ILLINOIS POLLUTION CONTROL BOARD
September 16, 2004

SUTTER SANITATION, INC. and LAVONNE HAKER,	)	
Petitioners,	)	
v.	)	PCB 04-187
	)	(Permit Appeal - Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

ORDER OF THE BOARD (by A.S. Moore):

Sutter Sanitation, Inc. and Lavonne Hacker (collectively "Sutter") appeal the decision of the Illinois Environmental Protection Agency (Agency) denying Sutter a development permit for a solid waste transfer station in Effingham County. The Agency denied the permit on three grounds. The only ground at issue today requires the Board to interpret a setback requirement of the Environmental Protection Act (Act) (415 ILCS 5 (2002)).

In its third ground for denial, the Agency stated that issuing the permit for the transfer station would result in a violation of Section 22.14 of the Act (415 ILCS 5/22.14 (2002)), which prohibits any person from establishing a garbage transfer station within 1,000 feet of a dwelling. The parties have filed counter-motions for partial summary judgment, asking the Board to decide whether the Agency properly denied the permit on this ground. It is undisputed that a mobile home, the dwelling at issue, was placed on land within 1,000 feet of the transfer station site *after* Sutter received siting approval for the transfer station from the Effingham County Board (Effingham County) but *before* Sutter applied with the Agency for the development permit.

For the reasons below, the Board finds that Sutter established its facility before the establishment of the dwelling. Issuance of the requested permit therefore would not result in a violation of Section 22.14 of the Act, and the Agency erred in denying the permit on this ground. Accordingly, the Board grants Sutter's motion for partial summary judgment, denies the Agency's motion for partial summary judgment, and directs the parties to hearing on the remaining two grounds for permit denial.

In this order, the Board first addresses several procedural matters. The Board then sets forth the undisputed facts of this case before turning to the counter-motions for partial summary judgment.

PROCEDURAL MATTERS

In this portion of the order, the Board first recites the procedural history of this case and, for background, the related siting appeal. The Board then rules on two motions. The first motion was filed by Jesse Ruffner and family (Ruffner family), Mr. Lloyd Stock (Mr. Stock), and Stock & Company, LLC (Stock & Co.). They move the Board to intervene in this permit appeal. These movants are involved with the land and mobile home across from the transfer station site. The second motion was filed by the Agency. The Agency moves the Board to strike part of Sutter's motion for partial summary judgment.

Procedural History

Permit Appeal

Sutter filed the petition for review on April 26, 2004. On May 6, 2004, the Board accepted the petition for hearing. On May 28, the Agency filed the administrative record of its final decision.[1] On May 28, 2004, the Ruffner family, Mr. Stock, and Stock & Co. filed a motion to intervene. On June 15 and 28, 2004, respectively, Sutter and the Agency filed responses to the motion to intervene.[2]

On August 2, 2004, Sutter filed a motion for partial summary judgment. On August 10, 2004, the Agency filed a motion for leave to file *instanter* its motion for partial summary judgment, attaching the motion for partial summary judgment. In its response to the Agency's motion for partial summary judgment, Sutter states that it does not object to the Board granting the Agency's motion for leave to file *instanter*. The Board grants the Agency's motion for leave to file *instanter*.[3]

On August 16, 2004, Sutter filed a response to the Agency's motion for partial summary judgment. On the same day, the Agency filed a response to Sutter's motion for partial summary judgment, along with a motion to strike part of Sutter's motion for partial summary judgment. On August 25, 2004, Sutter filed a response to the Agency's motion to strike.[4]

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[1] The Board cites the Agency's administrative record as "AR at _."

[2] The Board cites the motion to intervene as "Mot. Interv. at _." The Board cites Sutter's response to the motion to intervene as "Sutter Interv. Resp. at _" and the Agency's response to the motion to intervene as "Ag. Interv. Resp. at _."

[3] The Board cites Sutter's motion for partial summary judgment as "Sutter SJ Mot. at _" and the Agency's motion for partial summary judgment as "Ag. SJ Mot. at _."

[4] The Board cites Sutter's response to the Agency's motion for partial summary judgment as "Sutter SJ Resp. at _" and the Agency's response to Sutter's motion for partial summary judgment as "Ag. SJ Resp. at _." The Board cites the Agency's motion to strike as "Ag. Mot. Str. at _" and Sutter's response to the motion to strike as "Sutter Str. Resp. at _."

The current statutory deadline for the Board to decide this permit appeal, as waived out by Sutter, is December 31, 2004. The Board meeting prior to that deadline is currently scheduled for December 16, 2004.

Siting Appeal

In October 2002, Stock & Co. and a landfill located in Effingham County filed petitions with the Board to review Effingham County's September 16, 2002 grant of siting approval for the waste transfer station. *See* Landfill 33, Ltd. and Stock & Co., LLC v. Effingham County Board and Sutter Sanitation Services, PCB 03-43, 03-52 (consol.). On February 20, 2003, the Board affirmed Effingham County's siting decision, finding that Effingham County had jurisdiction over the application to site the transfer station, that the procedures Effingham County used were fundamentally fair, and that Effingham County's decision on several contested siting criteria was not against the manifest weight of the evidence.

Stock & Co. appealed the Board's decision to the Illinois Appellate Court, Fifth District. Stock & Co., LLC v. PCB, Effingham County Board, Sutter Sanitation Services, and Landfill 33, LTD. (Fifth District Appellate Court No. 5-03-0099). On May 7, 2004, the Appellate Court affirmed the Board in an unpublished order under Supreme Court Rule 23.

Motion to Intervene

The Ruffner family, Mr. Stock, and Stock & Co. seek to intervene in this permit appeal. They cite the Board's procedural rules at Sections 101.402(d)(2) and (3), which provide that "the Board may permit any person to intervene in any adjudicatory proceeding if: *** (2) The person may be materially prejudiced absent intervention; or (3) The person is so situated that the person may be adversely affected by a final Board order." Mot. Interv. at 2-3, quoting 35 Ill. Adm. Code 101.402(d)(2), (3). The movants claim that they satisfy these standards and therefore should be allowed to intervene.

