

JAN 10 2003

STATE OF ILLINOIS  
*Pollution Control Board*

— BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

LANDFILL 33, LTD.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB No. 03-43
	)	
EFFINGHAM COUNTY BOARD and	)	
SUTTER SANITATION SERVICES,	)	
	)	
Respondents.	)	
<hr/>		
STOCK & COMPANY, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB No. 03-52
	)	
EFFINGHAM COUNTY BOARD and	)	
SUTTER SANITATION SERVICES,	)	
	)	
Respondents.	)	

**RESPONDENT SUTTER SANITATION SERVICE, INC.'S**  
**INITIAL POST-HEARING BRIEF**

NOW COMES Respondent, SUTTER SANITATION SERVICE, INC., by and through its attorneys, Sorling, Northrup, Hanna, Cullen & Cochran, Ltd., David A. Rolf and Charles J. Northrup, of counsel, and pursuant to the December 19, 2002 Order of the Hearing Officer in this matter hereby submits its Initial Post-Hearing Brief.

I. INTRODUCTION

This matter went to hearing before a hearing officer of the Pollution Control Board ("PCB") on December 19, 2002. At the conclusion of the hearing the PCB Hearing Officer ordered simultaneous initial briefs on January 10, 2003. In that Sutter Sanitation Services, Inc.

("Sutter") is a Respondent in this matter (along with the Effingham County Board), it will attempt in this Initial Brief to identify arguments that may be raised by the two Petitioners. This attempt will necessarily be based upon the limited information provided in the Petitioners' Petitions and any evidence produced at the December 19, 2002 PCB hearing. Any failure to address or respond in this initial Brief to issues raised by the two Petitioner's in their initial briefs should not be viewed in any way as a waiver or acceptance of those issues. Those issues, if any, will necessarily be discussed in Sutter's Response Brief due on January 17, 2003.

## II. FACTUAL OVERVIEW

On April 19, 2002 Sutter submitted an application for local siting approval of a proposed solid waste transfer station ("the Application") to the Effingham County Board. On the evening of August 14, 2002, after proper notice, a public hearing was held before the Effingham County Board. Sutter participated, as did Petitioners Landfill 33 and Stock. In addition, members of the Effingham County Board also asked questions. Sutter called 4 witnesses; David Kimmle (Hurst-Roche Engineers); Mark Reitz (Hurst-Roche Engineers); James Bitzer (independent real estate appraiser); and Tracy Sutter (President, Sutter Sanitation Services, Inc.). Petitioner Landfill 33, through its counsel, as well as Petitioner Stock cross examined several of the witnesses.

Petitioner Landfill 33 presented three witnesses in opposition to the Application: Brian Hayes (Landfill 33 Manager); Don Sheffer (consultant for Landfill 33); and Bryan Johnsrud (consultant for Landfill 33). Following the close of the hearing, a 30 day written public comment period was established. Sutter timely filed comments as did both the Petitioners in this case: Landfill 33 and Stock. The public comment period closed on Friday, September 13, 2002. The Effingham County Board met on Monday, September 16, 2002 to discuss and vote on the Application. At

the September-16, 2002 meeting, the Effingham County Board approved the Application by a vote of 9 - 0 (C. 434).

On or about October 8, 2002, Landfill 33 filed its Petition for Review contesting the Effingham County Board's decision. An Amended Petition was filed on October 17, 2002. In the Amended Petition, Landfill 33 alleged that the Effingham County Board's decision with respect to the statutory siting criterion established in the Illinois Environmental Protection Act was against the manifest weight of the evidence. Specifically, Petitioner Landfill 33 contested siting criteria 1 (that the proposed facility is necessary to accommodate the waste needs of its intended service area), 2 (that the proposed facility is to be designed, located and operated so that the public health, safety and welfare are protected), 5 (that the operational plan for the proposed facility will minimize the danger from fire, spills, and other operational accidents to the surrounding area), and 8 (that the proposed facility be consistent with the solid waste management plan of the county). In addition, Petitioner Landfill 33 also generally alleged that the proceedings before the Effingham County Board were fundamentally unfair. However, no specific aspect of the proceeding was identified as being fundamentally unfair.

On or about October 16, 2002, Petitioner Stock filed its Petition for Review also contesting the Effingham County Board's decision. In its Petition, Stock claimed the Effingham County Board's decision was against the manifest weight of the evidence on five of the statutory criteria: 1, 2, 3 (that the proposed facility is located so as to minimize the effect on the value of the surrounding property), 5, and 8. In addition, Petitioner Stock alleged that the proceedings were fundamentally unfair in three specific aspects. Petitioner Stock claimed that: a transcript of the Effingham County Board proceeding was not made available to it; there was an undisclosed

familial relationship between Duanne Stock (the representative of Stock and the participant at the Effingham County Board hearing) and an Effingham County Board member; and that the Effingham County Board was biased in that Tracy Sutter had threatened the Effingham County Board with cessation of a recycling service that Sutter was voluntarily providing to area residents.

