BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

LANDFILL 33, LTD., Petitioner, v. EFFINGHAM COUNTY BOARD and SUTTER SANITATION SERVICES, Respondents.	)	PCB 03-43 (Third-Party Pollution Control Facility Siting Appeal)
STOCK & COMPANY, LLC, Petitioner, v. EFFINGHAM COUNTY BOARD and SUTTER SANITATION SERVICES, Respondents.	)	PCB 03-52 (Third-Party Pollution Control Facility Siting Appeal) (Consolidated)

NOTICE OF FILING

TO: Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA AIRBORNE EXPRESS)

Bradley P. Halloran, Esq.
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA AIRBORNE EXPRESS)

(SEE PERSONS ON ATTACHED LIST)

PLEASE TAKE NOTICE that I have today served for filing with the Office of the Illinois Pollution Control Board an original and nine copies of STOCK & COMPANY, LLC'S BRIEF IN REPLY TO THE INITIAL POST-HEARING BRIEFS OF SUTTER

SANITATION SERVICES, INC. AND THE EFFINGHAM COUNTY BOARD attached herewith, copies of which are herewith served upon you.

Respectfully submitted,

STOCK & COMPANY, LLC
Petitioner,

By: _____
One of Its Attorneys

Dated: January 16, 2003

Christine G. Zeman
David M. Walter
HODGE DWYER ZEMAN
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
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CERTIFICATE OF SERVICE

I, David M. Walter, the undersigned, hereby certify that I have served the attached **STOCK & COMPANY, LLC'S BRIEF IN REPLY TO THE INITIAL POST-HEARING BRIEFS OF SUTTER SANITATION SERVICES, INC. AND THE EFFINGHAM COUNTY BOARD** upon:

Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Bradley P. Halloran, Esq.
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
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Edward C. Deters, Esq.
Effingham County State's Attorney
County Office Building
101 North Fourth Street, Suite 400
Effingham, Illinois 62401

via Airborne Express in Springfield, Illinois, on January 16, 2003, for delivery to the above-referenced persons on January 17, 2003, at 10:30 a.m., and will serve upon:

Charles Jones Northrup, Esq.
Attorney for Sutter Sanitation Services
Sorling, Northrup, Hanna, Cullen & Cochran
Illinois Building, Suite 800
Post Office Box 5131
Springfield, Illinois 62705

Stephen F. Hedinger, Esq.
Attorney for Landfill 33, Ltd.
Hedinger Law Office
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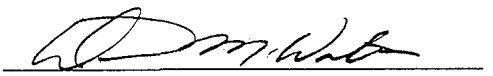
Springfield, Illinois 62703

via hand-delivery on January 17, 2003.



David M. Walter

STOK:001/Filings/NOF-COS – Reply Brief

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

LANDFILL 33, LTD.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 03-43
	)	(Third-Party Pollution Control
EFFINGHAM COUNTY BOARD and	)	Facility Siting Appeal)
SUTTER SANITATION SERVICES,	)	
	)	
Respondents.	)	
	)	
STOCK & COMPANY, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 03-52
	)	(Third-Party Pollution Control
EFFINGHAM COUNTY BOARD and	)	Facility Siting Appeal)
SUTTER SANITATION SERVICES,	)	(Consolidated)
	)	
Respondents.	)	

STOCK & COMPANY, LLC'S BRIEF IN REPLY TO THE INITIAL POST-HEARING BRIEFS OF SUTTER SANITATION SERVICES, INC. AND THE EFFINGHAM COUNTY BOARD

NOW COMES the Petitioner, STOCK & COMPANY, LLC ("Stock & Co."), and in reply to the Initial Post Hearing Briefs of Sutter Sanitation Services, Inc. ("Sutter") and the Effingham County Board ("County Board"), hereby states as follows:

I. BACKGROUND

On January 10, 2003, the parties filed their initial briefs pursuant to hearing officer Brad Halloran's order. Raising a jurisdictional question, the brief of Landfill 33, LTD. ("Landfill 33"), Stock & Co.'s co-petitioner, points out that pre-hearing notice was not perfected by the respondents pursuant to Section 39.2(d) of the Act (415 ILCS 5/39.2(d)). Landfill 33 Brief at 3. Although Stock & Co. itself did not raise the notice

issue, upon reviewing Landfill 33's brief and the Record, it agrees with Landfill 33's conclusion that notice was not properly perfected, and that the proper remedy for this jurisdictional defect is to vacate the proceedings. See Landfill 33 Brief at 4, including footnote 2. Any other remedy would reward the applicant for its own error and result in a fundamentally unfair proceeding. The applicant, in effect, has waived its right to "automatic approval" through its own mistake.

The County Board's brief opens with an "Introduction and Procedural History" section, which is little different from Sutter's "Introduction" and "Factual Overview." See Respondent Sutter Sanitation Services, Inc.'s Initial Post-Hearing Brief ("Sutter Brief") at 1-4, and the Effingham County Board's Initial Post-Hearing Brief ("County Brief") at 1-3. Nevertheless, very few citations to the Record are provided in support of the introductory factual assertions of either brief. Id.

II. AS EXPLAINED IN STOCK & CO.'S INITIAL POST-HEARING BRIEF, THE COUNTY BOARD'S DECISION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE

A county's decision to approve siting is reviewed using the manifest weight of the evidence standard. File v. D&L Landfill, Inc., 219 Ill. App. 3d 897, 901, 579 N.E.2d 1228, 162 Ill. Dec. 414 (5th Dist. 1991). And, as Sutter correctly notes, the burden of demonstrating that the local siting authority erred is on the Petitioners, i.e., Stock & Co. and Landfill 33. See, Sutter Brief at 17; 415 ILCS 5/40.1(b). Nonetheless, at the hearing before the County Board, Sutter had the burden of demonstrating, by a preponderance of the evidence, compliance with all nine criteria. American Bottom Conservancy, et al., v. Village of Fairmont, et. al., No. 01-159, 2001 Ill. Env. Lexis 489 at *6 (IPCB, Oct. 18, 2001).

