BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

SUTTER SANITATION, INC. and LAVONNE HAKER,	)	
Petitioners,	)	
v.	)	Case No. PCB 04-187
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	(Permit Appeal - Land)
Respondent.	)	

MOTION FOR PARTIAL SUMMARY JUDGMENT

NOW COMES Petitioners Sutter Sanitation, Inc. and Lavonne Haker (collectively "Sutter") and pursuant to Illinois Pollution Control Board ("PCB") Rule 101.516 and a Hearing Officer schedule, as amended, hereby moves the PCB to grant partial summary judgment in favor of Sutter and against Respondent, Illinois Environmental Protection Agency ("Illinois EPA") in the above captioned matter. In support of this Motion, Sutter states:

I. Introduction

This permit appeal requires the PCB to review the Illinois EPA's interpretation of the term "establish" with respect to the setback requirements of Section 22.14 of the Illinois Environmental Protection Act ("Act"). Section 22.14 prohibits the establishment of a solid waste transfer station if it is located within 1000 feet of a dwelling (415 ILCS 5/22.14(a)). However, Section 22.14 also provides for an exception to this setback requirement if the solid waste transfer station was "established" prior to the establishment of the dwelling (415 ILCS 5/22.14(b)(iii)). It is the Illinois EPA's interpretation of "establishment" that is at issue in this case. The Act does not define

"establishment," nor have any prior PCB opinions.

As discussed more fully below, this case is factually unique. Sutter filed for and obtained local siting approval from Effingham County to develop and operate a solid waste transfer station. Effingham County's decision was affirmed by the PCB as well as the Illinois Appellate Court. However, after Effingham County approved siting but before Sutter submitted its permit application to the Illinois EPA, Stock & Company, a facility objector and property owner, placed a mobile home on its property within the 1000 foot setback requirement contained in Section 22.14 of the Act. Upon review of Sutter's permit application, and in light of the post siting approval placement of a mobile home on property within the 1000 setback, the Illinois EPA denied the permit application on the grounds that granting it would violate Section 22.14 of the Act.

The legal issue to be resolved by the PCB is one of statutory construction. What is the meaning of "establishment" in Section 22.14 of the Act? If the Sutter facility was established prior to the placement of the mobile home on the neighboring property, the Illinois EPA's permit denial on this point is incorrect and must be reversed. It is Sutter's position that its facility became established on or about either of two dates: 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. In either case, both dates precede the placement of the mobile home on the nearby property. This position is clearly supported by the plain and ordinary meaning of the term "establishment," and is clearly a reasonable interpretation of Section 22.14 given the purposes of that Section and the Act as a whole. Conversely, if the Sutter facility was not established until it submitted a permit application to the Illinois EPA, the Illinois EPA's permit denial on this point is correct. However, Sutter believes that an interpretation tying "establishment" to permit submittal

is at odds with the use of the term and will create unjust and unreasonable consequences. As such, Sutter is asking the PCB to reverse the Illinois EPA's denial on this point.

II. Standard of Review

Granting a motion for summary judgment is appropriate where there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. 35 Ill.Adm. Code 101.516(b); E.g. United Disposal of Bradley, Inc. et al. v. Illinois EPA, PCB No. 03-235 (June 17, 2004). In reviewing a motion for summary judgment, the PCB reviews the legal precedent cited by the movants but also the record at issue including pleadings, depositions, admissions, and affidavits. Id. Also, motions for partial summary judgment, like this one, are appropriate. 35 Ill.Adm. Code 101.516(a). Finally, the PCB's review of this matter is governed by the burden of proof applicable to permit appeals. United Disposal of Bradley, Inc. et al., PCB No. 03-235 at 13 (June 17, 2004). In this case, the burden of proof requires Sutter to prove that granting its requested permit will not violate Section 22.14 of the Act. In turn, this requires that the PCB find that the Illinois EPA's determination that a facility becomes "established" for purposes of Section 22.14 upon submittal of a permit application to the Illinois EPA is an incorrect interpretation of Section 22.14. Based upon the facts and arguments below, this is a demonstration that Sutter can make.

III. Statement of Facts

The following facts are taken from the administrative record filed by the Illinois EPA in this case as well as portions of the records in prior PCB proceedings involving the Sutter facility.

The Sutter facility is located on approximately 3.2 acres approximately seven miles south of Altamont, Illinois along County Highway 25 (R. at 166). The Sutter facility is the site of a former commercial grain elevator (Id.). Numerous structures associated with the grain elevator are present

on-site including 3 large buildings; 6 grain elevators (bins); and sheds (R. at 224).

The property across the street from the Sutter facility is owned by "Stock & Company," a holding company for Stock family interests ("Stock")(R. at 246). The area is predominately level agricultural cropland (See attached Exhibit 1, testimony of real estate appraiser James Bitzer, C181 from PCB No. 03-43 and 03-52 (consolidated)(transcript of proceedings before the Effingham County Board)).

Prior to 1970, a house existed on the Stock property across the highway from the Sutter facility. This house was demolished in 1970 (R. at 87).

Beginning sometime between March and April, 2002, but in any case before April 19, 2002, the Sutter facility was used by Sutter to conduct recycling operations, namely as a citizen drop off point for recyclable materials (R. at 284; see attached Exhibit 2, testimony of Tracey Sutter, C190 from PCB No. 03-43 and 03-52 (consolidated)(transcript of proceedings before the Effingham County Board)); see attached Exhibit 3, testimony of Tracey Sutter, Hrng. Tr. at 68, PCB No. 03-43 and 03-52 (consolidated)(transcript of proceedings before the PCB)).

On March 20, 2002, pursuant to Section 39.2 of the Act, Sutter caused to be mailed to numerous property owners and public officials a "Notice of Intent to Request Local Siting Approval from the Effingham County Board for New Waste Transfer Station." This Notice identified the Sutter facility, its specific location and prospective application filing date. Such a Notice was sent and received by Stock & Company (See attached Exhibit 4, C96-C99 from PCB No. 03-43 and 03-52 (consolidated)).

On March 21 and 28, and April 4, 2002, Sutter caused to be published in the Effingham Daily News a "Notice of Intent to Request Local Siting Approval From Effingham County Board For New

Waste Transfer Station" (See attached Exhibit 5, C83 from PCB no. 03-43 and 03-52 (consolidated)). This Notice identified Sutter's facility, its location and prospective application filing date with Effingham County.

On April 19, 2002, Sutter filed its formal application with Effingham County for siting approval of its solid waste transfer station (See attached Exhibit 6, C2-C3 from PCB no. 03-43 and 03-52 (consolidated)).

On August 14, 2002, pursuant to notice, the Effingham County Board conducted a public hearing on the Sutter facility. Stock & Company participated through its registered agent, Duane Stock. (See attached Exhibit 7, C170 from PCB No. 03-43 and 03-52 (consolidated)(transcript of proceedings before the Effingham County Board))

On September 16, 2002, the Effingham County Board approved local siting authority for the Sutter facility (R. at 152-156).

At some point after September 16, 2002, a mobile home was placed on the Stock & Company property across the county highway but within 1000 feet of the Sutter facility (R. at 273). This mobile home may have been placed on the property in October, 2002 (R. at 93).

In October, 2002, Stock & Company and a landfill located in Effingham County filed petitions with the PCB to review Effingham County's September 16, 2002 siting approval (Landfill 33, Ltd. and Stock & Company, LLC, v. Effingham County Board and Sutter Sanitation Services, PCB No. 03-43 and 03-52 (consolidated)). On February 20, 2003, the PCB affirmed Effingham County's decision (See attached Exhibit 8). Stock & Company appealed the decision of the PCB to the Appellate Court (Stock & Company, LLC v. Illinois Pollution Control Board, et al., Fifth District Appellate Court No. 5-03-0099). On May 7, 2004, the Appellate Court affirmed the PCB

in a Rule 23 Order (See attached Exhibit 9).

Since the mobile home was placed on the Stock property sometime after Effingham County's siting approval, it has not been continuously occupied (R. at 237, 238, 239, 240, 241, and 242).

On September 29, 2003, Sutter submitted its formal "Development Permit Application" for the solid waste transfer station to the Illinois EPA (R. at 142 et seq.).

On October 27, 2003, the Illinois Department of Agriculture notified the Illinois EPA that the Sutter facility at the former grain facility would be "consistent with the IEPA's Agricultural Land Preservation Policy and in compliance with the state's Farmland Preservation Act" (R. at 12).

On December 8, 2003, the Illinois EPA received notification from the Illinois Department of Natural Resources via a "Consultation Agency Action Report" that the Sutter facility would not impact any "Natural Areas" or endangered species (R. at 13).

On March 30, 2004, the Sutter permit application was denied. The Illinois EPA identified three denial points. It is the third denial point that is at issue in this Motion. That denial point states in its entirety:

> "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."

(R. 1-2)

On April 26, 2004, Sutter filed its appeal of the Illinois EPA's permit application denial.

IV. Legal Argument

1. Statutory Framework

The issue before the PCB by this Motion is essentially an exercise in statutory construction.

The crux of this exercise, as has been noted, is for the PCB to determine the meaning of the term "establishment" as used in Section 22.14 of the Act. The relevant portions of that Section are as follows:

> "(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,...
>
> ...
>
> (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, 1998. ..."

(415 ILCS 5/22.14).

Sutter believes that the exception identified in subsection (b)(iii) is applicable in this case. Sutter's position is 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. The cardinal rule of statutory construction is that the court, or other tribunal, must ascertain and give effect to the intent of the legislature. Vicencio v. Lincoln-Way Builders, Inc., 204 Ill.2d 295, 301, 273 Ill.Dec. 390 (2003). Unfortunately, the legislature did not define the term "establishment" in the Act. In such a situation, it is the duty of the reviewing tribunal to give the term its "plain and ordinary" meaning. Id. If more than one reasonable interpretation of the term is possible, the term is deemed ambiguous

and it then becomes appropriate to look at factors beyond the statute's plain and ordinary meaning. Krohe v. City of Bloomington, 204 Ill.2d 392, 395, 273 Ill.Dec. 779 (2003). Sutter believes that the term "establishment" as used in its plain and ordinary meaning supports its position that the Illinois EPA's permit denial was inappropriate. However, even if the PCB finds that the term is ambiguous, a review of other factors will also support Sutter's position.

2. Plain and Ordinary Meaning

As noted above, the term "establishment" is not defined in the Act. As such, it should be given its "plain and ordinary meaning." It should also be recognized that such meanings should be given their full, and not a narrow, meaning. Chemed Corp. Inc. v. the State of Illinois, 186 Ill.App.3d 402, 134 Ill.Dec. 313 (4th Dist. 1989)("Moreover, the [undefined] term must be given its full meaning, not the narrowest possible meaning." citing Lake County Board of Review v. Property Tax Appeal Board, 119 Ill.2d 419, 519 N.E. 2d 459 (1988)). In determining what the "plain and ordinary" meaning of a term is it is appropriate to consider current dictionary meanings. See Advincula v. United Blood Services, 176 Ill.2d 1, 233 Ill.Dec. 1 (1996); Vincencio 204 Ill.2d at 301. It is also appropriate to consider common law interpretations. Advincula , 176 Ill.2d at 17. Upon review of both sources of meaning, it is clear that the term "establishment" supports an interpretation that the Sutter facility was established on either: 1) the date of public and private notice of the proposed siting location; or 2) upon County Board approval of the facility location. Both occurred prior to the placement of a mobile home on nearby property.

The Merriam-Webster's dictionary provides a number of definitions for the word "establish." These include:

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 ...

(Merriam-Webster OnLine Dictionary: www.m-w.com: see attached Exhibit 10; (2004)).

A number of these definitions would be appropriate to set the time of the "establishment" of the Sutter facility at the time of siting notice or County Board approval. Definition number one references an act of a body by enactment or agreement. Clearly, the actions of the Effingham County Board in conducting a public hearing, debating, and considering the Sutter facility and then formally approving it by unanimous vote constitute an enactment under this definition. Similarly, the action of the Effingham County Board in approving the facility certainly meets the definition of putting it "on a firm basis," or in a "favorable position." Also, the Effingham County Board's approval certainly is a measure of "full recognition or acceptance" of the facility at the identified location. Even earlier than the County Board action, however, was Sutter's provision of public and private notice of the facility and its open and notorious use of the facility as a recycling center. These actions also provide a measure of full recognition and acceptance of the facility. Clearly, under this dictionary definition, the Sutter facility was established at the time of public notice in March and April, 2002 or alternatively by Effingham County Board approval in September, 2002, but in any event prior to the placement of a mobile home on the property across the street sometime in October, 2001 after Effingham County approval. Under this construction, the Illinois EPA's interpretation is erroneous.

In addition to using a dictionary definition to determine the plain and ordinary meaning of the term "establishment," reference to court decisions interpreting the term are also helpful. At least

one Illinois court has opined on the issue of the meaning of "establishment" in the context of a land use controversy. While it is an older case, it is a pronouncement of the highest court in Illinois and has not been reversed or otherwise questioned. In addition, at least one intermediate court has also defined the term established, albeit not in a land use sense, but in the context of when a municipal library became established. This case as well is still good law in Illinois. Both cases support Sutter's position in this case.

In The Village of Villa Park v. The Wanderer's Rest Cemetery, 316 Ill.226, 1925 Ill. LEXIS 875 (1925), the Illinois Supreme Court was confronted with a similiar question as faced by the Illinois EPA in this matter. Namely, when was a particular facility (a cemetery) established? In September, 1922, an individual entered into a contract for the purchase of the property in question. Also in September, 1922, that individual met with a group of other persons on the property and "dedicated" it for use as a cemetery. Also during that month, the individual retained a firm to make a topographic map of the property. In December, 1922, the nearby village of Villa Park adopted an ordinance setting up setback requirements applicable to cemeteries. In January, 1923, a sign was placed on the property indicating its future use as a cemetery. In February, a corporation was formed to carry out the business of operating the cemetery. In May, 1923, the original real estate contract was consummated and the deed was actually recorded. In August, contracts were entered into with respect to making improvements to the property. In September, the plat of the cemetery was actually recorded in the Recorder's office. Also in September, 1923, the village of Villa Park attempted to enforce its setback requirements. Under these facts, the Supreme Court refused to enforce the setback requirements. The Court determined that the cemetery had been established prior to the Villa Park ordinance and that the village ordinance had no effect. This conclusion was reached even

though no actual burials had taken place. In fact, the Court identified a number of facts which it considered important: the mere purchase of the land for a particular purpose; the "dedication" of the property for use as a cemetery; the placement of a sign on the property; and the expenditure of funds in furtherance of the enterprise. In light of the Villa Park case, the Supreme Court has clearly defined "establish" to include a variety of actions equating with public recognition of a particular land use. Accordingly, the PCB should employ the same analysis as adopted by the Supreme Court. Indeed, the same set of general facts are present with respect to the Sutter facility. Sutter had leased the property for its facility, held an option to purchase (and has since purchased it) well before the placement of a mobile home across the highway. The Sutter facility was clearly "dedicated" as such by the public and private notice of the siting application as well as the use of the property as a recycling center a full seven months before the mobile home was placed on the property across the highway. Such "dedication" was also made crystal clear by the proceedings of the Effingham County Board in holding a public hearing and approving the facility location prior to the placement of the mobile home. In addition, Sutter has expended considerable funds in furtherance of the development of the property including its purchase but also engineering and attorney fees prior to the placement of the mobile home. These actions, as explained by the Supreme Court in the Villa Park case, clearly fall within a plain and ordinary definition of "establish." As such, the PCB should determine that the Sutter facility was established at the time of public and private notice of the facility was given or, at a minimum, when the facility was approved by the Effingham County Board. Both of these events preceded the placement of the mobile home on the nearby property.