The motion to intervene states that the Ruffner family resides across the street from the transfer station site and has lived there since October 1, 2003. Mot. Interv. at 3-4. Mr. Stock manages "the mobile home, which he also owns, and a newer manufactured home, which are both across the street and within 1000 feet of the Site." *Id*. at 4. Stock & Co. owns the land across the street from the transfer station site. *Id*. at 4-5. The movants want to be parties to this proceeding to ensure that their various interests are "adequately represented and defended, in addition to the governmental interests that the Agency will be representing in defending its denial of the Application." *Id*. at 6.

Sutter and the Agency oppose the motion to intervene. Both assert that the movants have failed to identify how their ability to participate in this proceeding through other available procedural means is insufficient. Sutter Interv. Resp. at 2, 5; Ag. Interv. Resp. at 3. The Agency further notes that the factual "roles played by the petitioning intervenors are not in dispute," and that Board can apply the law to those facts without granting the movants party status. Ag. Interv. Resp. at 5.

The Board denies the motion to intervene. The Act provides no third-party appeals of transfer station permit denials. Only the permit applicant may appeal. *See* 415 ILCS 5/40(a)(1) (2002). Otherwise, the Board has allowed only the State's Attorney or the Attorney General's Office to intervene in a permit appeal, in light of its unique constitutional role as a representative of the citizenry. *See* Pioneer Processing, Inc. v. IEPA, 102 Ill. 2d 119, 464 N.E.2d 238 (1984); McHenry County Landfill, Inc. v. IEPA, 154 Ill. App. 3d 89, 506 N.E.2d 372 (2d Dist. 1987); Saline County Landfill, Inc. v. IEPA, County of Saline, PCB 02-108 (Apr. 18, 2002).

In adopting the procedural rules' Section 101.402 on intervention, the Board never purported to overturn existing case law interpreting permissible intervention under the Act. Indeed, the Board cannot, through rulemaking or otherwise, expand intervention rights beyond that which the Act can bear. As the Board held in Riverdale Recycling, Inc. v. IEPA, PCB 00-228 (Aug. 10, 2000):

> After the holdings in Landfill, Inc. and Citizens Utilities, the legislature revisited the issue of third-party appeals, and has since enacted two specific sections [of the Act to allow third-party appeals of Resource Conservation and Recovery Act (RCRA) hazardous waste disposal site permit grants (415 ILCS 5/40(b) (2002)) and National Pollutant Discharge Elimination System (NPDES) permit grants or denials (415 ILCS 5/40(e) (2002))]. The legislature never granted general authority to the Board to allow third-party appeals or interventions in other cases involving permit denials. The silence of the Illinois General Assembly after the explicit requirement for statutory authority in Landfill, Inc. and Citizens Utilities is a clear indication that the Board does not have the authority under the Act to accept third-party appeals or interventions in this matter. Riverdale Recycling, PCB 00-228.

Regardless of the claimed interests that the movants here seek to protect, the Board lacks the authority to give party status through intervention to persons the General Assembly does not allow to become parties to this type of proceeding. The movants may, however, participate in this proceeding by making oral or written statements at hearing and by filing *amicus curiae* briefs or public comments. *See* 35 Ill. Adm. Code 101.110, 101.628.

Motion to Strike

The Agency moves to strike nine of the ten exhibits attached to Sutter's motion for partial summary judgment. Specifically, the Agency moves to strike Exhibits 1-9 and "any reference thereto or arguments in reliance thereon." Ag. Mot. Str. at 2. The Agency states that none of the exhibits was information before the Agency at the time it issued its decision. *Id*. at 2.

Sutter argues that the documents should not be stricken as they contain facts of which the Board may take "official notice." Sutter Str. Resp. at 2. Sutter describes the exhibits: Exhibits 1, 2, and 7, portions of the transcript of the siting hearing before Effingham County and part of the Board's record in PCB 03-43, PCB 03-52 (consol.); Exhibit 3, portions of the Board's hearing transcript in PCB 03-43, PCB 03-52 (consol.); Exhibits 4-7, portions of the Effingham County siting proceeding record and part of the Board's record in PCB 03-43, PCB 03-52

(consol.); Exhibit 8, the Board's final order in PCB 03-43, PCB 03-52 (consol.); and Exhibit 9, the unpublished order of the Illinois Appellate Court affirming the Board in PCB 03-43, PCB 03-52 (consol.). Sutter states, however, that even without the exhibits, the facts central to the pending summary judgment motions are not called into question by the Agency's motion to strike. *Id*. at 2.

The Board grants in part and denies in part the Agency's motion to strike. The Board's review of permit appeals is generally limited to the Agency record. *See* Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); Panhandle Eastern Pipe Line Co. v. IEPA, PCB 98-102, slip op. at 2 (Jan. 21, 1999), *aff'd sub nom* Panhandle Eastern Pipe Line Co. v. PCB and IEPA, 314 Ill. App. 3d 296, 734 N.E.2d 18 (4th Dist. 2000); American Waste Processing v. IEPA, PCB 91-38, slip op. at 2 (Oct. 1, 1992). The contested siting proceeding exhibits (Exhibits 1-7) attached to Sutter's pleading were not part of the record before the Agency at the time of permit denial. Sutter cites to these documents for various factual assertions in its motion for partial summary judgment. Sutter could have included this information in its permit application to the Agency, but did not. For this reason, and though the exhibits are public documents that the Board could take administrative notice of in Board proceedings generally (35 Ill. Adm. Code 101.630), the Board declines to do so here. Importantly, and as Sutter concedes, none of the exhibits is essential to the Board's ruling on the counter-motions for partial summary judgment. However, the Board will not strike its own decision from the related siting appeal (Exhibit 8) or the unpublished order affirming the Board (Exhibit 9), as the Board may always consider its precedent.

FACTS

The following facts are undisputed. On December 26, 2001, Sutter and Ray Haker entered into an agreement under which Ray Hacker would lease a parcel of property to the company. LaVonne Hacker is the successor to Ray Hacker.[5] Sutter planned to locate a waste transfer station on the property. AR at 273, 292-99. The property is approximately 3 acres in size and is situated roughly seven miles south of Altamont, in Effingham County. The property is the site of a former grain elevator. AR at 166, 273. Numerous structures associated with the grain elevator are present on the site: three large buildings; six grain elevators or bins; and sheds. AR at 224. Under the lease, Sutter had an option to purchase the property through a warranty deed agreement. AR at 293-94, 300-09. It was anticipated that Sutter would exercise the purchase provision after the company started operating the waste transfer station. AR at 273.