Here, the County Board's decision to grant local siting approval is against the manifest weight of the evidence, because the opposite result is clearly evident, plain, or indisputable from a review of the evidence in the Record. Indeed, as explained more fully in Stock & Co.'s initial post-hearing brief, Sutter failed to demonstrate that each of the statutory requirements was met. Moreover, undisputed evidence in the record (including evidence presented by Sutter itself) demonstrates that the statutory criteria are not met. The County Board's decision granting siting approval is simply against the manifest weight of the evidence. It must be reversed, or at a minimum, remanded.

In its brief, the County Board opts not to "rehash" the evidence presented in the hearing below. County Brief at 4. Instead, the County Board, without any citation to the Record and without any support in the Record, summarizes the County Board's procedure at pages two through five and states, "substantial discussion was had and consideration given to all of the evidence put on by both Landfill 33 and Sutter Sanitation." County Brief at 5. These claims regarding the County Board's deliberations are unsupported by any citations to the Record and should be stricken or otherwise not considered here. Moreover, the County Board admits that one of its members did not agree with other County Board members that Sutter had met two of the statutory criteria. See, County Brief at 5. Notwithstanding that one member voted "nay" on whether two criteria had been met, all County Board members (including the member who admitted that compliance with all of the criteria had not been demonstrated) voted to approve local siting anyway. Record ("R.") at C437-C438. See, also, Sutter Brief at 3.

A. Criterion I

In its brief, Sutter contends that it provided sufficient evidence to support the first criterion, stating in pertinent part, as follows:

> Sutter clearly provided sufficient evidence to support this criterion. In analyzing the need issue, Sutter reviewed Illinois EPA documents including remaining capacities of area disposal facilities, as well as the Effingham County waste disposal plan.

Sutter Brief at 18.

Sutter provides no citations to the Record, however, in support of these two statements. In its brief, Sutter also asserts, without support, as follows:

> [S]uch factors as a reasonable convenience of expanding the facility may be demonstrated to satisfy the need criteria.

Sutter Brief at 18.

In Clutts v. Beasely, the Fifth District Appellate Court did state, in pertinent part, as follows:

> First, a landfill does not have to be necessary in absolute terms. It is enough that it is "expedient" or is "reasonably convenient." [Citations omitted.] The testimony in this case established that the closest landfill was open only five days a week from 10 a.m. to 3 p.m. The only other alternative landfill was in Mayfield, Kentucky.

Clutts v. Beasley, 185 Ill. App. 3d 543, 546, 541 N.E.2d 844, 133 Ill. Dec. 633, 635 (5th Dist. 1989).

Nevertheless, in a later decision, the Court elaborated and explained that the applicant must demonstrate an urgent need for the new facility as well:

> With respect to the requirement of showing that the new landfill is necessary to accommodate the waste needs of the area it is intended to serve, the applicant need not show absolute necessity. However, the applicant must demonstrate an urgent need for the new facility as well as the reasonable convenience of establishing a new or expanding an existing landfill. [Citation omitted.] The applicant must show that the landfill is

> reasonably required by the waste needs of the area, including consideration of its waste production and disposal capabilities. [Citation omitted.] The applicant need not show that every other potential landfill site in the region is unsuitable but must show more than mere convenience.

File v. D & L Landfill, Inc., 219 Ill. App. 3d 897, 906-907, 579 N.E.2d 1228, 1235-1236, 162 Ill. Dec. 414 (5th Dist. 1991). (Emphasis added.)

As the Illinois Pollution Control Board ("Board") has also recognized, "necessary" connotes a "degree of requirement or essentiality" and not just that a facility will be "reasonably convenient." American Bottom Conservancy, et al., v. Village of Fairmont, et. al., No. 01-159, 2001 Ill. Env. Lexis 489 at *54 (IPCB, Oct. 18, 2001). (Emphasis added.) Indeed, the applicant must demonstrate, at a minimum, both an urgent need for, and the reasonable convenience of, the new facility. Id. (Emphasis Added.)

That Sutter failed to demonstrate an urgent need for its transfer station is supported by precedent regarding the efficiencies a transfer station may provide to haulers. Here, there is no dispute that Sutter attempted to establish need for the transfer station at this location so as to "economically access out-of-county landfills" through the use of packer trucks for local collection and a semi-trailer for the longer haul. R. at C15, C223, C240, and C278. A similar argument was unsuccessfully made by Waste Management of Illinois, Inc. to support a new transfer station in Bensenville. The Board and First District Appellate Court ruled that improvement in the efficiency of hauling operations is inadequate to meet the statutory requirement of necessity. Waste Management of Illinois, Inc. v. IPCB, 243 Ill. App. 3d 65, 69, 600 N.E.2d 55, 58, 175 Ill Dec. 432 (1st Dist. 1992).

Sutter failed completely to demonstrate any need for its transfer station, urgent or otherwise. The undisputed evidence in the Record demonstrates that regional waste capacity is adequate. R. at C142. The undisputed evidence in the Record demonstrates that a refuse collection vehicle can routinely and economically travel within a 30-mile radius of a waste disposal site. R. at C14. And, the undisputed evidence in the Record demonstrates that two landfills and a transfer station already exist within a 30-mile radius of the proposed facility. R. at C14, C17. Improvement in the efficiency of hauling operations does not establish need. Id. The County Board's decision with regard to Criterion I is thus against the manifest weight of the evidence, and must be reversed.[1]

C. Criterion II

Again, as the applicant at the hearing before the County Board, Sutter had the burden of establishing, by a preponderance of the evidence, that all of the essential criteria were satisfied. American Bottom Conservancy, et al. v. Village of Fairmont, et. al., No. 01-159, 2001 Ill. Env. Lexis 489 at *6 (IPCB, Oct. 18, 2001).

Where an applicant fails to demonstrate that the statutory criterion is satisfied, its application is properly denied. See, e.g., Waste Management of Illinois, Inc. v. IPCB, 123 Ill. App. 3d 1075, 1084, 79 Ill. Dec. 415, 422, 463 N.E.2d 969, 976 (2d Dist. 1984). Here, although Sutter presented evidence regarding the proposed transfer station's design, location, and operation, Sutter clearly failed to demonstrate that public, safety and welfare will be protected.