Another more recent case from the Illinois Appellate Court also provides a plain and ordinary definition of "establish" that supports Sutters position in this case. In Moseid v. McDonough, 103

Ill.App.2d 23, 1968 Ill.App.LEXIS 1393 (1st Dist. 1968), the Court was called upon to determine when a county law library was "established." (The issue was important with respect to the collection of certain taxes.) The plaintiffs argued that the library was only established when it became a "functioning institution." The Court, however, chose to define "established" otherwise:

> "This interpretation [functioning institution] requires too narrow and unnatural a meaning of 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.

Here too a court has given us the plain and ordinary meaning of the word establish. That meaning specifically includes the action of a county board approving a matter. See also, Martinson v. Kreski, 17 Mich.App. 679, 170 N.W. 2d 257 (Mich. App. 1969). As applied to the Sutter matter, the facts and holding of the Moseid case clearly indicate that the Sutter facility was established, at a minimum, on the date the Effingham County Board approved siting: September 16, 2002. This was well before the mobile home was placed on the property across the highway.

In light of the Villa Park and Moseid cases, Illinois courts have determined the plain and ordinary meaning of the term establish. That ordinary and plain meaning is entirely consistent with and supports a finding that the Sutter facility was established at the time the public and private notice of the facility was made, or at a minimum, when the County Board approved the location of the facility. For these reasons, the Illinois EPA's determination that the Sutter facility was not established until Sutter submitted a permit application is clearly erroneous and cannot serve as the

basis of a permit denial. Accordingly, granting Sutter's permit application will not result in the violation of the Act.

2. Ambiguity

If, despite the analysis above, the PCB believes that the term "establishment" can be reasonably interpreted in two different ways, it is therefore considered ambiguous. E.g. People v. Holloway, 177 Ill.2d 1, 224 Ill.Dec. 498 (1997)("When a statute can be reasonably interpreted in two different ways, it is ambiguous."). In such a case where a court is confronted with an ambiguous term it is appropriate to look beyond the statutes plain meaning. Id. In fact, where a statute is determined to be ambiguous, it is a tribunal's duty to give the ambiguous term a construction that is reasonable and that will not produce an absurd, unjust or unreasonable result which the legislature could not have intended. County Collector of DuPage County v. ATI Carriage House, Inc., 187 Ill.2d 326, 240 Ill.Dec. 683 (1999)("When a statute is ambiguous, it will be given a construction that is reasonable and that will not produce absurd, unjust or unreasonable results, which the legislature could not have intended."). Aiding in this construction is consideration of the reason and necessity of the law and the purposes to be achieved by it. Williams v. Staples, 208 Ill.2d 480, 281 Ill.Dec. 524 (2004).

A. Reasonableness

As Sutter proposes, defining "establishment" of a facility as used in Section 22.14 of the Act at the time of public and private notice of the siting application or, as an alternative, at the time of final action by the local governing body is entirely reasonable.

First, recognizing the "establishment" of a facility at the time of public and private notice of siting or upon local government approval is reasonable because, as noted above, it is consistent with

the plain and ordinary use of the term as defined by reference materials (the dictionary) and the courts.

Second, recognizing the "establishment" of a facility at the time of public and private notice of siting or upon local government approval is reasonable because it is consistent with the language used in Section 22.14. It is important to note that in Section 22.14(b), subsections (i) and (ii), the statute references "existing" facilities. 415 ILCS 5/22.14(b). Subsection (v) of Section 22.14 discusses facilities in "operation." 415 ILCS 5/22.14(b)(v). Clearly then, subsection (iii)'s use of the term "establishment" must be different than an "existing" or an "operating" facility. Raintree Homes, Inc. v. The Village of Long Grove, 209 Ill.2d 248, 282 Ill.Dec. 815 (2004)("We [the Illinois Supreme Court] must construe the statute so that "each word, clause or sentence is given reasonable meaning and not deemed superfluous or void."). It 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." It is therefore entirely reasonable to consider that "establishment" occurs at the time of public and private notice of siting or upon local government approval. Both of these events are much more significant than the date identified by the Illinois EPA, the mere filing of a permit application. Unlike the filing of a permit application, much broader notice requirements are necessary for the public and private notice associated with siting. Furthermore, and unlike the submittal of a permit application, tying "establishment" to local government approval recognizes a firm, and fully reviewable, decision by a third party which has determined the rights of the parties. No such significance is attached to the mere submittal of a permit application to the Illinois EPA.

Third, recognizing the "establishment" of a facility at the time of public and private notice of siting or upon local government approval is reasonable because it is consistent with the purposes

of Section 22.14. In relevant part, the purpose of Section 22.14 is to protect dwellings (and more appropriately the occupants of those dwellings) from a facility that chooses to locate nearby. Defining the "establishment" of a facility at the time of public and private notice of siting or upon local government approval achieves the protection of those dwellings. Under this construction, the only dwellings not protected are those that are not in existence on the date of public and private notice of siting or local government approval but are so placed after their owners have necessarily obtained knowledge (through public and private notice) of the facility. Under such circumstances, it is the dwelling owner who has made a choice to locate his or her dwelling nearby the facility. Clearly, the purposes of Section 22.14 are not served by this scenario in which it is the dwelling owner who has chosen, and in effect assumed the risk, to locate the dwelling nearby to a facility. The facts of this case are illustrative. The nearby property owner Stock had full knowledge of the Sutter facility. Stock received notice of the siting proposal, received notice of the public hearing, participated at the public hearing, and yet, after the County Board approved the facility, placed a mobile home on the property. It is Stock that has chosen to place a mobile home on property that he knows to be nearby the facility. It cannot be reasonably considered that the purpose of Section 22.14 was to protect and sanction such actions.

Another important, but broader, purpose of the Act must also be considered. That purpose is embodied in Section 39.2 of the Act wherein local governments were given the right and duty to review, consider and conclusively determine the appropriateness of facility location. In this case those rights and duties were given to the Effingham County Board. Those rights and duties were appropriately carried out by the Effingham County Board via a public hearing and public comment period as required by the Act. The County Board specifically considered such factors as site

suitability, the County's need for the facility, facility design, facility impact on neighboring property, and whether the facility would be protective of the public. See 415 ILCS 5/39.2(a). After considering these factors, the County Board unanimously approved the facility. The actions of the County Board were questioned by Stock, but nevertheless approved on appeal by the PCB and the Appellate Court. To allow the Illinois EPA to consider, in effect, compliance with Section 22.14 based upon the date of permit submittal reasserts the Illinois EPA back into the siting process and trumps the fully approved decision of the local government body charged with determining site suitability. Both results are in clear derogation of Section 39.2 of the Act.

B. Absurd, Unjust, Unreasonable Results

In contrast to the reasonableness of defining "establishment" to mean either the public and private notice of the siting or local government approval, the Illinois EPA's position that a facility is not established until a permit application is submitted is not reasonable, and will indeed result in absurd, unjust and unreasonable results.

First, tying the determination of "establishment" to the date a facility submits a permit application to the Illinois EPA 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. This is unreasonable and unjust, if not absurd, in that Section 22.14 can not be interpreted to sanction such actions. Such an interpretation would allow facility opponents to by-pass any participation at all in the siting process and simply show up with a mobile home prior to permit application submittal. It would, in effect, 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.

Second, tying the determination of "establishment" to the date a facility submits a permit application to the Illinois EPA is without any practical significance and therefore unreasonable. No public notice of the permit submittal is required (although certain government officials are required to be notified). No action by a local government is sought or given. Not even the Illinois EPA is compelled to do anything at the time of submittal (although it does start the mandatory review period). It is a date that has no significance to the public, or any local government or even the Illinois EPA. Stated more specifically in reference to defining "establishment," there is nothing about submitting a permit application that has any practical bearing on resolving or determining when a facility is established. The public is already aware of the facility through the notice process at the time the siting application is filed. Neighboring landowners are already aware of the facility through the private notice process at the time the siting application is filed. Public hearings on the facility are made know through public media. A public hearing has already been conducted by the local government. Pubic comments have been solicited and received. The local government has reviewed, considered and debated the facility and approved it. Finally, the applicant itself has already expended significant resources on the facility. An interpretation of Section 22.14 of the Act that the submittal of permit application somehow establishes a facility where it was not established before by virtue of the actions noted above is simply unreasonable, unjust and absurd.

Third, tying the "establishment" of a facility to the submittal of a permit application would only serve to create continual "races" to the Illinois EPA in order to get a facility established. Assuming that a mobile home was not placed upon nearby property at any time up until local government approval, upon that approval it would be a race to see who could either: 1) place a mobile home on nearby property to defeat the facility; or 2) get a permit application on file to

establish the facility. Such actions would inevitably create factual disputes that the Illinois EPA is not in a position to conclusively decide, but which could only be resolved by an inevitable appeal to the PCB. Also, it should be recognized that in such a scenario, the facility is always at the disadvantage and subject to the whim of the nearby property owner. It is clear that a facility can not go forward without local siting approval, and must demonstrate that local siting approval before submitting a complete permit application. Accordingly, even under the best of circumstances a facility will never be able to submit a complete permit application until after local siting is approved. In contrast to this, the nearby property owner can sit back and allow the facility to expend funds and time on a siting application and public hearing process and then move a mobile home onto the property at any time it is convenient for the owner. Yet another scenario would contemplate the nearby owner (perhaps all owners within the 1000 foot setback?) seeking compensation in exchange for not placing a mobile home on his property. Clearly, these possibilities were not reasonably intended or contemplated by the legislature in enacting Section 22.14. The Illinois EPA's interpretation of Section 22.14 that would allow such possibilities is therefore unreasonable.

Fourth, and as touched upon above, tying the "establishment" of a facility to the submittal of a permit application would defeat and void the role of local governments in the siting process established by the legislature. Allowing facility opponents to defeat a facility by bringing in a mobile home before or after a local government has held hearings or publically voted on the facility but prior to permit submittal would make all those actions of the local government moot. This case is illustrative of such a situation. By interpreting Section 22.14 such that the Sutter facility can not now go forward, the Illinois EPA has rendered meaningless the time, effort and resources expended by the Effingham County Board. By its interpretation, the Illinois EPA has effectively written out Effingham County from exercising its statutory right to determine the suitability of the Sutter facility.

Fifth, tying the "establishment" of a facility to permit application submittal (or any date subsequent to public and private notice of siting) would allow facility opponents to place a mobile home on nearby property and defeat a facility regardless of local government approval. To defeat this reality, the only way a facility could defeat this situation would be to buy-up enough property around the proposed facility to accommodate the 1000 foot setback requirement. Such an additional financial burden would be possible only for the largest waste companies. As a consequence, smaller waste companies (such as Sutter) could never grow and expand. This failure would in turn have negative effects on local (and regional) competition.

Sixth, tying the "establishment" of a facility to permit submittal is unjust because it fails to consider, and allows the loss of, the investment made by applicants in attempting to obtain local siting approval. Such investment includes: the cost of the property; 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. If, after this investment has been made, and local siting approved, local siting can be defeated by the placement of a mobile home on nearby property all of this investment will be lost. It is simply unjust to allow this occur. The Sutter matter is a case in point. Here, Sutter has expended significant sums in achieving the public approval of the location of the facility (all undertaken with the full knowledge and awareness of Stock) including but not limited to PCB and Appellate Court review and then Stock places a mobile home on the nearby property. This is clearly unjust to Sutter. As noted above, this situation is also unjust to the local government that has expended its time and resources in holding public hearings and openly considering, debating and approving the facility as well as the PCB and Appellate Court that has spent their resources (all at the behest of Stock) on reviewing the appropriateness of Effingham County's approval.

All of these arguments, whether relying upon the plain and ordinary meaning of the term

"establishment" or considering the purposes and consequences of the clearly demonstrate that the Illinois EPA's determination that a facility becomes established for purposes of Section 22.14 upon permit application can not be supported. Conversely, those arguments clearly demonstrate that a facility becomes established at the time public and private notice of the filing of a siting application is made or upon approval of siting by the appropriate local government. Because the Sutter facility was established at both of these times, it has met its burden of proof by demonstrating that granting its permit application will not violate Section 22.14 of the Act.

V. Conclusion

WHEREFORE Petitioners Sutter Sanitation and LaVonne Haker respectfully request that this Board grant this Motion for Partial Summary Judgment and find that the Illinois Environmental Protection Agency's denial of Sutter's permit application on the basis of a violation of Section 22.14 of the Act be reversed.

SUTTER SANITATION, INC., and
LAVONNE HAKER, Petitioners

By: _____
One Of Their Attorneys

Sorling, Northrup, Hanna
Cullen & Cochran, Ltd.
Charles J. Northrup, of Counsel
Suite 800 Illinois Building
P.O. Box 5131
Springfield, IL 62705
Telephone: 217.544.1144

PROOF OF SERVICE

The undersigned hereby certifies that an original and ten copies of the foregoing document was served by placing same in a sealed envelope addressed:

Dorothy M Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Il. 60601

and copies to:

John J. Kim, Attorney
Renee Cipriano, Director
Illinois Environmental Protection Agency
Division of Legal Counsel
1021 N. Grand Avenue, East
Springfield, Il. 62794-9276

Ms. Carol Sudman
Hearing Office
Illinois Pollution Control Board
1021 North Grand Ave. East
Post Office Box 19276
Springfield, IL 62794-9274

and by depositing same in the United States mail in Springfield, Illinois, on the 30th day of July, 2004, with postage fully prepaid.

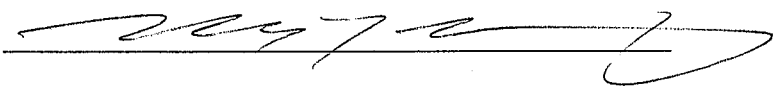

Exhibit 1

Sanitation in this case.

A. Yes, sir.

Q. Okay. What -- what is the character of the surrounding land?

A. Predominantly level agricultural cropland, and the far distance from the existing proposed -- to the proposed site.

Q. Okay. And -- excuse me -- and you're also familiar with the prior use of this particular piece of property, right?

A. It appears to be a grain elevator for the prior use, yes.

Q. Commercial agricultural use previously?

A. Yes, sir.

Q. Are you familiar -- or aware of any significant expansion or urbanization going on in that area now?

A. I'm not aware of any, nor were there any signs on my -- on my last inspection.

Q. And with respect to the other transfer facilities, you've mentioned specifically the Shelby County one that you were involved in and have seen, are you aware of any adverse impact on the operation of such facilities on the surrounding property?

C-181

Exhibit 2

thing.

MR. GOBCZYNSKI: Sure.

EXAMINATION

BY MR. ROLF:

Q. There was no fine or any other citation with regard to that, was there?

A. No. They told me when they were there that if there would be, that it would be within 90 days if I did not meet compliance.

Q. Okay. Are you planning on running another operation out there other than the transfer facility?

A. We currently already do. We handle the -- the recycling drop-off that was once implemented in Altamont. The equity done it. The equity can no longer house the recycling, so in doing this we do have the means and the -- the buildings to be able to handle the recycling as a drop-off, so we are currently operating that right now, wish to continue operating that along with our transfer site.

