BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

PETITIONERS SUTTER SANITATION AND LAVONNE HAKER'S RESPONSE TO ILLINOIS EPA'S MOTION FOR SUMMARY JUDGMENT

NOW COMES Petitioners, Sutter Sanitation Inc., and Lavonne Haker (collectively "Sutter") by and through their attorneys, Sorling, Northrup, Hanna, Cullen & Cochran, Charles J. Northrup, of counsel, and pursuant to Illinois Pollution Control Board ("PCB") Rule 101.516 and Hearing Officer schedule, as amended, hereby responds to Respondent Illinois Environmental Protection Agency's ("Illinois EPA") Motion for Summary Judgment ("Motion"). In support of this Response, Sutter states:

I. Introduction

As a general matter, Sutter does not object to the Illinois EPA's recitation of the standard of review (Section I of Illinois EPA Motion), the burden of proof (Section II), or the issue in this case to the extent that it identifies the issue as being an exercise in determining the meaning of "establish" as used in Section 22.14 of the Illinois Environmental Protection Act ("Act")(Section III). The facts too, as noted by the Illinois EPA, are "largely undisputed" (Illinois EPA Mot. p. 3).

Notwithstanding a lack of genuine disagreement on the legal and factual framework of the appeal, Sutter does strenuously object to Illinois EPA's interpretation of the term "establish" as used in Section 22.14 of the Act and its application to the facts of this case. Indeed, nothing in the Illinois EPA's arguments supports its determination that a facility is "established" for purposes of Section 22.14 upon submittal of a permit application.

The Illinois EPA raises two general arguments in its Motion. First, it contends that its interpretation of "establish" is supported by the "plain language" of Section 22.14. This plain language is divined by dictionary definitions and references to three cases: Medical Disposal Services, Inc. v. Illinois EPA, 286 Ill.App.3d 562, 222 Ill.Dec.225 (1st Dist. 1997); Village of Villa Park v. Wanderer's Rest Cemetery Co., 316 Ill. 226, 147 N.E. 140 (1925); and Moseid v. McDonough, 103 Ill.App.3d 23, 243 N.E.2d 394 (1st Dist. 1968). Interestingly, (which pointedly highlights the nature of the task before the PCB in this case) Sutter relies upon the same dictionary definitions and the latter two cases for support of its interpretation of "establish." Second, the Illinois EPA contends that its interpretation of Section 22.14 is consistent with the other language used in Section 22.14 as well as the Act in general.

As specifically identified below, the Illinois EPA's arguments do not support its interpretation of "establish" nor do they justify the denial of Sutter's permit application. As preface to Sutter's specific arguments below, the Illinois EPA's arguments are fundamentally flawed. In its Motion, the Illinois EPA argues that "establish" under Section 22.14 is synonymous with *permit issuance*. First, however, the PCB should note that the express basis of the Illinois EPA's denial point at issue was not that the Sutter facility was not "established" at the time of *permit issuance*, but rather that it was not established at the time of *permit application submittal*. Accordingly, the

Illinois EPA is clearly arguing for a an interpretation of Section 22.14 that is not even at issue in this appeal. Second, consistent with its position that permit issuance is the key event, the Illinois EPA's arguments are focused on the notion that all preliminary steps to permit issuance (such as local siting approval) are merely pre-conditions to permit issuance and otherwise without significance on the issue of interpreting "establishment." The problem with this line of argument is that the Illinois EPA fails to provide support for the underlying foundation of the argument that "establishment" is indeed synonymous with *permit issuance,* but it is defined by consideration of a broader range of significant events. Sutter believes strongly, as supported by the arguments below and its Motion for Summary Judgment that "establishment" is not synonymous with *permit issuance*. Accordingly, the Illinois EPA's arguments do not support its interpretation of "establish" as used in Section 22.14, and as such the PCB must reverse the Illinois EPA's permit denial point on this issue.

II. Illinois EPA's Motion to File Instanter

Sutter has no objection to the Illinois EPA's "Motion for Leave to File Instanter Motion for Summary Judgment."

