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March 26, 2004

Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 W. Randolph, Suite 11-500
Chicago, Illinois 60601

Re: Saline County Landfill, Inc. v. IEPA
PCB 04-117

Dear Ms. Gunn,

Enclosed please find original and ten copies of Brief of Petitioner, proof of service, and notice of filing. A self-addressed stamped envelope is enclosed as well.

Very truly yours,

Brian Konzen

bk/rh
Enclosure
cc: Service List
45117

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SALINE COUNTY LANDFILL, INC.,	)	
	)	
PETITIONER,	)	
	)	
v.	)	**No. PCB 04-117**
	)	**(PERMIT APPEAL)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
RESPONDENT.	)	

NOTICE OF FILING

John Kim, Esq.
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

Rod Wolf
Saline County State's Attorney
10 E. Poplar
Harrisburg, Illinois 62946

Steve Hedinger
2601 S. Fifth Street
Springfield, Illinois 62703

Please take notice that I have today filed with the Clerk of the Pollution Control Board, Motion to file Corrected Brief of Petitioner, Saline County Landfill, Inc., and certificate of service, on behalf of Saline County Landfill, Inc.

Brian E. Konzen, Esq.
Lueders, Robertson, Konzen LLC
1939 Delmar, P.O. Box 735
Granite City, Illinois 62040
Phone: (618) 876-8500
ARDC No.: 06187626

45117

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SALINE COUNTY LANDFILL, INC.,	)	
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v.	)	**No. PCB 04-117**
	)	**(PERMIT APPEAL)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
RESPONDENT.	)	

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Motion to file a Corrected Brief of Petitioner, Saline County Landfill, Inc., upon the following persons on this 26th day of March, 2004.

John Kim, Esq.
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Brian Konzen

45117

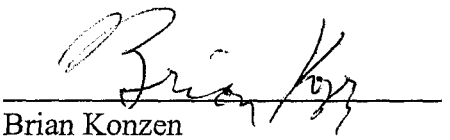
THE ILLINOIS POLLUTION CONTROL BOARD

SALINE COUNTY LANDFILL, INC.,	)	
	)	
PETITIONER,	)	
	)	
v.	)	**No. PCB 04-117**
	)	**(PERMIT APPEAL)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
RESPONDENT.	)	

MOTION TO FILE A CORRECTED BRIEF TO THE MARCH 22, 2004 BRIEF OF PETITIONER, SALINE COUNTY LANDFILL, INC.

Saline County Landfill, Inc., by their attorneys, Lueders, Robertson & Konzen, moves to correct typographical errors in the March 22, 2004 brief of Petitioner Saline County Landfill, Inc. Attached to this motion is the errata sheet and the corrected brief of petitioner, Saline County Landfill, Inc. None of the changes contained in the corrected brief are substantive, as reflected in the errata sheet.

Saline County Landfill, Inc.



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THE ILLINOIS POLLUTION CONTROL BOARD

SALINE COUNTY LANDFILL, INC.,	)	
	)	
PETITIONER,	)	
	)	
v.	)	**No. PCB 04-117**
	)	**(PERMIT APPEAL)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
RESPONDENT.	)	

ERRATA TO MARCH 22, 2004 BRIEF OF PETITIONER, SALINE COUNTY LANDFILL, INC.

COMES NOW, Saline County Landfill, Inc., by its attorneys, Lueders, Robertson & Konzen, and identifies the following errata to the brief of petitioner, Saline County Landfill, Inc.:

1. On the fourth page, in the quote at the bottom of the page, in the ninth line of said quote, the words "and" and "the" should be reversed.

2. On the sixth page, in the first full paragraph, in the fourth line of said paragraph, the word "for" should be deleted.

3. On the sixth page, in the first full paragraph, in the sixth line down, the comma behind "October" should be moved behind "1999."

4. On the sixth page, in the third full paragraph, "415 ILCS 539.2(f)" should be deleted and "415 ILCS 5/39.2(f)" inserted in its place.

5. On the tenth page, in the first full paragraph, in the third line down, the word "spupra" should be deleted and the word "supra" inserted in its place.

6. On the tenth page, in the second full paragraph, in the third line down, the word "the"

should be inserted in front of the word "Act."

7. On the twelfth page, in the second line from the bottom of the page, the word "which" should be inserted after the word "upon."

8. On the fifteenth page, in the fourth line down, the word "showed" should be deleted and the word "should" inserted in its place.

9. On the fifteenth page, in the ninth line down, the word "filled" should be deleted and the word "filed" inserted in its place.

10. On the eighteenth page, in paragraph two of the first quote, in the sixth line down, the word "the" should be deleted.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SALINE COUNTY LANDFILL, INC.,	)	
	)	
PETITIONER,	)	
	)	
v.	)	**No. PCB 04-117**
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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
RESPONDENT.	)	

BRIEF OF PETITIONER, SALINE COUNTY LANDFILL, INC.