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

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

C 190

Exhibit 3

A. [Witness nodded affirmatively.]

Q. Okay. When did you open that recycling facility?

A. We opened it -- let's see -- March of 2002.

Q. So sometime between March of 2002 and April of 2002, the committee came and visited you?

A. They did.

Q. Who all was on that committee?

A. Who was on that committee? Or who all was there that day?

Q. Who all was there that day?

A. Carolyn Willenborg, Charlie Velker, Karen Lucthfeld, and I believe his name is Bob Reardon.

Q. Okay. And at the time, you were in the process of developing your siting application, correct?

A. Yes, I would have been.

Q. And so you knew at that time that you intended to use that building as a transfer station, correct?

A. Not that building.

Q. Not which building?

A. The one you're asking me about in that lean-to. It ain't the same building.

Q. But the building there that's on that site,

Exhibit 4

Is your RETURN ADDRESS completed on the reverse side?

SENDER:
- Complete items 1 and/or additional services.
- Complete items 3, 4a, and 4b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "*Return Receipt Requested*" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wi receive the following services (for an extra fee):
1. ☐ Addressee's Address
2. ☒ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:
Duane Stock, Registered Agent
Stock & Co., LLC
205 South Washington
Taylorville, IL 62568

4a. Article Number

4b. Service Type
- ☒ Registered
- ☐ Certified
- ☐ Express Mail
- ☐ Insured
- ☒ Return Receipt for Merchandise
- ☐ COD

7. Date of Delivery
3-21-02

5. Received By: *(Print Name)*
Duane Stock

6. Signature: *(Addressee or Agent)*
X Duane Stock

8. Addressee's Address *(Only if requested and fee is paid)*

Thank you for using Return Receipt Service.

PS Form **3811**, December 1994 Domestic Return Receipt

C96

Date: March 20, 2002

To: Duane Stock, Registered Agent
Stock & Co., L.L.C.
205 South Washington Street
Taylorville, IL 62568-0151

From: Sutter Sanitation Service, Inc.

Re: Notice of Intent to Request Local Siting Approval from the Effingham County Board for New Waste Transfer Station

NOTICE is hereby given that Sutter Sanitation Service, Inc., an Illinois corporation, intends to file with the Effingham County Board a request for local siting approval for a new waste transfer station to be located on the real property legally described in Attachment A, commonly known as 2184 North 300th Street, Mason, IL 62443. The following information is provided pursuant to Section 39.2(b) of the Illinois Environmental Protection Act, 415 ILCS 5/39.2(b):

Name and Address of Applicant:	Sutter Sanitation Service, Inc. 105 East Main P.O. Box 589 Shumway, IL 62461
Location of Proposed Site:	2184 North 300th Street Mason, IL 62443
Nature and Size of Development:	Sutter Sanitation proposes to develop and operate a waste transfer station (for non-hazardous solid waste only) on approximately 3.23 acres at this location.
Nature of Activity Proposed:	The property will be used for purposes of transferring waste from refuse collection vehicles to transfer trailers, which will then be transferred to a solid waste landfill for waste disposal only as approved by the Illinois Environmental Protection Agency and other regulatory agencies as authorized by statute. No hazardous waste, as defined by state and federal law, will be accepted. No waste disposal will take place at this location.

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Probable Life of Proposed Activity:	The probable life of the waste transfer station will be in excess of 20 years.
Date of Submittal:	The request for site approval will be submitted to the Effingham County Board on April 19, 2002.
Right to Review and Comment:	The request for site approval will conform to the requirements of the Illinois Environmental Protection Act and will include: (i) the substance of the Applicant's proposal and (ii) documents in support of the Applicant's request. The application and documents so filed will be available for inspection at the office of the Effingham County Board and may be copied upon payment of the actual cost of reproduction. Any person may file written comments with the Effingham County Board concerning the appropriateness of the proposed site for its intended purpose. The Effingham County Board shall hold at least one public hearing on the request and shall consider any comment received or postmarked not later than 30 days after the date of the last public hearing.

ATTACHMENT A

Legal Description of Real Property Commonly Known as 2184 North 300th Street, Mason, IL 62443

A part of the West Half of the Southwest Quarter of Section 22, Township 6 North, Range 4 East of the Third Principal Meridian, Effingham County, Illinois, and being more particularly described as follows:

Commencing at an iron pin (set) at the Southwest corner of the West Half of the Southwest Quarter of Section 22, Township 6 North, Range 4 East of the Third Principal Meridian, thence North 00 degrees 00 minutes 00 seconds East (assumed bearing), a distance of 874.64 feet to an iron pin (set); thence North 90 degrees 00 minutes 00 seconds East, a distance of 40.0 feet to an iron pin (set) on the East right-of-way line of S.A. Route 25-Sec. 101, being the point of beginning; thence North 00 degrees 00 minutes 00 seconds East, a distance of 548.0 feet to an iron pin (set); thence North 90 degrees 00 minutes 00 seconds East, a distance of 257.0 feet to an iron pin (set); thence South 00 degrees 00 minutes 00 seconds West, a distance of 548.0 feet to an iron pin (set); thence South 90 degrees 00 minutes 00 seconds West, a distance of 257.0 feet to the point of beginning; situated in the County of Effingham and State of Illinois.

Exhibit 5

NOTICE OF INTENT TO REQUEST LOCAL SITING APPROVAL FROM EFFINGHAM COUNTY BOARD FOR NEW WASTE TRANSFER STATION

NOTICE IS HEREBY GIVEN that Sutter Sanitation Service, Inc., an Illinois corporation, intends to file with the Effingham County Board, a request for local siting approval for a new waste transfer station. The following information is provided pursuant to Section 39.2(b) of the Illinois Environmental Protection Act, 415 ILCS 5/39.2(b):

Name and Address of Applicant:
Sutter Sanitation Service, Inc.
105 East Main
P.O. Box 589
Shumway, IL 62461

Location of Proposed Site:
2184 North 300th Street
Mason, IL 62443

Nature and Size of Development:
Sutter Sanitation proposes to develop and operate a waste transfer station (for non-hazardous solid waste only) on approximately 3.23 acres at this location.

Nature of Activity Proposed:
The property will be used for purposes of transferring waste from refuse collection vehicles to transfer trailers, which will then be transferred to a solid waste landfill for waste disposal only as approved by the Illinois Environmental Protection Agency and other regulatory agencies as authorized by statute. No hazardous waste, as defined by state and federal law, will be accepted. No waste disposal will take place at this location.

Probable Life of Proposed Activity:
The probable life of the waste transfer station will be in excess of 20 years.

Date of Submittal:
The request for site approval will be submitted to the Effingham County Board on April 19, 2002.

Right to Review and Comment:
The request for site approval will conform to the requirements of the Illinois Environmental Protection Act and will include: (i) the substance of the Applicant's proposal and (ii) documents in support of the Applicant's request. The application and documents so filed will be available for inspection at the office of the Effingham County Board and may be copied upon payment of the actual cost of reproduction. Any person may file written comments with the Effingham County Board concerning the appropriateness of the proposed site for its intended purpose. The Effingham County Board shall hold at least one public hearing on the request and shall consider any comment received or postmarked not later than 30 days after the date of the last public hearing.

Legal #1114 3/21-28-4/4/02

C 83

Certificate Of Publication

STATE OF ILLINOIS, EFFINGHAM COUNTY, SS.

March 25, 2002 Effingham, Illinois

I, Stephen R. Raymond do certify that I am the authorized agent and the publisher of the Effingham Daily News, a secular newspaper of general circulation published daily, except Sunday and legal holidays in Effingham County, City of Effingham and the State of Illinois and that I am authorized to make this certificate for the said Newspaper that the notice or advertisement of

Intent to Request Local Siting Approval

relating to the matter of

New Waste Transfer Station

A true copy of which is hereto annexed, has been printed and published in the said Effingham Daily News as follows:

the first on the 21st day of March, 2002=

the second on the 28th day of March, 2002

the third on the 4th day of April, 2002

and that the said newspaper was regularly published for a period of one year prior to the date of the first publication of this notice.

I Further certify that the face of the type in which each publication of the said notice was made the same as the body type and the classified advertising in the issue of the said newspaper in which such publication was made.

I Further certify that said newspaper is a newspaper as defined in 'An Act to revise the law in relation to notices' as ammended by Act approved July 17, 1959.—Ill. Revised Statues, Chap. 100, Para. 1-10.

Effingham Daily News

SR

as agent of the Effingham Daily News

Exhibit 6

HR

APPLICATION FOR LOCAL SITING APPROVAL FOR PROPOSED SOLID WASTE TRANSFER STATION EFFINGHAM COUNTY, ILLINOIS

Prepared for:
Effingham County Board
and
Sutter Sanitation Services

April 19, 2002

C2

HURST-ROSCHE ENGINEERS INC.
1400 E. TREMONT ST. P.O. BOX 130 HILLSBORO, IL 62049 217/532-3959

APRIL 19, 2002

RECEIVED FROM SUTTER SANITATION SERVICES

APPLICATION FOR LOCAL SITING APPROVAL FOR PROPOSED SOLID WASTE TRANSFER STATION EFFINGHAM COUNTY, ILLINOIS PREPARED FOR: Effingham County Board and Sutter Sanitation Services April 19, 2002

ROBERT L. BEHRMAN
EFFINGHAM COUNTY CLERK

DATE: 4/19/02

SIGNED: Robert L Behrman

C3

Exhibit 7

MR. HEDINGER: Okay. That's all I have. Thank you.

MR. GOBCZYNSKI: Anyone else have a question?

MR. STOCK: Dwayne Stock, I represent the land owner to the west of the supposed site. My question has to deal with your comment about hazardous waste, that they will not accept any there. What happens when some hazardous waste does appear there? It gets picked up by accident or whatever you want to call it.

THE WITNESS: Sure. First of all, the facility is required -- if you'll refer to Criteria 2. I realize you don't have it in front of you. Let me just summarize. The facility is required to inspect loads that are received at the site on a regular basis. Normally that would be on a daily basis. They would take a load. It gets dumped onto the -- onto the tipping floor. It's spread out, and they visually inspect that load. If there's any items of concern, obviously the driver's questioned. If there's any items that can't be dealt with, load it back up on the truck, send them on their way. So in reality the -- the onus is put on the site to inspect loads that come into the

Exhibit 8

ILLINOIS POLLUTION CONTROL BOARD
February 20, 2003

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

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

STEPHEN F. HEDINGER OF HEDINGER LAW OFFICE APPEARED ON BEHALF OF LANDFILL 33, LTD.;

CHRISTINE G. ZEMAN OF HODGE, DWYER & ZEMAN APPEARED ON BEHALF OF STOCK & CO.;

EDWARD DEETERS OF THE EFFINGHAM COUNTY STATE'S ATTORNEY'S OFFICE APPEARED ON BEHALF OF THE EFFINGHAM COUNTY BOARD; and

CHARLES H. NORTHRUP AND DAVID A. ROLF OF SORLING, NORTHRUP, HANNA, CULLEN AND COCHRAN, LTD. APPEARED ON BEHALF OF SUTTER SANITATION SERVICES.

OPINION AND ORDER OF THE BOARD (by T.E. Johnson):

On October 10, 2002, Landfill 33, Ltd. (Landfill 33) filed a petition requesting the Board to review a September 19, 2002 decision of Effingham County Board (County Board) that granted Sutter Sanitation Services' (Sutter) application to site a solid waste transfer station in an unincorporated area of Effingham County. On October 21, 2002, Stock & Co. (Stock) filed a

petition requesting the Board review the same County Board decision, and Landfill 33 filed an amended petition.

The petitioners allege that (1) the County Board lacked jurisdiction over the siting application; (2) the procedures followed during the landfill siting public hearing were fundamentally unfair; and (3) that Sutter failed to satisfy six of the nine criteria listed in Section 39.2 of the Environmental Protection Act (Act). 415 ILCS 5/40.1 (2002).

After considering the evidence and arguments before it, the Board finds that the County Board had jurisdiction and followed fundamentally fair procedures. The Board finds that the County Board correctly determined that the landfill application satisfied the standards in Section 39.2(a) (i), (ii), (iii), (v) and (viii). 415 ILCS 5/39.2(a) (i), (ii), (iii), (v), (viii) (2002).

PROCEDURAL BACKGROUND

On November 7, 2002, the Board accepted Stock's petition and Landfill 33's amended petition and consolidated them for hearing. On December 19, 2002, a hearing in this matter was held. Sutter and Landfill 33 each presented witnesses. On December 30, 2002, Board hearing officer Bradley Halloran issued a hearing report that directed simultaneous opening briefs to be filed and served on or before January 10, 2003 and simultaneous reply briefs, if any, to be filed and served on or before January 17, 2003. Public comment was due to be filed on or before January 3, 2003.

Eight public comments were received. The parties filed briefs according to the set schedule.

REVIEW OF LOCAL SITING DECISIONS

Under Illinois law, local units of government act as siting authorities that are required to approve or disapprove requests for siting of new pollution control facilities, including new landfills. The process is governed by Section 39.2 of the Act. 415 ILCS 5/39.2 (2002). In addition, Illinois law provides that siting decisions made by the local siting authorities are appealable to this Board. The appeal process is governed by Section 40.1 of the Act. 415 ILCS 5/40.1 (2002).

Section 39.2(a) provides that the local siting authority, in this case the Effingham County Board, is to consider as many as nine criteria when reviewing an application for siting approval. 415 ILCS 5/39.2(a) (2002). Section 39.2(g) of the Act provides that the siting approval procedures, criteria, and appeal procedures provided for in Section 39.2 are the exclusive siting procedures for new pollution control facilities. However, the local siting authority may develop its own siting procedures, if those procedures are consistent with the Act and supplement, rather than supplant, those requirements. *See* Waste Management of Illinois v. PCB, 175 Ill. App. 3d 1023, 1036, 530 N.E.2d 682, 692-93 (2d Dist. 1988). Only if the local body finds that the applicant has proven by a preponderance of the evidence that all applicable criteria have been met can siting approval be granted. Hediger v. D & L Landfill, Inc., PCB 90-163, slip op. at 5 (Dec. 20, 1990).

When reviewing a local decision on the nine statutory criteria, this Board must determine whether the local decision is against the manifest weight of the evidence. McLean County Disposal, Inc. v. County of McLean, 207 Ill. App. 3d 352, 566 N.E.2d 26 (4th Dist. 1991); Waste Management of Illinois, Inc. v. PCB, 160 Ill. App. 3d 434, 513 N.E.2d 592 (2nd Dist. 1987); E & E Hauling, Inc. v. PCB, 116 Ill. App. 3d 586, 451 N.E.2d 555 (2nd Dist. 1983), aff'd in part 107 Ill.2d 33, 481 N.E.2d 664 (1985). 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. CDT Landfill Corporation v. City of Joliet, PCB 98-60, slip op. at 4 (Mar 5, 1998), *citing* Harris v. Day, 115 Ill. App. 3d 762, 451 N.E.2d 262, 265 (4th Dist. 1983).

This Board, on review, may not re-weigh the evidence on the nine criteria. Where there is conflicting evidence, the Board is not free to reverse merely because the lower tribunal credits one group of witnesses and does not credit the other. Fairview Area Citizens Taskforce v. PCB, 198 Ill. App. 3d 541, 550, 555 N.E.2d 1178, 1184 (3d Dist. 1990); Tate v. PCB, 188 Ill. App. 3d 994, 1022, 544 N.E.2d 1176, 1195 (4th Dist. 1989); Waste Management of Illinois, Inc. v. PCB, 187 Ill. App. 3d 79, 82, 543 N.E.2d 505, 507 (2nd Dist. 1989). Because the local government could have drawn different inferences and conclusions from conflicting testimony is not a basis for this Board to reverse the local government's findings. File v. D & L Landfill, Inc., PCB 90-94, (Aug. 30, 1990), *aff'd*, 219 Ill. App. 3d 897, 579 N.E.2d 1228 (5th Dist. 1991).