Sutter took possession of the Hacker property in February 2002. AR at 349. In April 2002, Sutter filed a transfer station siting application with Effingham County. *Id*. After a hearing on August 14, 2002, and a public comment period, Effingham County, on September 16,

[5] As noted, the Board refers to petitioners in this permit appeal, "Sutter Sanitation, Inc." and LaVonne Hacker, collectively as "Sutter." The Board notes, however, that the respondent siting applicant in PCB 03-43, 03-52 (consol.) was identified as "Sutter Sanitation Services," and that the Agency's permit denial letter refers to the "operator" as "Sutter Sanitation Service, Inc." AR at 1. The Agency's denial letter identifies LaVonne Hacker as "owner." In the interest of economy, and because petitioners use the short-form "Sutter" to cover all of these different procedural contexts, the Board also does so.

2002, by resolution, granted Sutter approval to site a waste transfer station on the Hacker property. AR at 152-56, 232, 258, 261, 349.

Stock & Co. owns property across the street from the transfer station site. AR at 234-35, 246, 273, 348-51. A house had existed on the Stock & Co. property, but the house was demolished in approximately 1970. AR at 87. After September 16, 2002, and by the end of October 2002, Mr. Stock moved a mobile home onto property across the street from the transfer station site. The mobile home is within 1,000 feet of the transfer station site. The mobile home was first occupied as a residence in October 2002, but may not have been continuously occupied since then. The current residents of the mobile home, as of March 18, 2004, moved into the home on October 1, 2003. Before the mobile home was placed there, the property across from the transfer station site was vacant agricultural land. AR at 90-93, 234-49, 273, 348-51.

On September 29, 2003, Sutter submitted an application to the Agency for a permit to develop a waste transfer station on the Hacker property. AR at 140-229. Following discussions between the Agency and Sutter, a revised permit application was submitted on December 12, 2003. AR at 248-340. On March 30, 2004, the Agency issued a final decision denying Sutter's permit application. AR at 1-2. The Agency's final decision lists three grounds for denial, the third of which is the subject of the counter-motions for partial summary judgment. The third denial ground states:

> Issuance of a permit for this facility would violate Section 22.14 of the Act because the proposed garbage transfer station would be located closer than 1000 feet from a dwelling that was so located before the application was submitted to the Illinois EPA. AR at 2.[6]

DISCUSSION

Below, the Board sets forth the statutory framework applicable to this case. The Board then provides the standard it applies when considering motions for summary judgment. Next, the Board describes the parties' arguments, after which the Board analyzes and rules on the counter-motions for partial summary judgment.

Statutory Framework

The Board first provides the Act's framework for permitting generally, and pollution control facility permitting specifically. Though this is not a pollution control facility siting case, the Board briefly explains the local siting process under the Act as it is central to today's ruling.

Permitting Under the Act Generally

The Act requires the Agency to issue a permit if the permit applicant proves that the requested permit will not violate the Act or the Board's regulations. *See* 415 ILCS 5/39(a)

[6] The other two denial grounds in the Agency's final decision relate to (1) the transfer building floor, and (2) handling and management procedures for certain wastes. AR at 2.

(2002). The Agency also must identify, in a permit denial, the provisions of the Act or Board regulations that may be violated if it granted the requested permit. *Id.*

If the Agency denies a requested permit, the applicant may appeal the Agency's decision to the Board within 35 days. *See* 415 ILCS 5/40(a)(1) (2002). The petitioner has the burden of proof on appeal. *Id*. On appeal "the sole question before the Board is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Act would occur if the permit was granted." Panhandle, PCB 98-102, slip op. at 10, *aff'd sub nom* Panhandle Eastern Pipeline Co. v. PCB and IEPA, 314 Ill. App. 3d 296, 734 N.E.2d 18 (4th Dist. 2000), quoting Centralia Environmental Services, Inc. v. IEPA, PCB 89-170, slip op. at 9 (Oct. 25, 1990); *see also* Browning-Ferris Industries of Illinois, Inc. v. PCB, 179 Ill. App. 3d 598, 601-602, 534 N.E.2d 616, 619 (2d Dist. 1989); Joliet Sand & Gravel Co. v. PCB, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (3d Dist. 1987), citing IEPA v. PCB, 118 Ill. App. 3d 772, 455 N.E.2d 188 (1st Dist. 1983). The Agency's denial letter frames the issues on appeal. *See* Centralia, PCB 89-170, slip op. at 8; Pulitzer Community Newspapers, Inc. v. IEPA, PCB 90-142, slip op. at 6 (Dec. 20, 1990).

The Board's review of permit appeals is generally limited to information before the Agency during the Agency's statutory review period, and is not based on information developed by the permit applicant or the Agency after the Agency's decision. Alton Packaging, 162 Ill. App. 3d at 738, 516 N.E.2d at 280; Panhandle, PCB 98-102, slip op. at 2; American Waste Processing, PCB 91-38, slip op. at 2. However, it is the proceeding before the Board that provides a mechanism for the petitioner to prove that issuing the requested permit would not result in a violation of the Act or Board regulations. Further, the Board proceeding affords the petitioner the opportunity to challenge the information relied upon by, and the reasons given by, the Agency for denying the permit. Alton Packaging, 162 Ill. App. 3d at 738, 516 N.E.2d at 280, citing IEPA v. PCB, 115 Ill. 2d 65, 70, 503 N.E.2d 343, 345 (1986).

Pollution Control Facility Permitting Under the Act

The permit process described above generally applies to all permitting under the Act, including pollution control facility permitting. Pollution control facility permitting, however, also requires proof that the proposed new facility has received local siting approval. Section 39(c) of the Act provides that:

> [N]o permit for the development or construction of a new pollution control facility may be granted by the Agency unless the applicant submits proof to the Agency that the location of said facility has been approved by the County Board of the county if in an unincorporated area, or the governing body of the municipality when in an incorporated area in which the facility is to be located in accordance with Section 39.2 of this Act. 415 ILCS 5/39(c) (2002).