FACTS

This petition for review presents a question of statutory construction, concerning Section 39.2(f) of the Illinois Environmental Protection Act. 415 ILCS 5/39.2(f).

On November 21, 1996, the Saline County Board granted local siting approval to a proposed expansion of the sanitary landfill owned and operated by Saline County Landfill, Inc. (SCLI). See IEPA's response to requests to admit, no. 9, hearing exhibit 3. On December 31, 1996, the Illinois Environmental Agency (IEPA) issued a permit for the development and operation of an expansion of the Saline County Landfill. That permitted expansion comprised a portion of the same air space that the Saline County Board had granted local siting approval to November 21. See IEPA's response to request to admit no.9, hearing exhibit 3. This December 31, 1996 permit, no. 1996-147-LFM, allows for the vertical expansion of 15.8 acres of the then-operating sited facility, and a 4.8 acre lateral expansion, all part of the larger expansion approved at the November 21, 1996 local siting hearing. That expansion air space was then partially filled with permitted solid waste. A copy of that complete permit 1996-147-LFM is attached to SCLI's petition for review.

Less than three years from the date of local siting approval, in October, 1999, SCLI timely submitted to the Illinois Environmental Protection Agency (IEPA), an application to develop and operate a horizontal and vertical expansion of SCLI's proposed sanitary landfill. IEPA denied that application for development permit, for the sole stated reason that application proposed a landfill design inconsistent with the landfill design approved at local siting. Specifically, the application for development permit denied by the IEPA on January 4, 2002, proposed a landfill with no interior separation berm between two sanitary landfill units. Hearing exhibit 2. The application submitted to the Saline County Board and approved in 1996 was found by this Board to include an interior separation berm between two landfill units, as explained below.

An expedited appeal between the same parties as the instant cause, SCLI and the IEPA, in PCB 02-108, followed. On May 16, 2002, this Board affirmed the IEPA's permit denial on the sole grounds stated in that January 4, 2002 permit denial letter, referenced above.

In so affirming the IEPA in PCB 02-108, this Board held:

> Finally, though it has no bearing on the Board's decision today, and the Board makes no ruling on it, *the parties do not dispute that SCLI can avoid returning for siting if it submits an amended permit application, proposing a wider interior separation berm, 100 feet wide instead of 50.*

PCB 02-108, May 16, 2002 Opinion, page 19 (emphasis added).

The IEPA did not appeal or otherwise contest this determination by the Board, quoted above. Intervenor County of Saline filed a motion to reconsider this sentence quoted above. This Board denied the County's motion to reconsider on July 11, 2002, holding:

> The Board finds that the County's assertions are groundless...Moreover, not only did the sentence at issue expressly provide that the Board was making no statement of the law, but the Board cannot misstate the law by merely observing, as it did, what the parties have not disputed...The challenged language plainly referred to SCLI submitting a *different* permit application to the Agency, one that for the first time would include a 100-foot wide interior berm...The Board therefore denies the County's motion. PCB 02-108, July 11, 2002, page 2.

Neither the Intervenor, County of Saline, nor the IEPA, appealed the Board's decisions in PCB 02-108.

While the appeal in cause PCB 02-108 was pending before this Board, SCLI had on file with the IEPA an application for renewal of its operating permit. During the pendency of the appeal in PCB 02-108, SCLI amended its renewal permit application to add to that application, IEPA log no. 2001-362, another application for a permit to expand its sanitary landfill. In January or February of 2003, the permit section manager, Bureau of Land, IEPA, contacted SCLI's representatives and requested they withdraw that application for development permit. Consistent with the position taken by the IEPA before this Board in PCB 02-108, the Permit Section Manager advised SCLI's representatives the November 21, 1996, local siting approval remained valid and would not expire under the IEPA's interpretation of sec. 39.2(f) of the Environmental Protection Act (Act), 415 ILCS 5/39.2(f). The Permit Section Manager further told representatives of SCLI in January or February of 2003 that the entire application, including the application for renewal of the operating permit, would have to be denied if they did not withdraw the application for expansion from the application for renewal permit. SCLI immediately withdrew the expansion application from its renewal permit application in IEPA log number 2001-362, on February 7, 2003. See IEPA's amended responses to

requests to admit, no. 14, hearing exhibit 4. See Hearing transcript, pages 60-61, 35-39. See further the March 12, 2003 correspondence of the Permit Section Manager, hearing exhibit 6.