III. Argument/Response

A. Background

As the PCB recalls, this case involves the interpretation of Section 22.14 of the Act. That section generally prohibits a solid waste transfer station within 1000 feet of a dwelling. However, Section 22.14(b) provides exceptions to this general prohibition. The exception at issue here allows a facility within the 1000 foot setback if the facility was established prior to the dwelling. Section 22.14(b)(iii) specifically provides that the general prohibition of Section 22.14 does not prohibit:

> (iii) any such [transfer station] facility which becomes nonconforming due to a change in zoning or the establishment of a dwelling which occurs after the establishment of the facility...

(415 ILCS 5/22.14(b)(iii).

In this case, the facts are undisputed. Sutter applied for and obtained local siting approval by unanimous vote of the Effingham County Board. However, at some point after Effingham County approval, a mobile home was moved onto property across the street and within 1000 feet of the Sutter facility. Sutter then applied for a permit from the Illinois EPA to operate the facility. The Illinois EPA denied the permit. The Illinois EPA's denial point at issue by the parties Motions for Summary Judgment is:

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

(R. 1-2).

B. Illinois EPA's "Plain Language" Argument

In its Motion, the Illinois EPA first argues that the plain and ordinary meaning of the term "establishment" as used in Section 22.14 supports its determination that the Sutter facility was established as of the date of permit application, but in any event not at the time of siting approval or some other event. The Illinois EPA cites to a number of definitions of the term "establish," but then without analysis of those definitions merely concludes that the Sutter facility was not established at the time of the Illinois EPA's final decision or permit application submittal.

A number of problems exist with this the Illinois EPA's argument. First, the dictionary definitions referenced, but not discussed, include such meanings as "to settle in a secure position or

condition;" "to cause to be recognized and accepted;" "to institute permanently by enactment or agreement;" "to put on a firm basis;" or "to put into a favorable position" (Motion p. 7). There is nothing about a permit application submittal that satisfies these definitions. A permit submittal does not *recognize* or *accept, put into force, institute permanently by enactment or agreement*, or *put into a favorable position.* It is merely a submission of an application. It should be clear that the mere submittal of a permit application does not carry the same significance of siting approval by a local government. All of the cited dictionary definitions can apply to describe and define the actions of the Effingham County Board in hearing, considering, debating and voting to approve local siting approval for the Sutter facility. Certainly Effingham County's action on siting *recognized* and *accepted* the location of the Sutter facility, and at a minimum gave that facility a *firm basis* and *favorable position.* Also, it should be beyond debate that the unanimous vote of the Effingham County Board was a *permanent* (considering that action has now been upheld by the PCB and the Appellate Court) and official *enactment* of that Board. Accordingly, these definitions support Sutters position that its facility was "established" at a minimum upon Effingham County siting approval.

Second, and as touched upon above, the Illinois EPA appears to be shifting the express focus of the denial point at issue. According to the specific denial point at issue, Sutter's permit application was denied because the Sutter facility was not "established" before its permit application was submitted to the Illinois EPA. However, the Illinois EPA is now arguing that the time of "establishment" is not permit application submittal but rather final permit decision ("For purposes of the Illinois EPA's review, and now the Board's review, the relevant fact is that the mobile home was in place well before *the final decision was issued*, and in fact was in place before the permit application was ever submitted. (Motion p. 8)). Whether the Sutter facility was established at the

time of "final decision" is not the issue before the PCB. The issue before the PCB, as framed by the denial letter, is whether the Sutter facility was established by the event of permit application submittal. In light of the Illinois EPA's arguments that focus on permit issuance as being synonymous with "establishment," it must necessarily be true that permit application submittal (the basis of the denial) is not a valid denial point.

After arguing the "plain and ordinary" meaning of "establishment" as noted above, the Illinois EPA makes what is essentially the crux of their argument which is that local siting approval cannot equate with "establishment" because it is only a preliminary step in the permitting of a facility:

> Though the proposed transfer station was the subject of a successful request for local siting approval, that prerequisite step to filing a permit application cannot be considered tantamount to the establishment of the proposed transfer station. Approval of local siting does not demonstrate that a proposed facility has been established, because approval of local siting approval is nothing more than a preliminary step that must be taken in order for the proposed facility to become established.

(Motion p. 8).

