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STATE OF ILLINOIS
Pollution Control Board

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

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

NOTICE

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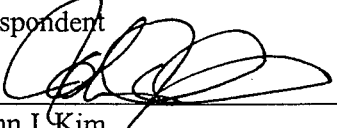
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PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a RESPONSE TO RUFFNER, ET AL., MOTION TO INTERVENE, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



John J. Kim
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Special Assistant Attorney General
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Dated: June 22, 2004

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Pollution Control Board

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

RESPONSE TO RUFFNER, ET AL., MOTION TO INTERVENE

NOW COMES the Respondent, the Illinois Environmental Protection Agency (“Illinois EPA”), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500 and 101.504, hereby respectfully responds to the Motion to Intervene (“motion”) filed by Jesse Ruffner and Family, Lloyd Stock, and Stock & Company, LLC’s (“petitioning intervenors”). In response to the petitioning intervenors’ motion, the Illinois EPA states as follows:

1. As noted by the petitioning intervenors, the Illinois Pollution Control Board’s (“Board”) authority to grant intervention to non-party requestors is found in Section 101.402 of the Board’s procedural rules (35 Ill. Adm. Code 101.402). There is no claim by the petitioning intervenors, and indeed none is provided in Section 101.402(c) of the Board’s procedural rules, that the petitioning intervenors have a statutory right to intervene. Thus, the only means by which the petitioning intervenors may be granted party status is for the Board to find that the discretionary provisions of Section 101.402(d) are applicable and weigh in favor of the petitioning intervenors. However, based upon the language within that provision, the Board should not so find.

2. Section 101.402(d) provides:

Subject to subsection (b) of this Section, the Board may permit any person to intervene in any adjudicatory proceeding if:

- 1) The person has a conditional statutory right to intervene in the proceeding;
- 2) The person may be materially prejudiced absent intervention; or
- 3) The person is so situated that the person may be adversely affected by a final Board order.

3. To prevail, the petitioning intervenors must demonstrate at least one of the three criteria in Section 101.402(d) has been met. The petitioning intervenors have not met that burden. First, the petitioning intervenors have not demonstrated that they have any conditional statutory right to intervene. Section 101.402(d)(1). There is no conditional statutory right that has been proffered by the petitioning intervenors; rather, they instead cite to Section 22.14 of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/22.14) as the relevant statutory provision.

4. The Illinois EPA agrees with the petitioning intervenors that Section 22.14 is relevant and undoubtedly will be considered and interpreted by the Board in the ultimate resolution of the pending appeal. But, that provision does not confer any right, conditional or otherwise, upon a private third-party to intervene in any related permit appeal. The application and enforcement of that provision is left to the Illinois EPA, which is a named party in the present action. The Illinois EPA, as the entity obligated to ensure compliance with that section, has taken and will continue to take all necessary steps before the Board to present its case.

5. With all due respect to the petitioning intervenors, however, that obligation rests solely with the Illinois EPA in a permit appeal context. If the Board were to allow intervention in this case, it would possibly allow a party other than the Illinois EPA to become directly involved in what is a clear act of the Illinois EPA's permitting authority. Section 39(a) of the Act (415 ILCS 5/39(a)) provides that the Illinois EPA is the agency charged with the

responsibility of reviewing and acting upon permit applications. The Illinois EPA did so here, and its actions are subject to appeal before the Board, which is a circumstance that has come to pass. The Illinois EPA and the Petitioner in this action are thus falling squarely within their statutory roles in the permit appeal process. To allow a private third-party to interject itself in these proceedings is without any basis in the Act.

6. Next, the petitioning intervenors must show that they will be materially prejudiced absent intervention. Section 101.402(d)(2). Again, the petitioning intervenors have failed to make this requisite showing, largely because they fail to acknowledge the other means by which they may participate in the proceedings. Non-parties to a permit appeal may be, and routinely are granted, the leave to file an *amicus curiae* brief setting forth any relevant arguments or positions for the Board's consideration. While a person filing an *amicus* brief is not a formal party to the action, that person's arguments are nonetheless considered by the Board in reaching its final decision. The Illinois EPA will have no objection to the petitioning intervenors filing an *amicus* brief on any aspect of the pending appeal.

