ILLINOIS POLLUTION CONTROL BOARD
April 5, 2001

COMMUNITY LANDFILL COMPANY and CITY OF MORRIS,	)	
Petitioners,	)	
v.	)	PCB 01-48
	)	PCB 01-49
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	(Permit Appeal - Land) (Consolidated)
Respondent.	)	

FRANK E. DEVITO, JOSEPH A. BOSCO, AND MARK A. LAROSE OF LAROSE & BOSCO, LTD. AND MICHAEL H. MASSINO, OF MICHAEL H. MASSINO, LTD., APPEARED ON BEHALF OF PETITIONERS; and

JOHN J. KIM, ASSISTANT COUNSEL, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by R.C. Flemal):

This matter is before the Board on two permit appeals filed by petitioners Community Landfill Company and City of Morris on September 7, 2000. Both appeals seek review of the Illinois Environmental Protection Agency's (Agency) decision to include certain conditions in petitioners' significant modification (sigmod) permits for Parcels A and B of the Morris Community Landfill located on Ashley Road, City of Morris, County of Grundy, Illinois. The Board consolidated the two appeals on September 21, 2000.

Also pending before the Board is petitioners' appeal of five hearing officer rulings that were made during the three-day hearing held in this matter.

For the reasons below, the Board affirms Parcel A Permit Conditions VII-11, II-2i, X-6 and Parcel B Permit Conditions VI-9 and IX-6. However, the Board instructs the Agency to modify Parcel A Conditions VII-7, VIII-23, VIII-24, VIII-25, and VIII-27, and Parcel B Conditions VI-7 and IX-1 consistent with this opinion and order.

PROCEDURAL HISTORY

On September 7, 2000, petitioners filed two permit appeals, PCB 01-48 and PCB 01-49. The appeals challenge the Agency's inclusion of certain conditions in the two sigmod permits the Agency issued to petitioners on August 4, 2000. On October 5, 2000, the

Board granted petitioners' motion to stay the contested permit conditions during the pendency of this appeal.

Hearing in this matter was held in Chicago, Illinois, on January 17-19, 2001, before Hearing Officer Bradley P. Halloran. Both petitioners and the Agency presented witnesses and argument. Witnesses for the petitioners were Michael McDermont, of Andrews Environmental Engineering; Robert Feeney, mayor of the City of Morris; Christine Roque, environmental protection engineer for the Agency; Van Silver, of Andrews Environmental Engineering; Marion Skouby, a consulting engineer; Gwenyth Thompson, manager of the Groundwater Assistance Unit at the Agency; and Joyce Munie, permit section manager of the Bureau of Land at the Agency. Witnesses for the Agency were Christine Roque; and Andrew Limmer, of Geotechnology, Inc., formerly of Andrews Environmental Engineering.

On February 23, 2001, Hearing Officer Halloran issued a hearing report stating, among other things, that the hearing witnesses' credibility was not an issue.

Petitioners and the Agency filed posthearing briefs on February 21, 2001. The parties filed response briefs on February 28, 2001.[1] The briefing schedule mandated simultaneous briefing, with no reply briefs allowed.

The Board received one public comment filed by the Grundy County Board. The Board accepts the filing over petitioners' objection. Pet. Br. at 35.

THE PERMITTING PROCESS

After the Agency's final decision on a permit is made, the permit applicant may appeal that decision to the Board. 415 ILCS 5/40(a)(1)(1998). The question before the Board in permit appeal proceedings is whether the applicant proves that that application, as submitted to the Agency, demonstrated that no violation of the Environmental Protection Act (Act) (415 ILCS 5 *et seq*. (1998)) would have occurred if the requested permit had been issued. Panhandle Eastern Pipe Line Company v. IEPA (January 21, 1999), PCB 98-102; Joliet Sand & Gravel Co. v. PCB, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (3rd Dist. 1987), citing IEPA v. PCB, 118 Ill. App. 3d 772, 455 N.E. 2d 189 (1st Dist. 1983).

Section 39(a) of the Act also allows the Agency to impose conditions on permits:

> In granting permits the Agency may impose such conditions as may be necessary to accomplish the purposes of this Act, and as are not

[1] References to the petitioners' posthearing brief will be cited as "Pet. Br. at __." References to petitioners' response brief will be cited as "Pet. Resp. Br. at __." The Agency's posthearing brief will be cited as "Ag. Br. at __." The Agency's response brief will be cited as "Ag. Resp. Br. at __."

> inconsistent with the regulations promulgated by the Board hereunder. 415 ILCS 5/39(a) (1998).

Section 40(a)(1) of the Act provides that:

> If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the applicant may, within 35 days, petition for a hearing before the Board to contest the decision of the Agency. 415 ILCS 5/40(a)(1)(1998).

Petitioners timely appealed the Agency's decision to grant petitioners' sigmod permits with conditions under Section 40(a)(1). Since petitioners are appealing certain permit conditions imposed by the Agency, petitioners must show that the modifications imposed by the Agency were not necessary to accomplish the purposes of the Act. Browning-Ferris Industries of Illinois v. PCB, 179 Ill. App. 3d 598, 534 N.E. 2d 616 (2nd Dist. 1989).

Standard of Review

It is well-settled that our review of permit appeals of this type is 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. PCB, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987). However, it is the hearing before the Board that provides a mechanism for the petitioner to prove that operating under the permit as granted would not violate the Act or regulations. Further, the hearing affords the petitioner the opportunity "to challenge the reasons given by the Agency for denying such permit by means of cross-examination and the Board the opportunity to receive testimony which would 'test the validity of the information (relied upon by the Agency)'." Alton Packaging Corp. v. IPCB, 162 Ill. App. 3d at 738, 516 N.E. 2d at 280, quoting IEPA v. IPCB, 115 Ill. 2d 65, 70 (1986).

Typically, evidence that was not before the Agency at the time of its decision is not admitted at hearing or considered by the Board. West Suburban Recycling and Energy Center, L.P. v. IEPA (October 17, 1996), PCB 95-199 and 95-125; Panhandle Eastern Pipe Line Company v. IEPA (January 21, 1999), PCB 98-102; Alton Packaging Corp. v. PCB, 162 Ill. App. 3d at 738, 516 N.E.2d at 280. Additionally, Section 105.214(a) of the Board's procedural rules states:

> Except as provided in subsection (b), (c) and (d) of this Section, the Board will conduct a public hearing, in accordance with 35 Ill. Adm. Code 101.Subpart F, upon an appropriately filed petition for review under this Subpart. The hearing will be based exclusively on the record before the Agency at the time the permit or decision was issued, unless the parties agree to supplement the record pursuant to Section 40(d) of the Act. If any party desires to introduce evidence before the Board with respect to any disputed issue of fact, the Board will

conduct a separate hearing and receive evidence with respect to the issue of fact. 35 Ill. Adm. Code 105.214(a).

Petitioners specifically appeal five of the hearing officer rulings.[2] In each instance the hearing officer denied admission of certain documents as evidence, while allowing petitioners to make offers of proof on that evidence. Petitioners argue that they should have been allowed to submit evidence at the hearing that would rebut the Agency's reasons to include the conditions, if the record included the Agency's reasons. Pet. Obj. at 3-9. The Agency responds that the hearing officer properly excluded the evidence. Ag. Resp. to Obj. at 4. The Board will address each evidentiary challenge in the context of the condition to which it applies.

SITE DESCRIPTION

The Morris Community Landfill (site) is located east of Morris, Illinois. Parcel B, Vol. I at 37.[3] The City of Morris owns the site and Community Landfill Company (CLC) operates the site. Tr. at 25-26;[4] Pet. Br. at 3. The site is used for the disposal of general municipal refuse, non-hazardous special waste, and construction/demolition debris. Parcel B, Vol. I at 33. It is divided into Parcel A and Parcel B. Tr. at 26; Pet. Br. at 3. Parcel A is approximately 55 acres; and Parcel B is about 64 acres. Tr. at 26; Pet. Br. at 3. Ashley Road separates the parcels. Parcel B, Vol. I at 33. CLC has operated Parcel A since 1996 and currently operates Parcel A under the sigmod permit that is the subject of PCB 01-48. Tr. at 26. It is expected to operate for four more years. Parcel B, Vol. I at 35. CLC no longer accepts waste at Parcel B. Parcel B, Vol. I at 35. It is the subject of PCB 01-49. Tr. at 26.

Originally under 35 Ill. Adm. Code 814.104(c), CLC had to file a sigmod permit for Parcel B by September 15, 1994. Parcel B, Vol. I at 34. On April 20, 1993, the Agency issued a supplemental permit including a condition that the Parcel B application was due by June 15, 1993. Parcel B, Vol. I at 35. CLC delayed submitting the Parcel B application to avoid duplicating efforts regarding submitting an application for Parcel A, the operational status of which was undetermined at that time. Parcel B, Vol. I at 34. In November 1994, after more than two years of negotiations between petitioners, the City of Morris granted CLC authorization to operate Parcel A by an amendment to the landfill lease dated November 14, 1994. Parcel B, Vol. I at 34.