The Act's definition of "new pollution control facility" includes "a pollution control facility initially permitted for development or construction after July 1, 1981." 415 ILCS 5/3.30(b)(1) (2002). "Pollution control facility" includes any "waste transfer station." 415 ILCS 5/3.30(a) (2002).

Pollution Control Facility Siting Under the Act

Under Section 39(c), the applicant for a pollution control facility development permit therefore must submit proof that it received siting approval from the local government in accordance with Section 39.2 of the Act (415 ILCS 5/39.2 (2002)). Section 39.2, commonly referred to as "S.B. 172" for the originating legislation, provides a process through which the local government decides, based on nine statutory criteria, whether to approve or disapprove a request to site a new pollution control facility, including a waste transfer station. However, a siting applicant must first give notice of its impending siting application to persons owning property within 250 feet of the site, to members of the General Assembly from that legislative district, and in a newspaper of general circulation published in that county. *See* 415 ILCS 5/39.2(b) (2002).

To receive siting approval, the applicant must demonstrate to the local government that the proposed facility meets all nine criteria. *See* 415 ILCS 5/39.2(a)(i)-(ix) (2002). The criteria include whether the proposed facility is designed, located, and proposed to be operated to protect the public health, safety, and welfare; whether it is located so as to minimize incompatibility with the character of the surrounding area; whether it has a plan of operations designed to minimize danger from fire, spills, or other operational accidents; and whether the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows. *See* 415 ILCS 5/39.2(a)(ii), (iii), (v), (vi) (2002). If the local government denies or conditionally grants siting, the applicant may appeal the decision to the Board. *See* 415 ILCS 5/40.1(a) (2002). If the local government grants siting, third parties who participated in the local hearing and who are so located as to be affected by the facility may appeal the decision to the Board. *See* 415 ILCS 5/40.1(b) (2002).

Section 22.14 Setback

Section 22.14 of the Act provides:

> (a) No person may establish any pollution control facility for use as a garbage transfer station, which is located less than 1000 feet from the nearest property zoned for primarily residential uses or within 1000 feet of any dwelling, except in counties of at least 3,000,000 inhabitants.
>
> ***
>
> (b) This Section does not prohibit (i) any such facility which is in existence on January 1, 1988, nor (ii) any facility in existence on January 1, 1988, as expanded before January 1, 1990, to include processing and transferring of municipal wastes for both recycling and disposal purposes, nor (iii) any such facility which becomes nonconforming due to a change in zoning or the establishment of a dwelling which occurs after the establishment of the facility, nor (iv) any facility established by a municipality with a population in excess of 1,000,000, nor (v) any transfer facility operating on January 1, 1988. No facility described in item (ii) shall, after July 14, 1995, accept landscape waste and other municipal waste in the same

> vehicle load. However, the use of an existing pollution control facility as a garbage transfer station shall be deemed to be the establishment of a new facility, and shall be subject to subsection (a), if such facility had not been used as a garbage transfer station within one year prior to January 1, 1988. 415 ILCS 5/22.14 (2002).

Standard for Considering Motions for Summary Judgment

Summary judgment is appropriate when the pleadings, depositions, admissions, affidavits, and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See* Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998); *see also* 35 Ill. Adm. Code 101.516(b). When ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment "is a drastic means of disposing of litigation," and therefore the Board should grant it only when the movant's right to the relief "is clear and free from doubt." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Putrill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). "Even so, while the nonmoving party in a summary judgment motion is not required to prove [its] case, [it] must nonetheless present a factual basis, which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

Parties' Arguments

Sutter's Motion for Partial Summary Judgment

Sutter argues that its waste transfer station became established either "when Sutter effectuated public and private notice of its intent to seek local siting approval of its facility; or when the Effingham County Board approved the Sutter siting application." Sutter SJ Mot. at 2. According to Sutter, the Section 22.14(b)(iii) exception to the Section 22.14(a) setback applies in this case: "that its facility having been established, at a minimum, on September 16, 2002, upon Effingham County Board approval, became 'non-conforming' only after the post-establishment placement of the mobile home within the setback requirements." *Id*. at 7.

Sutter argues that the plain and ordinary meaning of "establishment" favors its position. Sutter quotes from the definitions of the word "establish" in the *Merriam-Webster OnLine* dictionary:

> 1: to institute (as a law) permanently by enactment or agreement[;]
>
> ***
>
> 3 . . . b: to introduce and cause to grow and multiply[;]
>
> ***
>
> 5 a: to put on a firm basis: SET UP b: to put into a favorable position c: to gain full recognition or acceptance of ***. Sutter SJ Mot. at 8-9.

According to Sutter, the first and fifth definitions describe "the actions of the Effingham County Board in conducting a public hearing, debating, and considering the Sutter facility and then formally approving it." Sutter SJ Mot. at 9. Sutter further argues that the public and private notice it provided of its intent to file a siting application also provided "a measure of full recognition and acceptance of the facility." *Id.*

Sutter relies on an Illinois Supreme Court decision and an Illinois Appellate Court decision for the general proposition that a facility may be "established" by a number of identifiable events that take place well before any actual construction or operation. Sutter SJ Mot. at 10-13. According to Sutter, in The Village of Villa Park v. The Wanderer's Rest Cemetery, 316 Ill. 226, 147 N.E. 104 (1925), the Illinois Supreme Court held that a cemetery had been established prior to the adoption of a local ordinance requiring setbacks for cemeteries. Before the adoption of the ordinance, an individual had entered into a contract to purchase the land in question and had met with a group of persons on the property to "dedicate" it for use as a cemetery. Sutter SJ Mot. at 10. After the ordinance was adopted, a sign was posted on the site indicating its future use as a cemetery, a corporation was formed to operate the cemetery, and property documents were recorded. *Id.*

