

JUN 15 2004

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

SUTTER SANITATION, INC. and)
LAVONNE HAKER,)
))
Petitioners,)
))
v.)
))
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
))
Respondent.)

PCB No. 2004-187
(Permit Appeal - Land)

SUTTER SANITATION INC'S
RESPONSE TO RUFFNER, STOCK AND STOCK AND CO.
MOTION TO INTERVENE

NOW COMES Petitioner Sutter Sanitation, Inc. ("Sutter") and hereby responds and objects to the Motion of Mr. Jesse Ruffner and Family, Mr. Lloyd Stock, and Stock and Company's, LLC's Motion to Intervene ("Movants"). In support of its response and objection, Sutter states:

I. Introduction

1. On September 16, 2002 the Effingham County Board approved local siting for Sutter's solid waste transfer station (the "facility"). The Sutter facility is located in a former grain elevator site in an agricultural area. The property across the county road from the Sutter facility is owned by Stock and Company, LLC ("Stock LLC"). Movant Stock LLC appealed Effingham County's siting approval to the Illinois Pollution Control Board ("IPCB") and *lost*. Movant Stock LLC then appealed the IPCB decision to the Appellate Court and *lost*. During the period under which the siting approval was being contested by Stock LLC two things happened. Movant Lloyd Stock ("Stock") placed a mobile home on the Stock LLC property across the roadway from the Sutter facility, and Sutter submitted a permit application to the Illinois Environmental Protection Agency

("Illinois EPA") for the facility. After numerous comments and arguments were presented to the Illinois EPA for and against issuing the permit, the Illinois EPA denied the permit application. The primary and most significant denial point was based upon the Illinois EPA's interpretation of Section 22.14 of the Illinois Environmental Protection Act ("Act")(415 ILCS 5/22.14). This Section generally prohibits a transfer station within 1000 feet of a residence. The Illinois EPA apparently considered the "after the fact" placement of a mobile home on the Stock LLC property across from the Sutter facility an impediment to issuing the permit. Sutter contests this interpretation.

2. The Motion to Intervene at issue is merely the continuation of Stock's plan to defeat the Sutter facility by whatever means available. However, the Movants have no statutory right to intervene in this matter, have provided no legally supportable arguments for intervention, have failed to identify how their ability to participate by other available procedural means is insufficient and why their formal involvement as a party in support of the Illinois EPA's permit decision is somehow necessary to assist the Illinois EPA in justifying their decision or to the IPCB in evaluating the Illinois EPA's decision. Accordingly, the IPCB should deny the Motion to Intervene.

II. Factual Background

3. On April 19, 2002, Sutter submitted an application for local siting approval of a solid waste transfer station to the Effingham County Board. In August, 2002, the Effingham County Board held a hearing on the Sutter application. Stock LLC, and its manager Duanne Stock, participated at that hearing. On September 16, 2002, the Effingham County Board approved the Sutter application by unanimous vote. Stock appealed to the IPCB. After a public hearing during which evidence was heard, and public comment received (including from Stock and Stock LLC), the IPCB affirmed the Effingham County Board's decision (Landfill 33, Ltd and Stock & Co. v. Effingham County Board and Sutter Sanitation Services, PCB No. 03-43 & 03-52

(Consolidated)(February 20, 2003)). Stock LLC appealed the IPCB's decision to the Illinois Appellate Court citing numerous errors committed by the IPCB. The Appellate Court, Fifth District, affirmed the IPCB decision in full via a Rule 23 Order (Stock and Co., LLC v. Illinois Pollution Control Board, et al., No. 5-03-0099 (mandate issued June 7, 2004)).

4. Subsequent to the Effingham County Board's approval of Sutter's application in September, 2002, Stock (and or Stock LLC) moved a mobile home onto the property across the street from the Sutter facility. Prior to this time the Stock property was vacant agricultural land. During the pendency of the IPCB and Appellate review, Sutter submitted its Application for Permit to the Illinois EPA. Stock submitted comments challenging the grant of a permit because of the location of the mobile home across the street (ostensibly within the 1000 foot "setback" requirements of Section 22.14 of the Act). Sutter contested this as a valid grounds for permit denial, but the Illinois EPA denied the Sutter permit application on this basis. This appeal followed.

