BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

NOTICE

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

Carol Sudman, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue, East
P.O. Box 19274
Springfield, IL 62794-9274

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

Christine G. Zeman
Hodge Dwyer Zeman
3150 Roland Avenue
P.O. Box 5776
Springfield, IL 62705-4900

John M. Heyde
Sidley Austin Brown & Wood, LLP
10 South Dearborn Street
Chicago, IL 60603

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a MOTION TO STRIKE and RESPONSE TO PETITIONERS' MOTION FOR PARTIAL SUMMARY JUDGMENT, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: August 13, 2004

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

MOTION TO STRIKE PORTIONS OF THE PETITIONERS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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 101.502, hereby requests that the assigned Hearing Officer or the Illinois Pollution Control Board ("Board") strike portions of the Petitioners' motion for partial summary judgment. In support of this motion, the Illinois EPA states as follows:

1. The Petitioners, Sutter Sanitation, Inc., and Lavonne Haker, filed a motion for partial summary judgment ("motion") on August 2, 2004. Included in the motion are a number of references to documents and content contained within exhibits to the motion. Specifically, on at least pages 4 and 5, and in other parts of the motion, are references made to testimony, facts, or occurrences that were not before the Illinois EPA at the time of its final decision under appeal.

2. The Petitioners make repeated references to a number of exhibits in its motion. Of the 10 exhibits attached to the Petitioners motion, none of them was information included within the Administrative Record filed in this matter or otherwise before the Illinois EPA at the time of its decision. Exhibits 8 and 9 are decisions issued by the Board and appellate court,

respectively, in an appeal of the underlying local siting approval. Exhibit 10 is a definition taken from an internet website. Exhibit 10 is not of concern.

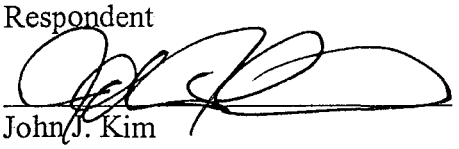
3. However, exhibits 1 through 9 should be stricken from the motion and any reference thereto or arguments in reliance thereon should also be stricken. The Board's review of permit appeals is generally limited to information before the Agency during the Agency's statutory review period, and is not based on information developed by the permit applicant or the Agency after the Agency's decision. Alton Packaging Corp. v. Pollution Control Board, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); Saline County Landfill, Inc. v. Illinois EPA, PCB 02-108 (May 16, 2002).

4. Pursuant to well-established Board precedent, the information contained within exhibits 1 through 9 should not be allowed for consideration by the Board, and the Petitioners' motion should be stricken accordingly.

WHEREFORE, for the reasons stated above, the Illinois EPA hereby respectfully requests that the Board strike exhibits 1 through 9 in the Petitioners' motion, and further strike any and all references to those exhibits and the information therein as such references may exist within the Petitioners' motion.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: August 13, 2004

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

RESPONSE TO PETITIONERS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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 101.516, hereby respectfully responds to the motion for partial summary judgment ("motion") filed by the Petitioners, Sutter Sanitation, Inc., and Lavonne Haker ("Petitioners"). In response to the Petitioners' motion, the Illinois EPA states as follows:

I. FACTS

By and large, the parties agree on the underlying facts presented in this appeal with some notable exceptions. First and foremost, the Illinois EPA has set forth in an accompanying Motion to Strike its arguments that exhibits 1 through 9 of the Petitioners' motion, and any references or arguments made in reliance thereto, should be stricken on the basis that the information within the exhibits was not before the Illinois EPA at the time of its final decision. The Board should consider the Petitioners' motion only after striking all references to information outside of the Administrative Record ("AR").

Also, the Petitioners have attempted repeatedly to mischaracterize the basis for the Illinois EPA's final decision. The Petitioners state that the Illinois EPA believes the determination of whether a facility has been established is made at the time of the submission of

a permit application. Petitioners' motion, p. 2. However, that claim is not supported by the final decision and is not accurate. The basis for denial in final decision that is the subject of the parties' motions for summary judgment provides:

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

AR, p. 2. The Illinois EPA correctly notes that at the time of the submission of the application, the dwelling in question was located within the setback zone described in Section 22.14 of the Environmental Protection Act ("Act") (415 ILCS 5/22.14). But the Illinois EPA does not state that decisions as to whether a facility is or is not in violation of Section 22.14 of the Act must be made at the time of the submission of a permit application; rather, the Illinois EPA noted that in this instance, that was the case.