The Agency and petitioners' consultants from Andrews Environmental advised petitioners to seek a variance from the Board regarding the overdue sigmod permit application. Parcel B, Vol. I at 34. CLC sought a variance from the Board on April 26, 1995. The Board

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[2] Citations to petitioners' objection to and appeal of hearing officer rulings will be cited as "Pet. Obj. at __." Citations to the Agency's response to the petitioners' filing will be cited as "Ag. Resp. to Obj. at __."

[3] Citations to the administrative record will be cited as "Parcel A/Parcel B, Vol. __ at __."

[4] The hearing transcripts will be cited as "Tr. at __."

denied CLC's petition for variance on September 21, 1995. Community Landfill Co. v. IEPA (September 21, 1995), PCB 95-137. CLC appealed, and on June 20, 1996, the Appellate Court for the Third District of Illinois set aside the Board order and directed the Board to issue an order granting CLC a prospective variance of 45 days to file its sigmod applications. Community Landfill Co. v. IPCB and IEPA, No. 3-96-1081 (1996), (unpublished order under Supreme Court Rule 23). The Board granted CLC until August 5, 1996, to file the sigmod applications. On August 5, 1996, petitioners filed the applications. On September 1, 1999, the Agency denied the sigmod permit applications. Parcel B, Vol. I at 36. Among other things, whether CLC timely filed the applications is raised in an enforcement case currently pending before the Board. See People of the State of Illinois v. Community Landfill Company Inc. (April 5, 2001), PCB 97-193 (ruling on motions for partial summary judgment).

CONTESTED CONDITIONS

Petitioners appeal twelve of the more than 200 conditions included in the two permits. Tr. at 26. Some of the contested conditions apply to both Parcels A and B. Other contested conditions apply only to one parcel. The Parcel A contested conditions, set forth on pages 5-6 of the petition filed September 7, 2000, in PCB 01-48 are:[5]

1. That the requirement to maintain leachate levels within Parcel A below the static groundwater level should be modified. (Condition VIII-27)

2. That petitioners be restricted from depositing refuse in any unpermitted portion of the landfill. (Condition II-2i)

3. That by February 1, 2001, a construction report be submitted regarding the installation of two vertical wells, horizontal leachate collector, force mains, and 5-day leachate storage tank. (Condition VII-7)

4. That petitioners install a 5-day leachate storage system. (Condition VII-11)

5. That petitioners complete the horizontal groundwater collection interceptor trench by March 1, 2001. (Condition VIII-23)

6. That petitioners be restricted from pumping wells T-2 and T-4. (Condition VIII-24)

7. That groundwater collection trench reporting requirements should be eliminated. (Condition VIII-25)

[5] The permits at issue are attached to each petition for review as Exhibit 2 (Exh. 2).

8. That petitioners maintain closure and post-closure care financial assurance for 100 years of treatment of groundwater at the site. (Condition X-6)

Similarly, the Parcel B contested conditions, set forth on pages 5 and 6 of the petition filed September 7, 2000, in PCB 01-49 are:

1. That petitioners complete work on leachate removal system force main, related piping, and 5-day storage tank by March 1, 2001. (Condition VI-7, 9)

2. That petitioners install a 5-day leachate storage system. (Condition VI-9)

3. That 475,000 cubic yards of waste be moved from Parcel B to Parcel A by February 1, 2001, or closure costs to be modified, to reflect third-party closure costs. (Condition IX-1)

4. That petitioners maintain closure and post-closure care financial assurance for 100 years of treatment of groundwater at the site. (Condition IX-6)

DISCUSSION

The Board first addresses Condition VIII-27 (Parcel A), followed by each contested condition in numerical order. Identical conditions for both Parcel A and B are addressed together.

Condition VIII-27 (Parcel A): Leachate Levels

Condition VIII-27 for Parcel A states, in pertinent part, that the permittee must maintain the leachate levels within Parcel A below the static groundwater levels at all times. Pet. for PCB 01-48, Exh. 2 at 42. Petitioners argue that 95% of the bottom of Parcel A is above the static groundwater level, which makes compliance with the condition impossible. Pet. Br. at 31. They suggest that the condition should be amended so that that condition only applies to the portion of Parcel A where the bottom of the landfill is below the static groundwater level. Pet. Br. at 31.

The Agency responds that it is willing to revise this condition as the Board sees fit. Ag. Br. at 27. It concedes that, as currently written, the condition "creates a situation in which compliance with the condition would be very difficult . . . ." Ag. Br. at 27. The Agency suggests changing the condition's language so that the condition does not apply to those portions of the landfill where the bottom is above the static groundwater level. Ag. Br. at 27-28; Tr. at 453.

The Board agrees with the parties that the condition is inappropriate. The Board accordingly directs the Agency to modify the condition so that it only applies to that portion of Parcel A where the bottom of the landfill is below the static groundwater level.

Condition II-2i (Parcel A): Waste Placement

Petitioners appeal Condition II-2i of Parcel A which states that:

> the operator of this solid waste facility shall not conduct the operation in a manner which results in deposition of refuse in any unpermitted (*i.e.*, without an Agency approved significant modification authorizing operation) portion of the landfill. Pet. for PCB 01-48, Exh. 2 at 5.

Petitioners argue that this condition unreasonably restricts them from placing waste necessary to build the separation layer's invert elevation. Pet. Br. at 10. Petitioners assert that the permit should be amended to allow for waste placement necessary to construct the separation layer and achieve the intended elevation. Pet. Br. at 32.

Petitioners' witness, Michael McDermont, testified that compliance with both Condition II-2i and Condition I-2a was impossible. Tr. at 608. Condition I-2a reads:

> No part of the unit shall be placed into service or accept waste until an acceptance report for all the activities listed below has been submitted to and approved by the Agency as a significant modification pursuant to 35 Ill. Adm. Code 11.505(d) and 13.203.
>
> a. Preparation of the separation layer to design parameters;
>
> * * *

According to McDermont, the intended separation layer's elevation is greater than the current land elevations. Tr. at 608. According to McDermont, the permit application included the petitioners' construction plan, which intended to allow placement of waste to build the necessary elevation. Tr. at 609-10, A30.[6] He explained that they wanted to improve Parcel A's ability to collect leachate by increasing the landform slope above the previous slope. Tr. at 608. He further explained that the separation layer's purpose was to intercept water that would otherwise infiltrate into the landfill and migrate through the waste. Tr. at 609.

The Agency argues that Condition II-2i is language directly from the Act. Specifically, Section 21(o)(9) of the Act prohibits the operator of the facility from conducting operations that result in deposition of refuse in any unpermitted portion of a landfill. Ag. Br. at 20; 415 ILCS 21(o)(9) (1998). The Agency argues that the condition is appropriate as a matter of law,

[6] Citations to the appendix material attached with petitioners' brief will be "A__."

and that the Agency cannot unilaterally amend a statutory provision. Ag. Br. at 20. The Agency notes that Section 21(o)(9) of the Act would apply to petitioners even if the Board directed striking Condition II-2i. Ag. Br. at 22.

The Agency also argues petitioners failed to appeal Condition I-2a, and therefore "any issues as to the propriety or interpretation of that Condition are not properly before the Board." Ag. Br. at 21. The Agency further argues that Roque testified the separation layer's construction would be within the landfill's permitted boundary. Ag. Br. at 22. The Agency concludes that there is nothing inconsistent between the construction plans for the separation layer and compliance with Condition II-2i of the permit. Ag. Br. at 22.

Petitioners respond that the language in Condition II-2i differs from the language in Section 21(o)(9) of the Act, in that II-2i includes "(*i.e.*, without an Agency approved significant modification authorizing operation)." Pet. Resp. Br. at 12. They contend that this language makes it necessary to read Condition II-2i with Condition I-2a. Pet. Resp. Br. at 12. Petitioners believe that if they cannot place waste in any unpermitted area of the landfill without a sigmod permit (Condition II-2i), then they cannot place the waste that is necessary to make the separation layer without receiving a sigmod permit for the layer's construction. Pet. Resp. Br. at 12-13.

The Agency responds that Munie's testimony was that the approved construction plan suggests that petitioners intended to use on-site waste to create the separation layer. Ag. Resp. Br. at 5. The Agency further notes that the construction plan states that refuse may be exhumed in conjunction with the preparation of the subgrade to design the grade, and that exhumed refuse will immediately be transported to and disposed of at the working face of the facility. Ag. Resp. Br. at 6, citing R. A, Vol. I at 54-55.