5. Movants filed their motion to intervene on May 28, 2004. The Motion was served upon Petitioner no sooner than June 1, 2004.

III. Standard of Review

5. Motions to intervene are governed by IPCB procedural rule 101.402 (35 Ill. Adm. Code 101.402). Indeed, there is no dispute that the applicable regulation establishing the elements to be considered for intervention is set out at 101.402(b) and (d) (See Mot. par. 5). Whether to grant or deny intervention under this regulation is discretionary. E.g. People v. Alloy Engineering and Casting Co., PCB No. 01-155 (September 6, 2001). That regulation provides in relevant part:

101.402 Intervention of Parties

- b) In determining whether to grant a motion to intervene, the Board will consider the timeliness of the motion and whether intervention will unduly delay or materially

prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding.

- d) 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.

35 Ill. Adm. Code 101.402.

The issue of intervention have been interpreted by the Courts and the IPCB on numerous occasions. In general, intervention by objectors is disfavored and not routinely granted by the IPCB. Prairie Rivers Network v. Illinois EPA et al., PCB No. 01-112(NPDES Permit Appeal)(April 19, 2001)(intervention denied to private company); People v. Alloy Engineering and Casting Co., PCB No. 01-155(Enforcement – Air)(September 6, 2001)(intervention denied to 45 facility neighbors); 2222 Elston LLC v. Purex Industries, Inc. et al., PCB No. 03-55 (Citizens UST Enforcement)(January 23, 2003)(intervention denied to the City of Chicago); Rochelle Waste Disposal, LLC v. City of Rochelle, PCB No. 03-218(Siting Appeal)(July 10, 2003)(intervention denied to voluntary citizen association); Lowe Transfer, Inc. et al. v. McHenry County, PCB No. 03-221(Siting Appeal)(July 10, 2003)(intervention denied to village); Stuart v. Fisher, PCB No. 02-164 (Citizens Enforcement -- Noise)(January 23, 2003)(intervention denied to Will County). In these cases, intervention was denied on a number of grounds, including the failure to demonstrate any material prejudice or adverse effects as required by the regulation. Some arguments that have been raised in support of intervention and which have not been deemed sufficient to demonstrate material prejudice or adverse effect so as to support intervention include: an inference of financial reimbursement 2222 Elston LLC, PCB No. 03-55 (January 23, 2003); “significant impact” based

upon proximity of location, participation in the underlying matter, ability to more “vigorously defend” a decision, and protecting rights under the Act (Lowe Transfer, PCB No. 03-221 (July 10, 2003); ensuring compliance under the Act (Alloy Engineering and Casting Co., PCB No. 01-155 (September 6, 2001); or business interests (Prairie Rivers Network, PCB No. 01-112 (April 19, 2001).

6. The one consistent, if not dispositive factor, that the IPCB repeatedly refers to in intervention opinions is the fact that even though intervention may not be allowed, potential intervenors have the significant procedural opportunity to participate in a proceeding via public comment or amicus curiae briefs. E.g. Rochelle Waste Disposal, PCB No. 03-218 (July 10, 2003)(In denying intervention to a citizen group, the Board noted the right to participate through public comments or amicus curiae briefs). The availability of these mechanisms allows objectors and “would be intervenors” the opportunity to participate without the need for formal intervention.

7. From time to time, the IPCB does allow intervention. However, intervention is permitted only in limited circumstances. One such circumstance is when a government body seeks to intervene on behalf of its citizenry in siting cases. Lowe Transfer, PCB No. 03-221 (July 10, 2003)(“A third party may intervene only when the third party is a state’s attorney or the Attorney General’s Office intervening to represent the public interest.”) Another circumstance has been where a government body seeks to intervene on behalf of the public at large and where the issue involved directly attacks issues of that body’s authority. Saline County Landfill, Inc. v. Illinois EPA, PCB No. 04-117(February 19, 2004); cf Lowe Transfer, PCB No. 03-221 (July 10, 2003)(Intervention denied to Village).