The parties conceded and this Board noted in PCB 02-108, that SCLI could file a new and different application for a permit for development of an expanded landfill. PCB 02-108, May 16, 2002, page 19, and July 11, 2002. SCLI accordingly filed within two months of February 7, 2003 an application for development permit of its sanitary landfill, this time proposing a 100 foot wide interior separation berm, IEPA log number 03-113. See IEPA's response to request to admit number 10. Hearing exhibit 3. The IEPA admits the application for developmental permit in IEPA log no. 03-113 is consistent with the design submitted to the County for local siting approval in 1996. The application for developmental permit in IEPA log no. 03-113 is consistent with the language quoted above from this Board's May 16, 2002 Opinion in PCB 02-108, in that the application in log no. 03-113 proposes a 100 foot wide interior separation berm. Hearing transcript, pages 51-53, 48.

On March 12, 2003, the permit section manager, Bureau of Land, IEPA, wrote a letter to an attorney who had advised the IEPA that it represented the Intervenor, the County of Saline. In that correspondence, the Permit Section Manager stated,

> Instead, we have interpreted Section 39.2(f) of the Illinois Environmental Protection Act to mean that a landfill's local siting approval expires within 3 years of being granted only if an application for a development permit has not been made during that 3-year period. This interpretation has consistently been employed in answering questions from potential operators and in reviewing permit applications. SCLI made application for a lateral expansion (Log no. 1999-381) within 3 years of obtaining local siting approval and although that application was denied and the Illinois Pollution Control Board has affirmed its denial, the 1996 local siting approval remains viable. Accordingly, if SCLI were to submit a permit application for a lateral expansion, that was consistent with the 1996 local siting approval and that met all the regulatory requirements, the

Illinois EPA would be obligated to approve it.

Hearing exhibit 6. This March 12, 2003 letter was consistent with the statements made by the Permit Section Manager to the representatives of SCLI in January or February of 2003, and was a document accessible to the public. Hearing transcript pages 35-37, 61, 52. See IEPA's amended responses to requests to admit, no. 4, 5, hearing exhibit 4. See further IEPA's response to request to admit no. 6, hearing exhibit 3.

The Permit Section Manager testified a development permit for SCLI's proposed expansion in IEPA log no. 03-113 was drafted, prepared, and unanimously recommended for the Section Manager's signature, by all reviewers and applicable staff at the IEPA. Hearing transcript pages 46-48.

On December 5, 2003, the IEPA reversed without warning its repeatedly-stated interpretation of Section 39.2(f) of the Act, and denied SCLI's application for the development permit in IEPA log no. 03-113. The sole stated reason in the December 5, 2003 permit denial letter, was that SCLI's local siting approval expired. The record in the instant appeal reflects the IEPA gave no justification for the reversal of its interpretation of Section 39.2(f). See IEPA's amended responses to requests to admit, no.s 4, 5, and 18, exhibit 4. March 12, 2003 letter from the Permit Section Manager, exhibit 6. See IEPA's response to requests to admit no. 17, exhibit 3. Hearing transcript, page 35-39, 46. Attempts by SCLI to determine the justification for the reversal of the IEPA's statutory interpretation, were objected to by the IEPA and Intervenor. Hearing transcript, pages 21-24, 49-51.

This appeal timely followed. Petition for review filed January 7, 2004.

The IEPA admits before issuing the December 5, 2003 permit denial letter to SCLI, it consistently interpreted Section 39.2(f) of the Act such that a local siting approval does not expire, except where the applicant fails to submit an application for development permit to the IEPA within three years. The IEPA admits it consistently so interpreted Section 39.2(f) of the Act since at least 1994. Exhibit 4, no.s 4, 5, 18. Hearing transcript, page 52, 35, 39. The IEPA admits SCLI has had continuously pending since October 1999, applications for permit to expand its Landfill, except for two periods, of two weeks and two months respectively. IEPA response to request to admit number 10, Exhibit 3.

ISSUE

The issue is whether under 415 ILCS 5/39.2(f) of the Act, the local siting approval of November 21, 1996, expired. The parties agree the issue on review is framed by the December 5, 2003 denial letter from the IEPA, hearing exhibit 5, and no other reasons for permit denial exist. Transcript page 32-33.

STANDARD OF REVIEW

The standard of review in this cause is whether issuance of the permit sought by SCLI will cause a violation of the Environmental Protection (Act), specifically 415 ILCS 5/39.2(f). There is no allegation that issuance of a permit will cause a violation of the Board's applicable regulations. IEPA's response to request to admit no. 17, hearing exhibit 3. This standard of review is articulated in 415 ILCS 5/40(a).

Because the issue before the Board is strictly one of statutory interpretation, upon further review of this cause by an appellate court, the standard of review will be de novo review, instead of the manifest weight of the evidence.