The two Petitions in this case were consolidated by the PCB and a hearing date was established. On December 19, 2002, at the PCB hearing, two citizens made oral comments: Nancy Deters and Lloyd Stock. Petitioner Stock, represented by counsel, called one witness, Duanne Stock. Sutter did not call any witnesses. Petitioner Landfill 33 attempted to call Tracy Sutter as a witness, but Sutter raised an objection which was sustained by the Hearing Officer. However, an offer of proof was made by Petitioner Landfill 33 in the form of testimony from Tracy Sutter. At the conclusion of the hearing a briefing schedule was agreed to, and a "Hearing Report" was filed by the Hearing Officer on December 30, 2002.

### III. ARGUMENT

#### A. Fundamental Fairness

##### 1. Landfill 33 Petition

As noted above, Petitioner Landfill 33 made no specific allegation of fundamental unfairness in its Petition. Similarly, Petitioner Landfill 33 identified no specific allegation of any issue of fundamental fairness in its Response to Interrogatories issued by Sutter. As such, Sutter can not at this time address any potential fundamental fairness arguments that Petitioner Landfill 33 may fashion from the record. Such arguments must necessarily be addressed in Sutter's Response Brief.

Notwithstanding this reservation to address Petitioner Landfill 33's fundamental fairness issues in its Response Brief, Sutter believes that any such fundamental fairness arguments raised by Petitioner Landfill 33 should be barred. First, the PCB procedural rules require that the *specific* grounds for a siting appeal must be included in a Petition. 35 Ill. Adm. Code 107.208(c) (This section provides that a Petition must include "a specification of the grounds for the appeal, including any allegations for fundamental unfairness..."). As noted above, Petitioner Landfill 33 did not allege any specific grounds of fundamental unfairness, it merely noted that the proceedings were fundamentally unfair. (This is in sharp contrast to Petitioner Stock's Petition which cites case law and facts in an effort to establish some element of fundamental unfairness.) Second, Petitioner Landfill 33 failed to identify any specific facts demonstrating fundamental unfairness in response to Sutter's Interrogatories specifically seeking such information. Petitioner merely responded by saying that such facts were included in the record. This Interrogatory Response is clearly inadequate and serves only as a refusal to identify the facts of any claim of fundamental unfairness. In addition, this refusal to identify the facts supporting any claim of fundamental unfairness is a breach of a party's obligations of full disclosure under Supreme Court and PCB Rules. See S. Ct. Rule 213; 35 Ill. Adm. Code 101.620. As such, a sanction of barring the presentation of claims based upon the unidentified information is appropriate. See 35 Ill. Adm. Code 101.800(3) ("The offending person may be barred from maintaining any particular claim, counterclaim, third-party complaint, or defense relating to that issue;") The cumulative effect of these non-disclosures has been to significantly prejudice Sutter. As it stands, Petitioner Landfill 33 has never identified any issue of fundamental unfairness. Nor has it even identified any fact that might support an allegation implicating fundamental

unfairness. If Petitioner Landfill 33 had disclosed its specific allegations of fundamental unfairness, either in its Petition or Interrogatory Responses, Sutter would have been able to gather evidence in rebuttal or even undertake additional discovery such as depositions. By not disclosing the basis of any fundamental fairness allegation, these discovery tools have been denied Sutter. Accordingly, Petitioner Landfill 33 should be barred from raising any fundamental fairness issues.

2. Stock Petition

a. Transcript Availability

As noted above, one of the arguments raised by Petitioner Stock was that the proceeding was fundamentally unfair because a copy of the Effingham County Board hearing transcript was not available when its representative, Duane Stock, requested a copy from the Effingham County Clerk. The PCB has held that under Section 39.2 of the Illinois Environmental Protection Act, where a transcript is on file with a local siting authority it must clearly be made available to the public. Spill et al v. City of Madison et al., PCB No. 96-91, p. 7, (March 21, 1996). However, only where the failure to make a transcript available results in prejudice to a party will the PCB rule that the absence of the transcript has rendered a proceeding fundamentally unfair. Id. On this issue, Petitioner Stock cannot meet its burden.

As an initial matter, the facts of Petitioner Stock's request to obtain a transcript bear careful review. As noted above, the County Board hearing in this matter took place on August 14, 2002. Petitioner Stock was present and participated. The 30 day public comment period closed on September 13, 2002. Petitioner Stock submitted a public comment on September 4, 2002. On September 16, 2002, the County Board deliberated and made its decision approving

the Application. It was not until October 2, 2002, *16 days after the County's decision*, that Petitioner Stock made any attempt to obtain a copy of the transcript (PCB tr. 44). That contact was a telephone call to the Effingham County Clerk (Id.). Petitioner Stock was told that Effingham County did not have a copy of the transcript, but that he should contact Sutter's attorneys (PCB tr. 52). However, at no time did Petitioner Stock make such a request (PCB tr. 52). Furthermore, and despite being represented by counsel at the time, at no time between October 2, 2002 and November 25, 2002 (when Petitioner Stock did obtain a copy of the transcript) did Petitioner Stock make any further inquiry concerning the transcript to the Effingham County Clerk, the Effingham County Board offices, or the State's Attorney (PCB tr. 47 - 48, 50 - 51). These facts clearly demonstrate that Petitioner Stock suffered no prejudice by not having a copy of the transcript. The fact that he did not even ask for a copy until after the Effingham County Board had made its decision demonstrates he suffered no prejudice. Obviously he felt he could adequately participate in the hearing and submit public comment without having a copy of the transcript. In fact, Petitioner Stock makes no allegation that he was prejudiced during the proceeding (of course there would be no contemporaneous transcript during the hearing itself) or the public comment period by the absence of the transcript. His only concern was that the transcript was not available for his preparation of the Petition for Review (PCB tr. 21). However, as he did timely file a Petition identifying a number of grounds for appeal, and did participate in the PCB hearing, no prejudice has occurred. Petitioner Stock's attempt to show any prejudice must fail by his own actions in not even asking for a transcript until after the Effingham County Board rendered its decision, and failing to follow up as advised by the County Clerk's office to obtain a transcript. As such, to the extent any prejudice

is present, it is of Stock's own making. Petitioner Stock should not be rewarded for his dilatory conduct.