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[1] Indeed, from the briefs and Record, it is not even clear what the "service area" is, as evidenced by silence on the issue in Sutter's brief, and Sutter's shift away from reference to a 30-50 mile radius of the proposed site as used in the application and evidence at hearing.

Nevertheless, in its brief, Sutter attempts to minimize the requirement that the public health, safety and welfare will be protected, stating, in pertinent part, as follows:

> First, and like the other criteria which speak in terms of *minimizing*, not eliminating, potential problems, Sutter is not required to guarantee a certain level of protection. Clutts, 133 Ill. Dec. at 635.

Sutter Brief at 21; Clutts v. Beasley, 185 Ill. App. 3d 543, 541 N.E.2d 844, 133 Ill. Dec. 633 (5th Dist. 1989).

The case at bar is easily distinguishable from the Fifth District's decision in Clutts, however. In Clutts, the evidence showed that the landfill was designed and proposed to be operated so as to protect public health, safety and welfare. Id. at 546. An experienced landfill design engineer had designed the proposed landfill in compliance with the applicable regulatory standards. Id. And, the Court held that compliance with these standards satisfied Criterion II. Id. Although Clutts argued that there could be no guarantee that the water supply would not be contaminated by the landfill, the Court stated that "[a] guarantee against contamination is not required by the statute." Id.

In stark contrast to Clutts, Sutter has not demonstrated that the facility is so designed, located, or proposed to be operated so as to protect public health, safety and welfare. Instead, the evidence in the Record demonstrates that, as designed, located, and proposed to be operated, Sutter's facility would violate several regulatory standards.

For example, Section 22.14(a) of the Illinois Environmental Protection Act ("Act") provides that no person may establish any pollution control facility for use as a garbage transfer station within 1000 feet of any dwelling. 415 ILCS 5/22.14(a). Nonetheless, Sutter's own application concedes that "the closest dwelling is located on

the property" that is proposed for the transfer station. R. at C19.[2] That the set back requirement of Section 22.14(a) is not met demonstrates that the facility is not located so as to protect public health, safety and welfare.

Similarly, Section 12(a) of the Act provides, inter alia, that no person shall threaten the discharge of any contaminants into the environment so as to cause or tend to cause water pollution in Illinois. 415 ILCS 5/12(a). As the transfer station is proposed to be modified from its prior use for grain storage and a grain elevator operation (R. at C77), it is not designed with any plan to prevent liquid wastes and leachate from running off the concrete floor and onto the ground surrounding the building. R. at C244. The concrete floor is to be washed down, yet nothing is in place to prevent the contaminated wash water from flowing off the floor and onto the ground outside. R. at C244. Sutter's expert was unable to tell the County Board whether water that drains from the proposed transfer facility location goes in the direction of an area lake. R. at C167. When Tracy Sutter was asked about which direction the water that drains from the facility would go and whether the lake would be affected, Mr. Sutter responded that he was "assuming that the water does not go in that direction." R. at C195.

In case the threat of water pollution is not enough, Sutter's own "Facility Plan" schematic shows that a large "existing propane tank" is located a short distance diagonally from the proposed transfer station. R. at C77. (Emphasis added.) And, Sutter's plan of operations increases the risk of disaster by routing semi-tractor trailers

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[2] This house on-site will preclude permitting by the Illinois Environmental Protection Agency ("IEPA"). R. at C238. As a practical matter, even if the house was not present on site, this provision of the Act will preclude the IEPA from issuing a permit for the transfer station anyway. Although not considered by the County Board below, public comment at the hearing on fundamental fairness, demonstrated that there is now another home located within 200 yards of the proposed site. See, Tr. at 40.

and trash collection vehicles around both sides of this propane tank as they travel to and from the highway. See "Process Flow Diagram," R. at C78. Sutter has presented no evidence regarding this tank's capacity, or if it is even still in use. And, if it is no longer in use, there is no evidence that the tank has been properly abandoned by having the fuel removed and the tank filled with water. See, e.g., Office of the State Fire Marshal's ("OSFM") standards for liquefied petroleum gas containers at 41 Ill. Admin. Code § 200.190. Similarly, Sutter has presented no evidence whatsoever that this large propane tank, around which semi-trailers and garbage trucks will be routed, is enclosed by a guard rail or by posts six inches or more in diameter. See, e.g., 41 Ill. Admin. Code § 200.70(d)(1).

Moreover, it is undisputed that the location of the proposed transfer station will be accessible to the public. R. at C191. And, when asked about the plan of operation for fueling an end loader that will be located on site, Mr. Sutter responded as follows:

> I currently use FS as a fuel service. They have trucks that will do deliveries. I will anticipate that on the loader, I would have them deliver the fuel on-site with their truck directly to the loader.

R. at C188.

Nevertheless, the OSFM's mobile fueling regulations prohibit the delivery of flammable or combustible motor vehicle fuels from tank trucks, tank wagons, or other portable tanks, subject to certain exceptions -- none of which have been shown to apply here. 41 Ill. Admin. Code § 170.210. See, e.g., 41 Ill. Admin. Code § 170.211 (allowing mobile dispensing at locations that are, inter alia, permitted by the OSFM, not normally accessible to the public, and at least 50 feet from structures or combustible storage). Unlike the applicant in Clutts, Sutter has not demonstrated compliance with the

applicable regulatory standards; to the contrary, Sutter has demonstrated that the facility will not be in compliance as designed, located and proposed to be operated.

In its brief, Sutter also cites the Fifth District's opinion in File, and contends in pertinent part, as follows:

> Second, the County's determination of this issue must be substantially guided by the evidence and testimony of the experts in this case. File v. D & L Landfill, Inc., 219 Ill. App. 3d.897, 162 Ill. Dec. 414 (5th Dist. 1991)(The appellate court noted that with respect to criterion number 2 "it has been held that the determination of this question is purely a matter of assessing the credibility of expert witnesses.")

Sutter Brief at 21.

Nevertheless, in File, conflicting evidence was presented with regard to this criterion, and the decisionmaker simply decided which evidence it found to be most credible. File at 907. In contrast here, as set forth above and in Stock & Co.'s initial post-hearing brief, undisputed evidence (including Sutter's own evidence) demonstrates that the criterion was not met.

