BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SALINE COUNTY LANDFILL, INC., PETITIONER,	)	
v.	)	No. PCB 2004-117 (PERMIT APPEAL)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT.	)	

NOTICE OF FILING AND PROOF OF SERVICE

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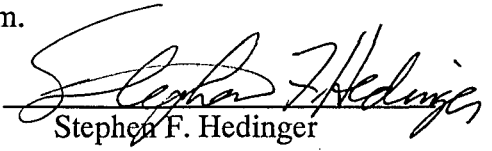
PLEASE TAKE NOTICE that on the 5th day of April, 2004, we sent via U.S. Mail delivery to the Clerk of the Pollution Control Board the original and nine copies of the CLOSING BRIEF OF INTERVENOR COUNTY OF SALINE for filing in the above entitled cause. Pursuant to Hearing Officer authorization, this document was also filed on this date by facsimile transmission, commenced before 5:00 p.m.

The undersigned certifies that a true and correct copy of the above-described document was served upon each of the above-identified individuals via U.S. Mail, by enclosing the same in envelopes properly addressed with first class postage affixed and by depositing said envelopes in a U.S. mailbox in Springfield, Illinois, all on the 5th day of April, 2004. Further, the above-described document was also served via facsimile transmission to the above-named parties on this date, commenced before 5:00 p.m.

By 
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SALINE COUNTY LANDFILL, INC., PETITIONER, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT. COUNTY OF SALINE, INTERVENOR.	)	No. PCB 2004-117 (PERMIT APPEAL)

CLOSING BRIEF OF INTERVENOR COUNTY OF SALINE

NOW COMES Intervenor, COUNTY OF SALINE, through its undersigned attorneys, and for its Closing Brief in this permit appeal proceeding brought by Petitioner SALINE COUNTY LANDFILL, INC. (hereinafter "SCLI"), states as follows:

Standard of Review

SCLI begins its discussion of this matter by claiming that "[t]he standard of review in this cause is whether issuance of the permit sought by SCLI will cause a violation of the Environmental Protection (Act) [sic], specifically 415 ILCS 5/39.2(f)." (SCLI Brief, at 6). This is a gross, and apparently intentional, misstatement of the law.

Less than two years ago SCLI brought another permit appeal before this Board (PCB 02-108), in which SCLI tried to convince this Board to issue a permit to a facility for which siting approval had never been granted by the Saline County Board. In denying SCLI's attempt to bypass the local siting approval process, this Board informed SCLI of the standard of review

employed by this Board in considering a permit appeal: "The petitioner has the burden of proof on appeal. *See* 415 ILCS 5/40(a)(1) (2000). On appeal 'the sole question before the Board is whether the applicant proves that the application, as submitted to the [Illinois Environmental Protection] Agency, demonstrated that no violation of the [Environmental Protection] Act would occur if this permit was granted.'" Saline County Landfill, Inc. v. Illinois Environmental Protection Agency, PCB 02-108, slip op. at 9 (May 16, 2002), citing Panhandle Eastern Pipe Line Co. v. IEPA, PCB 98-102, slip op. at 10 (Jan. 21, 1999), *aff'd sub nom* Panhandle Eastern Pipeline Co. v. PCB and IEPA, 314 Ill. App. 3d 296, 734 N.E.2d 18 (4th Dist. 2000), quoting Centralia Environmental Services, Inc. v. IEPA, PCB 89-170, slip op. at 9 (Oct. 25, 1990); Browning-Ferris Industries of Illinois, Inc. v. PCB, 179 Ill. App. 3d 598, 601-602, 534 N.E.2d 616, 619 (2d Dist. 1989); Joliet Sand & Gravel Co. v. PCB, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (3d Dist. 1987), citing IEPA v. PCB, 118 Ill. App. 3d 772, 455 N.E.2d 188 (1st Dist. 1983).

Hence, far from the burden here being upon the Agency to prove that issuance of the permit would cause a violation of the Act, in fact the burden falls upon SCLI to prove that issuance of the permit as submitted would not have violated the Act. It is a burden SCLI has failed to meet; presumably that explains SCLI's baseless attempt to convince this Board to utilize a different standard of review in this case.

Facts

In November 1996 the Saline County Board considered and approved an application submitted by SCLI to expand its facility located near Harrisburg. (See generally Saline County Landfill, Inc., PCB 02-108, slip op. at 4-9 (May 16, 2002)). Among other things, the approved

expansion plan called for construction of an earthen berm to separate the old landfill from the new; this berm was to be at least 50 feet wide, was to be filled with non-waste materials, and was to house a number of features ancillary to the landfill operations, including groundwater monitoring wells. Construction of the berm would allow for the certification of closure of the old landfill within five (5) years, whereas the new expansion was to have a lifespan of as many as twenty-five (25) years. SCLI also represented that the berm would enhance stability of the overall structure. (Id.).

Nearly three years after the Saline County Board approved the plan, in November 1999 SCLI submitted to the Agency an application for a permit to develop the facility that had been approved by the Saline County Board. That original application included all salient features that had been considered and approved by the Saline County Board, including the berm. (Id.).

The Agency's review identified a number of application provisions which did not or would not comply with the applicable regulations, and the Agency required that SCLI address these deficiencies. Among other things, the Agency noted that the planned 50 foot berm was not large enough to support separate groundwater modeling for both the old and the new landfills. (Id.).