LAW

In interpreting a statute, the words chosen by the legislature are to be given their plain meaning. The intent of the legislature should be ascertained primarily from a consideration of the legislative language itself, which affords the best means of its determination. No rule of statutory construction authorizes a tribunal to declare the legislature did not mean what the plain language of the statute imports. Envirite Corporation v. Illinois EPA, 158 Ill. 2d 210, 632 N.E. 2d 1035 (Ill.S.Ct. 1994).

It is a basic rule of statutory construction that the inclusion of one limitation is the exclusion of others. *Inclusio unius est exclusio alterius.* Browning Ferris Industries, Inc. v. PCB, 127 Ill.App. 3d 509, 468 N.E.2d 1016 (Third Dis. 1984). Rochelle Disposal Service, Inc. v. IPCB, 266 Ill. App. 3d 192, 639 N.E.2d 988 (2nd Dis.1994).

Though an agency's interpretation of its own regulations or rules is often entitled to great weight, an agency's statutory interpretations are reviewed de novo by the courts. Courts will not defer to an agency's interpretation that is contrary to the plain language of the statute. Marion Hospital v. Illinois Health Facilities Planning Board, 324 Ill.App. 3d 451, 753 N.E.2d 1104 (1st Dis. 2001).

The rule that the interpretation of a statute by an administrative body charged with applying the statute is given weight, is usually applied where the statute is ambiguous and where the interpretation by the administrative body is long continued and consistent so that the legislature may be regarded as having concurred in it. Moy v. Dept. of Registration and Education, 85 Ill.App.3d 27, 406 N.E.2d 191 (1st Dis. 1980). Ill. Attorney General Opinion, 99-008, July 9, 1999.

An agency's statutory interpretation that conflicts with the agency's earlier interpretation is entitled to considerably less deference than a statutory interpretation consistently held by the agency. Mobile Oil v. EPA, 871 F.2d 149 (DC Cir.1989). General Electric Co. v. Gilbert, 429 US 125, 142 (1976). NLRB v. Food and Commercial Workers, 484 US 112, 124 n. 20 (1987). INS v. Cardoza-Fonseca, 480 US 421,446 n. 30 (1987). Watt v. Alaska, 451 US 259, 273 (1981).

It is of great concern to the Illinois courts and this Board when the IEPA acts inconsistently. Chemetco v. Illinois Pollution Control Board, 140 Ill. App. 3d 283, 488 N.E. 2d 639, 643 (5th Dis.1986). Alton Packaging, 146 Ill. App. 3d 1090, 497 N.E. 2d 864, 866 (5th Dis., 1986). Owens Oil Company v. Illinois EPA, PCB 98-32 (December 18, 1997, page 2.)

BASIC RULES OF STATUTORY CONSTRUCTION REQUIRE THE IEPA TO ISSUE SCLI'S PERMIT

The statutory language at issue is plain and unambiguous. Basic rules of statutory construction support issuance of SCLI's permit. 415 ILCS 5/39.2(f) provides:

> A local siting approval granted under this section shall expire at the end of two calendar years after the date upon which it was granted, unless the local siting approval granted under this section is for a sanitary landfill operation, in which case the approval shall expire at the end of three calendar years from the date upon which it was granted, and unless within that period the applicant has made application to the Agency for a permit to develop the site. In the event that the local siting decision has been appealed, such expiration period shall be deemed to begin on the date upon which the appeal process is concluded.
>
> Except as otherwise provided in this subsection, upon the expiration of a development permit under subsection (k) of Section 39, any associated local siting approval granted for the facility under this section shall also expire.

Under the plain meaning of the language chosen by the legislature in 39.2(f) of the Act, a local siting approval issued by the County Board does not expire where the IEPA receives an application for a permit to develop the sanitary landfill within three years. It is undisputed SCLI timely submitted an application for permit to develop the sanitary landfill within three years of the November 21, 1996 local siting approval. See hearing exhibit 6, the March 12, 2003 letter from the Permit Section Manager. The primary rule of statutory interpretation is to follow the plain language of the Act. Envirite Corporation v. Illinois EPA, 158 Ill. 2d 210, 632 N.E.2d 1035 (Ill.S.Ct. 1994).

This Board should follow the plain meaning of the language of the Act. To hold local siting expires after an unsuccessful appeal of a permit denial would read into the Act additional language not chosen by the legislature in section 39.2(f). To hold an application for development permit must be continuously pending and on file with the IEPA to preserve the vitality of local siting approval, similarly requires the reading into 39.2(f) of language not written by the legislature. Such strained interpretations of the Act fail to follow the plain meaning of the language in the Act.