To receive siting approval, Sutter was required to submit sufficient details about the proposed facility to demonstrate that it meets each criterion listed in Section 39.2(a) of the Act. County of Kankakee, et al. v. City of Kankakee, et al, Nos. 03-31, 03-33, 03-35 (consolidated) at *27-28 (Ill. PCB, January 9, 2003) (reversing decision of municipality, which was against the manifest weight of the evidence, because compliance with Criterion II had not been demonstrated). Despite questioning by Mr. Deters, the County's counsel, that resulted in one witness suggesting that the County Board need not trouble itself with technical concerns because such concerns would be considered by the IEPA, the County Board cannot simply defer to the Agency when there is insufficient evidence to support an applicant's siting request. Id. R. at C269, C193-194. The County

Board's decision on Criterion II was against the manifest weight of the evidence and must be reversed.

D. Criterion III

As explained in Stock & Co.'s initial post-hearing brief, Criterion III is "two pronged." First, the applicant must demonstrate that the facility is located so as to minimize incompatibility with the character of the surrounding area. Second, the applicant must demonstrate that the facility is located so as to minimize the effect on the value of the surrounding property.

Nevertheless, Sutter simply failed to provide any evidence on the first prong or element of Criterion III. In its brief, Sutter claims, in pertinent part, as follows:

> After reviewing Sutter's proposed transfer station plans, visiting the proposed site, and based upon his general understanding of waste transfer station operations Mr. Bitzer opined that the proposed facility would not have an adverse impact on property values in the area, nor would it be incompatible with the area (C. 182).

Sutter Brief at 23. (Emphasis added.)

The Record, however, simply contains the following incomprehensible question from Sutter's lawyer that Mr. Bitzer agreed was "true."

> Q. Okay. Is your opinion then does this proposed facility meet, within a reasonable degree of your profession, Criterion No. 3, in that minimizing the incompatibility with the character of the surrounding area and minimizing the effect on the value of the surrounding property?
>
> A. That is true.
>
> [Q.] I don't have anything else for Mr. Bitzer, Mr. Chairman.

R. at C182.

There is no discussion in the Record whatsoever as to how the facility will minimize incompatibility with the character of the surrounding area. R. at C178-C182.

> An applicant must demonstrate it has done or will do what is reasonably feasible to minimize incompatibility.

Waste Management of Illinois, Inc. v. IPCB, 123 Ill. App. 3d 1075, 1090, 79 Ill. Dec. 415, 426, 463 N.E.2d 969, 980 (2d Dist. 1984). Sutter has presented no evidence that it has done or will do what is reasonably feasible to minimize incompatibility. Indeed, that a dwelling is on the transfer station property itself in violation of the statutory set back requirement at Section 22.14 of the Act is further evidence that reasonable efforts to minimize incompatibility have not been demonstrated. Thus, the decision of the County Board that this criterion has been met is against the manifest weight of the evidence.

E. Criterion V

As noted in Stock & Co.'s initial post-hearing brief, the statute requires that the danger from a facility be minimized, and Sutter has not done so. Indeed, it is clear from the Record and Sutter's brief that Sutter has ignored the language of the Act and, instead, simply taken minimal measures, at most and if at all, to address the danger of fires, spills, and operational accidents. See, e.g., Sutter Brief at 23-25.

The Second District Appellate Court has made it clear that when the General Assembly used the term "minimize" in Section 39.2 of the Act it was not referring to minimal efforts by applicants, stating in pertinent part as follows:

> Under [the applicant's] construction, any action, however small, taken by an applicant to minimize the landfill's incompatibility would satisfy the statutory requirement. Such a minimal requirement would render the criterion practically meaningless. Rather, we read section 39.2(a)(iii) as requiring an applicant to demonstrate more than minimal efforts to reduce the landfill's incompatibility.

* * *

> An applicant must demonstrate it has done or will do what is reasonably feasible to minimize incompatibility.

Waste Management of Illinois, Inc. v. IPCB, 123 Ill. App. 3d 1075, 1090, 79 Ill. Dec. 415, 426, 463 N.E.2d 969, 980 (2d Dist. 1984).

As illustrated further in Stock & Co.'s brief, Sutter has not demonstrated that it has done or will do what is reasonably feasible to minimize the danger to the surrounding area from fire, spills, or other operational accidents.

F. Criterion VIII

It is undisputed that Effingham County has adopted a regional waste management plan. R. at C71. In its brief, Sutter argues that the plan "supports both in and out of county disposal." Sutter Brief at 25. Sutter concludes in its brief that Criterion VIII was met, because out-of-county disposal was contemplated. Sutter Brief at 25. Nevertheless, Landfill 33 explains that the plan, as adopted previously, rejected a proposal for a transfer station and contemplated only the continued utilization of existing landfills through direct haul. See, Landfill 33 Brief at 12 (citing R. at C213-C216). Effingham 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 Effingham County's plan. While this criterion does not require that a county plan be followed to the letter or pose rigid requirements, the facility must not conflict with the county's stated intent in the plan, as it does here. Sierra Club v. City of Wood River, No. 98-43, 1998 Ill. Env. Lexis 12 at *24 (IPCB, Jan. 8, 1998).

G. Conclusion As To All Criteria

Section 39.2(a) of the Act sets forth criteria that must be met prior to the approval of a siting application for a waste transfer station. 415 ILCS 5/39.2(a). The General Assembly has charged the County Board with resolving the technical issues set forth therein, including the public health ramifications associated with the facility's design. Id. The applicant, Sutter, had the burden of proof and was required to demonstrate that the criteria were met. As explained with supporting citations in Stock & Co.'s initial post-hearing brief, Sutter did not demonstrate compliance.

It is undisputed that the regional waste disposal capacity is already adequate. R. at C142. Sutter did not demonstrate that the transfer station is needed. At best, it demonstrated that the transfer station might be convenient. Sutter also failed to demonstrate that the facility, an improvised design with minimal safeguards proposed to be retrofitted to a former grain elevator, is located so as to minimize incompatibility and the effect on the value of the surrounding property. More importantly, Sutter has failed to demonstrate that public health, safety, and welfare will be protected. Indeed, instead of being designed to minimize danger, it appears that Sutter's transfer station is disastrous as designed. The County Board's decision to approve local siting is against the manifest weight of the evidence and must be reversed.