Notwithstanding these egregious facts, Petitioner Stock cites Spill et al. V. City of Madison and Metro-East, LLC, PCB No. 96-91, 1996 WL 154321 (Ill. PCB, March 21, 1996) for the proposition that the unavailability of a hearing transcript renders a siting proceeding fundamentally unfair. This case does not support such a broad proposition. It certainly does not sanction a holding of fundamental unfairness where, as is undisputed in this case, no one requests a copy of the transcript until after the close of the public comment period and, indeed, after the siting body has made its decision.

In Spill, the applicant sought to obtain siting approval for a waste incinerator. Spill, PCB No. 96-91 at p. 3. A public hearing was held on the application beginning on July 25, 1995. Spill, PCB No. 96-91 at p. 4. The hearing, which took place over a four day period, was "long and arduous" and resulted in 49 hours of testimony and a transcript totaling over 1800 pages. Spill, PCB No. 96-91 at p. 8. Following the four day hearing, the siting body allowed for a 30 day public comment period. The hearing was transcribed by August 14, 1995, several days within the public comment period. However, during the public comment period, two petitioners called the siting body to obtain a copy of the transcript and were told none was available. Spill, PCB No. 96-91 at p. 7. In the absence of a transcript, those petitioners claimed they could not, and ultimately did not, file any public comments. Spill, PCB No. 96-91 at p. 7. Under these facts, the PCB ruled that the petitioners were prejudiced and as such the hearing was fundamentally unfair. In reaching this result, the PCB noted the length and complexity of the hearing as well as the fact that the siting body was apparently in possession of the transcript (and



a prior commitment by the siting body to make a copy of the transcript available at its public office) but failed to produce it. Spill, PCB No. 96-91 at p. 8.

The facts presented in Spill are not analogous to this matter and therefore do not support Petitioner Stock's argument. Unlike Spill, the hearing at issue in this case was neither "long nor arduous." In fact, it only took about three hours and 169 pages of transcript, not the 49 hours and 1800 pages at issue in Spill. Furthermore, unlike Spill, both Petitioners in this case filed public comments. Also unlike Spill, Petitioner Stock (nor anyone else for that matter) did not even request a copy of the transcript until *after* the public comment period had closed. Also, in Spill, there was no evidence that any of the Petitioners asked the applicant's counsel for a copy, which was done in this case, and then simply not pursued. Petitioner Stock's claims of prejudice and fundamental fairness should be rejected.

b. Bias - Familial Relationship

Petitioner Stock also claims that the proceedings were *potentially* affected by bias stemming from a familial relationship that was not disclosed. In this matter, the familial relationship at issue is that the Petitioner's representative, Duanne Stock, is a cousin of one of the Effingham County Board members, Karen Willenburg. Nothing other than the existence of this relationship between Stock and County Board Member Willenburg is alleged. Such is clearly insufficient to sustain a claim of bias.

An administrative official, such as county board member in a siting proceeding, is presumed to be objective and capable of fairly judging a particular controversy. Waste Management of Illinois v. Pollution Control Board, 175 Ill.App.3d 1023, 125 Ill.Dec. 524, 537 (2<sup>nd</sup> Dist. 1988)(citations omitted). Moreover, where an administrative official is acting in an

adjudicatory capacity, “bias or prejudice may only be shown if a disinterested observer might conclude that the administrative official had in some measure adjudged the facts as well as the law of the case in advance of hearing it.” Waste Management, 125 Ill.Dec. at 538, citing E & E Hauling, Inc. v. Pollution Control Board, 116 Ill.App.3d 586, 71 Ill.Dec. 587 *aff’d* 107 Ill.2d 33, 89 Ill.Dec. 821 (1985). No such bias can be shown in this case, nor in fact has even been alleged, stemming from the relationship between Petitioner’s representative, Duanne Stock, and County Board Member Willenburg.

As a preliminary matter, however, it is clear that Petitioner Stock has waived this argument by failing to raise it at the Effingham County Board hearing. This issue of waiver has been discussed before in the context of decision maker bias in a siting proceedings. E & E Hauling, Inc. v. Pollution Control Board, 107 Ill.2d 33, 89 Ill.Dec. 821 (1985); Sierra Club et al. v. Will County Board et al., PCB No. 99-136, 99-139 (August 5, 1999). In E & E Hauling, the Supreme Court noted:

“Generally, of course, a failure to object at the original proceeding constitutes a waiver of the right to raise the issue on appeal (citations omitted). ‘A claim of disqualifying bias or partiality on the part of a member of the judiciary or an administrative agency must be asserted promptly after knowledge of the alleged disqualification’ (citations omitted). The basis for this can be readily seen. To allow a party to first seek a ruling in a matter and, upon obtaining an unfavorable one, permit him to assert a claim of bias would be improper.”