7. Further, if a hearing is held in this matter, the petitioning intervenors are again provided an opportunity to participate by making public comments that will be taken by the Board with the rest of the hearing record. These capabilities provide a more than sufficient opportunity for the petitioning intervenors to present any arguments they feel appropriate to the Board, either through an *amicus curiae* brief or by making public comments at a hearing. These options preclude the petitioning intervenors from making any credible argument that failure to grant them intervention would result in material prejudice.

8. The last component for the Board's consideration in a case of discretionary intervention is whether the person is so situated that the person may be adversely affected by a

final Board order. Section 101.402(d)(3). Here again, based on the facts presented in this case, the petitioning intervenors have not made a persuasive argument that they deserve to be granted intervention. The crux of the petitioning intervenors argument is that the Board's final decision here may result in a hardship upon them, in that it may allow for the permitting of a transfer station in close proximity to their residence or property.

9. Although each of the petitioning intervenors claims a similar yet distinct adversity that may befall them should the Board ultimately decide that the Illinois EPA's decision should be reversed, the common theme and argument made by the petitioning intervenors is that they should be allowed to live or conduct business in the location in dispute without a transfer station located nearby. This is an extension of the protection and prohibition set forth in Section 22.14 of the Act. Again, as argued above, the Illinois EPA is the sole entity charged with the responsibility of enforcing that section, and the Illinois EPA has not and will not shirk from that responsibility.

10. Also, there is a question as to what sort of "Pandora's box" would be opened if the petitioning intervenors were granted intervenor status based on a claim that they were adversely impacted here. Although the petitioning intervenors are basing their arguments on location that is within the setback distance set forth in Section 22.14, their argument is essentially that they will suffer some consequence if a permit is granted to a facility that they find objectionable.

11. If that is the standard by which future motions to intervene are to be judged, then obviously there is a much larger (yet equally described) group of persons that may claim in the future that the permitting of some other facility in proximity to their homes or business interests is also objectionable. That circumstance alone is not and should not be deemed sufficient to

warrant granting of a motion to intervene, since the contentions of those complaining parties might not be based on any particular statutory provision.

12. The Board has not issued any final order that is persuasive in support of the petitioning intervenors' arguments. The petitioning intervenors cite favorably only to the case of Saline County Landfill, Inc. v. Illinois EPA, PCB 02-108. In that case, the Board granted intervenor status to the County of Saline based upon their status as a governmental entity charged with interpretation of local siting approval, an issue that was key to the resolution of the appeal.

13. Here, the only roles played by the petitioning intervenors are not in dispute, as the acts are essentially acknowledged on a chronological basis. Just how those acts should be applied to the resolution of this appeal is what remains, but it is not necessary for the petitioning intervenors to have party status in order for that factual application to occur.

14. More relevant and applicable to the present appeal are the Board's decisions in other matters involving requests for intervention. For the most part, the Board has not viewed motions to intervene with favor, properly setting forth the requisite regulatory standard in Section 101.402. This is a standard that should not be easily met, as intervention is a significant act with implications to parties that are otherwise clearly identified by statute.

15. Interestingly, in the case of 2222 Elston LLC v. Purex Industries, et al., PCB 03-55 (January 23, 2003), the Board considered a request for intervention filed by the City of Chicago ("City"). In that case, the Board gave no special deference to the City based on its status as a governmental entity, but rather reviewed the attendant facts. The Board was not persuaded that the City had provided sufficient justification to allow for intervention, despite the City's argument that financial implications may result from an adverse Board decision.

16. In another case involving a request by a governmental entity to intervene, the Board ruled that intervention was not warranted even when the entity argued that it may be adversely impacted in terms of its local ordinance. The Board did not find that such argument met the burden imposed by Section 101.402(d), but noted that the entity could participate in the proceeding through the filing of an *amicus curiae* brief. Stuart v. Fisher, PCB 02-164 (January 23, 2003).


17. Based on those decisions, it is clear that the Board considers the standard of whether to grant discretionary intervention to be a strict one. Based on the facts presented here, the petitioning intervenors have not presented a persuasive case that they should be granted intervention.

WHEREFORE, for the reasons set forth above, the Illinois EPA respectfully requests that the Board deny the petitioning intervenors' motion.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent



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Dated: June 22, 2004

This filing submitted on recycled paper.

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on June 22, 2004, I served true and correct copies of a RESPONSE TO RUFFNER, ET AL., MOTION TO INTERVENE, by placing true and correct copies in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. mail drop box located within Springfield, Illinois, with sufficient First Class Mail postage affixed thereto, upon the following named persons:

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