III. THE COUNTY BOARD'S PROCEEDINGS WERE FUNDAMENTALLY UNFAIR

Moreover, the proceedings before the County Board were not fundamentally fair as to Stock & Co. Examples of the lack of fundamental fairness, which are explained in greater detail in Stock & Co.'s initial post-hearing brief, include the following. The transcript of the hearing was not made available by the County Board in a timely manner.

In response to Sutter's inducement to provide recycling services, the County Board approved local siting despite Sutter's failure to demonstrate that the statutory criteria had been met. The mother of the County Board's attorney was a highly vocal advocate for the recycling center and hence siting approval -- yet this mother/son relationship was never disclosed. And, members of the County Board toured Sutter's site at least once, immediately before the siting application was filed, and again after the siting application had been filed, but the substance of those tours was not disclosed and persons opposed to the transfer station were not invited to participate

A. Unavailability of the Hearing Transcript at the County

The County Board hearing took place on August 14, 2002. R. at C125. The hearing record, although transcribed and certified by September 2, 2002, was not made available to the public at the County Board's offices until after the County Board approved local siting and after the time had elapsed for filing an appeal. R. at C294. When Stock & Co., through its Registered Agent, Duane Stock, contacted the County Clerk on October 2, 2002, to obtain a copy of the hearing transcript, he was told that the transcript was not available through the County and was advised to contact counsel for the applicant. See Affidavit attached to Stock & Co.'s Petition for Review, and Transcript of Hearing ("Tr.") at 44-45. As the Board is aware, it has previously held that a siting authority's failure to provide access to the hearing transcript is enough to make the proceedings fundamentally unfair. Spill, et al. v. City of Madison and Metro-East, LLC, PCB 96-91, 1996 Ill. Lexis 250 at *22 (IPCB March 21, 1996); American Bottom Conservancy, et al., v. Village of Fairmont, et. al., No. 00-200, 2000 Ill. Env. Lexis 665

at *44 (IPCB, Oct. 19, 2000).[3] See, also, County of Kankakee, et al. v. City of Kankakee, et al., Nos. 03-31, 03-33, 03-35 (consolidated) at *27-28 (IPCB, Jan. 9, 2003) (discussing the significance of the opportunity to review the transcript at 24).

In its brief, Sutter complains that it has been significantly prejudiced because Landfill 33 did not allege any specific grounds for fundamental unfairness and responded to Sutter's requests for disclosure by stating that such facts were included in the Record. Sutter Brief at 5. Ironically, however, Sutter then claims that no prejudice has occurred to Stock & Co. at all as a result of the County Board not making the transcript available, stating in pertinent part, as follows:

> In fact, Petitioner Stock make no allegation that he was prejudiced during the proceeding (of course there would be no contemporaneous transcript during the hearing itself) or the public comment period by the absence of the transcript. His only concern was that the transcript was not available for his preparation of the Petition for Review (PCB tr. 21). However, as he did timely file a Petition identifying a number of grounds for appeal, and did participate in the PCB hearing, no prejudice has occurred.

Sutter Brief at 7. (Emphasis added.)

Both the County Board and Sutter suggest that it was not enough that Stock & Co. asked for and did not receive a copy of a transcript to which it was entitled by Sections 39.2(c) and (d) of the Act. Sutter Brief at 7; County Brief at 8. It is undisputed that the

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[3] In its initial post-hearing Brief, Stock inadvertently cites to American Bottom instead of Spill as a case where no explanation was given for a delay in making the transcript available. See Stock & Co. Brief at 21 (with improper citation of "Id. at *45"). It was in Spill, however, and not American Bottom, where no explanation was offered for the delay in making the transcript available. Spill, et al. v. City of Madison and Metro-East, LLC, PCB 96-91, 1996 Ill. Lexis 250 at *20-22 (IPCB March 21, 1996). In American Bottom, the transcript was either "lost" or not yet received. American Bottom Conservancy, et al., v. Village of Fairmont, et. al., No. 00-200, 2000 Ill. Env. Lexis 665 at *21-22, 45 (IPCB, Oct. 19, 2000).

We note again that here the County Board offered no explanation for the delay between the date the hearing record was transcribed (September 2nd), the date it was first requested by Duane Stock (October 2nd), the date the appeal petition was due to be filed and was filed (October 21st) and the date the transcript was finally filed with the County (October 24th).

transcript was not even available at the County until October 24, 2002. See, e.g., County Brief at 7. Nevertheless, without any support or precedent, the County Board and Sutter suggest that Stock & Co. was required and indeed had the burden to continue to make futile requests to obtain a copy of the transcript after its October 2, 2002 efforts failed. Sutter brief at 7; County Brief at 8.

In addition, the County Board inaccurately suggests that Duane Stock failed to identify Stock & Co. as a participant, and incorrectly references the transcript as follows:

> Stock conceded he never contacted any Effingham County officials or public bodies to identify himself as a party or participant to the proceedings prior to the Board's vote on September 16, 2002 (PCB Tr. 50-51).

County Brief at 8.

In contrast to the County Board's claims, the actual testimony from the fundamental fairness hearing, which the County Board cites, provides, in pertinent part, as follows:

> Q. And would it be fair to say, Mr. Stock that in fact, between the waste transfer hearing and transfer siting hearing and the county board's action on September 16th, other than having made written comment, you never told the county board or the state's attorney's office or the county clerk's office that you considered yourself to be an active participant in these hearings, other than having made written comment?
>
> A. Correct.

Tr. at 50-51. (Emphasis added.)

Indeed, among other actions, Duane Stock attended the hearing on behalf of Stock & Co, asked questions of witnesses, and made public comments. R. at C170; C183; C415. Section 39.2(d) of the Act requires that a record of the public hearing be developed, and that the record be sufficient to form the basis of appeal. 415 ILCS

5/39.2(d). All such documents or other materials on file with the county board or governing body must be made available for public inspection and copying, without regard to one's role as a party or participant. 415 ILCS 5/39.2(c). And, by statute, a third party, i.e., someone other than the applicant, who participated in the public hearing may petition the Board to contest the approval of the County Board. 415 ILCS 40.1(b). Stock & Co. was thus legally entitled to review a copy of the transcript at the offices of the County Board before its appeal was due, but was denied that right.