E & E Hauling, 89 Ill.Dec. at 823. This situation is applicable here. Petitioner Stock participated in the Effingham County Board hearing (PCB tr. 51). However, he did not raise his relationship with Effingham County Board Member Willenburg (PCB tr. 52). Petitioner Stock filed a written public comment, yet here too, failed to disclose any relationship with Willenburg (PCB tr. 49). In fact, at no time prior to filing its Petition in this case did Petitioner’s

representative, Duane Stock, mention to anyone, including County Board Member Willenburg, that she should recuse herself (PCB tr. 51). Presumably Petitioner Stock was attempting just what the Supreme Court has cautioned against, namely that a participant would hold his cards just to see what decision would be rendered and if adverse to his interests, then raise the bias issue. This type of conduct is not acceptable to the Supreme Court and should not be acceptable to the PCB.

Notwithstanding the waiver of the issue, Petitioner Stock has introduced no facts to demonstrate that Effingham County Board Member Willenburg was biased in that she had prejudged the facts or law of the case. His assertion is only that a “familial relationship” existed. Petitioner makes no other assertion. This is entirely insufficient to show bias. Perhaps if Petitioner Stock could show that County Board Member Willenburg harbored some underlying family feud with Stock, he might have been able at least to make out a claim of bias. But he can not even do that. Duane Stock testified that Effingham County Board Member Willenburg was a “nice person,” he “very much” gets along with her, and that he does not have a bad relationship with her (PCB tr. 49 - 50).

Clearly, given these facts, no bias has been shown on the part of Effingham County Board Member Willenburg such that rendered the County Board proceedings fundamentally unfair.

c. Bias - Sutter Recycling

Petitioner Stock claims in its Petition for Review that the Effingham County Board was a biased decision maker because Sutter threatened to close a recycling center it had established if siting was denied. In its Petition, Petitioner Stock cited a single statement made by Effingham

County Board Member Voelker and recorded in the County Board minutes. That statement, in its entirety, was as follows:

Chairman L. Gobczynski said the Board will go through each Criterion and take a roll call vote. B. Grunloh Legislative Chairman said they did not take into account the vertical expansion of Landfill #33 (29 years) is available to serve the needs of Effingham County. L. Waldhoff Building and Grounds Chairman said that this is a transfer station not a landfill. *Board Member C. Voelker said recycling at this location is a valuable asset and needed in Effingham County.*

See County Board Minutes (C. 432). No other evidence of the claimed “threat” or bias was produced or alleged by Petitioner Stock. Presumably, Petitioner Stock will refer to two additional aspects of the record to support its claim. First, Tracy Sutter did testify that without the transfer station Sutter could not economically continue its voluntary recycling service (C. 190). Second, during the PCB hearing, a member of the public expressed her concern that Sutter discontinue its recycling efforts if it was not granted siting (PCB tr. 28 - 38). None of these items support a finding of bias on the part of the Effingham County Board. As such, Petitioner Stock’s claims must be rejected.

As noted above, administrative officials are presumed to act objectively and fairly in judging a particular controversy and bias can only be shown where a decision maker has prejudged the facts or law. This is a significant burden. Bias has not been demonstrated in instances where decision makers have gone so far as to publicly voice opposition to landfills in general, publicly noted favoring recycling over landfills as a waste management alternative, and identified landfills and incinerators as detrimental to parts of a county. Waste Management, 125 Ill. Dec. at 538. Here, where Petitioner Stock is arguing that Sutter somehow “threatened” the Effingham County Board to approve its Application, the burden on Petitioner Stock is, in effect,

to establish that Sutter had such control over the “deliberative faculties” of the Board as to overcome the presumed impartiality of the County Board. Tate et al. v. Macon County Board et al., PCB No. 88-126, p. 8 (December 15, 1988).

As a factual matter, no bias, or even a hint of bias has been shown. First, the comment by Effingham County Board Member Voelker is not an indication that Voelker is acting out of fear of losing Sutter’s recycling services. It is merely a statement that recycling is important to Effingham County. It certainly does not demonstrate that Effingham County Board Member Voelker has somehow prejudged the facts or the law, nor that he (or the Effingham County Board as a whole) has lost his “deliberative faculties” in the face of potentially losing Sutter’s recycling service. Second, the statement by Tracy Sutter that Sutter could not economically continue its recycling service if siting were not approved is in no way a threat of any kind. It is simply a statement of economic reality. Furthermore, the record is devoid of any evidence to support whether or not the Effingham County Board has any interest in having Sutter continue with its recycling service. Perhaps another hauler is waiting in the wings to offer a recycling service? Perhaps Petitioner Landfill 33 is in such a position? There is nothing in the record to demonstrate that Mr. Sutter’s statement on recycling had any impact at all on the Effingham County Board. Third, the statements of Ms. Deters, a member of the public, at the PCB hearing is no evidence of bias on the part of the Effingham County Board. Ms. Deters is not a decision maker as she does not sit on the Effingham County Board (PCB tr. 35). Ms. Deters does not even live in Effingham County (PCB tr. 36). Ms. Deters is certainly passionate about her cause, which is *recycling* (PCB tr. 29). She attended the County Board hearing (PCB tr. 34). She attended the County Board meeting when they voted on the Application (PCB tr. 37). She

writes letters to the editor of the local paper on the recycling issue (PCB tr. 30). It is therefore not unreasonable to consider that *her view* of this proceeding is about recycling. However, there is no evidence that anyone on the Effingham County Board shared her view or opinions, especially to the extent that holding such views or opinions may have prejudged the law or facts of the case. Fourth, and perhaps most significantly, is the recognition by the Effingham County Board itself that any recycling issues could not be a part of the deliberations on the issue before it, namely whether the Application satisfied the 9 statutory criteria. Throughout the proceedings, Chairman Gobiczynski and State's Attorney Deters made it clear that the only issues before the Effingham County Board were the nine statutory criteria. At numerous times throughout the proceeding, the limited and focused nature of the proceeding was identified:

"The purpose of this hearing is to look at the application for the local siting of the proposed solid waste transfer station for Sutter Sanitation Services, and what we're going to do here tonight is address their application, and we're going to take testimony from Sutter Sanitation as far as what they see and feel that they have done to *meet the various criteria that have been established by the State*, and we're going to investigate that, listen to it as a board, and from that point we will look at questions from the board initially, and then we will see if we have additional comments or questions from any parties that might be present that may be either in favor or opposition to the proposed sanitation station."

(Opening Statement by Chairman Gobiczynski, C. 128).

"By statute, if the board finds -- by statute, the county board must make a decision that one or more of the criteria have not been met. If the county board believes that the criteria have been met, they really have no authorization or authority under the statute to just simply decide they don't like the idea and they're going to vote against it. The county board has to follow the nine criteria and make a determination as to each -- as to whether or not that criteria has been met by Sutter Sanitation."

(Statement by State's Attorney Deters, C. 130 - 131).

“I think maybe its appropriate that I make a comment or two. What were trying to do here tonight, very clearly and very narrowly, is to judge this application based on the criteria before it. I would have to say that we have to be careful in the comments in – and opinions as to whether this is a good thing or a bad thing. Our job here is to be very narrow and focused, and we will accept written comments as to why these criteria are – are good or bad, but I think we have to be very focused on what we’re doing here tonight, or this would indeed be a very long night for all of us because we can’t just accept comments based on – on business practices or ethics or routes or even recycling, as much as those are important issues to all of us in our daily life. So I would just ask that we all try and focus on – on what’s at hand here and the work we have. And address the comments – or not comments. Address questions to these criteria, because it’s truly what we’re here for.”

(Statement by Chairman Gobczynski C. 225 -226)

“Well, I’m – I’m thinking myself personally that – and I’ll – I’ll defer to the Board’s decision on this, but to me, I think I said early on the purpose of what we were not here to do tonight was to discuss – and I’ll look at my notes, because that was three hours ago and my memory tends to go a little wacky after 10:00 at night. But I think we were trying to limit the comments to the issues at hand and the criterion, because if not, we’d be here to three weeks from Sunday, and we really wanted to keep the comments germane to our purpose at hand. And an issue of – myself personally, and I can only speak personally – the issue of recycling has absolutely nothing to do with why I’m here tonight. It’s an important issue in its right place. No one is saying it’s not, particularly me. However, I think this is something that has to be judged on its own merits, and – and that’s how I would prefer to leave that.”

(Statement by Chairman Gobczynski C. 289 - 290)

Given these admonishments, and the absence of evidence to the contrary, there can be no question as to whether the recycling issue biased the Effingham County Board. Finally, this entire bias argument based upon the recycling issue has been waived. When the issue of Sutter continuing its recycling service was brought up, neither Petitioner Stock or Landfill 33 objected. Petitioner Landfill 33 even conceded that it had no concerns with the recycling issue after Effingham County Board Chairman Gobczynski admonished the Effingham County Board not to

consider it. At the close of the County Board hearing, the following exchange occurred between Chairman Gobczynski and the attorney for Petitioner Landfill 33:

“MR. HEDINGER: Thank you, Mr. Chairman, for allowing us to make that presentation. We would request the -- a slight bit of additional testimony by Mr. Hayes to address some of the issues relating to the recycling that Mr. Sutter discussed in his testimony, which we didn't expect to be a part of this case. Recycling, I think he himself said, really didn't seem to have anything to do with this proposal and yet it is out now, and we would like to address that if -- if we might. I believe this should just take a couple of minutes.

MR. GOBCZYNSKI: Well, I'm -- I'm thinking myself personally that -- and I'll -- I'll defer to the board's decision on this, but to me, I think I said early on the purpose of what we were not here to do tonight was to discuss -- and I'll look at my notes, because that was three hours ago and my memory tends to go a little quickly after 10:00 at night. But I think we were trying to limit the comments to the issues at hand and the criterion, because if not, we'd be here to three weeks from Sunday, and we really wanted to keep the comments germane to our purpose at hand. And an issue of -- myself personally, and I can only speak personally -- the issue of recycling has absolutely nothing to do with why I'm here tonight. It's an important issue in its right place. No one's saying it's not, particularly me. However, I think this is something that has to be judged on its own merits, and -- and that's how I would prefer to leave that.

MR. HEDINGER: We'd be more than satisfied with that answer, Mr. Chairman. That was out understanding as well. The issue having come up, we were prepared to address it. Be we will -- we will table that, and that's all we have then. Thank you.