First, and fundamentally, "establishment" is not synonymous with *permit issuance*. Nowhere in the Act is "establishment" defined or equated with permit issuance. Certainly, nothing in Section 22.14 (or any other part of the Act) would lead to the conclusion that those two terms mean the same thing. If the legislature had wanted Section 22.14 to provide an exception for facilities that were *permitted* rather than "established" before the arrival of a dwelling within 1000 feet of the facility the legislature was fully capable of doing so. Permitting is a central concept to the Act and the legislature certainly knew the significance of that term. Nevertheless, the legislature chose not to use it. It chose to provide an exception based not upon *permit issuance*, but upon something else,

namely "establishment." Any construction of Section 22.14 that interprets "establishment" as permit issuance is simply unsupportable. Second, regardless of whether the Illinois EPA is correct or not that local siting approval is not a dispositive event for *permit issuance*, such an argument says nothing about the meaning of "establishment."

Notwithstanding these preliminary issues, the Illinois EPA cites to the Medical Disposal Services, Inc. v. Illinois EPA, 286 Ill.App.3d 562, 222 Ill.Dec. 225 (1st. Dist. 1997) case for the proposition that the approval of local siting only gives a successful applicant a right to apply for a permit, and that local siting approval does not vest any property rights with the successful applicant. The relevance of Medical Disposal Services to the issue before the PCB in this case is marginal at best. First, the Medical Disposal Services case is not a case interpreting Section 22.14 of the Act, nor does it define or discuss what actions might serve to "establish" a facility. The issue before the Court in Medical Disposal Services was whether local siting approval was applicant specific (which the Court held it was). Second, the dicta in the Medical Disposal Services case that local siting approval is only a condition that is required before a permit can issue does not resolve the issue of "establishment" as the Illinois EPA contends. While Medical Disposal Services identifies local siting approval as a condition to *permit issuance*, it does not necessarily follow that local siting approval is a condition to "establishment." As noted above, no authority has been referenced that *permit issuance* and "establishment" are synonymous. Third, it is clear from the Medical Disposal Services case that local siting approval is much, much more than simply a condition to permit issuance as the Illinois EPA contends. It is in and of itself a significant event that carries its own vital importance. The Court in Medical Disposal Services noted this event as "the most critical stage" Medical Disposal Services, 286 Ill.App.3d at 568. Siting approval, made by an elected body

after a public hearing and consideration of evidence and public comment clearly has set the specific location and parameters of a facility and has brought the facility to the public for critical scrutiny. In light of these facts, local siting approval is an event of such significance that it should rightly amount to "establishment." Fourth, the Illinois EPA's reference to other dicta in Medical Disposal Services that siting approval is not a property right is also not dispositive of whether siting approval, permit application submittal, or permit issuance constitutes "establishment." There is nothing in Section 22.14 or any other section of the Act that would equate a property right to "establishment." On this point, the Illinois EPA's own argument that *permit issuance* is synonymous with "establishment" (notwithstanding the argument that the denial was not based upon permit issuance but rather on permit submittal) is flawed because the Medical Disposal Services case notes even permits are only privileges and do not vest any rights. Medical Disposal Services, 286 Ill.App.3d at 569 ("even permits are only privileges from which no vested property rights attach").

In light of these arguments, the Medical Disposal Services case does not support the Illinois EPA's argument that a facility is not "established" until permit submittal or permit issuance. The PCB must reverse the Illinois EPA's denial point on this issue.

After the discussion of the Medical Disposal Services case, the Illinois EPA goes on to discuss two cases cited by Sutter: Village of Villa Park v. Wanderer's Rest Cemetery Co. and Moseid v. McDonough. Contrary to the arguments of the Illinois EPA, neither of these cases support its position in this case.

The Illinois EPA cites the Villa Park case for the proposition that it is *permit issuance* that defines "establishment." The crux of the Illinois EPA's argument is that:

> The closest analogy fact-wise that can be drawn between the Villa

> Park case and the present situation is that the Petitioners [Sutter] here cannot take the types of steps relied upon by the Villa Park court until after a permit to develop the transfer station is issued. Until that happens, no establishment of the transfer station could ever take place.