III. Argument

8. As a preliminary matter, and notwithstanding the IPCB’s treatment of the intervention

issue under Section 101.402 of its procedural rules, the statutory authority of the IPCB to grant interventions may be in question. This issue was raised in Riverdale Recycling, Inc. et al. v. Illinois EPA, PCB No. 00-228 (August 10, 2000). While that decision has been questioned because it was issued before the IPCB issued its “new” intervention rules (See Saline County Landfill, Inc. v. Illinois EPA, PCB No. 02-108 (April 18, 2002)), the IPCB was clear that intervention was not allowed in permit appeals:

“After the holdings in Landfill, Inc. and Citizens Utilities, the legislature revisited the issue of third-party appeals, and has since enacted two specific sections regarding appeals of Resource Conservation and Recovery Act (RCRA) and NPDES permit denials. See 415 ILCS 40(b),(e) (1998). The legislature never granted general authority to the Board to allow third-party appeals or interventions in other cases involving permit denials. The silence of the Illinois General Assembly after the explicit requirement for statutory authority in Landfill, Inc. and Citizens Utilities is a clear indication that the Board does not have authority under the Act to accept third-party appeals or interventions in this matter.”

To the extent the IPCB revisits this issue, the Movants in this case have no right to intervene.

9. Analyzing Movants arguments in light of the regulation and legal precedent set out above should lead the IPCB to conclude that intervention is not warranted in this case. As set out in 101.402, a number of prerequisites must be present. None of these are present in this case. four elements must be established:

Delay, Prejudice, Interference (101.402(b))

10. A threshold determination must be made that the intervention would not “unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding” (35 Ill. Adm. Code 101.402(b)). In this case, granting the Movants motion would have the potential for delaying this case and making the proceeding disorderly and inefficient. First, the Movants benefit by delaying Sutter’s operations at the facility. Stock and Stock LLC’s past conduct as demonstrated by their numerous appeals is indicative of their attempts to delay the resolution of

this matter. It should be expected that those attempts to delay will continue if they are allowed to intervene in this matter. Second, adding three additional parties will make any proceedings disorderly and inefficient by multiplying participation at hearing, at status conferences, for discovery and with respect to briefing and motions. This will necessarily inject some disorder into these proceedings. Perhaps more importantly, in that the Movants are seeking to affirm the Illinois EPA's decision, accommodating such duplicity of argument and action will make the proceedings inefficient.

Conditional Statutory Right to Intervene (101.402(d)(1))

11. None of the three Movants have *any* right to intervene, let alone a statutory one. Unlike RCRA or NPDES permit appeals, no statutory provision of the Act gives them a right to intervene in a solid waste permit appeal. Consistent with the clarity of this point, none of the Movants cite or claim such a statutory right, conditional or otherwise, in the Motion. Movant Ruffner does refer to a desire to enforce the provisions of Section 22.14 of the Act (Mot. par. 10). However, this desire to enforce provisions of the Act does not provide a statutory or conditional *right* to intervene. In fact, the potential intervenors in the Lowe Transfer case argued they needed to intervene for that same purpose; to ensure their rights were protected under Section 22.14. As noted above, intervention was denied.

Material Prejudice and Adverse Affect Absent Intervention (101.402(d)(2)(3))

12. With respect to all three Movants, none of them will be materially prejudiced or adversely affected by not being allowed to intervene. First, it is important to note that the Movants seek to intervene in support of the Illinois EPA's permit decision. The Movants have made no argument that the Illinois EPA's decision is incorrect. The Illinois EPA, whose decision is at issue, will presumably zealously and competently argue to affirm its own decision in this case just as

adequately, if not more so, than could the Movants. Second, as noted above, the Act provides Movants with more than adequate opportunity to participate in this proceeding without the necessity of formal intervention. The availability of such participation has been repeatedly cited by the IPCB in denying motions to intervene: Movants can participate by filing comments or amicus curiae briefs. Movants do not even address this issue in their Motion because they know it is undisputable. For these reasons alone, the Movants should be denied intervention.