Where the legislature carefully articulates in the plain language of the statute, the various scenarios by which a local siting may expire, this Board should not read into the Act anything else. In Section 39.2(f), the legislature states a local siting expires where the landfill applicant fails to apply to the IEPA for development permit within three years of the date upon which local siting was granted. The legislature further specifies the three-year period to submit a permit application to the IEPA shall not begin to run until conclusion of any appeal of the local siting decision. The legislature further specifies a local siting approval may expire upon expiration of a development permit under subsection (k) of Section 39 of the Act. Where the legislature carefully articulates possible exceptions to the continuing validity of the local siting, this Board should not read new

exceptions into the Act. The inclusion of those multiple scenarios where local siting expires, serves to exclude all other scenarios where local siting might expire. Browning Ferris Industries, Inc. v. PCB, 127 Ill.App.3d 509, 468 N.E.2d 1016 (Third Dis. 1984). Rochelle Disposal Service v. IPCB, 266 Ill.App.3d 192, 639 N.E.2d 988 (2nd Dis. 1994).

Intervenor apparently conceedes Section 39.2(f) of the Act is unambiguous. Hearing transcript, page 27. Where the Act is clear, other rules of statutory construction should not be resorted to. Envirite, supra.

This Board need look no further than the plain language of the Act, Section 39.2(f), to resolve this dispute. IEPA is creating a new statute of limitations on the validity of local sitings not found in the Act, and a new requirement the applicant must have a continuous, ongoing permit development application, also not in the Act. IEPA is further creating a new requirement an applicant cannot have a gap or break in continuity among its applications for incremental development of its locally approved expansions.

THE SUDDEN REVERSAL OF INTERPRETATION OF THE ACT BY THE IEPA IS ITSELF SUSPECT AND NOT ENTITLED TO DEFERENCE.

The Fifth District Appellate Court, the tribunal that will hear any review of the Board's ruling in the instant cause, repeatedly stressed to the Pollution Control Board the importance of consistency in interpreting the Act. "Of great concern to us is the fact that the Pollution Control Board is not consistent in its reading of the Act." Chemetco v. Illinois Pollution Control Board, 140 Ill. App. 3d 283, 488 N.E. 2d 639, 643 (5th Dis.1986). "We note administrative bodies are bound by prior custom and practice in interpreting their rules and may not arbitrarily disregard them." Alton Packaging Corporation v. Pollution Control Board and IEPA, 146 Ill. App. 3d 1090, 497 N.E. 2d 864, 866 (5th

Dis. 1986). The IEPA and this Board are bound by prior custom and practice, and the need for consistency in their interpretation of the Act, because "Administrative proceedings are governed by the fundamental principals and requirements of due process of law." Alton Packaging, 146 Ill. App. 3d 1090, 497 N.E. 2d 864, 866 (5th Dis., 1986). Thus, granting the desired permit in the instant cause to SCLI would not cause a violation of the Environmental Protection Act, because the IEPA should read Section 39.2 (f) of the Act consistently, as it had for ten years before the instant application.

Illinois Appellate courts consistently accord some deference to the long-continued and consistent statutory interpretations of an administrative agency charged with applying the statute. Moy v. Department of Registration and Education 85 Ill. App. 3d 27, 406 N.E. 2d 191 (1st Dis.1980).

> The rule is that the interpretation of a statute by an administrative body charged with applying the statute should be given great weight by courts and that such an administrative interpretation is to be regarded as a substantial factor in the interpretation applied by a reviewing court. *This rule is usually applied in instances where a statute is ambiguous and where the interpretation by the administrative body is long continued and consistent so that the legislature may be regarded as having concurred in it.* (emphasis added)

Even the Office of the Attorney General advises,

> "While it is true an interpretation of a statute by an administrative body charged with applying the statute is ordinarily accorded deference, that principal is generally applied in instances where the statute is ambiguous, and where the interpretation of the administrative body is long-continued and consistent so the legislature may be regarded as having concurred in it." Illinois Attorney General's Opinion 99-008, July 9, 1999.

Thus, the only statutory interpretation in the instant cause that is entitled to deference by any subsequent court of review, is the long-standing, consistent interpretation by the IEPA of Section

39.2(f) that local siting approvals do not expire so long as application for development permit is made within three years. As both the Illinois appellate courts and the Office of the Illinois Attorney General state, a new interpretation of the Act, inconsistent with the previous interpretations by the IEPA, are not entitled to such deference, because the legislature can not be regarded as having concurred. The IEPA's consistent interpretation of Section 39.2(f) Act for several years before December 5, 2003, should be undisputed. For about ten years, the IEPA consistently interpreted Section 39.2(f) of the Act to hold that a local siting approval does not expire so long as the IEPA received a development permit application with three years of the local siting. See the IEPA's amended responses to requests to admit number 4, 15, 18, hearing exhibit 4. See the March 12, 2003 correspondence signed by Joyce Munie, Manager, Permit Section, Bureau of Land, IEPA, hearing exhibit 6. See further the unchallenged testimony of Ms. Munie, as Permit Section Manager, at the March 4, 2004 hearing, transcript pages 35-39, 51-52. In that same testimony, the Permit Section Manager further admitted SCLI received no warning of the reversal by the IEPA of its interpretation of 39.2(f), before the December 5, 2003 permit denial at issue. Thus, the IEPA has repeatedly admitted of record the sudden reversal of its long-standing interpretation of Section 39.2(f), and that the reversal occurred without warning or explanation from the IEPA itself, to SCLI. Such an unexplained reversal of a longstanding statutory interpretation is not entitled to deference on review.