In addition to reviewing the local authority's decision on the nine criteria, the Board is required under Section 40.1 of the Act to determine whether the local proceeding was fundamentally fair. In E & E Hauling, Inc. v. PCB, the appellate court found that although citizens before a local decision maker are not entitled to a fair hearing by constitutional guarantees of due process, procedures at the local level must comport with due process standards of fundamental fairness. E & E Hauling, Inc. v. PCB, 116 Ill. App. 3d at 596, 451 N.E.2d at 564; *see also* Industrial Fuels & Resources v. PCB, 227 Ill. App. 3d 533, 592 N.E.2d 148 (4th Dist. 1992); Tate v. PCB, 188 Ill. App. 3d at 1019, 544 N.E.2d at 1193. Due process requirements are determined by balancing the weight of the individual's interest against society's interest in effective and efficient governmental operation. Waste Management of Illinois v. PCB, 175 Ill. App. 3d 1023, 1037, 530 N.E.2d 682, 693 (2nd Dist. 1988). The manner in which the hearing is conducted, the opportunity to be heard, the existence of *ex parte* contacts, prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid elements in assessing fundamental fairness. Hediger v. D & L Landfill, Inc.,PCB 90-163, slip op. at 5 (Dec. 20, 1990).

STATUTORY BACKGROUND

Section 40.1(b) of the Act provides:

> If the . . . governing body of the municipality . . . grants approval under Section 39.2 of this Act, a third party other than the applicant who participated in the public hearing conducted by the . . . governing body of the municipality may, within 35 days after the date on which the local siting authority granted siting approval, petition the Board for a hearing to contest the approval of . . . the governing body of the municipality. 415 ILCS 5/40.1(b) (2002).

According to Section 39.2(b) of the Act, no later than 14 days before requesting site approval from the County Board, Sutter was required to "cause written notice of such request to be served either in person or by registered mail, return receipt requested," on owners of property within 250 feet of the site boundaries. 415 ILCS 5/39.2(b) (2002).

Before the County Board could approve Sutter's application to site a transfer station within Effingham County, Sutter was required to submit sufficient details describing the proposed facility to demonstrate compliance with nine criterion provided in section 39.2(a) of the Act. 415 ILCS 5/39.2(a) (2002). Landfill 33 and Stock contend that the County Board's conclusion that Sutter demonstrated compliance with criterion (i), (ii), (iii), (v), (vi), and (viii) was against the manifest weight of the evidence. Those criterion require:

> (i) the facility is necessary to accommodate the waste needs of the area it is intended to serve;
>
> (ii) the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;
>
> (iii) the 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;
>
> * * *
>
> (v) the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents;
>
> (vi) the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows;
>
> * * *
>
> (viii) 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. 415 ILCS 5/39.2(a) (i), (ii), (iii), (v), (vi) (viii) (2002).

PRELIMINARY MATTERS

The parties raised a number issues at hearing and in their post-hearing briefs that require the Board's consideration. The Board will address each preliminary matter in turn.

Landfill 33's Offer of Proof

At the Board hearing, Sutter objected to Landfill 33's attempt to call Tracy Sutter as a witness because Landfill 33 did not indicate in its response to interrogatories that Mr. Sutter

would be called. Tr. at 57.[1] Landfill 33 argued that in the interrogatory response, it reserved the right to put on whatever case is necessary, and that the need to call Mr. Sutter as a witness did not arise until 6:30 p.m. the night prior to the hearing. Tr. at 58-59. Hearing Officer Halloran sustained the objection by Sutter, but allowed Landfill 33 to call Mr. Sutter as an offer of proof. Tr. at 59.

The Board finds that Sutter's objection is unfounded, and accepts the testimony of Mr. Sutter into evidence. Counsel for Landfill 33 stated that he did not realize the need to amend the interrogatory response until December 18, 2002 – the night prior to the hearing. All parties had the opportunity to cross-examine Mr. Sutter on the issues raised by Landfill 33, and were able to present additional arguments in their post hearing briefs. Accordingly, no material prejudice resulted from calling Mr. Sutter as a witness.

Respondents' Motions to Strike Landfill 33's Fundamental Fairness Arguments

In their post-hearing briefs, Sutter and the County Board both move to strike any fundamental fairness arguments raised by Landfill 33. Sutter at 5, County Board at 10. The respondents argue that Landfill 33 did not allege any specific grounds of fundamental fairness in their amended petition for review, but merely noted that the proceedings were fundamentally unfair. *Id.* Sutter also argues that Landfill 33 did not identify any specific facts demonstrating fundamental unfairness in response to Sutter's interrogatories. Sutter at 5.

Landfill 33 argues that the motions to strike are untimely, and should themselves be stricken. Landfill 33 Reply at 2. Landfill 33 asserts that the respondents never filed any written pleading with the Board or hearing officer on this issue until their closing briefs filed at the 11th hour. *Id.* Landfill 33 also argues that, because Sutter did not include a copy of the discovery request or response with its brief, Sutter has waived this issue. Landfill 33 at 3.

The Board will not grant the motions to strike. Motions attacking the sufficiency of a pleading filed with the Board must be filed within 30 days after service of the pleading unless the Board determines material prejudice would result. 35 Ill. Adm. Code 101.506. The respondents did not attack the sufficiency of Landfill 33's amended petition in a timely manner. The Board does not find that material prejudice will result if the motions are not accepted. Accordingly, the motions were not timely filed and will not be addressed by the Board.

Landfill 33's Notice of Errata

On January 14, 2003, Landfill 33 filed a notice of errata and a corrected closing brief. Landfill 33 asserts that a number of mistakes were identified with its closing brief filed on

[1] The County Board's record will be cited as "R. at __."; the Board's hearing will be cited as "Tr. at __"; Landfill 33's brief will be cited as "Landfill 33 at __."; Stock's brief will be cited as "Stock at __."; Sutter's brief will be cited as "Sutter at __."; The County Board's brief will be cited as "County at __."; "Reply" will denote a party's reply brief. Exhibits will be prefaced by the party's abbreviated or full name and "Exh. _."

January 9, 2002. Landfill 33 asserts that the mistakes were inadvertent, and that the corrected brief is not intended to substantively modify the pleading in any way. Notice of Errata at 1. No response to the notice of errata was filed, and the Board accepts Landfill 33's corrected closing brief.

FACTS

On April 19, 2002, Sutter filed its application for local siting approval for a proposed solid waste transfer station with the County Board. C4. A public hearing on the application was held before the County Board on August 14, 2002. C127. Sutter called four witnesses – David Kimmle, Mark Reitz, James Bitzer and Tracy Sutter. Landfill 33 presented three witnesses in opposition to the application – Brian Hayes, Don Sheffer and Bryan Johnsrud.

The public comment period closed on Friday, September 13, 2002. The County Board met on Monday, September 16, 2002, and unanimously voted to approve the application. R. at C434.

Sutter proposed to site the transfer station on three acres of land owned by Hacker family located off County Highway 25 (Altamont – Farina Blacktop), just north of Township Road 200 East. R. at C7,77. The property currently contains a grain elevator, grain bins, pole barns, sheds and a two-story frame house. R. at C7, C65, C77, C239 . Sutter proposes to use an existing former grain storage building, with modifications, as a transfer station. R. at C80. Existing pathways will be used for the transfer station. R. at C78,C176. The waste transfer is proposed to occur in a pole barn. R. at C242, C77.

The intent of the facility is to allow the transfer of waste from refuse collection vehicles such as packer trucks to transfer trucks. R. at C7. The waste transfer facility as proposed will consist of an enclosed tipping floor and loading bay. Waste delivered to the site will be deposited directly on to the concrete tipping floor, and then loaded into a transfer trailer using a rubber-tired end loader. *Id.* When full, the transfer trailer will be taken to a solid waste landfill for waste disposal. *Id.*

At the hearing, the following testimony was adduced:

To meet criterion (i), Sutter presented the testimony of Mr. Kimmle. Mr. Kimmle is a civil engineer who works for Hurst-Rosche Engineers. He has been an employee of Hurst-Rosche since 1986, and has experience with both applications for siting approval and design work on transfer stations. R. at C137. Mr. Kimmle testified that he utilized the Agency's annual report to identify landfill facilities located in a 30-50 mile radius from the proposed transfer station. R. at C140. He found that three current operating landfill facilities are within the 30-mile radius of the proposed transfer station. He categorized the disposal of those facilities as limited. R. at C141. Mr. Kimmle identified six other facilities within the 50-mile radius. He categorized the waste capacity within the 50-mile radius as adequate. R. at C142.

But, Mr. Kimmle identified a dilemma in maintaining a viable out-of-county waste disposal source and a method to transfer county-generated waste to one or more of these

facilities. Mr. Kimmle testified that to economically access out-of-county landfills, a waste transfer station is necessary. R. at C143. He testified that there has been a 50 % decline in the number of landfills since 1992 and a 40 % increase in the number of operating transfer stations since 1996. R. at C 143. Mr. Kimmle testified that the enhanced environmental regulations have caused a decline in the number of operational landfills, thereby forcing the remaining facilities to become larger and service a greater area. R. at C144.

Mr. Kimmle testified that by siting the proposed transfer station, and increasing the service area from a 30-mile radius to a 50-mile radius, the available landfill capacity has been increased from two to eight. R. at C144. Mr. Kimmle testified that Sutter's facility is necessary to accommodate the waste needs of the area it's intended to serve. R. at C144.

Mr. Kimmle testified that a house is located on the proposed site for the transfer facility, but that it is not inhabited and will be used as an office for the waste transfer facility. R. at C147. Mr. Kimmle also testified that proposed facility has been located a minimum of 1,000 feet from the nearest property zoned for primary residential use. *Id.*

Mr. Kimmle testified that the potential for leachate is minimal because the operations are indoors. But, he stated that any leachate generated will be collected and directed to a local sump that will then pump the water to a nearby leachate storage tank contained within a concrete containment dike prior to disposal off-site. R. at C150. Mr. Kimmle testified that the water resulting from washing the floor down will be contained within the building (in the lower elevation floor) and directed into the collection system. R. at C153-54.

Mr. Kimmle testified that the siting of the transfer station is consistent with the Effingham County Solid Waste Management Plan (Plan). R. at C162. Mr. Kimmle testified that the Plan indicates the County's intention to support the disposal of waste generated in the county at both in-county and out-of-county landfills. R. at C1443. He states that all waste collection in Effingham County is provided by private haulers that have the right to choose the landfill at which they dispose of waste. R. at C161.

Licensed real estate broker and appraiser James R. Bitzer testified that the proposed expansion met the requirements of criterion (iii). Bitzer has been a licensed broker since 1973, and has experience with transfer sites. R. at C178, 180. He testified that the proposed expansion minimized the incompatibility with the character of the surrounding area and minimized the effect on the value of the surrounding property. R. at C182. Bitzer testified that the character of the surrounding land is predominantly level agricultural cropland and that no significant expansion or urbanization is occurring in the area. R. at C181.

Tracy Sutter testified that he is a sanitation engineer and has been in the waste industry all his life. R. at C184. He said that Sutter Sanitation has been in existence for 34 years. Id. Mr. Sutter stated that Sutter primarily picks up residential trash, commercial trash and light industrial trash. *Id.* He testified that Sutter has never been cited or convicted for a violation in the field of solid waste management. R. at C186.

Mr. Sutter testified that if sited, the proposed facility would not hold waste overnight. R. at C197. He said that trucks typical to the industry today do not have problems opening their tailgates fully in the proposed transfer station. R. at C263-64. Although he acknowledged that issues do exist with the maximum available height for dumping roll-offs, he testified that on-site personal will always be present to assist drivers in this regard. R. at C265.

Testifying about criterion (i) for Landfill 33 was Mr. Don Sheffer. Mr. Sheffer is a registered professional engineer in the state of Illinois. R. at C203. He has been an engineer with Homer L. Chastain and Associates for approximately 40 years. He was the project manager for the preparation of the Effingham County Solid Waste Management Plan. R. at C204. He reviewed the application submitted to the county, the County's Plan, the five-year update of the Plan and information from the Agency on landfill capacities. R. at C205.

Mr. Sheffer testified that Sutter did not perform a traditional needs analysis, and failed to include current and projected waste generation rates. R. at C206. He testified that Landfill 33 has a recently issued permit that extends their life for an additional 22 years making the 7 year figure in Sutter's application inaccurate. R. at C207. Mr. Sheffer noted that D and L Landfill lists 45 years of remaining life, Wayne County has 30 years of remaining life, Lawrence County has 38 years of remaining life and the Five Oaks facility has 29 years of life. *Id.*

Mr. Sheffer said that even though there are fewer landfills, the capacity of those landfills is increasing. R. at C207. He testified that any hauler operating in the entire Effingham County area has at least one landfill available to him within 30 miles of the point where the hauler picks up at a house. R. at C210. He testified that a method to assess those landfills exists without the transfer station, and that the haul distances are not excessive to make it economically unfeasible. R. at C211.

Mr. Sheffer testified that the transfer station may be a convenience to the applicant, but not absolutely necessary to provide the proposed service area with adequate and economical landfill disposal through the direct haul method. R. at C212. He testified that the area has five large landfills available, and at least one of those is available within 50 miles indicating direct haul is the best choice. R. at C218.

Mr. Sheffer said that the proposed transfer station is an option of the Plan that was considered in 1994, but that the recommendations were that the county continue direct haul to in-county and out-of-county landfills. R. at C216. He testified that the five-year update continues the recommendations of the first plan. Id. He said that the county had the option to recommend the construction of an in-county transfer station but chose not to. R. at C217.

Mr. Sheffer testified that Landfill 33 has been granted a permit that would give them an additional 22 years of life. R. at C226.

Bryan Johnsrud, a professional engineer for Andrews Environmental Engineering in Springfield, testified on behalf of Landfill 33. He has been so employed for 12 years, and has been involved with solid waste management facilities the entire time. R. at C231-C232. Mr.

Johnsrud testified that there is a dwelling less than 200 feet from the building that Sutter wants to use for a transfer station. R. at C238.

Mr. Johnsrud said that the building intended to house the transfer station was not designed for that purpose. R. at C241. He said that the facility will probably have to be washed down on a daily basis generating a large amount of leachate that has to be pumped out and treated. R. at C249. He identified concerns about the floor slope and thickness, and the wooden structure of the building. R. at C245, C250. He also expressed concerns over the 16-foot clearance between the floor and the rafters. R. at C251. He asserted that an accident will happened and there is going to be physical damage and possible injuries. *Id.*

Mr. Kimmle testified that the Metropolitan Sewer District in St. Louis readily accepts leachate and provides contracts on short notice. R. at C267. He anticipates that, at least initially, the leachate would be hauled there. R. at C268. Mr. Kimmle testified that the application provides that any cracks in the concrete floor will be sealed with a sealer and maintained throughout the operation of the facility. R. at C268-69.

The Board received two public comments at the hearing. The first was by Nancy Deters. She was sworn in and subject to cross-examination. Tr. at 28. She was in favor of Sutter's proposed transfer station. Tr. at 28-29. Lloyd Stock made the second public comment. He, was not sworn in. Tr. at 39. He requested that the Board reverse the County's decision to grant siting approval to Sutter. Tr. at 42.