Board Finding

To prevail on its claim, petitioners must show that Condition II-2i is not necessary to accomplish the purposes of the Act. Browning-Ferris Industries of Illinois v. PCB, 179 Ill. App. 3d 598, 534 N.E. 2d 616 (2nd Dist. 1989). The Board finds that this condition is necessary to accomplish the purposes of the Act. The Act expressly forbids landfill operators from depositing waste in unpermitted portions of the landfill. 415 ILCS 5/21(o)(9) (1998). Roque testified that this condition was a standard condition in all sigmod permits. Tr. at 786.

To the extent the petitioners believe the condition conflicts with Condition I-2a, that condition was not included in the petition for review filed with the Board. The Board agrees with the Agency that the issue regarding the alleged conflict between Conditions II-2i and I-2a is not properly before the Board on appeal, and is therefore waived. If petitioners believed that Condition I-2a incorrectly prohibited them from bringing in waste beyond that contained on site to build the separation layer, then Condition I-2a is the condition that should be appealed. Regardless, the Board agrees with the Agency that Condition I-2a does not preclude

construction of the separation layer, since that layer would be within the landfill's permitted boundary.

Condition VII-7 (Parcel A) and Conditions VI-7 and VI-9 (Parcel B): Timing of Installation of Leachate Controls

The Agency issued conditions on each permit requiring that petitioners install a leachate control device. The conditions also require that the device be installed on Parcel A by February 1, 2001, and on Parcel B by March 1, 2001. Pet. for PCB 01-48, Exh. 2 at 30; Pet. for PCB 01-49, Exh. 2 at 20-21. Petitioners appeal these conditions, arguing they do not have enough time to comply with these conditions. Petitioners cite to Roque's testimony in which she stated that these deadlines were not based on environmental concerns. Pet. Br. at 39. Petitioners note that the leachate from Parcel B is currently being withdrawn through the gas collection system. Pet. Br. at 39.

The Agency responds that they imposed the deadlines because the permit applications did not suggest any other schedule. Ag. Br. at 23. Rather, the applications only stated that the leachate storage tanks would be constructed within six months of the issuance of the permits. Ag. Br. at 23. The applications were silent regarding the leachate extraction systems. Ag. Br. at 24. The Agency notes that Roque testified that based on her experience, usually when a leachate collection system is built, the pipings and header are installed before the tank, and the tank is the last component built. Ag. Br. at 24; Tr. at 253-54. The Agency concludes that Roque consistently used one time period in the permit application as the guideline for setting a complete schedule by which the petitioners were to complete all leachate extraction system construction. Ag. Br. at 24.

Board Findings

The question before the Board is whether petitioners have shown that the modifications imposed by the Agency were not necessary to accomplish the purposes of the Act. Browning-Ferris Industries of Illinois v. PCB, 179 Ill. App. 3d 598, 534 N.E. 2d 616 (2nd Dist. 1989). Petitioners' arguments against this condition are sparse. The basis for their appeal is that they need more time to accomplish the modifications, and there is no evidence that environmental harm will result if the modifications are delayed.

The Board finds that petitioners have not met their burden. Absent a more detailed description from petitioners to the Agency of petitioners' desired timeframe for installing the leachate control devices, the Agency's deadlines are reasonable and necessary to accomplish the purposes of the Act.

Because the Board stayed these conditions pending this appeal, the Board orders the Agency to modify the conditions to reflect that the leachate device be attached to Parcel A by August 30, 2001, and to Parcel B by September 27, 2001. These dates reflect the period of

time between when the appeals were filed (September 7, 2000) and the original permitted deadlines for installation (February 1, 2001, and March 1, 2001).

Conditions VII-11 (Parcel A) and VI-9 (Parcel B): Leachate Storage Capacity

Petitioners appeal two identical conditions for both Parcel A and Parcel B. The conditions, VII-11 and VI-9, require petitioners to install a five-day leachate storage system. Petitioners argue they should only have to install a one-day leachate storage system. Pet. Br. at 33.

The permit for both parcels states that the permit does not allow the following:

> The proposed one-day's worth of leachate storage.… Pursuant to 35 IAC Section 811.309(d)(6), a facility may have less than five (5) days' worth of storage capacity for accumulated leachate as required by 35 IAC 811.309(d)(1), if the owner or operator provides multiple treatment, storage, and disposal options which includes one day storage and two (2) alternative means. The proposed two (2) connections to the same sewer line connected to one receiving treatment facility (POTW) does not meet the above regulations. Therefore the facility shall provide for five (5) days' worth of accumulated leachate and condensate storage, and… Parcel B, Exh. 2 at 2; Parcel A, Exh. 2 at 31.

The relevant portions of 35 Ill. Adm. Code follows:

Section 811.309

d) Standards for Leachate Storage Systems

1) Except as otherwise provided in subsection (d)(6) of this Section, the leachate storage facility must be able to store a minimum of at least five days' worth of accumulated leachate at the maximum generation rate used in designing the leachate drainage system in accordance with Section 811.307. The minimum storage capacity may be built up over time and in stages, so long as the capacity for five consecutive days of accumulated leachate is available at any time during the design period of the facility.

2) All leachate storage tanks shall be equipped with secondary containment systems equivalent to the protection provided by a clay liner 0.61 meter (2 feet thick) having a permeability no greater than 10-7 centimeters per second.

* * *

6) A facility may have less than five days' worth of storage capacity for accumulated leachate as required by subsection (d)(1) of this Section, if the owner or operator of the facility demonstrates that multiple treatment, storage and disposal options in the facility's approved leachate management system developed in accordance with subsection (b) of this Section will achieve equivalent performance. Such options shall consist of not less than one day's worth of storage capacity for accumulated leachate plus at least two alternative means of managing accumulated leachate through treatment or disposal, or both treatment and disposal, each of which means is capable of treating or disposing of all leachate generated at the maximum generation rate on a daily basis.

e) Standards for Discharge to an Offsite Treatment Work

* * *

6) Where leachate is not directly discharged into a sewerage system, the operator shall provide storage capacity sufficient to transfer all leachate to an offsite treatment works. The storage system shall meet the requirements of subsection (d).

35 Ill. Adm. Code 811.309(d), (e)

During the permitting process, petitioners thought Section 811.309(e)(6) meant that the site did not need a leachate storage tank if it had a direct sewer connection. Pet. Br. at 11. Petitioners continue to contend this interpretation is correct and that no leachate storage should be required at the site. Pet. Br. at 33. However, the Agency disagreed with this interpretation, so McDermont recommended a one-day leachate storage tank. Pet. Br. at 11; Tr. at 668.

To comply with Section 811.309(d)(6), petitioners' permit applications proposed two means to transport leachate to the Morris publicly owned treatment works (POTW): (1) a direct connection to the POTW; and (2) a tanker truck to transport the leachate. Pet. Br. at 11, 33. McDermont believed that Section 811.309(d)(6) allowed for one day of leachate storage with a direct connection and a tank truck. Pet. Br. at 12; Tr. at 670.

Petitioners argue that the Agency's prior interpretations of Section 811.309(d) require only one POTW, rather than two. Pet Br. at 33. Petitioners observe that Roque testified that,

before the instant case, the Agency interpreted Section 811.309(d) to require two means to transport leachate to one POTW. Pet. Br. at 33. They further argue that for their case only, Munie interpreted Section 811.309(d) to require two or more POTW connections. Pet. Br. at 12. Petitioners note that the Agency recently issued Rochelle Municipal Landfill one day's leachate storage where there was only one POTW permit. Pet. Br. at 33.

The Agency argues that one day of storage was insufficient to satisfy the Section 811.309(d)(6) requirements that petitioners need at least two alternative means of managing accumulated leachate through treatment and/or disposal. Ag. Br. at 14. The Agency imposed a condition that petitioners have five days of storage because petitioners failed to demonstrate that they had two alternative means of treatment and/or disposal pursuant to Section 811.309(d)(6). Ag. Br. at 17. Specifically, the Agency acknowledges that while a direct sewer connection to the city's POTW is capable of treating or disposing of all leachate generated, a lone tanker truck would be incapable of treating or disposing 104,135 gallons of leachate. Ag. Br. at 17. The Agency further argues that the permit applications failed to state whether a truck would be dedicated to the site, what the truck's capacity would be, and where the truck would take the leachate.

The Agency further contends that a tanker truck is the same as a direct sewer connection to the city's POTW because it is the means to convey the leachate to the alternative means of treatment and/or disposal. Ag. Br. at 17. The Agency notes that if the POTW is shut down for maintenance or any other reason, no alternative means of leachate treatment or disposal exists. Ag. Br. at 18.

Petitioners respond that no leachate storage is necessary under Section 811.309(e), because in this instance, there is a direct sewer connection to the Morris POTW. Pet. Resp. Br. at 11. Petitioners assert that if there is a direct sewer connection, no leachate storage is required. Pet. Resp. Br. at 11.