(C. 289 - 290).

Again, Petitioner Stock has failed to produce any credible evidence that somehow the Effingham County Board was biased and essentially threatened into approving siting. What is evidenced by the record is that a full and fair hearing on this matter was conducted by the Effingham County Board, which was then followed by public comment, which was then followed by a deliberate and thorough discussion and vote on each of the nine statutory criteria.



The record demonstrates that the Effingham County Board's decision was a considered and deliberate decision and not subject to threats of blackmail as Petitioner asserts.

B. Statutory Criteria

As the PCB knows, the Illinois Environmental Protection Act ("Act") provides that a siting authority shall approve a siting request when nine specific statutory criteria are satisfied. 415 ILCS 5/39.2 (a). On September 16, 2002, the Effingham County Board determined that Sutter had satisfied the nine statutory criteria. Written findings of fact and a Resolution were adopted by the County Board by 9 -0 votes. Both Petitioner Landfill 33 and Petitioner Stock have asserted in their Petitions for Review that the County Board erred in finding that certain of these nine criteria were satisfied by Sutter's proposal.

When reviewing a local siting authority's decision on the nine criteria, the PCB must determine whether the local decision is against the manifest weight of the evidence. E.g. American Bottom Conservancy et al. v. Village of Fairmont City et al., PCB No. 01-159, p.2, (October 18, 2001). A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or indisputable from a review of the evidence. Id. If conflicting evidence is presented, the PCB can not overturn the decision of the local siting authority simply because the local authority gave greater weight to certain witnesses and not others. Id. Even if the PCB could reach a different conclusion than the local siting authority after a review of the evidence, that does not warrant a reversal. Id. The burden of demonstrating that the local siting authority erred is on the Petitioners. 415 ILCS 5/40.1(b); County of Kankakee et al. v. The City of Kankakee, PCB No. 03-31, 03-33, and 03-35 (consolidated), p. 3 (October 3, 2002).

As noted above, Petitioner Landfill 33 takes issue with the Effingham County Board's decision with respect to criterion 1, 2, 5 and 8. Petitioner Stock takes issue with criteria 1, 2, 3, 5 and 8. Respondent Sutter will address these criteria below. To the extent both Petitioners raised issues on the same statutory criteria, they will be addressed together.

1. Criterion 1: The facility is necessary to accommodate the waste needs of the area it is intended to serve.

Criterion number one requires that the proposed facility be necessary to accommodate the waste needs of the area. Sutter clearly provided sufficient evidence to support this criterion. In analyzing the need issue, Sutter reviewed Illinois EPA documents including remaining capacities of area disposal facilities, as well as the Effingham County waste disposal plan.

With respect to the need issue, the Act requires that there be a showing of need, but not that there be an absolute necessity to accommodate the area's needs. Clutts v. Beasley, 185 Ill. App.3d 543, 541 N.E.2d 844, 856 (5<sup>th</sup> Dist. 1989). Rather, such factors as a reasonable convenience of expanding the facility may be demonstrated to satisfy the need criterion. In fact, in one recent case, the Village of Fairmont City approved, and was affirmed by the Pollution Control Board, the siting of a landfill in area that boasted 3 new or expanded landfills with more than 100 million cubic yards of remaining waste capacity and more than 50 years of remaining life. See American Bottom Conservancy et al. v. Village of Fairmont City et al., PCB No. 01-159 (October 18, 2001).

Opposition on this criterion came from Landfill 33's witnesses, primarily Mr. Sheffer. First, Mr. Sheffer said that a traditional needs analysis had not been offered by Sutter Sanitation (C. 206). This is incorrect in that such an analysis was indeed performed as noted above. Of

course, Mr. Sheffer failed to offer any such analysis either. Second, Mr. Sheffer focused on the notion that Landfill 33 had "29 years" of life expectancy remaining, thus presumably demonstrating that no need exists in the area for other disposal options (C. 207). Indeed, it was this life expectancy standard that was the only argument offered at the hearing in opposition to the demonstrated need by Sutter. Several problems exist with such an analysis. As an initial matter, neither the Act nor case law suggest that the need be determined by application of a standard of life expectancy of existing disposal facilities. Such a standard is far too arbitrary and inaccurate. For example, Hearing Exhibit 4 reflects that Landfill 33's life expectancy was twenty-five years in 1995, with a vertical expansion allowing for perhaps five to seven more years (see Page 6-41). That same report also estimated ERC remaining capacity at fifteen years, but reported as less than one year in the 1999 EPA data. Further, we see that Landfill 33 itself reported to the Effingham County Board in 1999 that it had less than ten year expected life. What further bears out is that the previously stated life expectancies have historically expired far quicker than anticipated. In support of that fact, the Board can review the county plan in Exhibits 4 and 5. The county plan in Exhibit 4 at Page 6-41 to 6-42 states that in years eleven through twenty the county would support Landfill 33 expansion. The county in fact did so, however, in 1999, even prior to the expiration of five years into that plan. At Page 4-8 in Table 15, the county adopted alternatives to consider. Alternative A was considered less aggressive and Alternative C was considered the most aggressive. Alternative A contemplated an additional fifteen years for ERC and twenty-seven years for Landfill 33. The Board now knows that is not the case. Landfill 33 requested and received its expansion earlier than anticipated, in fact earlier than in the more aggressive approach in Alternative B in years eleven through twenty. This

Board supported such expansion based on the need demonstrated by Landfill 33. Consistent with the County Board recognizing the need is greater than originally identified in the 1995, or the 1999 readoption of the 1995 plan, the Board can and now should move forward with Alternative C. It provided in the five to ten year period support for a new transfer station. The county in 1995, and again in 1999 in readopting that plan, recognized that it might have to be more aggressive and that is why Alternative C was set forth in the table. It has been demonstrated that a more aggressive approach is in fact needed. Finally, Mr. Sheffer even admitted that he had no evidence in the record to support that Landfill 33 has twenty-nine years worth of capacity left (C. 227).