Sutter emphasizes that the Villa Park court found these events, including expending funds to further the enterprise, important in refusing to enforce the local ordinance against the cemetery even though no actual burials had taken place. Sutter SJ Mot. at 10-11. Sutter concludes that the Illinois Supreme Court "has clearly defined 'establish' to include a variety of actions equating with public recognition of a particular land use." *Id.* at 11. Sutter notes that, before placement of the mobile home, Sutter had entered into a lease for the land with an option to purchase. Sutter likens the Section 39.2(b) public and private notice it provided and Effingham County's siting approval with the "dedication" of the site for use as a waste transfer station. *Id.* Sutter adds that it spent considerable funds to on this project before the mobile home arrived. *Id.*

Sutter also cites the Illinois Appellate Court decision in Moseid v. McDonough, 103 Ill. App. 2d 23, 243 N.E.2d 394 (1st Dist. 1968), where the court had to decide when a county law library was "established," an issue important to the collection of certain taxes. According to Sutter, the plaintiff asserted that the library was established when it became a "functioning institution." Sutter SJ Mot. at 11-12. The court found this definition of "establish" too narrow and held that the library was established when the county board enacted an ordinance purporting to do so. *Id.* at 12. Sutter analogizes Effingham County's siting approval to the local ordinance in Moseid. *Id.*

Sutter further argues that other provisions within Section 22.14 of the Act confirm that its interpretation of the term "establishment" is reasonable. Sutter points to the reference to "existing" facilities in subsections (b)(i) and (ii) and the reference to facilities "operating" in subsection (b)(v) to conclude that the word "establishment" in subsection (b)(iii) must mean something different than an "existing" or "operating" facility: "[Establishment] can't mean any type of post-existing or post-operating facility because that would be redundant. It must therefore apply to a facility prior to its 'existence' or 'operation.'" Sutter SJ Mot. at 14.

Sutter maintains that its position is consistent with the purpose of Section 22.14: "to protect dwellings (and more appropriately the occupants of those dwellings) from a facility that chooses to locate nearby." Sutter SJ Mot. at 14-15. Sutter argues that after the public and private notices of the siting process are given, the only dwellings not protected by Section 22.14 are those of owners who "have necessarily obtained knowledge" of the facility and have nevertheless chosen to locate their dwellings near the facility. According to Sutter, these owners have "assumed the risk," and the purpose of Section 22.14 cannot be to protect and sanction the activities of Stock: "It is Stock that has chosen to place a mobile home on property that he knows to be nearby the facility." *Id*. at 15.

Sutter asserts that the Agency's position would "allow facility opponents to simply move a mobile, and by implication, temporary, home onto nearby property at any time prior to permit submittal to effectively defeat any facility." Sutter SJ Mot. at 16. This would lead, Sutter maintains, to "unreasonable and unjust, if not absurd" results, where facility opponents could simply "by-pass any participation at all in the siting process and simply show up with a mobile home prior to permit application submittal." *Id*. Sutter argues that this would effectively "nullify the entire public siting process and the authority the legislature has given local governments to have a say, and indeed the final decision, on site suitability." *Id*.

In addition, Sutter maintains that the only way to counteract this scenario would be to "buy-up enough property around the proposed facility to accommodate the 1000 foot setback requirement." Sutter SJ Mot. at 19. According to Sutter, this "additional financial burden would be possible only for the largest waste companies" and "smaller waste companies (such as Sutter) could never grow and expand," which in turn would hurt local and regional competition. *Id*.

Finally, Sutter argues that tying "establishment" to the permit application submittal would lead to the unjust loss of resources to both the siting applicant and the local government. Sutter states that a siting applicant's investments in pursuing local siting approval include property cost, engineering fees, legal fees, and "often a local government application fee which can in and of itself be in the hundreds of thousands of dollars." Sutter SJ Mot. at 19. Sutter adds that the local government "expended its time and resources in holding public hearings and openly considering, debating approving the facility." *Id*.

Agency's Response to Sutter

The Agency asserts that Sutter mischaracterizes the Agency's basis for the third denial ground in the final decision denying the requested permit. Ag. SJ Resp. at 1. According to the Agency, its denial letter simply states that at the time of Sutter submitted the permit application, the dwelling in question was already established in the setback zone: "But the Illinois EPA does not state that decisions as to whether a facility is or is not in violation of Section 22.14 of the Act must be made at the time of the submission of a permit application . . . ." *Id*. at 2. Instead, it is the Agency's position that "the proposed garbage transfer station was not established as of the time the development permit application was submitted." *Id*.

The Agency does not agree that the Section 22.14(b)(iii) exception to the setback requirement applies because the dwelling was established before the transfer station was established and indeed, the transfer station is still not established:

> [A] facility cannot be established by the completion of a preliminary step [local siting approval] needed to apply for a permit to actually develop and ultimately operate the facility. There is no question that the dwelling was in place before the development permit application was submitted, and well before a final decision on that permit application was issued. *** Given that petitioners do not currently possess any authority that would allow them to develop the proposed transfer station, much less operate it, . . . no credible claim can be made that the proposed transfer station nonetheless has been established. Ag. SJ Resp. at 3.

The Agency argues that local siting approval cannot "establish" a waste transfer station because that approval does not authorize the development or operation of the facility. Ag. SJ Resp. at 4. The Agency poses the hypothetical in which a siting applicant receives local siting approval but then takes no further steps to develop the facility. The Agency argues that the transfer station's local siting approval would expire at the end of two calendar years under Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)). The Agency questions how a facility could be considered "established" and "yet never be built or developed or even be the subject of a permit application." *Id*. The Agency takes the position that the "best proof a facility has been established is the receipt of a permit authorizing development and operation of the facility itself." *Id*.

The Agency also disputes that notice of an impending siting application given under Section 39.2(b) can establish a facility. The Agency asserts that because Section 39.2(b) notice must be given only to property owners within 250 feet of the proposed facility, dwellings outside that range, but within the 1000 setback protection of Section 22.14, would never receive that notice. Ag. SJ Resp. at 5. "This is further supported by the recognition that a local unit of government cannot deny or base its decision on local siting approval on compliance with Section 22.14, since it has no authority to enforce that provision and the provision itself is not a subsection of Section 39.2." *Id*. The Agency goes further and states that if Effingham County was aware of a dwelling established before notice of a siting request is given, the county board "still could not use that fact to deny local siting approval since that factual consideration is not one allowed by the Act." *Id*. at 9.