Public Comments

A number of public comments for and against the siting of the proposed transfer station were accepted at the local level. The Board finds that consideration of public comments during the siting process is appropriate. However, public comments are not entitled to the same weight as expert testimony submitted under oath and subject to cross-examination. Public comments receive a lesser weight. City of Geneva v. Waste Management Inc., PCB 94-58 (July 21, 1994); Browning Ferris Industries v. Lake County Board of Supervisors, PCB 82-101 (Dec. 2, 1982).

The public comments submitted by interested persons from the surrounding community at the local level and at the Board level are evidence in the record properly considered by the decision making body. But, these public comments are entitled to less weight than is sworn testimony subject to cross-examination. The Board will assess public comments in this light when deciding whether or not the County Board's decision is against the manifest weight of the evidence or fundamentally unfair.

LANDFILL 33 ARGUMENTS

Landfill 33 challenges the decision on three grounds: (1) that Sutter failed to comply with statutory jurisdictional prerequisites; (2) that the proceedings before the County Board were fundamentally unfair; and (3) that the decision of the County Board was against the manifest weight of the evidence with respect to criteria (i), (ii), (v), (vi), and (viii).

Jurisdictional

Landfill 33 asserts that Sutter did not comply with mandatory notice requirements in that it did not assure that the notice was timely delivered to all members of the General Assembly from the district in which the proposes site is located. L33 brief at 3. Landfill 33 contends that Section 39.2(d) of the Act requires notice to be delivered by certified mail to the appropriate legislators no later than 14 days prior to hearing – July 31, 2002. *Id.* Landfill 33 asserts that Senator N. Duane Noland did not receive his notice until August 1, 2002. L33 brief at 4. Landfill 33 argues that Sutter's attempt to hand-deliver notice to Senator Noland on July 31, 2002 is ineffective as failing to have complied with the statute. *Id.* Accordingly, argues Landfill 33, the proceedings are void and the County Board ruling must be vacated. *Id.*

Fundamental Fairness

Landfill 33 identifies three manners in which the proceedings were fundamentally unfair.

Recycling Issue

First, Landfill 33 asserts that it was provided fundamentally unfair proceedings through the County Board's refusal to allow Landfill 33 to address recycling issues which had been discussed by Sutter and more than one commenter, and were ultimately relied upon by the County Board in rendering a decision. L33 at 5.

Landfill 33 asserts that at least one County Board member, Voelker, expressly voted in favor of Sutter's proposal because Sutter claimed it would also operate a recycling center, but not without the transfer station. L33 Reply at 6.

Landfill 33 contends that: (1) early in the underlying proceedings, the County Board chairman instructed the audience that the proceedings were to concern themselves with Sutter's proposal and nothing else; (2) that Tracy Sutter spoke at length about the recycling center and in fact threatened the County Board that he would close down the recycling center if transfer station siting approval was not given; (3) that Landfill 33 offered to present testimony to address the recycling issue raised by Tracy Sutter but was instructed by the chairman not to proceed with such testimony; and (4) that the County Board expressly considered this recycling issue, and in fact ruled in Sutter's favor on the basis of the recycling program. L33 at 5.

Landfill 33 asserts that the recycling issue should have been largely irrelevant to the siting issue, but was actually a first and foremost concern of the County Board. L33 at 6. Landfill 33 concludes that it was deprived of an opportunity to address an issue that was pivotal to the County Board's decision, and was prejudiced as a result. L33 at 6. L33 asserts it was prejudiced because it was not given the same and opportunity as others to address the recycling issue. L33 Reply at 6. Landfill 33 contends that because no transcription of the September 16, 2002 meeting is in the official record it cannot be said, one way or another, whether more than one member of the County Board commented on the recycling issue. *Id.* Landfill 33 argues that the availability of public comment did not accomplish its purpose because it was not submitted under oath and is given less weight. *Id.*

Visits by the County

Landfill 33 asserts that the County Board conducted a visit to the transfer site on July 31, 2002, and that Landfill 33 was given no opportunity to attend. L33 at 6. Landfill 33 also asserts that just prior to filing the application, several County Board members visited the recycling center and got a "red carpet tour." L33 Reply at 7. Landfill 33 argues that even if a site visit is acceptable, it must be accompanied with notice to the parties to allow them to attend as well. *Id.*

Amendment of Application

Landfill 33 asserts that at the end of the public comment period after the hearing, Sutter submitted a public comment that for the first time contended that the proposed transfer station was necessary because Landfill 33 may have insufficient capacity. L33 at 6. Landfill 33 claims that this new basis for need was made at the close of the public comment period thus not providing an opportunity to respond or present contrary evidence or argument. L33 at 7.

Landfill 33 argues that applicants are permitted to make only a single amendment to their application that must be made prior to completion of the presentation of evidence at hearing, and even in that case, the decision deadline is extended by 90 days. *Id.* Landfill 33 argues it lost the opportunity to cross-examine as well as present its own evidence on this issue as a result of the untimely amendment. *Id.*

Siting Criteria

Landfill 33 challenges five of the siting criteria. Their arguments on each issue will be summarized below:

Criterion (i)

Landfill 33 asserts that based on Sutter's own work product, it is clear that there is no need for the proposed facility in that the transfer station is clearly not necessary to accommodate the waste needs of its intended service area. L33 at 9. Nothing about the proposal, argues Landfill 33, supports the view that without this transfer station the out of county disposal facilities might not be viable. *Id.* Further, asserts Landfill 33, Sutter's burden was to prove that the service area needs the transfer station, not that out of county facilities need it. *Id.*

Landfill 33 argues that Sutter assumes that a 30-50 mile range is the economical distance a refuse collection vehicle can travel on a routine basis, and that the evidence shows that the out of county facilities are each located 50 or miles less from the location of the proposed transfer station. Thus, argues Landfill 33, these facilities can already be economically accessed without creating a transfer station. L33 at 10.

Landfill 33 contends that professional engineer Don Sheffer demonstrated that virtually any location within the service area is within 30 miles of the largest of the landfills identified by Sutter. L33 at 10. Landfill 33 asserts that Sutter's approach does not constitute a typical needs analysis, in that Sutter contends the need for the facility hinges on the dilemma in maintaining a

viable out of county waste disposal source and a method to transfer county generated waste to one or more of these facilities. L33 Reply at 8.

Landfill 33 claims that Sutter could have limited its proposed service area to Effingham County, but did not do so in its application and its amendment to modify the service area to one exclusive to Effingham County was made at the last day of public comments following the hearing and is, thus, too late. L33 Reply at 9, 10.

Landfill 33 asserts that even with the transfer facility, the eight facilities identified by Sutter as available for the disposal capacity for the service area are all easily within the range identified by Sutter as a reasonable hauling distance (30-50 miles). L33 Reply at 9. Landfill 33 argues that Sutter has admitted no need exists for the transfer station, but that it might be convenient for Sutter's own business purposes. L33 Reply at 10.

Criterion (ii)

Landfill 33 asserts that the County Board simply refused to accept unrebutted testimony concerning deficiencies of the proposed transfer station with respect to criterion (ii). L33 at 13. Landfill 33 notes that pursuant to Section 22.14 of the Act, it is unlawful for anyone to establish a transfer station within 1,000 feet of a dwelling. *Id.* Landfill 33 asserts that Sutter's own documentation reveals the existence of a dwelling less than 200 feet from the proposed transfer station. *Id.* Landfill 33 also contends that a dwelling exists across the road from this facility and that the County Board refused to accept evidence relating to that structure. L33 at 14.

Landfill 33 contends that the wood framing on the inside of the proposed transfer station is improper for a transfer station against which waste will be dumped, scraped and pushed during everyday operations. L33 at 14. In addition, Landfill 33 claims that the structure lacks walls within the facility against which a scraper can push waste in order to scoop it in to the appropriate receptacle. *Id.*

Criterion (v)

Landfill 33 contends that because of its wooden interior and rural location the proposed transfer station is at a greater risk of fire. L33 at 14. Landfill 33 asserts that the concrete floor in the building is crumbling thus posing an environmental hazard. L33 at 15. Landfill 33 also asserts that the door and ceiling heights in the proposed station pose a hazard for roll-off containers, and indicate that Mr. Johnsrud testified that the issue is not whether an accident will occur, but when and how bad it will be. L33 at 15.

Landfill 33 contends that Sutter made no efforts to calculate the amounts of leachate it will generate, nor what specifically it will do with that leachate. Landfill 33 at 16. Indeed, Landfill 33 states, Sutter is not even aware of whether it will be able to find someone to accept and treat the leachate. *Id.*

Landfill 33 asserts that the siting authority cannot simply defer to the Agency when there is insufficient evidence to support an applicant's siting requests. L33 Reply at 13. Accordingly,

Landfill 33 refutes Sutter's claim that the majority of the issues presented by Mr. Johnsrud should be part of the Agency application process. *Id.*

Criterion (vi)

Landfill 33 asserts that Mr. Johnsrud testified that when considering the small site, the close proximity of the scale house to the road, and the tight turning radiuses into and out of the proposed transfer station, traffic disruption and safety hazards are potential problems. L33 at 16. Landfill 33 claims that Sutter did not even provide a traffic count of the anticipated number of vehicles it would receive from its recycling business to compare with traffic issues relating to the transfer station. *Id.* Finally, Landfill 33 argues that Sutter did not address the impact of facility traffic during the road restriction months (January through April) for the roadway approaching the facility. *Id.*

Criterion (viii)

Landfill 33 asserts that nowhere in the Plan is the need for a transfer station asserted. L33 at 11. Landfill 33 refutes Sutter's claim that the station is needed to meet the Plan's encouragement of the use of out-of-county waste facilities, and asserts that the 50-mile economical transport radius established by Sutter is easily met without any transfer station. *Id.*

Landfill 33 argues that although the Plan considered transfer stations as an option in a preliminary step of the planning process, the Plan rejected the use of transfer stations and opted solely for the continued direct hauling of waste to in and out of county sites. L33 at 12, L33 Reply at 11. In short, asserts Landfill 33, Sutter is focusing upon components of the Plan that were proposed but not adopted by the County. L33 Reply at 11. Finally, Landfill 33 asserts that the Plan does not list any new programs or facilities to be developed during the 2-4 or 5-10 year period. *Id.*

STOCK'S ARGUMENTS

Stock challenges the decision on two grounds: (1) that the proceedings before the County Board were fundamentally unfair; and (2) that the decision of the County Board was against the manifest weight of the evidence with respect to criteria (i), (ii), (iii), (v), and (viii).

Fundamental Fairness

Stock identifies four ways in which the proceedings were fundamentally unfair.

Transcript Availability

Stock contends that when its registered agent, Duane Stock, contacted the Effingham County Clerk on October 2, 2002, to obtain a copy of the hearing transcript, he was told the transcript was not available through the County Board and was advised to contact counsel for the applicant. Stock at 30. Stock argues that a siting authority's failure to provide access to the transcript is enough to make the proceedings fundamentally unfair. *Id.* Stock contends that it

was legally entitled, pursuant to Section 39.2(c) of the Act, to review a copy of the transcript at the offices of the County Board before its appeal was due, but was denied that right. Stock Reply at 18. Stock asserts that the County Boards delegation of its record keeping responsibility to the attorney for the applicant is itself suggestive of collusion between the applicant and decision-maker. *Id.*

Stock asserts it was prejudiced because its arguments in the petition for review had to be based solely on the siting application and Duane Stock's attendance at the hearing. Stock at 30. Stock argues that this failure is egregious because the transcript was not available through the County Board until after the deadline for appeal – more than a month after the close of the public comment period and more than six weeks after it had initially been transcribed. Stock at 31.

Stock contends it was further prejudiced by misstatements about the testimony at hearing contained in a letter Sutter's attorney sent to the County Board's attorney that was relied upon by the County Board in making its decision. Stock at 32.

Recycling Issues

Stock argues that the County Board based its decision on Sutter's threat to close the recycling center instead of the statutory criteria in light of Sutter's threat at the underlying hearing to close the recycling center if the siting for transfer station was not approved. Stock at 33, 34. Stock asserts that the County Board was confused about the recycling issue in that the chairman stated the County Board could not accept comments at hearing based on recycling, but did accept public comments. Stock at 35, 36. Stock asserts that the minutes of the September 16, 2002 meeting reveal that County Board member Voelker said recycling at this location is a valuable asset needed in Effingham County, and that this statement was made immediately prior to the County Board's vote on the transfer station. Stock Reply at 21.

Further, Stock contends that Sutter was allowed to present evidence that the transfer facility was needed for recycling to take place in Effingham County, but those opposed to the facility were not allowed to present evidence of the other alternatives that are already available except as public comment. Stock at 36. Stock argues that bias or prejudice by the County Board because a disinterested observer might conclude the administrative body or its members had in some measure adjudged the facts as well as the law in advance of hearing it. Stock Reply at 24.

Stock argues that the claims made by the County Board that substantial discussion was had and consideration given to all of the evidence put on by both Landfill 33 and Sutter are unsupported by any citation to the record and should be stricken or otherwise not considered here. Stock Reply at 3.

Undisclosed relationships

Stock asserts that the fact that Duane Stock is the first cousin of County Board Member Carolyn Willenburg was not disclosed by the County Board. Stock at 36. More importantly, contends Stock, the mother-son relationship of State's Attorney Ed Deters, who provided legal counsel to the County Board, and Nancy Deters, an outspoken advocate for the recycling center

and thus the transfer station, was also never disclosed. *Id.* Stock asserts that Nancy Deters even vouched for Sutter's character, but that the fact that the decision-maker's legal counselor was her son was never properly disclosed. Stock at 37.

Tours of the Site

Stock contends the record indicates that *ex parte* contacts occurred between the applicant and the County Board thereby biasing the County Board and resulting in its decision to approve local siting even though the criteria had not been met. Stock at 38. At hearing, Stock asserts, Sutter admitted that County Board members toured the building to be used for the transfer station and that the expected operations of the transfer station was possibly in their minds. Stock at 39. Stock argues that fundamental fairness requires that representatives of all parties to the siting proceeding be given an opportunity to accompany the local governing body when it takes such a tour. *Id.*

Siting Criteria

Stock challenges five of the siting criteria. Their arguments on each issue will be summarized below:

Criterion (i)

Stock asserts that as a matter of law, potential convenience for waste haulers does not demonstrate need. Need, asserts Stock, connotes a degree of requirement or essentiality and not just reasonable convenience. Stock Reply at 5. Stock contends the applicant must demonstrate, at a minimum, an urgent need for, and the reasonable convenience of, the new facility. *Id.* Stock argues that the Board and the First District Appellate Court ruled that improvement in the efficiency of hauling operations is adequate to meet the statutory requirement of necessity. *Id, citing* Waste Management of Illinois, Inc. v. PCB, 243 Ill. App. 3d 65, 69, 600 N.E.2d 55 (1 st Dist. 1992).

Stock focuses on the testimony of Sutter's witness Mr. Kimmle and the application itself. Both, asserts Stock, concede that the regional waste disposal capacity already appears to be adequate. Stock at 9. Stock contends that Sutter did not and cannot demonstrate any urgent need for the facility, but instead only presented evidence regarding the possible economic benefit that the transfer station might provide to waste haulers. Stock at 13.

Stock argues that in the application Sutter alternates between road miles when referring to distances from existing waste disposal alternatives and miles as the crow flies when referring to distances from its own proposed facility. Stock at 12. This, asserts Stock, artificially creates an appearance that the current alternatives for waste disposal such as the Shelbyville transfer station are further away. *Id.*

Stock contends that Sutter did not present evidence regarding waste production or waste generation of the area as is customary and required by the Second and Third District Appellate Courts. Stock at 15.