Hearing Officer Appeal: Subpoenas of Agency Permits for Other Landfills

Petitioners appeal the hearing officer's ruling quashing petitioners' *subpoena duces tecum* on the basis that the subpoena was overly burdensome, unreasonable, and there was no evidence that the Agency considered the requested documents at the time it made its permit determinations. Pet. Obj. at 16; Tr. at 273. On January 5, 2001, petitioners issued hearing subpoenas requiring the presence of certain Agency employees at the hearing, and requesting that the Agency produce the most current sigmod permits, NPDES permits, and closure and post-closure care cost estimates for ten other Illinois landfills. Pet. Obj. at 16-17. The Agency provided the sigmod permits for the ten landfills and one NPDES permit for the Litchfield landfill, but none of the NPDES permits, or closure or post-closure care cost plans for the landfills. Pet. Obj. at 19.

Petitioners contend that the information, if provided, would show that the Agency had previously allowed one-day storage with only one POTW connection. Pet. Obj. at 17.

The Agency responds that the scope of the subpoena was unreasonable. Ag. Resp. to Obj. at 12. In the motion to quash, the Agency states that to comply with petitioners' request each permit reviewer would have to search the file for the requested documents. Mot. to Quash at 2-3. Given the Agency's limited resources, the reviewers' current work load, and the short period of time between when the request was received (January 8, 2001) and the hearing (January 17, 2001), the Agency argues it would be impossible for them to comply with the request. Mot. to Quash at 3.

The Agency further argues that petitioners could have requested these documents before the hearing. Mot. to Quash at 3-4. They argue that petitioners should have asked for the information in the request for production filed on November 16, 2000. Mot. to Quash at 4.

Pursuant to Section 101.622(d) of the Board's procedural rules:

> The hearing officer, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance, may quash or modify the subpoena if it is unreasonable or irrelevant. The hearing officer will rule upon motions to quash or modify material requested in the subpoena . . . in accordance with the standards articulated in Section 101.614 of this Part.

Section 101.614, which also authorizes the hearing officer to limit discovery through means other than subpoenas, provides:

> The hearing officer may at any time on his or her own motion, or on the motion of any party, order the production of information which is relevant to the matter under consideration. The hearing officer will deny, limit or condition the production of information when necessary to prevent undue delay, undue expense, or harassment, or to protect materials from disclosure consistent with the provisions of Sections 7 and 7.1 of the Act and 35 Ill. Adm. Code 101.130.

Board Findings

First regarding the hearing officer ruling, the Board finds that given the volume of the requested materials and the limited timeframe that the Agency had to provide them, the hearing officer's ruling was appropriate. Additionally, the Agency provided much of the requested information before hearing. The Board finds that petitioners' request was unreasonable since the documents could have been requested earlier to provide the Agency sufficient time to provide the materials.

Second, Section 811.309(d)(6) of the Act states that for a facility to qualify for the

one-day storage exception, it must have "at least two alternative means of managing accumulated leachate through treatment or disposal, or both treatment and disposal, each of which means is capable of treating or disposing of all leachate generated at the maximum generation rate on a daily basis." 35 Ill. Adm. Code 811.309(d)(6).

The Board finds that Section 811.309(d)(6) language is clear on its face in requiring two methods of treatment and disposal of leachate. While CLC's plan calls for two transportation methods, it does not include the necessary two treatment and disposal methods. CLC does not therefore qualify for the Section 811.309(d)(6) one-day storage provision, and the Agency correctly conditioned the sigmod permits with the five-day requirement.

To the extent that petitioners assert Section 811.309(e)(6) does not require that petitioners provide any storage, the Board finds this issue is not properly before the Board. Petitioners' permit applications proposed one day of leachate storage. Petitioner's brief requests that the Board modify the conditions to allow for one-day leachate storage. Pet. Br. at 33. The issue presented to the Board is whether five days of storage is necessary, as the permits require. If petitioners believed that they did not have to provide any leachate storage under Section 811.309(e)(6), then they should have included that section in their permit applications.

Conditions VIII-23, VIII-24 and VIII-25: Groundwater Remediation System

Petitioners appeal Conditions VIII-23, VIII-24, and VIII-25 that pertain to the groundwater remediation system. Specifically, Condition VIII-23 for Parcel A requires petitioners to begin installing the proposed 2,076 foot groundwater interceptor trench as part the landfill's contingent remediation plan by September 1, 2000. Further, Condition VIII-23 requires petitioners to complete the trench construction by March 1, 2001, and have it operational by June 1, 2001. Condition VIII-24 requires petitioners to properly abandon two vertical withdrawal wells identified as T-2 and T-4. Condition VIII-25 requires, among other things, that petitioners assess the trench's performance and summarize the volumes of groundwater the trench extracts.

Petitioners' Arguments

Petitioners argue that they should be allowed to use the vertical withdrawal wells to pump contaminated groundwater from the landfill for treatment and disposal instead of using a groundwater interceptor trench. They contend that the deep well system is the preferred method for treating potentially contaminated groundwater since the site had been undermined. Pet. Br. at 23. In this regard, they note that Skouby, a geotechnical expert, concluded from trench pump tests that the site was undermined. Pet. Br. at 22. He based his conclusion on drawdown in various monitoring points and the amounts of water pumped through the shale

layer.[7] Pet. Br. at 22-23. Further, petitioners note that both Skouby and Silver concluded that the proposed deep well groundwater remediation system met or exceeded the factors of safety for slope stability and load bearing capacity in accordance with 35 Ill. Adm. Code 811.304 (a) through (d), and 811.305(a). Pet. Br. at 24. They based this conclusion on their experience, review of the documentation, and their performance of various tests. Pet. Br. at 24.

Petitioners rely on Skouby's and Silver's testimonies to address the Agency's concerns that subsidence would occur from dewatering the undermined area. Based on a review of the boring logs, Skouby testified no mine void or mine opening exists at Morris and that complete subsidence had occurred at the site. Pet. Br. at 26. Petitioners state that the permit application included many references that complete subsidence of the undermined areas had already occurred at the site. Pet. Resp. Br. at 7-8.

Regarding the Agency's reliance on the Streator EIS conclusions,[8] petitioners assert that those conclusions are not applicable to the site because the site does not have Streator's geologic conditions. Pet. Resp. Br. at 9. In this regard Skouby testified that the site does not have the #6 coal that caused a problem at Streator, and the site does not have sinkholes. Pet. Br. at 26. Silver presented a graphical comparison of geological conditions under Streator and Morris that shows that #6 coal is not present under site. Pet. Br. at 27. Petitioners therefore question the Agency's continued reliance on the Streator EIS conclusions to argue that additional subsidence would occur if the site is dewatered to the top of the coal.

In addition, Skouby stated that the intent of the deep well system was not to dewater any mine void. Pet. Br. at 26. Petitioners assert that the application clearly stated that the intent was to maintain groundwater at seven feet of drawdown or elevation of 500 feet, which is approximately 20 feet above the top of the coal. Pet. Resp. Br. at 9. Petitioners note that pumping rates will be monitored on a regular basis and adjustments will be documented monthly and quarterly and reported to the Agency annually. Pet. Resp. Br. at 9.

Further, petitioners state that Silver's mass stability and subsidence analysis showed that the landfill unit met or exceeded the safety factors set forth at 35 Ill. Adm. Code 811.304 by lowering the groundwater levels to elevations of 509, 506, and 503 feet. Pet. Br. at 23-24. Petitioners note that Silver's extrapolation calculation shows that the stability safety factors are met when groundwater levels are lowered to an elevation of 480 feet. Pet. Br. at 24. Regarding the Agency's concerns relating to the extrapolation method's use, petitioners note that both Skouby and Silver testified that the method was appropriate, and the conclusions based on the extrapolation were sound. Pet. Br. at 24. Petitioners argue that the Agency did

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[7] Drawdown means the lowering of water level in a well as a result of pumping or withdrawal. Drawdown is the difference between the height of the water table or potentiometric surface (confined aquifer) and that of the water in the well.

[8] The Streator EIS is an Environmental Impact Statement prepared by the United States Environmental Protection Agency (USEPA) regarding rehabilitation of wastewater facilities in Streator, Illinois.

not present any testimony that the system would not meet the factors of safety at lower groundwater levels or that the proven trend of increased stability at lower groundwater elevations would somehow reverse itself. Pet. Resp. Br. at 5.

Agency Arguments

The Agency argues that it denied petitioners' plan to use wells T-2 and T-4 to pump contaminated groundwater, since such use could dewater the shallow monitoring zone through removal of groundwater from the undermined coal zone. Ag. Br. at 5. The Agency contends that dewatering the undermined coal zone could potentially cause mine subsidence, which could adversely impact the landfill's stability. Ag. Br. at 5. The Agency asserts that using wells T-2 and T-4 as part of the groundwater remediation system would violate the Board's landfill regulations pertaining to the foundation and mass stability set forth at 35 Ill. Adm. Code 811.304 (a), (b) and (c), and 811.305(a).[9] Ag. Br. at 5. The Agency raises many concerns regarding petitioners' proposed use of the deep well extraction system for groundwater remediation.