Sutter also suggests that Stock & Co. failed to "follow up as advised by the County Clerk's office to obtain a transcript." Sutter Brief at 7. Nevertheless, the only advice Stock & Co. received from the County Clerk's office was to contact Sutter's attorney. Tr. at 52; Sutter Brief at 7. Sutter cites no support for the proposition that a decisionmaker can delegate its record-keeping responsibilities to the attorney for the applicant. Indeed, the County Board's delegation of this responsibility to the attorney for the applicant is itself suggestive of collusion between the applicant and decisionmaker and thus a lack of fundamental fairness.

Both the County Board and Sutter suggest that Stock & Co. was not prejudiced because it did not ask for the transcript until after the County Board issued its decision approving siting. Sutter Brief at 7. Nevertheless, as explained in Stock & Co.'s initial post-hearing brief, the County Board's decision to approve siting was clearly against the manifest weight of the evidence and, thus, understandably unexpected by Stock & Co. Moreover, Duane Stock, Stock & Co.'s agent, was admittedly naïve regarding these proceedings. Tr. at 49. Unlike Sutter, the County Board, or even Landfill 33, Stock &

Co. was not represented by an attorney during the hearings before the County Board. R. at C1-C439.

In its brief, Sutter attempts to distinguish the Spill decision by comparing the number of hours required for the hearing and the number of pages in the transcripts, then concluding that the hearing in Spill was longer and required more pages. Sutter Brief at 9. This is a difference without a distinction. In fact, unlike in Spill, the transcript in this case should have been made available nearly immediately upon the hearing's completion because there were substantially fewer pages and less testimony to transcribe. In Spill, the hearing took place over a four day period and resulted in a transcript in excess of 1800 pages; the hearing here lasted approximate three (3) hours and resulted in a transcript of less than 300 pages. Sutter Brief at 9. And, contrary to Sutter's suggestion, the Board's decision in Spill was clearly not limited to instances "where a transcript is on file with a local siting authority." Contrast Sutter Brief at 6 with Spill at *19-22 ("the City's failure to provide access to the transcript rendered the proceeding fundamentally unfair").

Moreover, as explained in its brief, Stock & Co was prejudiced by misstatements about the testimony at hearing, that were contained in a letter Sutter's attorney sent to the Effingham County State's Attorney, Ed Deters, and then County Board Chairman Leon Gobczynski.[4] R. at C368 to R. at C375A. The County Board's misplaced reliance on this letter from Sutter's counsel is evidenced by its verbatim adoption of "Attachment 5" to the letter, even including the typographical errors (e.g., the word "staring" in paragraph 7(a)), as its findings of fact. Compare Attachment 5, R. at C375A, with "Finding of

[4] Subsequent to the hearing in the proceedings below, Chairman Leon Gobczynski resigned from the County Board.

Fact," R. at C433. This misplaced reliance was particularly prejudicial, since none of the County Board members who voted (including one member who did not attend the hearing) could verify the accuracy of the letter from Sutter's counsel against the transcript (which was unavailable).[5]

B. The County Board Based Its Decision on Recycling Rather Than The Statutory Criteria

In its brief, Sutter concedes that any presumed impartiality of the County Board can be overcome, stating, in pertinent part, as follows:

> [T]he burden on Petitioner Stock is, in effect, to establish that Sutter had such control over the "deliberative faculties" of the Board as to overcome the presumed impartiality of the County Board. Tate et al. v. Macon County Board et al., PCB No. 88-126, p. 8 (December 15, 1988)

Sutter Brief at 12-13. (Emphasis added.)

As explained further below and in Stock & Co.'s initial post-hearing brief, the deliberative faculties of the County Board were indeed directed away from the statutory criteria. The record demonstrates that Sutter induced the County Board to approve local siting, despite the proposed transfer station's noncompliance with the statutory criteria, using both a "carrot" (its promise to continue and even expand recycling operations if siting approval was granted) and a "stick" (its statements that continued recycling services would be impossible, if siting approval was denied). R. at C190-C193. See, e.g., County Board member Charles Voelker's prefatory statement in the County Board's decision regarding recycling at this location. R. at C437.

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[5] See County Board meeting minutes for September 16, 2002, indicating that County Board member Bob Shields voted to approve local siting (R. at C437-439); transcript of August 14, 2002, which shows appearances by County Board members, except for Bob Shields (R. at C127); and filestamp date on transcript indicating its filing by the County Clerk on October 24, 2002.

In its brief, the County Board misquotes Mr. Voelker's prefatory statement as follows:

> The only offer of proof on that issue seems to be a statement taken from the minutes by Board member Charles Voelker at the September 16, 2002 Board meeting, before the vote, that "recycling is a valuable asset and needed in Effingham County." (R. C437).

County Brief at 9.

In fact, the minutes of the September 16, 2002, County Board meeting state as follows:

> Board Member C. Voelker said recycling at this location is a valuable asset and needed in Effingham County.

R. at C437. (Emphasis added.)

Contrary to the misquotation in the County's brief, one can conclude that Mr. Voelker was not simply commenting about the value of recycling in general during the course of the Board meeting. Indeed, the minutes of the September 16, 2002, County Board meeting are evidence that, immediately prior to the County Board's vote on the siting application and the County Board's discussion regarding whether each of the criterion had been met, Mr. Voelker addressed the value of the facility in providing recycling services at this location.

Furthermore, Tracy Sutter's direct examination testimony illustrates that the recycling center was opened primarily to induce the County Board to approve local siting:

> 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 station.

R. at C190.

This "fledgling" recycling center was opened just prior to Sutter's application being submitted to the County Board. R. at C414. See also offer of proof in Tr. at 68. And, common business practice and common sense dictate that a businessman, such as Sutter, does not voluntarily and uniquely offer a service that he knows is economically impossible. See Sutter brief at 12 ("Tracy Sutter did testify that without the transfer station Sutter could not economically continue its voluntary recycling service"). Indeed, even prior to the hearing, County Board members had traveled to the site of Sutter's proposed transfer station, and toured the recycling facility. R. at C191.

