viability of waste transfer site to waste haulers. In doing so, the County Board's determination was not against the manifest weight of the evidence.

CONCLUSION

For the foregoing reasons, and those as stated in Effingham County's initial brief, Effingham County respectfully requests that the Pollution Control Board affirm the September 16, 2002 decision of Effingham County, approving Sutter Sanitation, Inc.'s application for local siting of a waste transfer station.

RESPECTFULLY SUBMITTED



Edward C. Deters
State's Attorney
Effingham County

PROOF OF SERVICE

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

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

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

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and by depositing same in the United States mail in Effingham, Illinois, on the
16th day of January, 2003, with postage fully prepaid.

Charles Wright