13. Movant Ruffners' specific argument of material prejudice and adverse effect, to the extent that it can be discerned from the Motion, is that they should be allowed to live where they want to. This is not an issue that is before the IPCB in this appeal. Ruffners have no ownership interest in the property upon which they are currently renting a mobile home. While they have not disclosed any lease terms in their Motion, presumably the Ruffners are not bound to the land like serfs or vassals of historical times. The Ruffners are free to move and live anywhere they want. Renting a mobile home for some unknown term fails to support an argument for intervention. Certainly, Movants have cited to no authority in support of such an argument. Furthermore, the Ruffners moved into the mobile home well after the Sutter facility had been identified, established and approved as a transfer station (Mot. par. 10). For these reasons, Ruffners specific claims are insufficient.

14. Movant Stock's claims are equally insufficient. The only material prejudice and adverse effect claimed by Stock is that the transfer station will infringe upon his financial and management interests in the mobile home(s) that he placed on the property subsequent to Effingham County's siting approval because he may be unable to rent them. First, Stock has cited no case or opinion where financial and management interests of tangible property have ever been the basis of intervention. In fact, based upon the IPCB opinions cited above just the opposite appears to be the

case. Only where a representative body of the community at large has sought to intervene has intervention been allowed (and not always then). Second, it needs to be made clear that the only interest Stock has in this area is an interest in the mobile homes. Presumably, those homes are mobile and that nothing is preventing Mr. Stock from taking advantage of that mobility and moving those homes to other locations. Third, Stock's claims that he will not be able to rent the mobile homes is pure speculation. No information is provided that would support that argument. Speculation and hypothetical interests are insufficient to support a claim for intervention. Soyland Power Cooperative, Inc. v. Illinois Power Co., 213 Ill.App.3d 916, 157 Ill.Dec. 393 (4th Dist. 1991). Finally, and as is the case with the Ruffners, to the extent any prejudice is at issue it is entirely of Stock's own making. Movant Stock knew full well that the Effingham County had approved siting for the Sutter facility. Despite this knowledge, he placed a mobile home on the property. As noted in the introductory paragraph, this placement is nothing more than part of Stock's plan to circumvent Effingham County's, the IPCB's, and the Illinois Appellate Court's siting approval. To the extent Stock is unable to rent the mobile homes (for which we have no evidence), that is a problem of his own making, not that of Sutter or the Illinois EPA. These arguments do not support intervention.

15. Finally, Stock LLC, makes essentially the same arguments as Stock. Specifically, Stock LLC cites to a potential for negative financial impact. Here too, this is pure speculation. Stock LLC provides no information on property values (recall here that in approving the siting the Effingham County Board has determined that the Sutter facility is not inconsistent with the surrounding area and will minimize any effect on property values). Stock LLC has provided no information on how the property's use is in the least bit effected. In addition, Stock LLC claims that the Sutter facility will create negative environmental and psychological effects concerning its property (Mot. par. 12). Again, such a claim is not supported by a scintilla of fact or evidence.

Indeed, we know environmental impacts, if any, will be minimal because Effingham County, the IPCB, and the Appellate Court have all viewed the suitability of the Sutter facility and found it to be appropriate. Claims of psychological effects is simply wild speculation. Finally, as with Movants Ruffners and Stock, any perceived problem is a loss of Stock LLC's own making. Stock LLC has been an early and consistent participant in this proceeding, going all the way back to the original application filing in April 2002, and yet it chose to "rent" (we don't really know what the arrangements with Stock are) its property or otherwise make it available (to a relative no less) for the placement of a mobile home after the Effingham County's siting approval. Clearly, these facts do not support the IPCB allowing intervention.

IV. Conclusion

16. For the foregoing reasons, Petitioner Sutter Sanitation, Inc. respectfully requests that the Illinois Pollution Control Board deny Movants' Petition to Intervene.

Respectfully submitted.

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 a copy of the foregoing document was served by placing same via Federal Express in a sealed envelope addressed to:

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

and by Hand Delivery to:

Mr. 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

Mr. Christine Zeman
Hodge, Dywer & Zeman
3150 Roland Avenue
Post Office Box 5776
Springfield, IL 62705-5776

and by U.S. Mail to:

Mr. John M. Heycle
Sidley, Austin, Brown & Wood
10 South Dearborn
Chicago, IL 60603

on the 14th day of June, 2004, with postage fully prepaid.