The Agency states the Streator EIS supports its concern regarding mine subsidence underneath the landfill as a result of pumping of groundwater from wells T-2 and T-4. Ag. Br. at 6. The Agency notes that in the Streator EIS, the USEPA concluded that significantly lowering the undermined areas' existing groundwater levels would increase the stress in the roof, pillars, and floor of the mine, increasing the potential for subsidence. Ag. Br. at 6. The Agency contends that, while it has not used the Streator EIS to compare the Streator and Morris geologies, the USEPA's conclusion applies to the site because it is constructed over an undermined area where dewatering may occur. Ag. Br. at 7.

The Agency contends that the permit application did not address the issue of potential mine subsidence from dewatering of mine voids. Ag. Br. at 7. Further, the Agency notes that the application's stability analysis section failed to mention any previous mine subsidence at the site. Ag. Br. at 7-8. In this regard, the Agency argues that Silver, who prepared the mass stability and subsidence reports, performed the stability calculation by assuming 100% mine subsidence with no mine voids. Ag. Br. at 9. Again, the Agency notes that the stability report does not mention the assumption concerning subsidence. Ag. Br. at 9.

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[9] Section 811.304(a) requires the material beneath the unit to have sufficient strength to support the weight of the unit during all phases of construction and operation. Section 811.304(b) provides that the total settlement or swell of the foundation must not cause or contribute to the failure of the liner leachate collection system. Section 811.305(c) states that the solid waste disposal unit must be designed to achieve a safety factor against bearing capacity failure of at least 2.0 under static conditions and 1.5 under seismic loadings. Section 811.05(a) states that if the *in situ* material provides insufficient strength to meet the requirements of Section 811.304, then the insufficient material shall be removed and replaced with clean material sufficient to meet the requirements of Section 811.304.

The Agency questions Silver's assumption concerning mine subsidence due to Limmer's testimony. Ag. Br. at 9-10. Limmer is a hydrogeologist who prepared the groundwater remediation portions of the permit applications. The Agency states that Limmer testified repeatedly that there were mine voids at the facility, and that dewatering those mine voids was a danger to be avoided. Ag. Br. at 10. The Agency asserts that dewatering of mine voids through use of wells T-2 and T-4 could create a potential for further mine subsidence. Therefore, the Agency asserts that Silver's assumption of 100 percent mine subsidence is not valid. Ag. Br. at 10.

In addition, the Agency challenges Silver's extrapolation method to determine the factor of safety at an elevation of 490 feet. Silver used the PCSTABL-5 program to determine the landfill stability at groundwater elevation of 509, 506, and 503 feet. However, the Agency notes that Silver determined the safety factor at a groundwater elevation of 490 feet by extrapolating the results from the three higher elevation runs instead of performing another run of the PCSTABL-5 program. Ag. Br. at 10. The Agency argues that the permit application did not include any further documentation or description, either graphical or textual, besides a statement that Silver used a straight line extrapolation. Ag. Br. at 11. The Agency asserts that this lack of information is troubling since the Agency believes there is no reason for not using the PCSTABL-5 program to determine safety factor at the additional groundwater elevation. Ag. Br. at 11. Further, the Agency contends that the missing supporting documentation does not allow the evaluation of the results since there is no data or calculation to review. Ag. Br. at 11.

The Agency also questions the permit application's well drawdown calculations and conclusions. The Agency notes that the drawdown is a key component in determining whether using wells T-2 and T-4 would dewater mine voids. Ag. Br. at 11. The permit application provides that a seven-foot drawdown would be adequate to capture the groundwater from the landfill's undermined areas. Ag. Br. at 11.

The Agency states that Limmer used the "Theis" calculation or solution[10] to "back calculate" the pumping rate for maintaining a seven-foot drawdown. Ag. Br. at 11. The Agency questions Limmer's assumption that using the Theis calculation requires the horizontal extent of the aquifer to be infinite. Ag. Br. at 11-12. The Agency states that Limmer's calculation assumed the aquifer to be infinite in horizontal extent, even though a provision of the permit application stated that the aquifer is laterally bounded by *in situ* coal. Ag. Br. at 12. The Agency maintains that, in calculating the drawdown, Limmer did not consider the presence of a lateral boundary. Ag. Br. at 12. In this regard, the Agency notes that it is possible to account for the presence of a lateral barrier by using an imaginary well calculation. The Agency states that if the lateral boundary was considered in the drawdown calculation, the

[10] The Theis calculation or solution is an analytical solution developed by Theis that can be used to calculate drawdown if aquifer properties and pumping rates are known. The Theis solution can be used to back calculate pumping rate for a given drawdown.

drawdown could be shown to be higher. Ag. Br. at 13. The Agency asserts that higher drawdown would lead to a very real possibility of dewatering of the mine voids. Ag. Br. at 13.

Finally, in its response brief, the Agency presents certain calculations to show that the pump test performed by petitioners resulted in water being withdrawn very close to the top of the coal seam. Ag. Resp. Br. at 25-26. The Agency's calculations, based on the rationale presented by Skouby at hearing, indicate that the pump test resulted in water being withdrawn at an elevation of less than two feet from the top of the mined area. Ag. Resp. Br. at 26. The Agency asserts that the calculation of water withdrawal levels and the possibility of incorrect assumptions in calculating drawdown support its position that the use of wells T-2 and T-4 could lead to dewatering of the mine voids.

Hearing Officer Appeal

Exhibit D2: Silver's Comparison Chart; Silver's Streator EIS Testimony.

Petitioners appeal the hearing officer ruling prohibiting Exhibit D2 and Silver's testimony. Petitioners assert that during discovery, they learned that the Agency rejected the deep well system based on Roque's reliance on the Streator EIS. Pet. Obj. at 10. At hearing, the petitioners tried to rebut Roque's testimony using Silver's prepared Exhibit D2, but the hearing officer would not allow D2 to be admitted and struck Silver's testimony rebutting Roque's conclusion and criticizing her reliance on the Streator EIS. Pet. Obj. at 11. The hearing officer sustained the Agency's objection to the admission of D2 on the basis that D2 was not part of the record. Tr. at 328.

Exhibit D2 is a comparison of the Streator geology taken from the Streator EIS and the site's geology taken from boring logs and other information contained in the permit application. Pet. Obj. at 11; Tr. at 317, 324.

Petitioners argue that the Streator EIS was not included in the record, although the hearing officer admitted it at hearing despite petitioners' objection. Pet. Obj. at 11-12. Petitioners assert that denying them the right to rebut the applicability of the Streator EIS testimony with competent expert testimony allows the Agency to reach conclusions regarding matters not in the record. Pet. Obj. at 11. They also note that the hearing officer excluded Silver's testimony rebutting the Agency's reliance on the Streator EIS as irrelevant and as a document made after the permit issued. Pet. Obj. at 11; Tr. at 352.

The Agency responds that Exhibit D2 was prepared after the decision date and was not part of the permit applications submitted to the Agency. Ag. Resp. to Obj. at 12. The Agency also notes that they did not review the summary of the boring logs in the form presented by Exhibit D2. Ag. Resp. to Obj. at 12-13.

Exhibit DD: Silver's Stability Chart.

Petitioners also appeal the hearing officer's ruling denying the admission of Exhibit DD. Pet. Obj. at 15. Exhibit DD is a chart, created by Silver, which demonstrates how he extrapolated data to conclude that the landfill met the stability regulations down to 480 feet. Petitioners admit that Exhibit DD was prepared after the permits were denied.[11] Pet. Obj. at 15. They assert that the diagram was offered solely to highlight Silver's extrapolation theory to the Board. Pet. Obj. at 15-16.

The Agency responds that the exhibit is not only demonstrative, it is substantive in that it tries to fill a gap in the permit application, *i.e.*, petitioners' failure to provide supporting documentation of Silver's extrapolation. Ag. Resp. to Obj. at 17-18.

Board Findings

Evidentiary Rulings.

As previously stated, generally evidence that was not before the Agency at the time of its decision should not be admitted at hearing or considered by the Board. West Suburban Recycling and Energy Center, L.P. v. IEPA (October 17, 1996), PCB 95-199 and 95-125; Pandhandle Eastern Pipe Line Company v. IEPA (January 21, 1999), PCB (98-102); Alton Packaging Corp. v. PCB, 162 Ill. App. 3d at 738, 516 N.E.2d at 280. Additionally, Section 105.214(a) of the Board's procedural rules states:

> Except as provided in subsection (b), (c) and (d) of this Section, the Board will conduct a public hearing, in accordance with 35 Ill. Adm. Code 101.Subpart F, upon an appropriately filed petition for review under this Subpart. The hearing will be based exclusively on the record before the Agency at the time the permit or decision was issued, unless the parties agree to supplement the record pursuant to Section 40(d) of the Act. If any party desires to introduce evidence before the Board with respect to any disputed issue of fact, the Board will conduct a separate hearing and receive evidence with respect to the issue of fact.