(IEPA MSJ p. 10).

This analogy, and the rule that is attempted to be crafted from it is not supported by the facts of the Villa Park case. First, the steps that the Villa Park court relied upon to find an established cemetery were not dependant upon any other approvals or conditions set by third parties. The events that the Court found dispositive were those taken independent of any government approval or acknowledgment such as the "dedication" of the property for a cemetery by private citizens; the placement of a sign on the property; and the expenditure of funds to further the project. As noted in Sutter's Motion for Summary Judgment, these are open and notorious acts made in public whereby the cemetery promoters staked their claim. The Courts decision was not dependant upon any governmental recognition similar to permit issuance. Second, and here again, by arguing that only by *permit issuance* is a facility established, the Illinois EPA is going far beyond the express denial point which was tied not to permit issuance but permit application submittal.

The Illinois EPA next discusses the Moseid case and uses it as support for two arguments. First, it argues that the ordinance establishing the library at issue in the Moseid case "must have included language that stated the ordinance was itself establishing the library" (Motion p. 11). Because the Effingham County Board's resolution approving siting of the Sutter facility does not specifically use the word "establish" the Illinois EPA contends the Sutter facility was not established (Motion p. 11). A number of problems arise with this argument. First, as acknowledged by the Illinois EPA, there is no indication in the opinion what language was used in the ordinance at issue

in the Moseid case. Accordingly, the foundation of the Illinois EPA's argument that the ordinance "must have" included the word establish is pure speculation. Second, the Illinois EPA's arguments exalts semantics over substance. It is not the specific wording of the resolution that is significant. It is the undisputed effect of that resolution in approving local siting that is of significance. Regardless of whether the resolution used the term "establish," there is no dispute that the resolution of the Effingham County Board granted local siting approval to the Sutter facility. In turn, it is that event, not the wording of the resolution memorializing that event, that is the event triggering "establishment." Third, the Illinois EPA simply ignores the language of the case which expressly condemns a "too narrow" interpretation of the term "establish" and holds that a facility (in Moseid a library) is established by the local government's formal approval and acknowledgment, on paper only, of the facility.

The Illinois EPA's second argument is that the enactment of the library ordinance was the sole official declaration necessary to establish the facility (Motion p. 11). The Illinois EPA goes on to contend that this is in contrast to the Sutter case because the sole official declaration necessary before the Sutter facility can be developed and operated is the permit decision, not local siting approval (Motion p. 11). Therefore, the Sutter facility is not established by the approval of local siting, but only by Illinois EPA permit issuance. This argument is flawed. First, here again the Illinois EPA is arguing that it is *permit issuance* that establishes a facility ("Since the development permit has not been issued, the proposed transfer station has not yet been established" (Motion p. 11).) As noted, this was not the express denial point relied upon by the Illinois EPA. The Illinois EPA denied the Sutter application on the grounds that the Sutter facility was not established on the date the permit application was submitted. Second, we do not know from the Moseid case if the

Illinois EPA's factual assertion that it was the ordinance that was the sole official declaration establishing the facility is factually correct. It would not be unreasonable to speculate, which is just what the Illinois EPA is doing, that a myriad of building and construction permits might also be necessary in order to actually develop and operate the library. If that was the case, the Moseid case would be an even closer analogy to the Sutter matter in that an official declaration or enactment of a local government body was sufficient to establish a facility even if additional permits or approvals might be necessary to bring the facility into development and operation. Third, the Illinois EPA assumes that "establishment" as used in Section 22.14 of the Act is synonymous to development and operation. As has been noted, that is just not the case. If the legislature wanted to exempt only developed, operational, or permitted facilities from the dwelling setback at issue it would have used that specific language. It did not.

C. Illinois EPA's "Consistency" Argument

The Illinois EPA also argues that only permit issuance can establish a facility under Section 22.14 is consistent with other portions of the Act (Motion p. 12). The Illinois EPA references Section 39.2 of the Act relating to the siting authority granted to local government bodies and attempts two arguments. The first argument, confusing as it is, is based upon a faulty hypothetical. The hypothetical proposed by the Illinois EPA sets a scenario where a dwelling exists and is occupied prior to the submittal of an application for local siting approval. The local government goes on to approve siting notwithstanding the existence of this dwelling. If the local government siting approval is equivalent to the "establishment" of the facility, the Illinois EPA appears to argue that such an approval creates a violation of Section 22.14 in that you now have an established facility (via local siting approval) and also an established dwelling within the setback..