What is more accurate in determining need than “expected life remaining” calculations are actual cubic yard capacity figures. The Effingham County Board recognized this fact and repeatedly inquired of Landfill 33 as to what capacity it has with the vertical expansion, which information Landfill 33 was unable or at very least unwilling to provide, choosing to instead set forth an arbitrary standard of life expectancy without any factual support. Based upon Landfill 33's own reports to the Illinois EPA, as described in its “Solid Waste Landfill Capacity Certification” Reports of 2001 and 2002, it appears that Landfill 33 may only have 10 years of expected life remaining. This is based upon an annual increase in waste receipts of 9% which is slightly less than the rate described by the Certification Reports. See Report prepared by David Kimmle attached to Sutter public comment as Attachment 3 (C. 384). In light of these factors, and the evidence presented, the Effingham County Board’s decision is clearly not against the manifest weight of the evidence.

2. Criterion 2: The facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected.

Criterion number two relates to the specific design and operations of the proposed facility and whether it will be operated in a safe manner. Here too, the overwhelming evidence, as contained within the Application and the testimony is that the proposed facility will satisfy this criterion. Two points, however, must be remembered on this issue. First, and like the other criteria which speak in terms of *minimizing*, not eliminating, potential problems, Sutter is not required to *guarantee* a certain level of protection. Clutts, 133 Ill. Dec. at 635. Of course, Sutter believes, and the evidence shows, that the public is amply protected by the design, location and operations of the proposed facility. Second, the County's determination of this issue must be substantially guided by the evidence and testimony of the experts in this case. File v. D & L Landfill, Inc., 219 Ill. App.3d 897, 162 Ill. Dec. 414 (5<sup>th</sup> Dist. 1991)(The appellate court noted that with respect to criterion number 2 "it has been held that the determination of this question is purely a matter of assessing the credibility of expert witnesses." ). Here, the witnesses for the facility opponents, namely Landfill 33, only testified to general issues of possible concerns. As noted above, these concerns were not substantiated by any evidence presented. Accordingly, the mere statements of potential concerns cannot be given significant weight by the Pollution Control Board.

Notwithstanding the above evidentiary and credibility issues, Petitioner Landfill 33 did raise a concern with respect to the thickness of the concrete floor. First, an issue was raised with respect to whether it would support the weight of the loaded waste trucks. In this regard, Mr. Johnsrud, a consultant for Petitioner Landfill 33, testified that in his opinion the concrete floor

needed to be 8 to 10 inches thick (C. 247). Admittedly, Sutter did not know the thickness of the floor. In response, Tracey Sutter responded by noting that the concrete floor had supported the weight of grain trucks, and it would therefore also support the weight of the waste trucks. Since the time of the hearing, however, Sutter Sanitation's engineers have taken core samples of the floor. These samples were attached as Attachment 4 to Sutter's public comment (C. 387). These samples show that the concrete floor is 8.5 inches thick, on top of two to three inches of aggregate. According to Sutter's engineers, as well as apparently Mr. Johnsrud, this thickness is more than adequate to support the weight of the waste trucks. The second issue raised was with respect to cracks and the slope of the floor such that any generated leachate might infiltrate below the floor. At the Effingham County Board hearing, Mr. Kimmle noted that any cracks would be sealed to prevent infiltration (C. 268-269). During the recent sampling it was also discovered that a moisture barrier currently exists under the concrete floor which will prevent water migration into the subgrade. In addition, the slope of the floor is towards the east which is where the transfer pit and sump will be located. In light of these factors, as well as the evidence produced at hearing, the Pollution Control Board should conclude that the Effingham County Board's decision was not against the manifest weight of the evidence.

3. Criterion 3: The facility is locate so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property.

Criterion number three requires that the proposed facility be located so as to minimize incompatibility with the character of the surrounding area and to minimize the affect of the value on the surrounding property. Sutter Sanitation has provided sufficient evidence to satisfy this criterion and the Effingham County Board's decision was appropriate. The law requires only that

the location *minimize* incompatibility and affect on property values. In this case, the only evidence on this point shows that the proposed transfer station will have *no* impact on these issues. The evidence before the Effingham County Board was offered by Mr. Bitzer. In addition to being a qualified appraiser from the Effingham County area, Mr. Bitzer has visited and evaluated several waste transfer stations in the past. After reviewing Sutter's proposed transfer station plans, visiting the proposed site, and based upon his general understanding of waste transfer station operations Mr. Bitzer opined that the proposed facility would not have an adverse impact on property values in the area, nor would it be incompatible with the area (C. 182). In fact, in response to a question from Duanne Stock, Mr. Bitzer indicated the proposed transfer station would have "zero impact" (C 183). Echoing this minimal impact, even a witness on behalf of the opponent, Landfill 33, stated that transfer stations are often located in populated areas. Finally, the Pollution Control Board should consider that no evidence or testimony was presented by anyone else which would rebut or contradict Mr. Bitzer's testimony. Thus, the Effingham County Board's decision on this criterion was appropriate and not against the manifest weight of the evidence.