Like the appellate courts, this Board recognizes the importance of consistency in the actions of the IEPA. "When an Agency departs from its prior practice, it accordingly must be for good cause, such as change in law, determination that the facts of the new matter are different from those upon which the prior practice was based, or determination that the prior practice was in error (citations omitted). No such cause is present here." Owens Oil Company v. Illinois EPA, PCB 98-

32 (December 18, 1997, page 2.) In the instant cause, the IEPA departed from a long standing interpretation of the statute without any determination of record that the prior practice was an error, without any change in the statute, and without any determination that the facts in the instant cause are different. The IEPA can not now retroactively justify a change in its longstanding statutory interpretation. The Act requires that the reasons for the permit denial be given at the time of the denial. Such reasons can not be supplemented now. 415 ILCS 5/39(a).

It is true courts will give greater weight to an agency's construction of its own promulgated rule than to an agency's interpretation of a statute. However, even this Board's regulatory interpretations are not entitled to great weight where the interpretation is inconsistent with long-settled constructions, or where this Board's prior interpretations have been inconsistent. Dean Foods Co. v. Pollution Control Board 143 Ill. App. 3d 322, 492 N.E. 2d 1344, 1349 (2nd Dis.1986).

ALL PARTIES TO THE INSTANT APPEAL CONCEDED, AND THIS BOARD RECOGNIZED, THE NOVEMBER 21, 1996 LOCAL SITING HAS NOT EXPIRED.

Of great significance is the IEPA's judicial admission before this Board that another local siting application for SCLI was unnecessary to allow an expansion permit to issue to SCLI. Thus, the IEPA admitted of record before this Board that the November 21, 1996 local siting approval did not expire. See the Opinion of this Board in PCB 02-108, May 16, 2002, page 19. That Opinion was attached to and filed with the original petition for review in this instant cause. Intervenor recognized the significance of this judicial admission by the IEPA, as stated by this Board in PCB 02-108, on May 16, 2002, so Intervenor moved for this Board to reconsider its decision as to that language. This Board made the appropriate decision and denied the Intervenor's motion to reconsider on July 11, 2002. Neither Intervenor, County of Saline, nor the IEPA appealed this Board's recognition of the

IEPA's judicial admission-that another local siting approval was unnecessary to allow SCLI to obtain an expansion permit. Therefore, the December 5, 2003 permit denial, and its reversal of position by the IEPA concerning the continuing validity of the 1996 local siting approval, is all the more vulnerable to challenge. The IEPA should not be allowed to withdraw its admissions of record before this Board, and force SCLI to attempt or undergo another local siting approval process.

THE 1996 LOCAL SITING APPROVAL COULD NOT HAVE EXPIRED, BECAUSE THE IEPA PERMITTED FOR DEVELOPMENT AND OPERATION A PORTION OF THAT LOCALLY APPROVED EXPANSION.

After the 1996 local siting approval, the IEPA issued a development and operation permit for vertical expansion of SCLI's landfill, dated December 31, 1996, IEPA Log Number 1996-147. Said 1996 permit is attached to the initial petition for review filed by SCLI in the instant appeal. The IEPA admits permit 1996-147 authorized the vertical expansion of SCLI Landfill, including vertical expansion into air space approved at the November 21, 1996 local siting approval. See IEPA's responses to request to admit number 8 and 9, hearing exhibit 3. Therefore, the November 21, 1996 local siting approval could not have expired due to alleged failure to timely apply for a development permit under 415 ILCS 5/39.2(f)-the expansion approved at local siting was in fact partly permitted by IEPA for development and operation, and was in fact partly filled with waste pursuant to that permit.

Intervenor or the IEPA might now argue the December 31, 1996 permit, 1996-147, pertained to a previous local siting approval, before the November 21, 1996 siting approval at issue. This argument was implicitly rejected by this Board in PCB 02-108, in its May 16,2002 opinion, page 17. This Board held that the November 21, 1996 a local siting approval, the very siting approval at issue in the instant cause, superseded all previous local siting approvals. In PCB 02-108, SCLI argued to

this Board the County granted before 1996 local siting approval for a landfill expansion with no interior separation berm. This Board held the November 21, 1996 local siting approval "necessarily amended the County Board's" earlier siting approval. Neither Intervenor, County of Saline, nor the IEPA, appealed or challenged that ruling by this Board in PCB 02-108. Thus, this Board should rule the December 31, 1996 development permit pertains to and is based on the local siting approval granted November 21, 1996, because the 1996 local siting approval necessarily amends any prior local siting approval. Therefore, by law the December 31, 1996 permit constitutes a timely permit, issued for expansion air space approved at the same 1996 local siting approval the IEPA believes has expired. If permitted, and partly filed, the local siting cannot have expired.