A number of significant problems exist with the hypothetical and argument. First, as a factual matter it does not represent the facts of this case. As the PCB knows, it is undisputed that no dwelling was established at the time Effingham County approved local siting for the Sutter facility. Second, Section 22.14 does not provide rights or significance to the simple act of "establishment" in and of itself. Section 22.14 assigns significance to "establishment" based upon who was "established" first: the dwelling or the facility. If a dwelling was established prior to local government approval (as proposed in the Illinois EPA's hypothetical), the subsequent action of the local government in "establishing" the facility would not in any way impede the Illinois EPA from denying permits under Section 22.14. Third, Illinois EPA contends that a local government would have no choice but to approve local siting notwithstanding the existence of a pre-existing dwelling within the 1000 foot setback, thus creating the hypothetical violation (and internal tension) of Section 22.14. However, this is not the case. Pursuant to Section 39.2 of the Act local governments can review a sweeping range of issues in considering a siting application. This range clearly envisions issues related to setbacks and the proximity of dwellings or residences nearby the proposed facility. (See 39.2(a)(ii) related to location such that the public health and safety is protected; 39.2(a)(iii) related to incompatibility of the facility with respect to surrounding property; 39.2(a)(v) related to location to minimize danger to surrounding area; and, 39.2(a)(vi) related to traffic flows in the area.) In light of these issues, the Illinois EPA's hypothetical, and the argument it is designed to support, is not applicable nor dispositive of any issue in this case.

The Illinois EPA raises a second, and perhaps related argument, based upon the differences between required notice provisions in Section 39.2 and the 1000 setback requirements in Section 22.14. The argument is this:

> Since the local unit of government cannot enforce Section 22.14, and since the local siting approval process does not require notice to parties that may be included within the setback zone, it would frustrate the purpose of Section 22.14 if local siting approval was tantamount to establishment of a transfer station. A county board would be helpless to deny a siting on the basis that Section 22.14 would be violated, and the Illinois EPA would not be able to deny a permit on that basis since the facility would already be established.

(Motion p. 12-13.)

This argument lacks merit on a number of basis. First, as noted above, a local government can take into consideration the setback issues of Section 22.14 and make it the basis of a denial. Accordingly, a county board is not "helpless" if it chose to deny siting on the basis of a perceived violation of 22.14. Second, the local siting approval process does require notice to those who may fall within the 1000 foot setback. This notice is effectuated by public notice in newspapers and notice to government representatives (in addition to notice to those within 250 feet of the facility). Most significantly, however, is that the purpose of Section 22.14 is not frustrated by considering a facility to be established at time of siting approval (if not earlier). The purpose of Section 22.14 is to give rights to the first entity established. If, as posed in the hypothetical, a legitimate dwelling within the 1000 foot setback exists prior to local government siting approval, the establishment of the facility by the local government does not impact the Illinois EPA's application of Section 22.14 via the permitting process. That is so because it is a question of who was established first. Under no reading of 22.14, nor under any argument by Sutter, does the mere establishment of a facility trump a pre-existing dwelling. That is simply not the case, nor is such a construction advocated by Sutter. It is a question of who has been "established" first. If a dwelling is established prior to the establishment of a facility, its pre-establishment controls the review under section 22.14 and the facility is barred. The fact that a local government, by approving a siting application, has

"established" a facility has no bearing on the Illinois EPA's authority under 22.14. The Illinois EPA's authority remains fully intact to identify, as expressly required by section 22.14, who was "established" first, the dwelling or the facility.

IV. Conclusion

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

Respectfully submitted,

SUTTER SANITATION, INC., and
LAVONNE HAKER, Petitioners

By: _____
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PROOF OF SERVICE

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

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and copies to:

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and by depositing same in the United States mail in Springfield, Illinois, on the 13th day of August, 2004, with postage fully prepaid.