So there is no misunderstanding, it is the position of the Illinois EPA that neither effectuation of public and private notice of an intent to seek local siting approval nor the issuance of local siting approval by a local unit of government constitutes establishment of the proposed subject facility. That, without question, is the position of the Petitioners. Petitioners' motion, p. 2. The Illinois EPA's position is that based upon the facts presented here, the proposed garbage transfer station was not established as of the time the development permit application was submitted to the Illinois EPA. At the time of the submission of the permit application, there was a dwelling in existence that was within the setback zone defined in Section 22.14. Therefore, the Illinois EPA could not issue a permit that would establish the proposed garbage transfer station since it would result in a violation of Section 22.14.

There is also an assertion made by the Petitioners that the since the time the mobile home in question was placed on the Stock property, it has not been continuously occupied. Petitioners'

motion, p. 6. This statement is based on a number of affidavits that have "canned" language stating, "Based on my personal observations, the mobile home across County Highway 25 from the proposed Sutter Sanitation, Inc. facility has not been continuously occupied and has at times appeared to be vacant." AR, pp. 237-242. That boilerplate language does not provide any description of what is meant by continuous occupation, it does not describe what types of observations were relied upon, and is vague as to what "times" the mobile home has appeared to be vacant. Nonetheless, the reference is irrelevant because it is undisputed that the dwelling was in place at the times described by all parties, and that the dwelling has been (and may still be) occupied by dwellers.

II. ILLINOIS EPA'S POSITION IS SUPPORTED BY SECTION 22.14

The Petitioners argue that an exception in Section 22.14(b)(iii) of the Act supports its position and is applicable. That exception provides that Section 22.14 does not prohibit any facility which becomes nonconforming due to the establishment of a dwelling which occurs after the establishment of the facility. Petitioners' motion, p. 7. Again, this argument turns on whether the Board interprets "establish" consistent with the Illinois EPA's position or the Petitioners' position. The Illinois EPA argues that a facility cannot be established by the completion of a preliminary step needed to apply for a permit to actually develop and ultimately operate the facility. There is no question that the dwelling was in place before the development permit application was submitted, and well before a final decision on that permit application was issued. Accordingly, the dwelling was established before the proposed garbage transfer station was established. Given that the Petitioners do not currently possess any authority that would allow them to develop the proposed transfer station, much less operate it, it is no credible claim can be made that the proposed transfer station nonetheless has been established.

III. APPROVAL OF LOCAL SITING IS NOT ESTABLISHMENT

The Petitioners argue that the actions of the Effingham County Board constitute an enactment presumably equating to establishment for purposes of Section 22.14. Petitioners' motion, p. 9. Taking a clear look at the county board's actions, however, and the role that the county board plays in the permitting scheme, proves that the county board did not establish the proposed facility. The county board followed its obligations as set forth in Section 39.2 of the Act (415 ILCS 5/39.2); namely, the county board received and acted upon a request for local siting approval, pursuant to the statutory mandate in the Act. The approval that resulted did not authorize the development of the proposed transfer station. The approval that resulted did not authorize the operation of the proposed transfer station. All that approval did was signify that the relevant local unit of government had deemed the proposed location to be suitable for the proposed facility.

Suppose that the county board approved the request for local siting, and then the applicant took no further steps to develop the proposed facility. In the case of a transfer station, local siting approval would expire at the end of two calendar years from the date of issuance pursuant to Section 39.2(f) of the Act. Taking the Petitioners' argument to be true, that would mean the proposed facility could be established by virtue of the grant of local siting approval yet never be built or developed or even be the subject of a permit application, yet the proposed facility would still be established. The natural corollary to a question of when a facility is established is when that facility ceases to be; the Illinois EPA takes the position that the best proof a facility has been established is the receipt of a permit authorizing the development and operation of the facility itself. When a permit expires, or when operations cease, then the facility can be considered closed. But under the Petitioners' view, there is no clearly defined end to the

established facility.

The Petitioners further argue that even earlier than the county board action was the provision of public and private notice of the proposed facility and the open and notorious use of the facility as a recycling facility. Those actions, argue the Petitioners, also provide a measure of full recognition and acceptance of the facility. Petitioners' motion, p. 9.

The Illinois EPA takes a contrary position. That the Petitioners provided public and private notice of an impending request for local siting approval is of no consequence, if for no other reason than the notice provisions of Section 39.2 are not the same in scope as the setback zone pursuant to Section 22.14. Section 39.2 of the Act defines those parties that must receive notice of a request for siting approval as parties within 250 feet of the proposed facility. Compare that with Section 22.14, which describes the setback zone from a garbage transfer station to the nearest dwelling of 1,000 feet. It is very possible that a party located outside the area required for notice (per Section 39.2) would still be within the area covered in the setback zone (per Section 22.14). Such a party may never receive the notice described in Section 39.2. The Act must be interpreted to mean that the purposes of Section 22.14 and 39.2 are not overlapping, and that Section 22.14 serves a different purpose.