Regardless of how this Board interprets Section 39.2(f) of the Act, that December 31, 1996 expansion permit, 1996-147-LFM, removes the subject Landfill from arguments the November 21, 1996 local siting expired. That is, SCLI's three-year time frame to seek a development permit following local siting approval did not expire, because multiple development permit applications were timely filed with the IEPA concerning the new air space approved at the 1996 local siting, and at least one permit for development and operation of part of the proposed expansion issued, after the 1996 local siting. No further analysis or ruling by this Board is necessary.

ARGUMENTS RAISED BY INTERVENOR

During the March 4, 2004 evidentiary hearing in the instant cause, Counsel for Intervenor misstated SCLI's position by mischaracterizing the instant appeal as based on equitable estoppel or detrimental reliance principals. Transcript, page 40. SCLI is not arguing equitable estoppel or detrimental reliance, nor are the principals of detrimental reliance and equitable estoppel pleaded in SCLI's petition for review. Further, there is no allegation by SCLI that representatives of the IEPA

knowingly made untrue representations, one of the typical elements of the doctrine of equitable estoppel. People v. Freedom Oil PCB 93-59 (May 5, 1994 et 5.) Instead of equitable estoppel and detrimental reliance principals, SCLI argues the sudden reversal in the IEPA's long-standing and consistent interpretation of 39.2(f) of the Act, results in an incorrect statutory interpretation, and denies SCLI fairness.

Intervenor or the IEPA may cite this Board's Opinion in Village of Fox River Grove v. Illinois EPA, PCB 97-156, for the propositions that, (1.) The IEPA claims the right to correct its own past misinterpretations of this Board's rules, and (2.) The IEPA's previous misinterpretations of this Board's regulations are therefore not relevant to the instant appeal. SCLI submits the ruling of this Board in Village of Fox River v. Illinois EPA, PCB 97-156, distinguishable and inapplicable to the instant appeal.

The ruling of this Board in Village of Fox River Grove v. Illinois EPA, PCB 97-156, is inapplicable to the instant appeal because the instant appeal involves solely construction of the Act, while the Village in Fox River Grove sought an interpretation of this Board's own regulation. The distinction is critical, because upon appellate review, this Board's interpretations of its own regulations are entitled to great deference, but new or inconsistent interpretations of the Act are not entitled to such deference by an Appellate Court. Unlike the instant cause, the sole issue before this Board in Village of Fox River Grove v. Illinois EPA, PCB 97-156, was "whether the Village should be required to meet the effluent standards set forth in 35 Illinois Administrative Code 304.120(b)." Fox River, PCB 97-156, page two.

Unlike Fox River Grove, in the instant cause, the IEPA's interpretation of the Act was consistent for about ten years, ample time to demonstrate the legislature's concurrence with the

IEPA's statutory interpretation. In the instant cause, unlike Fox River Grove, the IEPA has not corrected a misinterpretation of this Board's own regulations.

Unlike the facts in Village of Fox River Grove, this Board has already acknowledged and acquiesced in the IEPA's previous interpretation of Section 39.2(f) of the Act. In PCB 02-108, on May 16, 2002, page 19, this Board recognized all parties agreed SCLI could apply for a development permit to expand SCLI's landfill without seeking another local siting approval. For this Board to hold otherwise now would be inconsistent with PCB 02-108, and therefore distinguishable from the record presented to the Appellate Court in Fox River Grove.

The Intervenor equates a permit denial with a failure to file a permit application within three years of local siting approval. 415 ILCS 5.39.2(f) contains no such language. In fact, SCLI timely filed a complete developmental permit application in 1999. The permit denial stated no issues of completeness or timeliness, and the Agency is required by law to detail the reasons for permit denial. 415 ILCS 5/39(a). Again, SCLI met the statutory time requirements to preserve the validity of its local siting.

Instead of "banking" its local siting as alleged by Intervenor, SCLI diligently and continuously pursued its permit. The IEPA admits SCLI has had a permit application pending almost continuously since 1999. SCLI zealously obtained expedited review of its permit application by the Board in PCB 02-108. Further, SCLI modified the proposed design in its permit application so as to reduce the facility's impact on the nine siting criteria of 415 ILCS 5/39.2(a). PCB 02-108, decided May 16, 2002. Waste Management of Illinois v. IEPA, PCB No. 94-153, (July 21, 1994). The facts of the pending permit application do not support the concerns expressed by Intervenor about banking of local siting approvals.