At the hearing, Tracy Sutter quickly emphasized that Sutter had no intention of continuing the recycling operation unless the transfer station was approved by the County Board. R. at C190. Sutter's claims that "there is nothing in the record to demonstrate that Mr. Sutter's statement on recycling had any impact at all on the Effingham County Board," is belied by the Record. Sutter Brief at 13. For example, a County Board member sought assurances from Sutter that if local siting was granted, Sutter would continue recycling. R. at C192. Another County Board member inquired about whether Sutter intended to pick up any of the recyclable materials if local siting was granted. R. at C193.

Ms. Deters described the County Board's deliberations, in pertinent part, as follows:

> Even though recycling per se may not have been officially on the agenda, the question whether Sutter Sanitation Service receives its permit (for a solid waste transfer station) and the continuation of the fledgling recycling service they provide, are bound together – like it or not. Package deal. No permit, no recycling. As I recall Mr. Grunloh verified that with a question to Tracy Sutter.

R. at C414.

In its brief, Sutter suggests that the only issues before the Effingham County Board were the nine statutory criteria, stating in pertinent part as follows:

> Fourth, and perhaps most significantly, is the recognition by the Effingham County Board itself that any recycling issues could not be part of the deliberations on the issue before it, namely whether the Application satisfied the 9 statutory criteria.

Sutter Brief at 14. (Emphasis added.)

The Record demonstrates otherwise. Sutter was allowed to present testimony regarding his recycling operation, even though opponents to the facility were not allowed to present rebuttal testimony.[6] R. at C19-C193; C289-C290. The County's counsel, too, introduced information regarding the recycling center in his questions of witnesses, including to Sutter, about signage at the site. R. at C193-C194.

> Q. Do you -- do you have any signage, or do you anticipate signage directing traffic essentially for those who are new to the recycling process, directing them which way to go so that they're not getting lost with trucks that may be in this facility?
>
> A. Currently there are signs.

R. at C193.

The importance of the recycling center at this location was in fact discussed during the County Board's deliberations immediately before the County Board voted to approve local siting. R. at C437. Furthermore, immediately after

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[6] Contrast the Record with Sutter's suggestion that this issue was somehow waived. R. at C289-C292; C437; and Sutter Brief at 15. See also Landfill 33 Brief at 6 (explaining that Landfill 33 was prejudiced by the assurances it received from the County Board that recycling would not be considered when, in fact, it was).

the parties moved their exhibits into evidence, the County Board made it clear that public comments about recycling would be considered. R. at C291.

> Mr. Grunloh: * * * [W]e still are going to accept any information, if somebody has a recycling standpoint to this, that can be submitted to us, I would think.
>
> Mr. Gobczynski: That's a great point. And -- and we -- we certainly will take that and make that all part of the record....

R. at C291.

Plainly, Sutter's recycling operations were considered by the County Board. And, to a disinterested observer, Sutter's inducement of a promise to provide voluntary recycling services if siting was approved may appear to have resulted in the County Board's prejudgment of adjudicative facts with regard to the statutory criteria. As Sutter correctly notes in its brief, the standard with regard to fundamental fairness is based upon what a "disinterested observer" might conclude:

> [W]here an administrative official is acting in an adjudicatory capacity, "bias or prejudice may only be shown if a disinterested observer might conclude that the administrative official had in some measure adjudged the facts as well as the law of the case in advance of hearing it."

Sutter Brief at 10.

Here, bias or prejudice by the County Board is established, because based on the Record "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." See e.g., County of Kankakee, et al. v. City of Kankakee, et al, Nos. 03-31, 03-33, 03-35 (consolidated) at *19 (Ill. PCB, January 9, 2003) (emphasis added). As noted in Stock & Co.'s initial post-hearing brief, the proceedings were also potentially affected by bias stemming from familial relationships that were not disclosed.

C. Potential Bias Due to Non-Disclosure of Familial Relationships

In its brief, Sutter incorrectly assumes that Stock & Co. is alleging that the proceedings before the County Board were fundamentally unfair as to Stock & Co. because Duane Stock is the first cousin of County Board member Carolyn Willenburg, stating in pertinent part, as follows:

> In addition, Petitioner Stock alleged that the proceedings were fundamentally unfair in three specific aspects. Petitioner Stock claimed that:
>
> * * *
>
> there was an undisclosed familial relationship between Duanne [sic] Stock (the representative of Stock and the participant at the Effingham County Board hearing) and an Effingham County Board member....

Sutter Brief at 3-4.

The County Board also incorrectly assumes that Stock & Co.'s fundamental fairness argument is based upon some bias between these first cousins, stating as follows:

> Stock's second suggestion of unfairness is made of the existence of some bias to Stock and Company by Board Member Carolyn Willenburg's first cousin relationship to Duane Stock.

County Brief at 8.

Contrary to Sutter and the County Board's suggestion, however, Stock & Co. is not asserting that the non-disclosure of Duane Stock's relationship to a County Board member caused the proceedings to be fundamentally unfair as to Stock & Co. Indeed, Stock & Co. has never limited its argument with regard to fundamental fairness and non-disclosure of familial relationships to the Duane Stock – Carolyn Willenburg relationship alone. See, e.g., Stock & Co.'s Petition at 3 ("the proceedings were potentially affected by bias stemming from familial relationships that were not disclosed"). Neither the County Board nor Duane Stock (who was admittedly naïve to such proceedings)

disclosed his relationship as first cousin to County Board member Carolyn Willenburg. R. at C1-C439; Tr. at 49. Nevertheless, Stock & Co. knew that Duane Stock's relationship to a County Board member had not been disclosed and, based upon the available information, suspected that other familial relationships may not have been disclosed either. See, e.g., Stock & Co.'s Petition at 3.