The Agency argues that is unreasonable and absurd to deem established a proposed facility that has not received official approval to actually be built: "Indeed, in this case, with the denial of the permit application (including on grounds other than the setback violation), the Petitioners' position contemplates an established facility that has no authorization to be built." Ag. SJ Resp. at 7.

The Agency contests Sutter's interpretation of other terms used in Section 22.14. The Agency insists that the General Assembly could not have meant "establish" to mean "obtain local siting approval" because (1) under Section 22.14(b)(iii), "establish" is also used in reference to dwellings, and dwellings undergo "no similar preliminary step," and (2) under the

last sentence of Section 22.14(b), establishment can mean "use." Ag. SJ Resp. at 7-8. Recognizing, however, that the Agency is not arguing that "establish" means actual "use" or "operation," the Agency states that the "position espoused by the Illinois EPA in this matter need not go to the lengths of the terms used in Section 22.14(b)." *Id*. at 8.

The Agency disagrees that its interpretation of Section 22.14 "puts a proposed facility at a disadvantage, subject to the whim of a nearby property owner." Ag. SJ Resp. at 9. On the contrary, the Agency believes its interpretation "gives all due protection to a nearby property owner as described in Section 22.14 of the Act." *Id*. The Agency asserts that the General Assembly created the Section 22.14 setback for the "protection [of] citizens dwelling within a defined zone," not for "the ease and flexibility of proposed transfer stations." *Id*. at 9-10.

Finally, the Agency states that when it issues a final decision on a transfer station permit application, the Agency is not authorized to consider the financial investment in local siting that the applicant may lose. Ag. SJ Resp. at 10. Recognizing that local siting may entail significant expenditures, the Agency concludes: "that fact alone does not allow for a balancing of equities in the application of Section 22.14 of the Act. Any party that seeks to develop a new pollution control facility must do so knowing that there will be expenses associated with the endeavor, along with very real risks that that the proposal may never make it to fruition." *Id*.

Agency's Motion for Partial Summary Judgment

The Agency's position is that "the existence of the mobile home dwelling less than 1,000 feet from the proposed transfer station (at least as of the date the permit application was submitted) creates a situation in which approval of the permit application would result in a violation of Section 22.14 of the Act." Ag. SJ Mot. at 4.

The Agency agrees with Sutter that the "dispositive question" is "whether the proposed garbage transfer station was established prior to the dwelling." Ag. SJ Mot. at 6. Further, the Agency agrees with Sutter that the language of Section 22.14 is clear. *Id*. at 7. In addition to referring to the *Merriam-Webster OnLine* dictionary for definitions of "establish," as did Sutter, the Agency provides the following definitions of the word from the *American Heritage Dictionary*: "To make firm or secure, to settle in a secure position or condition, to cause to be recognized and accepted, to found, to make a state institution of, to introduce and put into force, or to prove the validity or truth of." *Id*.

The Agency then concludes that these definitions support its position. Ag. SJ Mot. at 8. According to the Agency, receiving local siting approval "cannot be considered tantamount to the establishment of the proposed transfer station" because local siting approval is merely a "prerequisite step to filing a permit application" and "nothing more than a preliminary step that must be taken in order for the proposed facility to become established." *Id*.

The Agency cites Medical Disposal Services, Inc. v. IEPA, 286 Ill. App. 3d 562, 677 N.E.2d 428 (1st Dist. 1997), for the proposition that local siting approval is "only a condition that is required before permits can be issued." Ag. SJ Mot. at 8. According to the Agency, "while a permit gives the holder the specified rights therein, local siting approval only gives the

specific applicant the right to apply for a permit." *Id*., citing Medical Disposal, 286 Ill. App. 3d at 569, 677 N.E.2d at 433.

The Agency argues that the case law cited by Sutter, Villa Park and Moseid, actually supports the Agency's position. Ag. SJ Mot. at 9. The Agency states that the Villa Park decision relied on the fact that, before the ordinance was adopted, purchasers of platted lots at the cemetery had acquired a vested right in using the premises for burial, a right that could not be divested without due process. The Agency emphasizes that receipt of local siting approval does not result in a vested right, but the Agency also concedes that neither does the issuance of a permit. *Id*. at 9-10, citing Medical Disposal, 286 Ill. App. 3d at 569, 677 N.E.2d at 433 (no vested property right attaches to local siting approval or State permit). The Agency maintains, nevertheless, that Sutter "cannot take the types of steps relied on by the Villa Park court until after a permit to develop the transfer station is issued." *Id*. at 10.

The Agency interprets the Moseid decision as holding that the county ordinance itself actually purported to establish the library at issue. Ag. SJ Mot. at 11. In contrast, the Agency continues, the "wording of the resolution memorializing the approval of local siting does not in any way state that the proposed transfer station is established as of the passage of the resolution." *Id*., citing AR at 261. The Agency concludes that because there is "no evidence in Moseid that any other official permitting or authorization was needed prior to construction and operation of the library," the ordinance in Moseid is "most closely analogous to the development permit sought by the Petitioners here." *Id*.

Lastly, the Agency asserts that its interpretation of Section 22.14 is consistent with Section 39.2 of the Act and that Sutter's interpretation of "establish" would frustrate the purpose of Section 22.14. Ag. SJ Mot. at 12-13. Emphasizing that someone could live beyond the 250-foot area of the Section 39.2(b) notice to property owners, and yet within the 1000-foot area of the Section 22.14 setback, the Agency opines: "A county board would be helpless to deny a siting on the basis that Section 22.14 would be violated, and the Illinois EPA would not be able to deny a permit on that basis since the facility would already be established." *Id*. at 13.

Sutter's Response to the Agency

Sutter notes that the Agency cites to a number of definitions of the word "establish" and then "without analysis of those definitions merely concludes that the Sutter facility was not established." Sutter SJ Resp. at 4. Sutter maintains the definitions quoted by the Agency actually apply to the "actions of the Effingham County Board in hearing, considering, debating and voting to approve local siting approval for the Sutter facility." *Id*. at 5.

Sutter claims that the Agency, for the first time, argues that permit issuance is synonymous with "establishment" under Section 22.14. Sutter states, however, that the Agency's basis for the denial ground at issue was that the facility was not established at the time of permit application submittal. Sutter SJ Resp. at 2. According to Sutter, because the Agency now argues that permit issuance is the critical event that "establishes" a facility, "it must necessarily be true that permit application submittal (the basis of the denial point) is not a valid denial point." *Id*. at 6.