In this specific instance however, the Board finds that Exhibit D2 should have been admitted. The Board agrees with petitioners' characterization that Exhibit D2 is demonstrative only, and cumulative to other information in the record.

First, the record contained the site's boring logs. Although Exhibit D2 presented the boring logs information in a different format than the format in the record, the information is the same. Second, although the Streator EIS was not an official part of the administrative record, the Agency admitted it relied on the Streator EIS when it created these conditions. Accordingly, the Board concludes that Exhibit D2 is only comprised of information the Agency had before it at the time of its decision. We recognize that the Streator EIS was only before

[11] The Board notes the permits were issued with conditions, not denied.

the Agency because the Agency put it there, and that it was not part of petitioners' submission to the Agency. Regardless, the purpose of excluding evidence at hearing that was not before the Agency will not be violated with the admission of Exhibit D2. The Board reverses the hearing officer decision to exclude Exhibit D2 and Van Silver's testimony regarding Exhibit D2.

However, the Board affirms the hearing officer's ruling prohibiting Exhibit DD's admission. Exhibit DD contains information that the Agency did not have in the record the computer test that verified the extrapolated factor of safety. Unlike Exhibit D2, the Agency did not have this information, in any form, in the record. Therefore, the Board affirms the hearing officer's exclusion of Exhibit DD.

The Conditions.

Regarding the Agency's concern that deep well pumping would increase the potential for subsidence, the Board agrees with petitioners that the Agency inappropriately relied on the Streator EIS conclusions to support its assertions. The Board believes that the Streator EIS conclusions may be applied at sites with geologic conditions similar to those at Streator. However, the Agency did not bother to compare the geologic conditions at Streator and the site. The record shows that the geologic conditions under the site are dissimilar to Streator; while conditions conducive to subsidence existed at Streator, subsidence had already occurred at the site. Agency Exh. III at B-37, Parcel A, Vol. I at 195; Tr. at 419. Further, the coal seam (#6 coal) present in Streator is not present under the site.

Regarding the Agency's claim that the application did not mention any evidence of possible mine subsidence, the Board notes that the application for Parcel A included several references to mine subsidence. Parcel A, Vol. I at 188, 195. In addition, based on a review of the boring logs in the application, petitioners' expert geologist, Skouby, testified that there is no longer a mine void or mine opening at the site and that complete subsidence had occurred at the site. Tr. at 419.

Moreover, the Board believes that the deep well system's design drawdown addresses the Agency's concern regarding dewatering of the undermined areas. As petitioners note, the Parcel A application states that a drawdown of seven feet or a groundwater elevation of 500 feet will be maintained in the undermined areas during deep well pumping. Parcel A, Vol. VI at 264, 272, and 275. The Board believes that maintaining the drawdown at an elevation of 500 feet, which is 20 feet above the top of the coal seam (elevation of 480 feet), would minimize the potential of dewatering the undermined areas.

Regarding the use of straight-line extrapolation to determine the factors of safety for landfill stability at 480 feet, the Board finds that although the preferred approach is to run the PCSTABL-5 computer program at 480 feet, Silver and Skouby noted the straight-line extrapolation is also a valid method. Pet. Br. at 24. The factors of safety determined using

PCSTABL-5 at elevations of 509, 506, and 503 feet show a definite trend of increased factor of safety at lower groundwater levels.

Finally, regarding the Agency's concerns about drawdown calculations, the Board notes that petitioners did not rely on the Theis solution to calculate drawdown. Petitioners analyzed the pump test results using the methods of Hantush, Newman and Walton, and made the drawdown predictions using the Hantush ß method. Tr. at 869, Parcel A, Vol. VI at 266. Petitioners only used the Theis solution to predict the pumping rate for the design drawdown of seven feet. Tr. at 870. The application notes that the Theis solution was used to predict the pumping rate since it matches the Hantush's solution over a long period of time. Parcel A, Vol. VI at 302. In light of this, the Agency's concerns regarding the assumptions of the Theis solution have no bearing on the drawdown calculations presented in the Parcel A application. However, the Board believes that the presence of a horizontal barrier such as unmined coal may result in a pumping rate higher than the calculated rate of 55 gallons per minute. In this regard, the Board believes that petitioners will have to adjust the pumping rate to achieve the design drawdown of seven feet.

The Board finds that petitioners have demonstrated that the use of the deep well groundwater remediation system would not result in a violation of the mass stability requirements at 35 Ill. Adm. Code 811.304 (a) through (c) and 811.305(a). Further, the Board finds that petitioners used an acceptable extrapolation method to show that the landfill met the required mass stability factors at the lower groundwater elevation of 480 feet.

The Board directs the Agency to modify the conditions to limit the drawdown to seven feet or groundwater elevation of 500 feet to minimize any potential for dewatering of the undermined area. The Board further directs the Agency to modify Condition VIII-23 authorizing petitioners to use the deep well system and striking the trench installation requirement. Additionally, the Board directs the Agency to modify Conditions VIII-24 and 25 consistent with the modifications in Condition VIII-23.

Condition IX-1 (Parcel B): Overfill and Financial Assurance

Petitioners appeal Condition IX-1 in the Parcel B permit, which states as follows:

> The facility shall be closed in accordance with the closure plan in the Application Log No 2000-156 subject to special condition below. . . .
>
> This permit . . . does not approve the proposed schedule in the Waste Relocation Plan contained in Attachment 15 of the Application Log No. 2000-156. Furthermore, the Illinois EPA is not in agreement that the proposed cost estimate for hauling and disposal of the excess waste reflects third party cost, as required in 35 IAC Section 811.704(d).

> Before February 1, 2001, the permittee shall remove the 475,000 cubic yards of excess waste from Parcel B . . . . Within 30 days from completion of waste removal, the owner and operator shall submit to the Illinois EPA an application for a significant modification showing the change in the final contours of the Parcel B landfill.
>
> If the excess waste has not been removed by February 1, 2001, the owner and operator shall submit a revised cost estimate for the removal and disposal of the excess waste based on the Illinois EPA hiring a third party cost [sic] pursuant to IAC 811.704(d), in the form of an application for significant modification by March 1, 2001.
>
> Pet. for PCB 01-49, Exh. 2 at 32-33.

Petitioners argue that they should be allowed to obtain local siting to leave any overfill in Parcel B, rather than transporting the overfill to Parcel A. Pet. Br. at 34. Petitioners note that in both the 1996 and 2000 permit applications, they requested time after the permits were issued to either obtain local siting for any overfill in Parcel B, or to move the material across the street to Parcel A. Pet. Br. at 13, citing Tr. at 220.[12] Roque and Munie testified that they set the February 1, 2001 date because they believed petitioners had enough time to obtain local siting between 1996 and 2000. Pet. Br. at 13, citing Tr. at 220 and 510. Petitioners note that Morris' Mayor Feeney testified that he believed it was necessary to wait for the permit to be issued for siting to be successful. Pet. Br. at 13, citing Tr. at 90,103,133,135, and 136. McDermont testified that he believed that petitioners should not petition for siting approval before the sigmod permits were issued, if they hoped to receive siting. Pet. Br. at 14, citing Tr. at 654-55, 729-32.

Petitioners argue that local siting is a better option than actually moving the overfill to Parcel A, because moving the waste could create environmental hazards, whether or not it is done properly. Pet. Br. at 35. Petitioners further argue that they would have to obtain relief from a city council ban to put municipal solid waste on Parcel A. Pet. Br. at 35.[13]

The Agency argues that they allowed petitioners a reasonable time to address the overfill. Ag. Br. at 36. The Agency notes that the permit application failed to propose a time period for removal, so the Agency was obligated to set a fixed time. Ag. Br. at 36.

The Agency further argues that there is no valid reason to give petitioners more time to get local siting approval. Ag. Resp. Br. at 16. They note that despite Mayor Feeney's and

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[12] The Board notes that Condition IX-1 does not specifically state that petitioners must move the overfill to Parcel A. The condition simply says petitioners shall remove the excess waste in Parcel B.

[13] Petitioners note that the ban only allows construction, demolition debris and LUST contaminated soil. Pet. Br. at 35.

McDermont's beliefs that obtaining the sigmod permits would increase their chances for siting approval, these beliefs are not relevant to determining whether the Agency could allow expanding the landfill by permitting the overfill waste without proof of local siting approval. Ag. Resp. Br. at 16. The Agency believes that the overfill waste is an expansion beyond the landfill's permitted waste boundaries, which they could not authorize without proof of local siting approval. Ag. Br. at 40.