Stock & Co. retained counsel, and through discovery in this proceeding, Stock & Co.'s counsel sought information regarding other such familial relationships that had not been disclosed by the County Board. It was not until the hearing on fundamental fairness, however, that Stock & Co. actually obtained the testimony of Sutter's most ardent supporter, Nancy Deters, that she was the mother of the County Board's attorney. See Tr. at 28-39.

Again, bias or prejudice by the County Board is established when the Record demonstrates that "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." See, e.g., County of Kankakee, et al. v. City of Kankakee, et al, Nos. 03-31, 03-33, 03-35 (consolidated) at *19 (Ill. PCB, January 9, 2003). (Emphasis added.)

Nancy Deters' testimony was that she and her son "rarely" agree about anything (Tr. at 30). As the term "rarely" is not all-inclusive, it leaves open to the disinterested observer that this may be one issue on which she and Ed Deters agree. Similarly, while she was unable to recall if she spoke with her son (Tr. at 30) or County Board Members (Tr. at 31), there is no evidence in the Record that she did not.

When combined with Mr. Deters' suggestion that he might have a role in decisionmaking process (R. at C130) and his active role at the hearing (R. at C269, C193-195), a disinterested observer might conclude that Ed Deters' representation of the County Board was materially limited by his responsibilities to his mother, or by his own interests in not taking a position in opposition to that of his mother. A disinterested observer might further conclude that, because the mother of the County Board's attorney was an active supporter of local siting approval, and because the County's attorney took an active role during the hearing, including in asking leading questions that suggested that the County Board need not trouble itself with technical concerns because they would be considered by the IEPA, and that signage for traffic for the recycling center would be available, the County Board that received his counsel may have, in some measure, adjudged the facts as well as the law of the case in advance of hearing it.

At a minimum, a remand with disclosure of these relationships is therefore required. The participants and the public at large had the right to know about such relationships, especially the one between the most ardent supporter of the recycling center and transfer station and the attorney on whom the decisionmaker relied for its counsel.

D. Tours Of The Site By The County, Without All Parties Invited

In addition, as explained further in Stock & Co.'s brief, the Record indicates that *ex parte* contacts occurred between the Applicant and the County Board after the siting application had been filed, thereby biasing the County Board and resulting in its decision to approve local siting even though the criteria had not been met. For example, meeting minutes of the County Board refer to a decision to tour the site on July 31, 2002,

coincidentally at the same time and on the same date that the public hearing had originally been scheduled and then inexplicably reset, well after the siting application had been filed. R. at C109-C110; C125. Nowhere does the Record reflect that this tour did not occur. R. at C109-C110; C125. Furthermore, the Waste Committee of the County Board had been to the site approximately one month prior to Sutter's application being filed. R. at C191; Tr. at 67-68.

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. Spill, et al. v. City of Madison and Metro-East, LLC, PCB 96-91, 1996 Ill. Env. Lexis 250 at *26 (IPCB March 21, 1996). Here, there is no evidence that the tour by the County Board planned for July 31, 2002, did not occur, and yet the evidence is clear that the public was not invited. Stock & Co. and other opponents of the transfer station were prejudiced by the fact that the general public was excluded from the tour and not given equal access to information obtained from the tour by the participating County Board members. See, e.g., offer of proof in Tr. at 67-74. The County Board's failure to include the information in the Record regarding the tour that Sutter stated occurred immediately before the application was filed and, more importantly, the tour that appears to have occurred after the siting application was filed, where the public was not invited to attend or respond, rendered the process fundamentally unfair. See, Spill at *29. See also, Kankakee at *21.

IV. REVERSAL (OR, AT A MIMIMUM, REMAND) OF THE COUNTY BOARD'S DECISION IS REQUIRED

Section 39.2(a) of the Act sets forth criteria that must be met prior to the approval of a siting application for a waste transfer station. 415 ILCS 5/39.2(a). The General

Assembly has charged the County Board with resolving the technical issues set forth therein, including the public health ramifications associated with the facility's design. Id. The applicant, Sutter, had the burden of proof and was required to demonstrate that the criteria were met. Sutter did not do so.

It is undisputed that the regional waste disposal capacity is already adequate. R. at C142. Sutter did not demonstrate that the transfer station is needed to accommodate the waste needs of the area intended to be served. Sutter also failed to demonstrate that the facility, an improvised design with minimal safeguards proposed to be retrofitted to a former grain elevator, is located so as to minimize incompatibility and the effect on the value of the surrounding property. More importantly, Sutter failed to demonstrate that the facility is proposed to be located, designed and operated so as to protect public health, safety, and welfare. The County Board's decision to approve local siting is against the manifest weight of the evidence and must be reversed.

In addition, the proceedings before the County Board were not fundamentally fair as to Stock & Co. The transcript of the hearing was not made available by the County Board until after the deadline for appeal of the County Board's decision, hampering Stock & Co. in its efforts to formulate the basis for its appeal. Sutter induced the County Board to approve local siting, despite Sutter's failure to demonstrate that the statutory criteria had been met, by promising to continue to provide recycling services if approval was granted. The mother of the County Board's attorney was a highly vocal advocate for Sutter's recycling services and hence siting approval -- yet this mother/son relationship was never disclosed. And, members of the County Board toured Sutter's site at least once, and possibly twice, with the second one scheduled well after the siting application

was filed, but the substance of such tour(s) was not disclosed and persons opposed to the transfer station were not invited to participate.

Due to the failure of the applicant to provide sufficient information on the above statutorily mandated criteria, the County Board's decision to grant siting approval for the proposed transfer station is against the manifest weight of the evidence. As a result, the County Board's decision must be reversed. The lack of fundamental fairness surrounding the hearing, decision, and preparation of the record for appeal also requires reversal of the siting approval, or in the alternative, that the matter be remanded to the County Board for a new hearing.

WHEREFORE, for the above-listed reasons, Petitioner, STOCK & COMPANY, LLC, asks that the Illinois Pollution Control Board reverse the Effingham County Board's approval of the siting of a solid waste transfer station requested by the applicant, Sutter Sanitation Services, and grant in favor of STOCK & COMPANY, LLC, any other relief that the Illinois Pollution Control Board deems appropriate.

STOCK & COMPANY, LLC,
Petitioner,

BY: _____
One of Its Attorneys

Dated: January 16, 2003

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