Criterion (ii)

Stock argues that upon consideration of all evidence, it is plain that Sutter failed to demonstrate that the public health, safety and welfare will be protected. Stock at 17. First, contends Stock, Sutter has not designed a waste transfer station, but has simply proposed slight modifications to one of three pole barns currently located at a site where a grain elevator used to be operated. *Id.*

Stock asserts that the application itself concedes that the closest dwelling is located on the property proposed for the transfer station, but that no evidence was presented that the two-story house will only be used as an office. Stock at 18. 19.

Stock contends that nothing is planned to prevent liquid wastes and leachate from running off the concrete floor and onto the ground surrounding the building; that older trucks used by other haulers will be unable to open their tailgates fully when unloading in the building because of inadequate clearance; that roll-offs will not be able to raise their beds to the full height as designed if unloading in the building; and that no safe alternatives were presented for when these vehicles cannot be unload as designed. Stock at 20. Stock asserts that the record demonstrates that, as designed, located and proposed to be operated, Sutter's facility would violate several regulatory standards. Stock Reply at 7.

Stock highlights the testimony of Tracy Sutter, who when asked about which direction the water that drains from the facility would go and whether the lake would be affected, responded he was assuming that the water does not go in that direction. Stock Reply at 8.

Stock argues that the County Board cannot simply defer to the Agency when there is in sufficient evidence to support an applicant's siting request. Stock Reply at 10.

Criterion (iii)

Stock asserts that to satisfy this criterion, Sutter provided a letter from a certified residential real estate appraiser, but that the letter gives no bases for its conclusion that the property values will not be affected. Stock at 21. Stock argues that Sutter failed to provide any evidence as to how the facility will minimize incompatibility with the character of the area and that the decision of the County Board is, therefore, against the manifest weight of the evidence. Stock at 22.

Criterion (v)

Stock asserts that instead of being designed to minimize the danger to the surrounding area, Sutter's plan contains minimal designs to protect the surrounding area. Stock at 23. Stock contends that the transfer station is proposed to be located immediately adjacent to three existing grain bins and a nearby a large existing propane tank – both of which are know fire hazards. *Id.* Stock alleges that Sutter's contingency plan for fires is inadequate as it essentially only requires that calls be made to management and "911" in the event of an emergency. Stock at 23, 24.

Stock further asserts that the contingency plan contains no strategy for evacuating members of the public from the transfer station; contains no provisions for preventing the spread of fires to the propane tank and grain bins; does not address the recycling building in which reclaimed cardboard, among other items, are to be stored; does not identify fire-fighting equipment other than a handful of fire extinguishers; does not identify smoke alarms in any of the buildings; and contains no provisions to notify the owner operator of a fire at night or on the weekend when the facility is closed. Stock at 24.

Thus, argues Stock, Sutter has simply not demonstrated it has done what is reasonably feasible to minimize the danger to the surrounding area. Stock at 25. Sutter's proposed transfer station is a disaster waiting to happen, contends Stock. Stock at 27.

Criterion (viii)

Stock argues that Sutter's own evidence shows that persons desiring to transfer waste to one of the out-of-county landfills referenced by Sutter can economically use the existing Shelbyville transfer station, and that the decision of the County Board on this criterion is, accordingly, against the manifest of the evidence. Stock at 28.

Stock asserts that the County's previous rejection of a proposal for a transfer station in its Plan is evidence that Sutter's proposed facility is not consistent with the County's Plan. Stock Reply at 13.

EFFINGHAM COUNTY'S ARGUMENTS

Criteria

Effingham County asserts that the County Board's decisions on the statutory criteria were not against the manifest weight of the evidence. Effingham County asserts that the burden of establishing the decision was in error is squarely on the petitioners, and that both sides presented credible evidence on each criteria. County Board at 4. The County contends that substantial discussion was had and consideration given to all of the evidence put forth by Landfill 33 and Sutter. County Board at 5.

As to criterion (iii), the County Board contends that testimony presented by James Bitzer, a real estate appraiser, indicated there would be zero or minimal impact to the surrounding properties if the County Board approved the proposal. County Board at 6.

Fundamental Fairness

The County Board disputes that the proceedings were not conducted in a fundamentally fair manner.

Transcript Availability

The County Board asserts that Duane Stock admitted that he did not request a transcript of the underlying hearing between the hearing date and the September 16, 2002 County Board meeting. County Board at 7. He also admitted, the County Board contends, that he made no effort between October 2, 2002 and November 25, 2002, to contact anyone in Effingham County to get a copy of the transcript. County Board at 8. The County Board argues that Stock was not prejudiced in any way by the transcript's unavailability. *Id.*

Undisclosed Relationships

The County Board next addresses the familial relationship between Duane Stock and Carolyn Willenburg. Nowhere, contends the County Board, is it established that the relationship adversely affected Stock. County Board at 8. The County Board highlights testimony where Duane Stock stated that Willenburg was a nice person. that they got along very well, and that he never asked her to step aside or recuse herself. *Id.* The County Board concludes that the mere suggestion that the relationship created unfairness is insufficient to support petitioners' claim of bias. County Board at 9.

Recycling Issue

The County asserts that the county board chairman properly focused the issues to the County Board, and that the recycling issue was not raised during the discussion on the criteria at the September 16 meeting. County Board at 10. The County Board concludes that the petitioners' have failed to establish that any County Board members' vote was affected or changed based on the recycling issue. *Id.*

SUTTER'S ARGUMENTS

Fundamental Fairness

Sutter argues that any fundamental fairness arguments raised by Landfill 33 should be barred because Landfill 33 did not identify any specific facts demonstrating fundamental unfairness in the petition or in response to Sutter's interrogatories. Sutter at 5. Sutter asserts that it was significantly prejudiced by these non-disclosures in that it would have been able to gather evidence in rebuttal or undertake additional discovery had the allegations been properly disclosed. Sutter at 5, 6.

Transcript Availability

Sutter argues that only where the failure to make a transcript available results in prejudice to a party is the absence of the transcript fundamentally unfair. Sutter at 6. Sutter asserts that Stock did not attempt to obtain a copy of the transcript until October 2, 2002 – 16 days after the County Board's decision. Sutter at 7. Sutter further asserts that Stock made no further inquiries between October 2, 2002 and November 25, 2002, and that these facts clearly demonstrate that Stock suffered no prejudice by not having a copy of the transcript. *Id.*

Undisclosed Relationships

Sutter contends that nothing other than the existence of the Stock – Willenburg relationship is alleged, and that this is clearly insufficient to sustain a claim of bias. Sutter at 9. Bias, states Sutter, 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 in advance of hearing it. Sutter at 10. Nonetheless, argues Sutter, Stock has waived this argument by failing to raise it at the County Board hearing.

Recycling Issue

Once again, Sutter argues that bias can only be shown where a decision maker has prejudged the facts or law. Sutter at 12. Sutter contends this showing has not been made. The comment by County Board Member Voelker, asserts Sutter, does not indicate that Voelker was acting out of fear of losing Sutter's recycling services, but is merely a statement that recycling is important to Effingham County. Sutter at 13.

Sutter contends that the statement by Tracy Sutter that Sutter could not economically continue recycling if siting were not approved is not a threat, but a simple statement of economic reality. Sutter at 13. Sutter discounts the statements of Ms. Deters at the Board hearing as she is not a decision-maker and does not even live in Effingham County. *Id.* Most important, asserts Sutter, is the recognition of the County Board that recycling issues could not be a part of the deliberations on the siting issue before it. Sutter at 14.

Finally, Sutter argues that the recycling issue has been waiver because neither Stock nor Landfill 33 objected when the issue was brought up at the underlying hearing. Sutter at 15.

Site Visits

Sutter asserts that during the pendency of the application neither the County Board nor the waste committee visited the proposed transfer facility. Sutter reply at 7. Sutter contends there is no evidence in the record that any visit occurred, and that the only reference to a site tour is a notation in the County Board minutes that a proposed site visit had been scheduled. *Id.* Sutter does acknowledge that members of the waste committee visited the site of the proposed transfer station prior to the application being filed. However, Sutter asserts that the visit was to the recycling operation, is not prohibited by precedent and has not prejudiced the petitioners. Sutter reply at 7, 8.

Criteria

Criterion (i)

Sutter addressed the need and the solid waste plan together. Sutter contends that in analyzing the needs issue, Sutter reviewed Agency documents including remaining capacities of area disposal facilities as well as the Effingham County waste disposal plan. Sutter at 18. Sutter argues that neither the Act nor case law suggests that the need be determined by application of a

standard of life expectancy of existing disposal facilities because such a standard would be arbitrary and inaccurate. Sutter at 19. Specifically, Sutter notes that Hearing Exhibit 4 reflects that Landfill 33's life expectancy was 25 years in 1995 but that Landfill 33 itself reported to the County Board in 1999 that it had less than ten years of expected life. *Id.*

Sutter asserts that the need criterion was clearly met by evidence and testimony of the rapidly diminishing capacity of Effingham County area landfills and the economic viability of the proposed waste transfer station. Sutter Reply at 11-12. Sutter contends that previously stated life expectancies have historically expired far quicker than anticipated. Sutter at 19.

Criterion (ii)

Sutter asserts that it is not required to guarantee a certain level of protection, but must minimize potential problems. Sutter at 21. Sutter argues that the County Board determination of this issue must be substantially guided by the evidence and testimony of the experts in this case. Sutter at 21. Sutter contends that Landfill 33's witnesses only testified to general issues of possible concerns, but that these concerns were not substantiated by any evidence and cannot be given significant weight by the Board. Sutter at 21.

Sutter acknowledges that it did not know the thickness of the floor, but asserts that since the time of the hearing its engineers have taken core samples showing the floor is 8.5 inches thick. Sutter at 22. These samples were attached as attachment 4 of Sutter public comment. Sutter asserts that the sampling also revealed that a moisture barrier currently exists under the concrete floor which will prevent water migration into the sub grade, and that the slope of the floor is towards the east which is where the transfer pit and sump will be located. Sutter at 22.

Criterion (iii)

Sutter asserts that the only evidence on this point shows the proposed transfer station will have no impact on incompatibility issues. Sutter at 23. Sutter asserts that testimony by Mr. Bitzer revealed that the proposed facility would not have an adverse impact on property values in the area nor would it be incompatible with the area. *Id.*

Criterion (v)

Sutter asserts that Mr. Kimmle, a professional engineer, testified that because combustible refuse would not be stored on site, the risk of fire is decreased. Sutter at 23. Sutter contends that the fire extinguishers as well as a contingency plan are in place to address an emergency situations. Sutter at 24. To minimize environmental impacts, Sutter asserts that leachate will be collected and stored on site in a 1,000 gallon concrete containment structure that will be periodically shipped off site for disposal. *Id.*

Sutter asserts that Mr. Kimmle testified that these measures are completely in accordance with industry standards. Sutter at 24. Sutter states that typical trucks, including all that it owns, have no height problem raising beds to dump the waste in the proposed transfer station, and that whenever any truck enters the building to unload waste, a Sutter employee will be there to assist.

Sutter at 24. Sutter contends that safeguards will be in place to minimize the chance of any contact with the building structure in the infrequent situations where a larger truck might be present. *Id.*

Criterion (viii)

Sutter contends that the Plan supports both in and out of county disposal. Consistent with the Plan, asserts Sutter, and in recognition of 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. Sutter at 25. Sutter asserts that given the increased need of solid waste facilities and the greater pace at which landfill space is decreasing, out of county disposal options, as provided in the Plan, must also be put in place. *Id.* Sutter asserts that such out of county disposal was contemplated and recognized in the Plan. *Id.*

Sutter directs attention to table 15 of the Plan where the county adopted alternatives to consider. Sutter argues that consistent with the County Board recognizing the need is greater than originally identified in the 1995 or 1999 readoption of the 1995 Plan, the County Board can and should move forward with Alternative C which provides in the five to ten year period support for a new transfer station. Sutter at 19-20.

Sutter contends that the County recognized it might have to be more aggressive and that is why Alternative C was set forth in the table. Sutter at 20.

DISCUSSION

The Board will now assesses the merits of (1) Landfill 33's jurisdictional argument; (2) the petitioners' fundamental unfairness arguments; and (3) the petitioners' contentions that the County Board's determination that Sutter satisfied Section 39.2 of the Act is against the manifest weight of the evidence.

Jurisdiction

Landfill 33 asserts that Sutter did not comply with mandatory notice requirements in that it did not assure that the notice was timely delivered to all members of the General Assembly from the district in which the proposes site is located. Section 39.2(d) of the Act requires that no later than 14 days prior to hearing, notice shall be published and delivered by certified mail to all members of the General Assembly from the district in which the proposed site is located. 415 ILCS 5/39.2(d) (2002).

Senator Noland did not receive notice of the hearing by certified mail until August 1, 2002, but did receive notice by personal service on July 31, 2002 - 14 days prior to the hearing. C352.

The notice requirements of Section 39.2(b) are jurisdictional prerequisites, which must be followed to vest the City with the power to hear a landfill proposal. *See* Kane County Defenders, Inc. v. PCB, 139 Ill. App. 3d 588, 593, 487 N.E.2d 743, 746 (2nd Dist. 1985). The Board finds

that the notice requirements were met in this case. It is undisputed that Senator Noland did receive actual notice of the hearing 14 days prior to that hearing. The Board cannot find any substantive difference between personal service and service by certified mail. The use of personal service still provides a permanent record for the sending and receiving of notices. Accordingly, the Board finds that sufficient notice was provided to Senator Noland.

Fundamental Fairness

In an administrative hearing, due process is satisfied by procedures that are suitable for the nature of the determination to be made and that conform to the fundamental principles of justice. Waste Management of Illinois, Inc. v. PCB, 175 Ill. App. 3d 1023, 1036, 530 N.E.2d 682, 693 (2nd Dist. 1988). In reviewing a Section 39.2 decision on site approval, the Board must consider the fundamental fairness of the procedures used by the County Board in reaching its decision. 415 ILCS 5/40.1(a) (2002).

Availability of Hearing Transcript

Stock contends that it was prejudiced because its registered agent, Duane Stock, was unable to obtain a copy of the hearing transcript from the County Board on October 2, 2002. Stock asserts it was prejudiced because its arguments in the petition for review had to be based solely on the siting application and Duane Stock's attendance at the hearing.

The Board has addressed the issue of availability of the transcript before the local siting authority on a number of occasions. *See* Sierra Club v. City of Wood River, PCB 95-174 (Oct. 5, 1995); Spill v. City of Madison, PCB 96-91 (Mar. 21, 1996); American Bottom Conservancy v. Village of Fairmont City, PCB 00-200 (Oct. 19, 2000). In City of Wood River, the Board held that although Section 39.2(c) of the Act requires that the local hearing transcript hearing be made available to the public, unavailability of the transcript will render the siting proceedings fundamentally unfair only if such unavailability prejudiced petitioners. In City of Wood River, the Board found that even if the transcript was unavailable, it could not find that this error had made the proceeding fundamentally unfair, since the petitioners failed to demonstrate prejudice.

In both Spill and American Bottom, the Board found that the proceedings were fundamentally unfair because the petitioners were prejudiced as a result of the unavailability of the transcript. In Spill, the Board found petitioners were prejudiced because they were unable to file public comments. In American Bottom, the Board found petitioners timely took the appropriate steps to review the transcript, but were not provided the transcript until after the close of the public comment period, and were therefore prejudiced in their ability to file public coments. American Bottom, PCB 00-200, slip op. at 44.