This is further supported by the recognition that a local unit of government cannot deny or base its decision on local siting approval on compliance with Section 22.14, since it has no authority to enforce that provision and the provision itself is not a subsection of Section 39.2. The local unit of government applies Section 39.2, and the Illinois EPA enforces Section 22.14.

Also, that the proposed transfer station is located on the same site as a recycling center is of no relevance for the sake of this appeal, since prior use as a different type of facility (indeed, one that did not even require permitting from the Illinois EPA) can hardly be considered notice

that the facility would someday be used for a wholly different function and be subject to different and more stringent regulation.

IV. CASELAW SUPPORTS THE ILLINOIS EPA'S FINAL DECISION

For all the arguments and reasons set forth in the Illinois EPA's motion for summary judgment, the case law cited to by the Petitioners is actually more persuasive and supportive of the Illinois EPA's interpretation, and not the Petitioners.

V. EVEN IF "ESTABLISH" IS DEEMED AMBIGUOUS, THE ILLINOIS EPA'S FINAL DECISION IS STILL CORRECT

The Petitioners argue that if the Board finds that a plain and clear reading of Section 22.14 of the Act indicates there is ambiguous terminology used, then its interpretation should be accepted over the Illinois EPA's. The Illinois EPA argues instead that, if the Board should find it necessary to go beyond a plain reading of the statutory language, the final decision under appeal will still be found correct.

The Petitioners claim that its construction of "establish" or "establishment" is the interpretation that will avoid an absurd or unjust result. Petitioners' motion, p. 13. However, the better argument is that the Illinois EPA's interpretation as applied to the facts here is the only way to avoid an absurd result.

First, the Petitioners state that its interpretation is the more reasonable one. This is not so, since recognizing the establishment of the proposed transfer station at the time of public and private notice or approval of local siting (as advocated by the Petitioners) results in the notion that a facility is established before it has ever received local siting approval, or before it has ever received a permit authorizing the facility's development. In their desire to avoid the adverse facts before them, the Petitioners are attempting to convince the Board that putting the cart before the horse is the reasonable thing to do. All that need be done to negate that argument is to

consider the implications; it is unreasonable and absurd to allow the establishment of a proposed facility that has not received official approval to actually be built. Indeed, in this case, with the denial of the permit application (including on grounds other than the setback violation), the Petitioners' position contemplates an established facility that has no authorization to be built. The Petitioners also rely on the language of Section 22.14(b) in support of their claim. A review of that language reveals that, again, the statutory language is supportive of and consistent with the Illinois EPA's interpretation.

Specifically, in Section 22.14(b), there are five exemptions to the setback requirement set forth, followed by this language:

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

The General Assembly would not use the term "establish" in Section 22.14(a) to mean "obtain local siting approval" (as advocated by the Petitioners) and then use "establishment" in Section 22.14(b) to specifically mean "use." Also, the use of the term "establishment" twice in Section 22.14(b)(iii) is further evidence that the General Assembly did not intend "establish" to mean obtaining local siting approval, since there is no similar preliminary conditional step for a dwelling.

In the present case, Section 22.14(a) provides setback restrictions as to how a transfer station may be established. Section 22.14(b) describes exceptions to that general restriction, and in so doing equates—in at least one defined circumstance—the *establishment* of a transfer station as being akin to *use* of a transfer station. Reading Section 22.14 as a whole then, it is reasonable to conclude the General Assembly intended that the establishment of a transfer station was the same as the use of a transfer station; put another way, a transfer station is established when it is

first used. Notably, although there is a reference to "use" of a transfer station in Section 22.14 in the context of establishment, there is no other reference to any preliminary step such as municipal approval or permit approval. The position espoused by the Illinois EPA in this matter need not go to the lengths of the terms used in Section 22.14(b), since the facts indisputably show that the dwelling was established before the proposed transfer station ever received a permit authorizing development, to say nothing of authorizing use/operation.

Petitioners argue that public and private notice of siting or local government approval are more significant than the filing of a permit application in terms of deciding whether a facility has been established. Petitioners' motion, p. 14. Again, the Illinois EPA's position is not that the date of filing a permit application is the only benchmark to be used; however, in the present case, that the dwelling was in existence prior to submission of the permit application (and thus prior to any official permission to develop the transfer station) is relevant.