CONCLUDING ARGUMENTS

SCLI urges this Board to promote consistency in interpreting the Act. SCLI respectfully directs this Board's attention to its Opinion in Saline County Landfill, Inc. v. IEPA, PCB 02-108, April 18, 2002, page 21:

> ...permitting necessarily follows siting, and, practically speaking, some changes from earlier designs will almost inevitably occur and indeed may have to occur to comply with the Act and Board regulations.
>
> An applicant that has been through local siting, an often expensive and time-consuming process, should not have to return to get new local siting approval for every single design change without regard to the import of the change. *Just as the Board will not allow the local siting process to be effectively bypassed, the Board will not send a permit applicant back to restart a process started roughly six years ago without justification grounded in the words and policies of the Act.* (Emphasis added).

This Board further held on page 23,

> The Board notes that if each and every design change made in permitting a landfill expansion automatically meant the redesigned expansion lacks local siting approval, the result could be a nearly endless loop of siting , followed by permitting, followed by siting, *ad nauseam*.

SCLI submits basic rules of statutory construction, consistency with the IEPA's historic interpretation of the Act, and consistency with this Board's own Opinion in Saline County Landfill v. IEPA, PCB 02-108, require a development permit to issue to SCLI.

SCLI prays this Board reverse and remand the December 5, 2003 permit denial back to the IEPA, with instructions to issue a permit to develop the requested expansion, to SCLI instanter, in

IEPA log no. 03-113. SCLI requests such additional and further relief as this Board deems fair, just, and equitable.

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45389

THE ILLINOIS POLLUTION CONTROL BOARD

SALINE COUNTY LANDFILL, INC.,	)	
	)	
PETITIONER,	)	
	)	
v.	)	No. PCB 04-117
	)	(PERMIT APPEAL)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
RESPONDENT.	)	

MOTION TO FILE A CORRECTED BRIEF TO THE MARCH 22, 2004 BRIEF OF PETITIONER, SALINE COUNTY LANDFILL, INC.

Saline County Landfill, Inc., by their attorneys, Lueders, Robertson & Konzen, moves to correct typographical errors in the March 22, 2004 brief of Petitioner Saline County Landfill, Inc. Attached to this motion is the errata sheet and the corrected brief of petitioner, Saline County Landfill, Inc. None of the changes contained in the corrected brief are substantive, as reflected in the errata sheet.

Saline County Landfill, Inc.,

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45455

THE ILLINOIS POLLUTION CONTROL BOARD

SALINE COUNTY LANDFILL, INC.,	)	
	)	
PETITIONER,	)	
	)	
v.	)	**No. PCB 04-117**
	)	**(PERMIT APPEAL)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
RESPONDENT.	)	

ERRATA TO MARCH 22, 2004 BRIEF OF PETITIONER, SALINE COUNTY LANDFILL, INC.

COMES NOW, Saline County Landfill, Inc., by its attorneys, Lueders, Robertson & Konzen, and identifies the following errata to the brief of petitioner, Saline County Landfill, Inc.:

1. On the fourth page, in the quote at the bottom of the page, in the ninth line of said quote, the words "and" and "the" should be reversed.

2. On the sixth page, in the first full paragraph, in the fourth line of said paragraph, the word "for" should be deleted.

3. On the sixth page, in the first full paragraph, in the sixth line down, the comma behind "October" should be moved behind "1999."

4. On the sixth page, in the third full paragraph, "415 ILCS 539.2(f)" should be deleted and "415 ILCS 5/39.2(f)" inserted in its place.

5. On the tenth page, in the first full paragraph, in the third line down, the word "spupra" should be deleted and the word "supra" inserted in its place.

6. On the tenth page, in the second full paragraph, in the third line down, the word "the"

should be inserted in front of the word "Act."

7. On the twelfth page, in the second line from the bottom of the page, the word "which" should be inserted after the word "upon."

8. On the fifteenth page, in the fourth line down, the word "showed" should be deleted and the word "should" inserted in its place.

9. On the fifteenth page, in the ninth line down, the word "filled" should be deleted and the word "filed" inserted in its place.

10. On the eighteenth page, in paragraph two of the first quote, in the sixth line down, the word "the" should be deleted.

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FAX TRANSMISSION SHEET

TO: Dorothy Gunn 312-814-3669

FROM: Brian Konzen

DATE: March 29, 2004

PAGES: 4 With Cover Page

MESSAGE: Per Ryan Robertson's call to you this morning, I am enclosing Motion to File a Corrected Brief, and Errata to March 22, 2004 Brief.