The Board finds that Stock has not demonstrated prejudice due to the unavailability of the transcript. Stock did not attempt to obtain a copy of the transcript until October 2, 2002 – a full 16 days after the County Board's decision, and well after the close of the public comment period on September 13, 2002. Tr. at 44, 47. Stock did timely file a public comment after the County Board hearing. C415-C416. The Board is not convinced that Stock was prejudiced in the filing of his petition for review. Stock's petition was accepted by the Board and was effective in

preserving Stock's right to appeal the County's decision. Accordingly, the Board finds the County's failure to provide access to the transcript did not render the proceeding fundamentally unfair.

Recycling Issue

Petitioners both contend they were deprived of an opportunity to address a recycling issue that was pivotal to the County Board's decision, and were prejudiced as a result.

Public officials should be considered to act without bias. E & E Hauling, Inc. v. PCB, 107 Ill.2d 33, 42, 481 N.E.2d 664, 668 (1985). Furthermore, the appellate court has stated that where a municipal government "operates in an adjudicatory capacity, bias or prejudice may only be shown if a disinterested observer might conclude that the administrative body, or its members, had in some measure adjudged the facts as well as the law of the case in advance of hearing it." Concerned Adjoining Owners, 288 Ill. App. 3d at 573, 680 N.E.2d at 816.

The petitioners have not shown that the County Board, or members of the County Board, prejudged the facts or law in this instance. The record is clear that throughout the proceeding both the County Board chairman and Effingham County State's Attorney Deters informed the County Board that the decision about the transfer station must be based on the statutory criteria and not the recycling issue. *See* C128, C131, C290. The comment by County Board member Voelker does not lead a disinterested observer to conclude the prejudging of facts or law in this case, nor is it sufficient to overcome the presumption that public officials should be considered to act without bias. The Board finds that the testimony concerning the recycling center did not result in a fundamental unfair proceeding.

Undisclosed Relationships

Stock asserts two undisclosed relationships have rendered the proceedings before the County Board fundamentally unfair. The first is the first cousin relationship between Duane Stock and County Board Member Carolyn Willenburg. The second involves the mother-son relationship of State's Attorney Ed Deters, who provided legal counsel to the County Board, and Nancy Deters, an outspoken advocate for the recycling center and the transfer station.

Sutter has argued that allegation concerning the impropriety of the relationship between Duane Stock and Carolyn Willenburg was waived because Stock never raised it at the County Board hearing. The Board agrees. The Illinois Supreme Court has held that a claim of disqualifying bias or partiality on the part of an administrative agency must be asserted promptly after knowledge of the alleged disqualification. E&E Hauling, Inc. v. PCB, 107 Ill.2d 33, 89 Ill. Dec. 821 (1985). Duane Stock participated in the underlying hearing and filed a public comment. No indication is found in the record that he raised the relationship issue prior to the filing of his petition for review filed before the Board. Fundamental fairness issues stemming from the Duane Stock – Carolyn Willenburg relationship are, therefore, waived.

Stock asserts the Ed Deters-Nancy Deters relationship was not discovered until the hearing before the Board on December 19, 2002, and has not been waived. The Board agrees.

Once again, in considering this relationship, the Board must decide whether a disinterested observer might conclude that the County Board, or its members, had in some measure adjudged the facts as well as the law of the case in advance of hearing it.

The Board finds that no bias resulted from the non-disclosure of the Deters' relationship. As referenced above, the standard for bias focuses on whether a *decision-maker* has prejudged facts or law. *See* E&E Hauling, emphasis added. Neither of the Deters was a decisionmaker in this matter. Nancy Deters attended the hearing and provided pubic comment. Ed Deters represented the County in this matter, but was not shown to be a decision-maker. He did not have a vote and or recommend any findings. Accordingly, the fact that his relationship with Nancy Deters was undisclosed did not render the underlying proceedings fundamentally unfair.

Site Visits

The petitioners contend that *ex parte* contacts occurred between the applicant and the County Board thereby biasing the County Board and resulting in its decision to approve local siting even though the criteria had not been met. Landfill 33 asserts that the County Board conducted a publicly unannounced visit to the transfer site on July 31, 2002. Sutter disputes this assertion stating that during the pendency of the application neither the County Board nor the waste committee visited the proposed transfer facility. Sutter Reply at 7.

Sutter contends there is no evidence in the record that the visit occurred, and that the only reference to a site tour is a notation in the County Board minutes that a proposed site visit had been scheduled. Sutter does acknowledge that members of the waste committee visited the site of the proposed transfer station prior to the application being filed. However, Sutter asserts that the visit was to the recycling operation, is not prohibited by precedent and has not prejudiced the petitioners.

Ex parte contacts between the local governing body and the applicant in the form of expense-paid tours of model facilities have been held to be fundamentally unfair. Southwest Energy Corp. v. PCB, 275 Ill. App. 3d 84, 92, 655 N.E.2d 304, 310 (4th Dist. 1995). In that case, opponents to the incinerator were not invited on the tour. The appellate court indicated that it encouraged the touring of existing facilities, but that fundamental fairness requires that representatives of all parties to the siting proceeding be given an opportunity to accompany the local governing body when it takes the tour. Southwest Energy, 275 Ill. App. 3d at 94, 655 N.E.2d at 310.

If a site visit did occur on July 31, 2002, it would have resulted in a fundamentally unfair situation. However, the record does not contain sufficient evidence that any trip occurred. The only testimony on the matter is that of Tracy Sutter during Landfill 33's offer of proof at the Board hearing. He did not recall any trip other than the visit of the waste committee prior to the filing of the application. Tr. at 73-74. The petitioners have not met their burden in showing that a visit took place on July 31, 2002.

As noted, a visit by the County Board's waste committee to Sutter's site did occur, but, the record clearly reveals the visit pre-dated the filing of the application. Consequently, the

Board finds that there is insufficient evidence to find that a site visit occurred on July 31, 2002, and the pre-application visit of April 19, 2002, did not result in an unfair proceeding.

Amendment of Application

Landfill 33 asserts that at the end of the public comment period after the hearing, Sutter submitted a public comment that for the first time contended that the proposed transfer station was necessary because Landfill 33 may have insufficient capacity. Landfill 33 considers this an improper amendment to Sutter's application. Sutter did not respond to this argument.

The Board finds that Sutter's public comment did not result in an amendment to Sutter's petition. The public comment in question addresses each of the criteria. *See* R. at C368-387. In addressing the first criterion, Sutter references various reported capacities of Landfill 33. However, a review of the record reveals that the comment does nothing more than expand on information presented in the application and at the hearing. As the public comment does not seek to amend the application, Landfill 33's argument is moot.

Siting Criteria

A party seeking siting approval for a pollution control facility must submit sufficient details of the proposed facility to meet each of the nine statutory criteria. 415 ILCS 5/39.2(a) (2002). Petitioners contend that Sutter failed to meet criteria (i), (ii), (iii), (v), (vi), and (viii).

The Board cannot reweigh the evidence. The Board may only reverse the County Board decision on the criteria if the decision was against the manifest weight of the evidence. Waste Management of Illinois, Inc. v. PCB (1987), 160 Ill. App. 3d 434, 513 N.E.2d 592. 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. Harris v. Day, 115 Ill. App. 3d 762, 451 N.E.2d 262. Merely because the Board could reach a different conclusion, is not sufficient to warrant reversal. City of Rockford v. PCB and Frank's Industrial Waste, (2nd Dist. 1984) 125 Ill. App. 3d 384, 465 N.E.2d 996.

Criterion (i)

Section 39.2(a)(i) of the Act provides that local siting approval shall only be granted if the facility is necessary to accommodate the waste needs for the area it is intended to serve. The applicant is not required to show absolute necessity in order to satisfy criterion (i). Fairview Area Citizens 198 Ill. App. 3d at 551, *citing* Tate v. PCB, 188 Ill. App. 3d 994, 544 N.E.2d 1176 (4th Dist. 1989); Clutts v. Beasley, 185 Ill. App. 3d 543, 541 N.E.2d 844 (5th Dist. 1989). The Third District Appellate Court has construed "necessary" as a degree of requirement or essentiality, and found that a landfill must be shown to be reasonably required by the waste needs of the area intended to be served, taking into consideration the waste production of the area and the waste disposal capability, along with any other relevant factors. Waste Management, Inc., v. PCB, 122 Ill. App. 3d 639, 644; 461 N.E.2d 542 (3rd Dist. 1984).

After careful review of the record, the Board finds that the County Board's finding of need for Sutter's proposed transfer station is not against the manifest weight of the evidence. Although Sutter acknowledged that sufficient capacity to accommodate the waste needs of the service area consisting of the 50-mile radius around the proposed transfer station existed, the need criterion was met by evidence and testimony of the rapidly diminishing capacity of Effingham County area landfills and the economic viability of the proposed waste transfer station.

The applicant is not required to show absolute necessity in order to satisfy criterion (i). Sutter reviewed Agency documents including remaining capacities of area disposal facilities as well as the Effingham County waste disposal plan. Sutter's expert Mr. Kimmle testified that to economically access out-of-county landfills, a waste transfer station is necessary. R. at C143. The Board is instructed to considering the waste production of the area along with any other relevant factors. *See* Waste Management, Inc., v. PCB, 122 Ill. App.3d at 644. Sutter argues that the expected life of landfills in general and Landfill 33 in particular historically expire quicker than anticipated, and that based on Landfill 33's solid waste landfill capacity certification reports of 2001 and 2002, may only have ten years of expected life left.

The Board finds enough merit in Sutter's application and testimony so that a result opposite to the County Board's decision is not clearly evident, plain, or indisputable. Thus, the County Board's decision that Sutter met its burden of proof on the need criterion is not against the manifest weight of the evidence.

Criterion (ii)

Criterion (ii) of Section 39.2 of the Act requires the applicant to show that "the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected." 415 ILCS 5/39.2(a)(ii) (2002). After reviewing the record, the Board finds that the County Board's conclusion that the design of the transfer station is adequate to assure the lack of movement of contaminants is not against the manifest weight of the evidence.

The petitioners assert that Sutter failed to demonstrate that the public health, safety and welfare will be protected. Both petitioners argue that the transfer station will be within 1,000 feet of a dwelling. The Board disagrees. The record reveals that a house is located on the proposed site for the transfer facility. R. at C147. However, Sutter's expert Mr. Kimmle testified that the house is not inhabited and will be used as an office for the waste transfer facility. *Id.* Mr. Kimmle also testified that proposed facility has been located a minimum of 1,000 feet from the nearest property zoned for primary residential use. *Id.* The petitioners also argue that a house is located across the street from the proposed transfer station. Landfill 33 at 14, Stock at 19. However, the underlying record does not contain any evidence concerning this dwelling. The issue was not raised until the hearing before the Board, and is, accordingly, not properly before the Board in this proceeding.

The petitioners raise a number of issues concerning the design of the proposed transfer facility. For example, the petitioners contend that nothing is planned to prevent liquid wastes and leachate from running off the concrete floor and onto the ground surrounding the building,

that older trucks used by other haulers will be unable to open their tailgates fully when unloading in the building because of inadequate clearance, and that roll-offs will not be able to raise their beds to the full height as designed if unloading in the building.

Sutter presented testimony concerning the potential for leachate generation at the facility. Mr. Kimmle testified that the potential for leachate is minimal because the operations are indoors. R. at C150. But, he stated that any leachate generated will be collected and directed to a local sump that will then pump the water to a nearby leachate storage tank contained within a concrete containment dike prior to disposal off-site. *Id.*. Mr. Kimmle testified that the water resulting from washing the floor down will be contained within the building (in the lower elevation floor) and directed into the collection system. R. at C153-54.

Sutter also presented testimony regarding concerns about inadequate clearance in the proposed transfer station. Tracy Sutter testified that trucks typical to the industry today do not have problems opening their tailgates fully. R. at C263-64. Although he acknowledged that issues do exist with the maximum available height for dumping roll-offs, he testified that on-site personal will always be present to assist drivers in this regard. R. at C265.

The Board finds that that there is evidence in the record to support the County Board's decision on criterion (ii), and, therefore, the decision is not against the manifest weight of the evidence.

Criterion (iii)

Criterion (iii) requires the applicant to minimize the incompatibility of the facility on the surrounding area and to minimize the effect on property values. This criterion requires an applicant to demonstrate more than minimal efforts to reduce the landfill's incompatibility. File, 219 Ill. App. 3d at 907; Waste Management, 123 Ill. App. 3d at 1089. An applicant must demonstrate that it has done or will do what is reasonably feasible to minimize incompatibility. Waste Management, 123 Ill. App. 3d at 1090. However, an applicant cannot establish compatibility based upon a pre-existing facility, and the compatibility of an expansion must be considered as a new and separate regional pollution control facility. Waste Management, 123 Ill. App. 3d at 1088.

Stock argues that Sutter failed to provide any evidence as to how the facility will minimize incompatibility with the character of the area and that the decision of the County Board is, therefore, against the manifest weight of the evidence. At the hearing before the County Board, Sutter presented testimony by licensed real estate broker and appraiser James R. Bitzer that the proposed expansion met the requirements of criterion (iii) in that it minimized the incompatibility with the character of the surrounding area and minimized the effect on the value of the surrounding property. R. at C182. Bitzer testified that the character of the surrounding land is predominantly level agricultural cropland and that no significant expansion or urbanization is going on in the area. R. at C181.

The Board finds that the County Board decision on criterion (iii) was not against the manifest weight of the evidence. Sufficient evidence exists on the record to support the County

Board's decision that no impact will result from the siting of the proposed transfer station. An opposite result is not clearly evident or indisputable from a review of the evidence. The Board, thus, concludes that the City's decision on criterion (iii) is not against the manifest weight of the evidence.

Criterion (v)

Criterion (v) of Section 39.2 of the Act requires that the application's "plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operations accidents." 415 ILCS 5/39.2(a) (2002).

Both petitioners argue that the County Board's decision is against the manifest weight of the evidence on this criterion. Landfill 33 contends the wooden interior and the rural location of the proposed transfer station pose a greater risk of fire, and that the door and ceiling heights in the proposed station pose a hazard for roll-off containers. Stock contends that the transfer station is proposed to be located immediately adjacent to three existing grain bins and a nearby a large existing propane tank – both of which are known fire hazards. Stock further raises a number of shortcomings in the contingency plan it contends render the County Board decision on this criterion against he manifest weight of the evidence.

Sutter asserts that Mr. Kimmle testified that the measures proposed to satisfy the requirements of this criterion are completely in accordance with industry standards. Sutter contends that the fire extinguishers as well as a contingency plan is in place to address an emergency situations, and that environmental impacts will be minimized in part due to the leachate will be collection procedures.

Much of the issues raised in regards to this criterion were also discussed during the Board's analysis of criterion (ii). The Board finds that the County Board's decision that Sutter satisfied the requirements of this criterion are not against the manifest weight of the evidence. At the siting hearing, Mr. Kimmle testified that the plan of operations is designed to minimize the danger to the surrounding area from fire, spill, or other operational concerns. R. at C160. He testified that the primary concerns in addressing this criterion for solid waste transfer facilities are the storage of petroleum products and refuse on site, and that there is not into to store either at this facility. R. at C158. Mr. Kimmle further testified about the leachate collection provisions, and that the contour of the site is such that potential accidental spill during the transfer process can be contained on site and appropriately cleaned up. R. at C159.