Hearing Officer Appeal: Admission of Newspaper Article and Letter

Petitioners appeal the hearing officer's ruling prohibiting the admission of a newspaper article and a letter from counsel for petitioners to a City of Morris alderman. Pet. Obj. at 14. Petitioners argue that these documents were relevant to combat the Agency's argument that petitioners should not have more time to obtain local siting, because they had enough to do that before the Agency issued the permits. Pet. Obj. at 14. Petitioners believe that these exhibits support Mayor Feeney's and McDermont's testimony that negative publicity and confusion regarding the landfill's permit status created an unfavorable climate for siting approval. Pet. Obj. at 14. They claim that without these documents, the Board may not find Mayor Feeney's and McDermont's testimony credible. Pet. Obj. at 14.

The Agency responds that the letter was not included in the permit application, was not received by the Agency before they ruled on the permits, was sent to a third party, and discussed enforcement matters. Ag. Resp. to Obj. at 15. The Agency argues there is no justification for allowing the letter into evidence. Ag. Resp. to Obj. at 16.

The Agency further argues that the Board should affirm the hearing officer's ruling prohibiting the admission of the newspaper article. Ag. Resp. to Obj. at 16. The Agency argues that the article addresses previous appeals to the Board that have been dismissed. Ag. Resp. to Obj. at 16. Additionally, although the article pre-dated the Agency's decision on the permits, petitioners failed to include the letter in the application. Ag. Resp. to Obj. at 16-17.

Board Findings

First, the Board affirms the hearing officer's ruling regarding the letter and the newspaper article. The Board is to base its decision on the record before the Agency. West Suburban Recycling and Energy Center, L.P. v. IEPA (October 17, 1996), PCB 95-199 and 95-125; Pandhandle Eastern Pipe Line Company v. IEPA (January 21, 1999), PCB 98-102; Alton Packaging Corp. v. PCB, 162 Ill. App. 3d at 738, 516 N.E.2d at 280. Neither of these documents was submitted to the Agency prior to its decision; therefore the Agency did not consider the documents when they issued the permit with the conditions. To the extent that petitioners are concerned the Board may not find Mayor Feeney's or McDermont's testimony credible, the Board reminds petitioners that the hearing officer report concludes that every witness in the hearing gave credible testimony.

Regarding the overfill, the question before the Board is whether petitioners have shown that the conditions imposed by the Agency were not necessary to accomplish the purposes of the Act. Browning-Ferris Industries of Illinois v. PCB, 179 Ill. App. 3d 598, 534 N.E. 2d 616 (2nd Dist. 1989).

Petitioner knew about the overfill issue in 1996, and addressed it in both the 1996 sigmod application and the sigmod application at issue here by suggesting alternatives of removal or retroactive siting.[14] Pet. Br. at 13, citing Tr. at 220 and 510. In April 1998, the Attorney General added the overfill issue as the subject of four counts in an enforcement action initiated in 1997 against CLC by the Attorney General. See People of the State of Illinois v. Community Landfill Company Inc. (April 5, 2001), PCB 97-193 (slip op. at 1-2, and n. 2). When the permits were issued in August 2000, however, the enforcement action was, and still is, pending.

The Agency has previously attempted to address similar dilemmas in similar fashion through the permit process. The Board and the courts have found that the Agency cannot do so. Particularly relevant is Waste Management Inc. v. IEPA (October 1, 1984), PCB 84-45, 84-61, 84-48 (cons.) *aff'd sub nom*. IEPA v. IPCB, 138 Ill. App. 3d 550, 486 N.E.2d 293 (3d Dist. 1985). In that case, among other things, the Board reversed the denial of an operating permit for a new trench at a landfill in which problems existed with other units. The Board considered the problems inherent in the use of the permit process to accomplish the ends of rulemaking or enforcement actions in some detail, commenting:

> The attempted use of compliance orders as a substitute for enforcement Also have dangers in addition to elimination of public participation rights When the Agency reserves to itself the sole discretion to define and order a remedy without either the right of permit appeal or finding of violation by this Board, it is shifting to itself the accountability that should rest with the permitee. What if the permittee complies with a remedial strategy solely dictated and approved by the Agency, and an environmental upset occurs? At that point, what forum exists in the [Act] for its resolution, and by whom? On what grounds can the Agency bring an enforcement action against the permittee? It is the Agency, not the permittee, that has used its sole discretion to define the remedial strategy; the permittee is merely following Agency orders. In issuing the permit, the Agency has pre-approved its own actions and assumed responsibilities, as well as rights, placed on the permittee.
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> * * *

[14] The Board reminds petitioners that it has made no ruling on "the question of whether, under Section 39.2 of the Act, a landfill can obtain siting approval 'for waste that is in place.'" ESG Watts v. Sangamon County Board (June 17, 1999), PCB 98-2 (slip op. at 10), appeal docketed, No. 4-99-0746.

> In conclusion, the Board does not question the Agency's good intentions. However, the Board will not uphold permit conditions or permit denials that short-circuit public and private rights clearly established in the Act. The Board believes that such attempts serve to prolong, rather than to "expedite", environmental protection efforts. Waste Management Inc. v. IEPA, PCB 84-45, 84-61, 84-48 (cons.), slip op at 38.

In the instant case the Board cannot affirm this condition as written. The Board orders the Agency to strike the portion of the condition addressing the overfill removal, because it will not accomplish the purposes of the Act. Rather, as in Waste Management, the Board finds that the ongoing enforcement action is the appropriate forum in which find whether there is overfill, and if so, craft the appropriate penalty. The record in this case does not fully explore the environmental benefits and dangers of moving some or all of the excess waste. Enforcement actions are, by their nature, designed to produce this type of information while protecting the participation rights of all parties as well as the public.

In light of this holding, the Board will instruct its hearing officer to take all appropriate measures to expedite the resolution of the overfill portion of the complaint (Counts 7-10) in People v. Community Landfill Co., Inc., PCB 97-193. The Board trusts that the Attorney General will exercise his prosecutorial discretion to accomplish this task.

One item for consideration remains: that portion of Condition IX-1 which requires petitioners to file sufficient financial assurance to insure third-party closure of the landfill, including the 475,000 cubic yards of excess waste. The Board finds that this condition is very necessary to accomplish the purposes of the financial assurance provisions of the Act, by ensuring that there will be sufficient funds available to properly deal with the excess waste in Parcel B in all eventualities. Once the enforcement action creates a remedy for the overfill problem, the amount of financial assurance required can be modified as necessary to prevent any concerns about a financial assurance "windfall" to the State. But, while finding this condition is necessary, the Board orders the Agency to modify the condition so the petitioners must post additional financial assurance by August 30, 2001. This date reflects the period of time when the appeals were filed (September 7, 2000) and the original permitted deadline of February 1, 2001.

Condition X-6 (Parcel A) and Condition IX-6 (Parcel B): Financial Assurance Amount

Petitioners appeal the conditions in both permits that require financial assurance in the amount of $12,357,756 for Parcel A and $5,069,610 for Parcel B, totaling approximately $17 million. Before the Agency ruled on the original 1996 applications, petitioners filed addendums on August 13, 1999, recalculating the financial assurance from $17 million to $7 million. Pet. Br. at 16; Tr. at 619. The Agency denied the permits on September 1, 1999, because of the financial assurance reduction. Pet. Br. at 17, A50. Petitioner appealed these denials to the Board, but subsequently filed a motion to dismiss the appeals. Community Landfill Company and City of Morris (Parcels A and B) v. IEPA (August 24, 2000),

PCB 00-66, 00-67. Petitioners contend they filed the motions to dismiss the appeals because they reached an agreement with the Agency to: (1) resubmit the applications (under protest) with closure and post-closure care costs for approximately $17 million submitted; (2) exchange drafts with the Agency of the financial assurance documents in exchange for drafts of the permit; and (3) postpone resolution of the financial assurance issue until later. Pet. Br. at 18; Tr. at 620-22.

Petitioners subsequently filed the May 2000 permit applications, which are the subject of this appeal. Petitioners included the following language in the cover letter for each permit:

> Community Landfill Company and the City of Morris are including a $17,427,366 closure, post-closure care cost estimate in these applications, and are agreeing to submit bonds in that amount at the time of issuance of the permits, solely as a means to resolve this matter without prejudice to (sic) its rights to seek a reduction of the closure and post-closure care cost estimates at a later date and through appropriate available procedures. Pet. Br. at 18, citing A57, A59.