Sutter asserts that the "crux" of the Agency's position is that "local siting approval cannot equate with 'establishment' because it is only a preliminary step in the permitting of a facility." Sutter SJ Resp. at 6. Sutter suggests, however, that if the legislature had wanted the exception to the Section 22.14 setback to apply to facilities that were "permitted" rather than "established" before the arrival of a dwelling, then it would have used the term "permitted." *Id*. Sutter further argues that whether the Agency is "is correct or not that local siting approval is not a dispositive event for permit issuance, such an argument says nothing about the meaning of 'establishment.'" *Id*. at 7.

Sutter states that the relevance of Medical Disposal is "marginal at best." Sutter SJ Resp. at 7. Sutter notes that the court there was not defining or discussing what actions might "establish" a facility. The issue in Medical Disposal was whether local siting approval was applicant specific. According to Sutter, the court's *dicta* that local siting approval is only a condition that is required before a permit can issue does not resolve the issue of what "establishment" means. *Id*. Indeed, continues Sutter, the Medical Disposal court referred to local siting approval as "the most critical stage." *Id*., citing Medical Disposal, 286 Ill. App. 3d at 568.

Sutter takes issue with the Agency's "confusing" argument about consistency between Section 22.14 and Section 39.2. Sutter SJ Resp. at 11. Sutter notes that the hypothetical posed by the Agency assumes that a dwelling within 1000 feet of the proposed facility is established before local siting approval is granted, and that the local government's approval somehow "creates a violation of Section 22.14 in that you now have an established facility (via local siting approval) and also an established dwelling within the setback." *Id*.

First, Sutter points out that the hypothetical does not represent the facts of this case because it is undisputed that the dwelling was not established before Effingham County granted siting approval. Sutter SJ Resp. at 12. Second, argues Sutter, in the Agency's hypothetical, the subsequent action of the local government approving facility siting would not preclude the Agency from denying the permit under Section 22.14. Third, Sutter asserts that the Agency is wrong in concluding that the local government in the hypothetical would have no choice but to approve siting notwithstanding the already-established dwelling: "Pursuant to Section 39.2 of the Act local governments can review a sweeping range of issues in considering a siting application. This range clearly envisions issues related to setbacks and the proximity of dwellings or residences nearby the proposed facility." *Id*., citing Section 39.2 siting criteria (a)(ii), (iii), (v), (vi).

Next, Sutter attacks the Agency's argument about persons within the 1000-foot setback not getting notice of a pending siting application under Section 39.2 because they are beyond the 250-foot notice area. "This notice is effectuated by public notice in newspapers and notice to government representatives (in addition to those within 250 feet of the facility)." Sutter SJ Resp. at 13. Lastly, Sutter maintains that the purpose of Section 22.14 is not frustrated by considering a facility established upon local siting approval. The purpose of Section 22.14 is to "give rights to the first entity established." *Id*. According to Sutter, "it is a question of who was established first" and in the hypothetical, with the pre-existing dwelling, the subsequent establishment of the

facility upon receiving local siting approval does not impact the Agency's application of Section 22.14 in the permitting process. *Id*.

Board Analysis and Ruling

The Agency's permit denial letter states that issuing the requested development permit would violate Section 22.14 because Sutter's "proposed garbage transfer station would be located closer than 1000 feet from a dwelling that was so located before the application was submitted to the Illinois EPA." AR at 2. For purposes of the counter-motions for partial summary judgment then, the issue, as framed in the Agency's denial letter, is whether issuance of Sutter's requested permit would violate Section 22.14 of the Act. This, in turn, requires the Board to review the Agency's interpretation of the term "establish" as used in the setback requirement of Section 22.14.

As a preliminary matter, the Board finds that the Agency denial letter does not state that the transfer station was established upon permit application submittal. The Agency letter simply indicates that the facility was not established at the time of permit application submittal—the letter does not state when a facility is considered established. Contrary to Sutter's suggestions, nothing in the Agency's arguments on summary judgment, that a facility is established upon permit issuance, is inconsistent with the denial letter, nor do the Agency's arguments somehow render invalid the denial ground at issue.

The Board's primary task in construing a statutory provision is to ascertain and give effect to the intent of the legislature. *See* Vicencio v. Lincoln-Way Builders, Inc., 204 Ill. 2d 295, 301, 789 N.E.2d 290, 294 (2003). "The best indication of legislative intent is the statutory language, given its plain and ordinary meaning." Krohe v. City of Bloomington, 204 Ill. 2d 392, 395, 789 N.E.2d 1211, 1212 (2003). If the statutory language is "clear and unambiguous," then the Board "must apply the statute without resort to further aids of statutory construction." *Id*. If, however, the statutory language is ambiguous, the Board "may look to other sources to ascertain the legislature's intent." *Id*.

A statutory term is considered ambiguous if more than one interpretation of the term is reasonable. *See* People v. Holloway, 177 Ill. 2d 1, 8, 682 N.E.2d 59, 63 (1997). The Board then must give the ambiguous term a construction that is reasonable and that will avoid absurd, unjust, or unreasonable results, which the legislature could not have intended. *See* County Collector of DuPage County v. ATI Carriage House, Inc., 187 Ill. 2d 326, 332, 718 N.E.2d 164, 168 (1999). In doing so, the Board may consider the purpose of the law being interpreted. *See* Williams v. Staples, 208 Ill. 2d 480, 487, 804 N.E.2d 489, 493 (2004).

Section 22.14(a) of the Act provides that "[n]o person may establish any pollution control facility for use as a garbage transfer station, which is located . . . within 1000 feet of any dwelling . . . ." 415 ILCS 5/22.14(a) (2002). Section 22.14(a) therefore prohibits the establishment of a garbage transfer station within 1000 feet of any dwelling. However, under subsection (b)(iii) of Section 22.14, the setback requirement of subsection (a) does not apply to any such facility that becomes "nonconforming due to . . . the establishment of a dwelling which

occurs after the establishment of the facility." 415 ILCS 5/22.14(b)(iii) (2002). The Act does not include a definition of "establishment."