5. Criterion 5: The plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents.

Criterion number five requires the plan of operations for the facility be designed to minimize the danger to the surrounding area from fires, spills or other operational hazards. This criterion has also been met. In addition to the information contained in the Application itself, Mr. Kimmle, a professional engineer, testified on this criterion. Mr. Kimmle stated that because combustible refuse would not be stored on-site, the risk of fire is decreased (C. 158).

Furthermore, fire extinguishers as well as a contingency plan is in place to address any emergency type situation (C. 159). With respect to spills, it should be restated that no petroleum products will be stored on-site (C. 158). This, of course, eliminates any concern with respect to spillages of this type of material. The only potential for a liquid spill relates to the collection and storage of leachate from site operations. To minimize environmental impacts, and as required by the Illinois EPA, leachate will be collected and stored on-site in a 1,000 gallon tank. Id. It will then be periodically shipped off-site for disposal. Id. The tank itself will be within a concrete containment structure (C. 151). This structure will serve to protect the tank from any vehicle collisions, but also to contain any spill that might occur from the tank itself. In addition, and as noted above, a contingency plan is in place to address any spillage should it occur. As Mr. Kimmle testified, these measures are completely in accordance with industry standards (C. 159). With respect to operational accidents, Tracy Sutter addressed the one issue raised at the County Board hearing about the height of the building where waste will be dumped and whether it would be sufficient to accommodate dump trucks. Mr. Sutter explained that typical trucks, including all that he owns, have no height problem raising beds to dump the waste within the building (C. 264). Mr. Sutter also testified that whenever a truck enters the building to unload waste, a Sutter Sanitation employee will be there to assist (C. 265). Therefore, even in those infrequent situations where a larger truck might be present, safeguards will be in place to minimize the chance of any contact with the building structure. Finally, it should be considered that the only challenge on criterion number five was set forth by Landfill 33's witness, Mr. Johnsrud, based merely on alleged lack of meaningful detail in the plan of operations, and not upon any claim that Mr. Kimmle's or Tracy Sutter's testimony was unbelievable or flawed. In light of the evidence,



and the applicable standard that fire, spills, and accidents be *minimized*, and not eliminated, by the proposed facility's plan of operations, the Effingham County Board's decision was not against the manifest weight of the evidence.

8. Criterion 8: If the facility is to be located in a county where the county board has adopted a solid waste management plan consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act, the facility is consistent with that plan.

Criterion number eight requires that if the proposed facility is located in a county where the County Board has adopted a solid waste management plan, the proposed facility be consistent with that plan. Effingham County adopted such a plan in 1995 and readopted it in 1999. The Effingham County plan supports both in and out of county disposal. Consistent with the plan, and in recognition of the rapidly increasing waste needs of the County, the County Board approved Landfill 33's request for an expansion of its landfill some five to ten years earlier than anticipated. Given the increased need of solid waste facilities and the greater pace at which available landfill space is decreasing (including the impending closure of the ERC landfill), out of county disposal options, as provided for in the County plan, must also be put in place. Again, such out of county disposal was contemplated and recognized in the County Plan. Accordingly, the Effingham County Board's determination that the criteria was met is not against the manifest weight of the evidence.

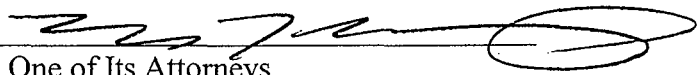
### III. CONCLUSION

For the reasons set forth above, Respondent Sutter Sanitation Service, Inc., respectfully requests that the Pollution Control Board affirm the September 16, 2002 decision of the

Effingham County Board approving Sutter Sanitation Services, Inc. Request for Local Siting  
Approval for a Proposed Solid Waste Transfer Station in Effingham County.

Respectfully submitted,

SUTTER SANITATION SERVICES

By:   
One of Its Attorneys

Sorling, Northrup, Hanna, Cullen  
and Cochran, Ltd.  
David A. Rolf and  
Charles J. Northrup, of Counsel  
Suite 800 Illinois Building  
Post Office Box 5131  
Springfield, IL 62705  
Telephone: (217) 544-1144

**PROOF OF SERVICE**

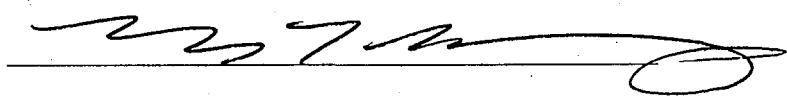
The undersigned hereby certifies that a copy of the foregoing document was served by hand delivery on Friday, January 10, 2003 to:

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

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

and by Federal Express on Thursday, January 9, 2003 to:

Edward C. Deters  
Effingham County State's Attorney  
County Office Building  
101 N. Fourth St., Suite 400  
Effingham, IL 62401

A handwritten signature in black ink, appearing to be "C. Zeman", written over a horizontal line.

0369180.005

1/9/2003CJN