Stock focuses much of its argument on Sutter's contingency plan. However, the contingency plan is not the sole issue to be considered. In its application, and at hearing, Sutter provides detailed information about the plan of operations. The majority of this information is submitted under criterion (ii), and, in addition to the contingency plan, includes provisions for site operation, methods of transfer or disposal of waste generated at the site, information on the leachate containment system, and litter, vector and odor control. R. at C19-25.

Sutter has presented aplan of operations as required by criterion (v). Ample evidence exists in the record to support the County Board's decision that Sutter satisfied criterion (v). The

Board finds that the County Board decision is not against the manifest weight of the evidence.

Criterion (vi)

Landfill 33 raised concerns about the site size, the close proximity of the scale house to the road, and the tight turning radiuses into and out of the proposed transfer station. Landfill 33 claims that Sutter did not even provide a traffic count of the anticipated number of vehicles it would receive from its recycling business to compare with traffic issues relating to the transfer station, and did not address the impact of facility traffic during the road restriction months (January through April) for the roadway approaching the facility.

Neither of the respondents responded to Landfill 33's assertion that the County Board's decision on this criterion was against the manifest weight of the evidence. Landfill 33 did not seek to review this criterion in their amended petition filed with the Board on October 21, 2002.

Section 107.208 of the Board's procedural rules provides the petition content requirements for a petition to review a pollution control facility siting decision. *See* 35 Ill. Adm. Code 107.208. Such a petition must include, *inter alia*, a specification of the grounds for the appeal, including any manner in which the decision as to particular criteria is against the manifest weight of the evidence. 35 Ill. Adm. Code 107.208(c).

As noted, Landfill 33 does not allege that the County Board decision on criterion (vi) is against the manifest weight of the evidence in its amended petition. Landfill 33 never attempted to amend its petition, and did not request the Board to review criterion (vi) until the filing of its post-hearing brief. No attempt to challenge criterion (vi) is contained in any hearing officer order in this matter.

The Board will not entertain argument on this criterion. Landfill 33 did not meet the requirements of Section 107.208(c) that clearly provide that the petition must specify any manner in which the decision as to particular criteria is against the manifest weight of the evidence. Landfill 33 had the opportunity to amend the petition at any point before the hearing, and even during the hearing itself, but never attempted to do so. Landfill 33's late attempt to challenge criterion (vi) before the Board resulted in prejudice to the respondents, who did not address this issue through the pendency of the case.

Criterion (viii)

Criterion (viii) requires the applicant to show that the proposed expansion is consistent with the County Solid Waste Management Plan. To satisfy this criterion, the local body must apply the County Solid Waste Management Plan to the proposed facility and make a determination whether the application is drafted in such a way as to be consistent with the plan. City of Geneva v. Waste Management of Illinois, Inc., PCB 94-58, (July 21, 1994)

In reviewing the evidence, the Board finds that the County Board's decision regarding this criterion is not against the manifest weight of the evidence. The County Board presented extensive evidence and expert testimony finding the proposed transfer station is consistent with

the Effingham County Plan. Mr. Kimmle stated that the proposed station is consistent with the County's intention to avail itself to both in-county and out-of-county landfills. Landfill 33 did present expert testimony in opposition that although the Plan considered transfer stations as an option in a preliminary step of the planning process, the Plan rejected the used of transfer stations.

The County Board considered the testimony from both experts on this issue. The Plan does contemplate the use of an in-county transfer station. The County Board's decision cannot be found to be against the manifest weight of the evidence merely because it valued the testimony of one expert over another. The Board may not re-weigh the evidence. The Board therefore, upholds the decision and finds that the County Board decision was not against the manifest weight of the evidence on criterion (viii).

CONCLUSION

After our careful review of the record, the Board concludes that the County Board had jurisdiction over Sutter's application for a new solid waste transfer station, and that the procedures the County Board followed to address the merits of the application were fundamentally fair. Additionally, the Board finds that the County Board's determination Sutter met the requirements of criteria (i), (ii), (iii), (v), and (viii) of Section 39.2 of the Act was not against the manifest weight of the evidence.

This opinion and order constitutes the Board's findings of facts and conclusions of law.

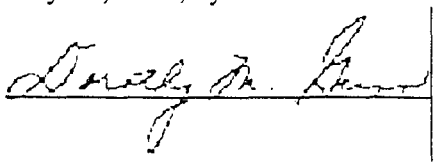
ORDER

The decision of the Effingham County Board approving Sutter's application to site a new solid waste transfer station is affirmed.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2002); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill.2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on February 20, 2003, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

Exhibit 9

NO. 5-03-0099

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

STOCK & COMPANY, LLC, Petitioner, v. ILLINOIS POLLUTION CONTROL BOARD, EFFINGHAM COUNTY BOARD, SUTTER SANITATION SERVICES, and LANDFILL 33, LTD., Respondents.	Petition for the Review of an Order of the Illinois Pollution Control Board. Docket Nos. PCB 03-43 & PCB 03-52 (Consolidated)

RULE 23 ORDER

On April 19, 2002, Sutter Sanitation Services, Inc. (Sutter), filed with the Effingham County Board an application for local siting approval for a solid waste transfer station to be located in Effingham County. The proposed site for the transfer station is three acres in rural Effingham County that currently is used as a grain elevator. The area surrounding the site is used as agricultural cropland. There are no occupied residences, buildings, or other development in the area. Stock & Company, LLC (Stock), owns the cropland directly across the road from the proposed transfer station site. Stock objected to the proposed transfer station.

On August 14, 2002, pursuant to provisions of the Environmental Protection Act (Act) (415 ILCS 5/39, 39.2 (West 2002)), a public hearing was held on the application before the Effingham County Board. Testimony was taken, including that of several experts, and public comments were accepted. Stock participated in the hearing and submitted public comments. On September 16, 2002, the Effingham County Board approved the application for the local

siting of the transfer station, finding that Sutter had demonstrated that its proposal met all the criteria set forth in section 39.2(a) of the Act (415 ILCS 5/39.2(a) (West 2002)).

Stock appealed the county board's decision to the Illinois Pollution Control Board, arguing that the proceedings before the county board were fundamentally unfair and that the county board's findings that Sutter had satisfied the criteria of section 39.2(a) were contrary to the manifest weight of the evidence. The Pollution Control Board upheld the decision of the county board. Stock now brings this appeal before us, arguing that the Pollution Control Board's findings that Sutter had satisfied criteria (i), (ii), and (v) of section 39.2(a) of the Act (415 ILCS 5/39.2(a)(i), (a)(ii), (a)(v) (West 2002)) were contrary to the manifest weight of the evidence and that the proceedings before the county board were fundamentally unfair because the transcript of the hearing before the county board had not been timely made available to Stock.

Section 39.2(a) of the Act provides that an applicant for local siting approval shall submit to the county board sufficient details describing the proposed facility to demonstrate compliance with the Act, and local siting approval shall be granted only if the proposed facility meets certain criteria, including:

> "(i) the facility is necessary to accommodate the waste needs of the area it is intended to serve;
>
> (ii) the facility is so designed, located[,] and proposed to be operated that the public health, safety[,] and welfare will be protected;
>
> * * *
>
> (v) the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents[.]" 415 ILCS 5/39.2(a)(i), (a)(ii), (a)(v) (West 2002).

On appeal, Stock argues that Sutter did not demonstrate that its proposed facility meets these

criteria and that the decision of the Pollution Control Board affirming the county board's finding that Sutter had demonstrated compliance with these criteria was contrary to the manifest weight of the evidence.

On review, we are to determine whether the Pollution Control Board's decision is contrary to the manifest weight of the evidence. *Turlek v. Pollution Control Board*, 274 Ill. App. 3d 244, 249 (1995). In order for the board's decision to be against the manifest weight of the evidence, more is required than that a different conclusion may be reasonable; the opposite conclusion must be clearly evident, plain, or indisputable. *Turlek*, 274 Ill. App. 3d at 249.

We will not set forth herein all the evidence presented to the county board and the Pollution Control Board regarding the above criteria. The written opinion of the Pollution Control Board is lengthy and detailed and adequately sets forth all the evidence relied upon for its decision. Suffice it to say that Sutter presented several expert witnesses who testified to facts demonstrating that the proposed facility is necessary to accommodate the waste needs of the area it is intended to serve, that it is so designed, located, and proposed to be operated that the public health, safety, and welfare will be protected, and that the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents. Although some witnesses testified to the contrary on some of these criteria, it is up to the county board to determine the credibility of the witnesses, to resolve conflicts in the evidence, and to weigh all the evidence presented. *Concerned Adjoining Owners v. Pollution Control Board*, 288 Ill. App. 3d 565, 576 (1997). After carefully reviewing all the evidence presented to both the county board and the Pollution Control Board, we cannot conclude that the decision of the Pollution Control Board, which affirmed the local siting approval granted by the county board, is contrary to the manifest weight of the evidence. A conclusion opposite to that reached by the Pollution

Control Board is not clearly evident, plain, or indisputable.

We turn now to Stock's argument that the proceedings before the county board were fundamentally unfair because the transcript of those proceedings was not provided to Stock in a timely manner. Stock argues that the transcript of the county board proceedings was not made available to Stock until after the deadline for the appeal of the county board's decision, thus hampering Stock in its efforts to formulate the basis for its appeal of the county board's decision to the Pollution Control Board. Stock argues that as a result of the transcript not being made available in a timely manner, Stock had to rely on its representative's recollection of the hearing in preparing its petition for review to the Pollution Control Board. Stock fails to demonstrate, however, how it was prejudiced by this circumstance, especially in light of the facts that its petition for review was subject to amendment after receipt of the transcript and that Stock had the transcript well in advance of the hearing before the Pollution Control Board.

The hearing before the county board was on August 14, 2002. The certification of the court reporter indicates that the transcript of this hearing was prepared by September 2, 2002. The county board's decision was rendered on September 16, 2002. Stock contacted the Effingham county clerk on October 2, 2002, to request a copy of the transcript and was told that the only copy was in the possession of Sutter's attorney. Stock did not contact Sutter's attorney and request a copy of the transcript. Stock filed its petition for review with the Pollution Control Board on October 21, 2002. On October 24, 2002, the transcript of the hearing before the county board was filed with the county clerk. Stock finally reviewed the transcript on November 25, 2002, when it went to the county clerk's office. The hearing before the Pollution Control Board was not held until December 19, 2002.

Stock raised this argument before the Pollution Control Board, which rejected it on the basis that Stock had failed to demonstrate any prejudice as a result of the untimely

availability of the transcript. The board held that the unavailability of a transcript will render the proceedings fundamentally unfair only if that unavailability prejudiced the petitioner. The Pollution Control Board was not convinced that Stock was prejudiced in the filing of its petition for review in that its petition had been accepted by the board and was effective in preserving Stock's right to appeal the county board's decision. Accordingly, the Pollution Control Board found that the county's failure to provide access to the transcript at an earlier date did not render the proceedings fundamentally unfair.

Initially, the parties dispute the appropriate standard for our review. Relying on *Land & Lakes Co. v. Pollution Control Board*, 319 Ill. App. 3d 41, 48-49 (2000), Stock argues that the appropriate standard of review is *de novo* because, although the usual standard that is applied to mixed questions of law and fact before administrative agencies is the "clearly erroneous" standard, the rationale for applying that standard–to provide some deference to the agency's peculiar experience and expertise–does not apply to the question of fundamental fairness, a question with which the courts and not the Pollution Control Board have peculiar experience and expertise. Sutter argues that the appropriate standard of review is whether the agency's decision is contrary to the manifest weight of the evidence, relying on *Daly v. Pollution Control Board*, 264 Ill. App. 3d 968, 971 (1994). The Pollution Control Board argues that the appropriate standard of review is whether the agency's decision is clearly erroneous, relying primarily on *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 205 (1998). We find it unnecessary to resolve the question of the appropriate standard of review because we find that, even under the least deferential *de novo* standard of review, we affirm the decision of the Pollution Control Board.

All the parties agree that proceedings before the local siting authority, in this case the county board, must be fundamentally fair to all the participants. *Land & Lakes Co. v. Pollution Control Board*, 319 Ill. App. 3d 41, 47 (2000). The parties also agree that the Act

requires that a copy of the transcript of the hearing before the county board be made available to the participants and that a failure to provide that transcript may render the proceeding fundamentally unfair. *Sierra Club v. City of Wood River*, Ill. Pollution Control Bd. Op. 95-174 (October 5, 1995). The parties also seem to agree that a failure to provide the transcript renders the proceeding fundamentally unfair *only where the petitioner can demonstrate prejudice as a result. Sierra Club v. City of Wood River*, Ill. Pollution Control Bd. Op. 95-174 (October 5, 1995). The parties disagree on whether Stock has, in fact, demonstrated prejudice as a result of the untimely availability of the transcript.

Whether we employ the *de novo* standard of review, the "clearly erroneous" standard of review, or the manifest-weight-of-the-evidence standard of review, we conclude that Stock has failed to demonstrate, or even specify, any prejudice as a result of the untimely availability of the transcript. We note that even after Stock reviewed the transcript of the county board hearing, it did not seek to amend its petition for review before the Pollution Control Board. There is no indication in the record that Stock attempted to and was precluded from raising any issue before the Pollution Control Board as a result of the tardy availability of the transcript. Stock had reviewed the transcript well in advance of the hearing before the Pollution Control Board and could have sought leave to amend its petition for review. It did not. The transcript was available to Stock at the hearing before the Pollution Control Board and could have been used to point out inconsistencies in the testimony of witnesses or conflicts in the evidence. It was not. Stock has made only vague allegations of prejudice but has failed to substantiate those claims with any evidence of actual prejudice in drafting its petition for review to the Pollution Control Board or in proceedings before that board.

In the absence of a demonstration of prejudice to Stock, we cannot conclude that the proceedings before the county board were fundamentally unfair as a result of the tardy

availability of the transcript of those proceedings. See *Tate v. Pollution Control Board*, 188 Ill. App. 3d 994, 1017 (1989) (in the absence of a demonstration of prejudice, the failure to make documents available is harmless error, and the proceedings are not fundamentally unfair).

For the foregoing reasons, we affirm the decision of the Illinois Pollution Control Board.

Affirmed.

WELCH, J., with GOLDENHERSH and HOPKINS, JJ., concurring.

Exhibit 10

Merriam-Webster Online Dictionary

One entry found for **establish**.

Main Entry: **es tab lish**
Pronunciation: `is-'ta-blish`
Function: *transitive verb*
Etymology: Middle English *establissen,* from Middle French *establiss-,* stem of *establir,* from Latin *stabilire,* from *stabilis* stable
1 : to institute (as a law) permanently by enactment or agreement
2 *obsolete* **:** **SETTLE** 7
3 a : to make firm or stable **b :** to introduce and cause to grow and multiply <*establish* grass on pasturelands>
4 a : to bring into existence **:** **FOUND** <*established* a republic> **b :** **BRING ABOUT, EFFECT** <*established* friendly relations>
5 a : to put on a firm basis **:** **SET UP** <*establish* his son in business> **b :** to put into a favorable position **c :** to gain full recognition or acceptance of <the role *established* her as a star>
6 : to make (a church) a national or state institution
7 : to put beyond doubt **:** **PROVE** <*established* my innocence>
- es tab lish able /-sh&-b&l/ *adjective*
- es tab lish er /-sh&r/ *noun*

For **More Information on "establish" go to Britannica.com**
Get the **Top 10 Search Results for "establish"**

Pronunciation Symbols