Neither party disputes that the mobile home is a dwelling and that it was established after Sutter's waste transfer station received local siting approval. Sutter argues that its facility was established when Effingham County granted siting approval, if not earlier when Sutter provided notice of its intent to file a siting application. The Agency maintains that Sutter's facility was not established at the time Sutter submitted the development permit application, and that the "best proof a facility has been established is the receipt of a permit authorizing development and operation of the facility itself." Ag. SJ Resp. at 4.

Initially, the Board finds that there are no genuine issues of material fact and that the Board may properly rule on this matter through summary judgment. Under the unique circumstances of this case, the Board holds that the waste transfer station was established before the dwelling was established. To rule on the motions for counter-summary judgment, the Board need not decide whether, in every instance, a waste transfer station is established upon notice of a pending siting application or upon the grant of local siting approval. Here, the mobile home did not arrive in the timeframe between Section 39.2 notice and Section 39.2 siting approval. The Board holds that in this case, the waste transfer station was established no later than the time of siting approval. Nor does the Board need to define what constitutes a dwelling in every instance. Here, the parties agree that placement of the mobile home and its occupancy occurred after siting approval.

The Board finds that this interpretation comports with the plain meaning of the word "establish" as used in Section 22.14. At least upon the grant of siting by Effingham County, the waste transfer station was "established" in the ordinary sense of the word. The completed Section 39.2 siting process entails public notice, public hearings, public comment, and an appealable decision on the siting criteria. Those criteria include a demonstration by the applicant that the proposed facility is located "so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property." 415 ILCS 5/39.2(a)(iii) (2002).

To borrow from the dictionary definitions of the word "establish," the transfer station had been, through the local body's "enactment," put "on a firm basis" or "into a favorable position," and "recognized and accepted." *See* Vincencio, 204 Ill. 2d at 301, 789 N.E.2d at 294 (looking to dictionary definition when interpreting statutory term); *see also* Lake County Board of Review v. Property Tax Appeal Board, 119 Ill. 2d 419, 423, 519 N.E.2d 459, 461 (1988) (statutory term not defined in statute must be given its "ordinary and popularly understood meaning" and its "full meaning, not the narrowest meaning of which it is susceptible").

The Board's interpretation is supported by Moseid, a decision on which Sutter relies. As discussed above, the court had to determine when a county library was "established" for tax purposes. Rejecting the position that the library was established only when it became a "functioning institution," the court held:

> This interpretation [functioning institution] requires too narrow and unnatural a meaning for the term, "establish." While there are numerous dictionary definitions of the word, many of them would substantiate the 'establishment' of the library on September 30, 1963 with the enactment of the County ordinance purporting to do so. The execution or implementation of the ordinance occurred somewhat later, but, in our opinion, the library was established by the act of the County Board . . . . Moseid, 103 Ill. App. 2d at 31, 243 N.E.2d at 398.

The Moseid court thus found the action of a county board approving a matter, like Sutter's local siting approval here, to constitute the establishment of the facility. The Agency's speculation about the wording of the ordinance in Moseid is just that. What was critical to the court's holding was that a county ordinance approved the library. That library was no less established if, subsequently, local building permits would have had to issue for the actual construction. Likewise here with respect to Sutter's need for permitting after local siting approval. Nor does the Board find it critical whether or not Effingham County's resolution used to the term "establish"—that would exalt form over substance. What matters is that the resolution approved siting for the transfer station.

Even if the Board were to find any ambiguity in the use of the term "establish" in Section 22.14, finding that a transfer station is not established even through the grant of local siting approval would lead to absurd results that the General Assembly could not have intended. Indeed, the "local site approval process is the most critical stage" for a pollution control facility. Medical Disposal, 286 Ill. App. 3d at 568, 677 N.E.2d at 432. To allow the placement of a dwelling to trump a prior siting grant would not only condone the waste of considerable time and resources in the completed local siting process, but would undermine the critical statutory role of local government in assessing and approving pollution control facility siting applications.

By the time of local siting approval, the Act contemplates that various public notices of the proposed facility have been given, including by newspaper of general circulation in the area, and public hearings have been conducted on the proposal. The Board finds it unreasonable to maintain that the purpose of Section 22.14 is to ensure that someone will be able to place a dwelling within the 1000-foot setback *after* this local siting process has concluded, and thereby preclude the facility. Moreover, though the Board does not find these facts here, it is beyond question that the General Assembly did not enact Section 22.14 to allow for the sham placement of a purported dwelling, *during* the local siting process, simply to thwart a facility.

The Board disagrees with the Agency's conclusion that the mobile home was established first. Because the mobile home was not established before the transfer station was established, Section 22.14 does not prohibit the transfer station, "which became nonconforming due to . . . the establishment of a dwelling which occurs after the establishment of the facility." 415 ILCS 5/22.14(b)(iii) (2002). The Board therefore finds that the Agency erred in denying Sutter's permit application on the ground that permit issuance would result in a violation of Section 22.14. Sutter is entitled to judgment as a matter of law. Accordingly, the Board grants Sutter's motion for partial summary judgment and denies the Agency's motion for partial summary judgment.

CONCLUSION

Under the particular facts of this case, the Board finds that Sutter established its transfer station before the dwelling across the street was established. Because issuance of the development permit for the transfer station would not result in a violation of Section 22.14 of the Act, the Board reverses the Agency on this ground. The Board therefore grants Sutter's motion for partial summary judgment, denies the Agency's motion for partial summary judgment, and directs the parties to hearing on the two grounds for permit denial that remain at issue.

ORDER

1. The Board denies the motion to intervene of the Ruffner family, Mr. Stock, and Stock & Co.

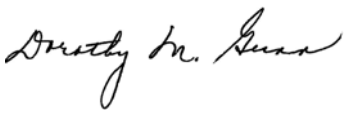
2. The Board grants in part and denies in part the Agency's motion to strike, striking Exhibits 1-7 of, and references to those exhibits in, Sutter's motion for partial summary judgment.

3. The Board grants Sutter's motion for partial summary judgment.

4. The Board denies the Agency's motion for partial summary judgment.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 16, 2004, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board