In July of 1999, petitioners participated in negotiations with the City of Morris regarding reducing the costs of treating the leachate, groundwater and condensate. Tr. at 613; Pet. Br. at 15. The negotiations produced an agreement between petitioners that the City of Morris would treat the leachate at the Morris POTW at a significantly reduced cost. Pet. Br. at 16, citing Exhibit LL. The agreement also stated that "This agreement shall inure to the benefit of Lessee, its successors and assigns, and specifically to the State of Illinois Environmental Protection Agency, or its designee in the event it is required to perform closure and post-closure activities." Exh. LL; A45. Following this agreement, petitioners filed the addendums that recalculated the financial assurance $10 million downward.

Petitioners assert that they should be granted a reduction in financial assurance because:

1. The Morris POTW is not financially connected to the landfill and CLC does not share in any revenue received from the Morris POTW.

2. The agreement that was entered into with the Morris POTW was very much an arms-length one, and a matter of public record.

3. The lease amendment allowing for treatment of leachate at a reduced cost inures to the benefit of the Agency.

4. If the Agency had to clean up the landfill because the operator walked away, the Agency would receive $10 million worth of free leachate treatment.

5. If the Agency required CLC to post an additional $10 million performance bond plus $10 million for the free leachate disposal, the Agency would be receiving $20 million benefit that would result in "double dipping."

6. The Agency had already approved the Morris POTW cost as a third party cost with respect to the gas permit even though Morris owned both the landfill and POTW.

7. The Agency accepted a reservation of disposal capacity agreement from the City of Morris and CLC whereby the city and CLC agreed to reserve available disposal volume in Parcel A to accommodate any overfill in Parcel B, and that agreement does not contain any third party waste disposal cost.

Pet. Br. at 19-10.

Petitioners assert that $10 million of the $17 million financial assurance was attributable to the treatment of groundwater, leachate, and condensate pursuant to the contingent remediation plan. Pet. Br. at 15.

In summary, the Agency responds that petitioners never requested that the Agency review a request to revise the approved cost estimates. Ag. Br. at 28. Lacking such request, the Agency asserts there is no Agency decision for the Board to review. Ag. Br. at 28. Additionally, petitioners have yet to ask the Agency to revise the previously approved cost estimate. Ag. Br. at 30; Tr. at 719.

The Agency argues that despite the paragraph in the permits' cover letters, nothing in the permit applications expresses any request from petitioners to revise the cost estimates. Ag. Br. at 31. In fact, the Agency notes that the cover letters state the full cost estimate amount to resolve the matter of issuing permits, and petitioners were reserving their right to seek a reduction of the cost estimates at a later date. Ag. Br. at 32.

The Agency asserts that the addendum to the lease, Exhibit KK, reflects that petitioners intended to file an application with the Agency seeking to reduce the amount of the cost estimate after the permits were approved. Ag. Br. at 32. Specifically, the addendum states in pertinent part:

> WHEREAS, while the Lessor and Lessee disagree with the IEPA that . . . the proper financial assurance number is $7,077,716, in an effort to resolve the permit appeals presently pending and to have the significant modification permits issued for the landfill, the Lessor and Lessee are willing to post the IEPA required $17,159,346 in performance bonds with the IEPA, and have the IEPA issue the significant modification permits. Exh. KK at 1-2.

* * *

5. Lessor and Lessee will file an application with the IEPA to reduce the financial assurance from $17,159,346 to $7,077,716 after the significant modification permit applications have been approved for Parcels A and B. If the IEPA agrees to reduce the financial assurance to $7,077,716 or less, then the Lessor's $10,081,630 bond will be terminated and Lessee shall have no further responsibility for it. If the IEPA denies the applications to reduce the bond amount, the lessor and lessee shall jointly file an appeal with the Pollution Control Board and prosecute the same through the Illinois court, if necessary. . . . (emphasis supplied)
Exh. KK at 3

The Agency argues that petitioners never filed the application to reduce the financial assurance, and therefore there is no Agency decision from which petitioners can appeal.

Regarding the issue's merits, the Agency argues that a reduction is not justified simply because Morris' POTW is the petitioners' preferred means for treatment of leachate at a discounted rate. Ag. Br. at 34. The Agency notes that McDermont testified that if Morris' POTW shut down, another POTW would have to be used to accept and treat the landfill's leachate. Ag. Br. at 35, citing Tr. at 715. CLC has no other agreements with any other POTWs to accept the leachate. Ag. Br. at 35, citing Tr. at 716. If Morris' POTW shuts down, and the $10 million reduction petitioners advocate has occurred, the Agency would be responsible for finding $10 million to cover treatment costs at another POTW. Ag. Br. at 35, citing Tr. at 718. The Agency concludes that the very point of financial assurance is to prevent such a scenario. Ag. Br. at 35.

Hearing Officer Ruling: Information Concerning City Water Light and Power Landfill

Petitioners appeal the hearing officer's ruling prohibiting testimony or exhibits of the City Water Light and Power (CWLP) landfill and the related closure and post-closure cost plans for the landfill. Pet. Obj. at 20. They argue that Springfield owns both the CWLP landfill and the leachate detention pond where the landfill deposits its leachate. Pet. Obj. at 20. Petitioners assert that the CWLP landfill closure and post-closure care cost plan does not include a cost for leachate treatment. Pet. Obj. at 20. Petitioners wanted this information included at hearing to demonstrate that the Agency handled the financial assurance for the Morris landfill differently than that for the CWLP landfill.

The Agency responds that the hearing officer properly excluded the document and testimony as irrelevant to this case. Ag. Resp. to Obj. at 22-23. The Agency explains that the CWLP landfill is distinguishable in that petitioners did not characterize CWLP's treatment facility as a POTW. Ag. Resp. to Obj. at 23. They argue that if the treatment facility was on-

site, then the permitting standards would be different than those for a landfill proposing to take leachate to an off-site POTW owned by the landfill's owner. Ag. Resp. to Obj. at 23.

Board Findings

First, on the hearing officer issue, the Board finds that the hearing officer properly excluded the information. The CWLP permit was not part of the record presented to the Agency. To the extent that the document and testimony may have shown the Agency treated the financial assurance issue between Morris and CWLP differently, the Board finds that this issue is irrelevant for the reasons explained below.

Second, the Board finds that this issue presented by the permits' financial assurance condition is properly before the Board. Petitioners are appealing a specific condition of the permit. Pursuant to Section 40(a)(1) of the Act:

> If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the applicant may, within 35 days, petition for a hearing before the Board to contest the decision of the Agency. 415 ILCS 5/40(a)(1)(1998).

There is no provision that provides that petitioner must file an application with the Agency to reduce the financial assurance before bringing the issue to the Board. Although petitioners may have represented their intention to file an application with the Agency, they are not prohibited from appealing this condition directly to the Board. Indeed, failure to appeal the condition here could later be construed as waiver of any right to challenge it in a later proceeding. Panhandle Eastern Pipe Line Company v. IEPA (January 21, 1999), PCB 98-102.

As to the claim's merits, the Board notes that pursuant to Section 21.1(a) of the Act, financial assurance is intended to insure complete and environmentally proper closure of the site and post-closure care. 415 ILCS 5/21.1(a) (1998). If indeed something should happen that would cause the Morris POTW to be unable, for whatever reason, to treat the leachate generated at the CLC landfill, and treatment was not covered by financial assurance, the burden would fall on the state to pay for the treatment costs. Although the Board recognizes that the probability of the Morris POTW being unable to treat the leachate may be low, the burden remains on petitioners to post financial assurance to provide for alternate compliance methods should such a situation occur. Therefore, the Board affirms Parcel A, Condition X-6 and Parcel B, Condition IX-6 financial assurance conditions as necessary to accomplish the purposes of the Act.

CONCLUSION

The Board finds that the Agency properly imposed Conditions VII-11, II-2i, and X-6 for Parcel A and Conditions VI-9 and IX-6 for Parcel B as necessary to further the purposes of the Act. The order below instructs the Agency to modify the remaining conditions.

ORDER

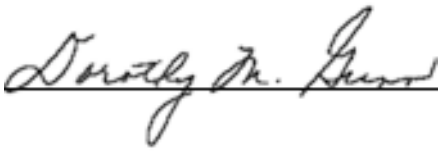
Permit No. 2000-155-LFM (Parcel A), granted on August 4, 2000, to the City of Morris as owner and Community Landfill Company as operator, is hereby affirmed as to Conditions VII-11, II-2i, and X-6. The Board instructs the Illinois Environmental Protection Agency to reissue the permit after modifying Conditions VII-7, VIII-23, VIII-24, VIII-25, and VIII-27 consistent with this opinion.

Permit No. 2000-156-LFM (Parcel B), granted on August 4, 2000, to the City of Morris as owner and Community Landfill Company as operator, is hereby affirmed as to Conditions VI-9 and IX-6. The Board instructs the Illinois Environmental Protection Agency to reissue the permit after modifying Conditions VI-7 and IX-1 consistent with this opinion.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1998)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of the date of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 172 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.520, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 5th day of April 2001 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board