The Petitioners continually ignore or draw attention away from the State's permitting process. Receipt of local siting approval, while an important step, is still a preliminary step that an applicant must take prior to receiving permission to develop a proposed facility. While the significance of obtaining local siting approval should not being overlooked, it should also be kept in perspective with the purpose of local siting approval, i.e., to allow a permit applicant to proceed (if they so choose) to asking the Illinois EPA for a permit authorizing the construction or development of a facility.

Another argument offered by the Petitioners is that tying the determination of "establishment" to the date a facility submits a permit application would allow facility opponents to simply move a mobile home prior to the date the application is submitted. The Petitioners argue that this interpretation would allow facility opponents to bypass participation in the siting

process and nullify the entire siting process and the authority given to local governments by the legislature. Petitioners' motion, p. 16. This argument is not meritorious since it fails to take into consideration that the construction and framework of the Act is such that local units of government are not authorized to deny local siting approval on the basis of a potential violation of Section 22.14. If the Effingham County Board were aware of a dwelling established prior to the Petitioners issuing notice of an impending siting request, it still could not use that fact to deny local siting approval since that factual consideration is not one allowed by the Act. The legislature structured the Act such that the Illinois EPA, not local units of government, takes into account whether or not a proposed transfer station will comply with Section 22.14 of the Act. The Petitioners fail to acknowledge that the Act sets forth a system in which the local unit of government and the Illinois EPA play separate roles with separate functions.

The Petitioners then argue that the interpretation of the Illinois EPA puts a proposed facility at a disadvantage, subject to the whim of a nearby property owner. Petitioners' motion, p. 18. The basic supposition for this argument is that permit applicants have no ability to decide on what site they seek to use for their proposed facility. The Board should not interpret the Act in such a way that the burden of locating a proposed transfer station is eased for the facility at the expense of nearby dwellers. Rather, the Act should be construed to give dwellers the benefit and protection afforded by the local siting process and a prohibitive setback zone; the Petitioners must be presumed to be cognizant of the limitations imposed by the Act and thus must conform their actions and decisions accordingly.

The Illinois EPA's interpretation does not subject a proposed facility to the whim of a nearby property owner, but rather gives all due protection to a nearby property owner as described in Section 22.14 of the Act. There is a reason the General Assembly created a setback

zone, and it was obviously not for the ease and flexibility of proposed transfer stations. It was intended to provide protection for citizens dwelling within a defined zone, and the Illinois EPA has given proper application to that provision.

The final argument advanced by the Petitioners is that the Illinois EPA's decision was unjust, since it failed to consider the loss of the investment by the applicants in attempting to obtain local siting approval. Petitioners' motion, p. 19. While the Illinois EPA understands there may be significant expenditures associated with seeking local siting approval, that fact alone does not allow for a balancing of equities in the application of Section 22.14 of the Act. Any party that seeks to develop a new pollution control facility must do so knowing that there will be expenses associated with the endeavor, along with very real risks that the proposal may never make it to fruition. The Illinois EPA is not trivializing expenses involved with the development of a new transfer station, but at the same time the Illinois EPA is not empowered to take such expenditures into account when issuing final decisions. Neither the Illinois EPA nor the Board has been granted the authority to balance equities when reaching final decisions, as opposed to a court of law. Both the Board and the Illinois EPA must act within the confines of the statutory authorization provided by the Act, and the Act does not allow for equitable relief or consideration along the lines suggested by the Petitioners.

WHEREFORE, for the reasons set forth above, the Illinois EPA respectfully requests that the Board deny the Petitioners' motion for partial summary judgment and instead grant the Illinois EPA's motion for summary judgment, thus affirming the final decision under appeal.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: August 13, 2004

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on August 13, 2004, I served true and correct copies of a MOTION TO STRIKE and RESPONSE TO PETITIONERS' MOTION FOR PARTIAL SUMMARY JUDGMENT, 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:

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

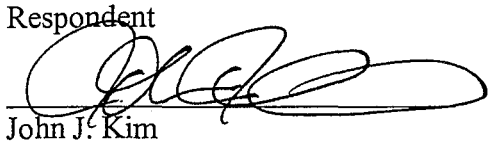
Carol Sudman, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue, East
P.O. Box 19274
Springfield, IL 62794-9274

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

Christine G. Zeman
Hodge Dwyer Zeman
3150 Roland Avenue
P.O. Box 5776
Springfield, IL 62705-4900

John M. Heyde
Sidley Austin Brown & Wood, LLP
10 South Dearborn Street
Chicago, IL 60603

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)