SCLI had a number of options to address this problem. First, SCLI could have retained the 50 foot berm, and modeled both the old and new landfills as a single site. Second, SCLI could have expanded the width of the berm to 100 feet or more to accommodate the two groundwater monitoring zones. Either of these options would have been consistent with the siting approval, which required that the berm be a minimum of 50 feet wide. (Id.).

However, SCLI did not choose either of these options. Instead, its revised plan, filed with the Agency in August 2000, eliminated the berm altogether. This revision would allow

SCLI to place waste where the berm's non-waste material had been planned, would eliminate the separation of the old and the new landfills, and resulted in a re-engineering of the structural support system, as well as the groundwater monitoring system. The old landfill's closure date was also impacted; rather than being closed within five (5) years, under the revised design the old landfill would remain "open" until the entire expanded facility was ready to close. SCLI's proposed revision withdrew its original proposal, and substituted the new design. (Id.).

Saline County immediately objected to SCLI's proposal, pointing out that removal of the berm was patently inconsistent with the November 1996 siting approval. (Id.). The Agency carefully considered Saline County's objection, and required that SCLI submit substantial additional materials relating to the 1996 siting approval. Once these materials were submitted, the Agency determined that Saline County's objection was well-taken, and offered SCLI the opportunity to revise its submittal once again, this time to return to the original design that had been approved by the Saline County Board. SCLI rejected this opportunity, though, and so the Agency issued a final denial of SCLI's application for a development permit, as required by 415 ILCS 5/39(c) (which requires proof of siting approval prior to issuance of any such permit). (Id.). SCLI appealed, and by its May 16, 2002 order, the Pollution Control Board affirmed. SCLI did not seek any further review, either through a motion for reconsideration or through appeal to the appellate court. This Board's order came 6 years after Saline County had granted the siting approval.

During the time the Agency was considering whether SCLI's modifications were inconsistent with the siting approval, SCLI had pending before the Agency not only that application for a development permit, but also a routine application for renewal of the existing landfill's operating permit. That renewal application, Log No. 2001-362, was originally

submitted on September 24, 2001, but on January 24, 2002 (which was approximately three weeks after the Agency denied SCLI's development permit application), SCLI sent a letter to the Agency which disputed the Agency's denial of the development permit application, but purported to incorporate the entire record of that permit log (Log 1999-381) into the old facility's renewal application proceeding (Log 2001-362); according to SCLI, the purpose of this was "[t]o maintain the record for 2001-362." By virtue of SCLI's action, the non-conforming redesign was once again pending as a permit application before the Agency.

The Agency informed SCLI that it would be necessary to deny the renewal application (Log 2001-362), because the non-conforming design had already been adjudicated to be unacceptable, never having been approved in local siting proceedings. Thereafter, on February 7, 2003, SCLI withdrew the request for development permit approval which it had incorporated into the operating permit renewal proceeding (i.e., it withdrew the 1999-381 record from 2001-362). At that time, therefore, SCLI had no permit application pending whatsoever with respect to its proposed expansion.

In April 2003, SCLI submitted the instant permit application, Log No. 2003-113, which purports to resurrect the facility design which SCLI had abandoned earlier in its Log No. 1999-381 submittals.

To briefly reiterate, the Log No. 1999-381 was submitted nearly three (3) years following the Saline County Board's November 1996 siting approval. In August 2000, SCLI superceded that permit request and replaced it with a request for approval of a facility which had never received siting approval. The Agency denied that request on January 4, 2002, and for the following nearly three (3) weeks no permit application was pending at all relative to the area designated for the new facility. On January 24, 2002, SCLI purported to incorporate (by

reference) the earlier submittal from Log No. 1999-361, but, on February 7, 2003, it withdrew that submittal as well. Finally, in April 2003 SCLI once again submitted an application purporting to seek permit approval for the geographic area that was the subject matter of the November 1996 siting approval. Accordingly, from at least August 2000, when it superceded the original permit application with the design that had never been approved by Saline County, until at least April 2003, virtually no permit application of SCLI was before the Agency that had ever been approved through the local siting process.

Saline County's Role in Landfill Issues

The courts, and this Board, have long recognized that Section 39.2 of the Environmental Protection Act, 415 ILCS 5/39.2, represents the singular most important stage of the continuum of siting and approving pollution control facilities such as landfills:

> The General Assembly recognized that it was important that a county board or the governing body of a municipality have the opportunity to investigate and examine the past operating history and past record of convictions and violations of an applicant. The importance of site approval was previously recognized in the case of *Kane County Defenders, Inc. v. Pollution Control Board*, 139 Ill. App. 3d 588, 593, 93 Ill. Dec. 918, 487 N.E.2d 743 (1985), which pointed out: "This broad delegation of adjudicative power to the county board clearly reflects a legislative understanding that the county board hearing, which presents the only opportunity for public comment on the proposed site, is the most critical stage of the landfill site approval process." We agree that the local site approval process is the most critical stage of the process.

Medical Disposal Services, Inc. v. Environmental Protection Agency, 286 Ill. App. 3d 562, 568, 677 N.E.2d 428, 432 (1st Dist. 1997) (emphasis added).

Significantly, when Saline County granted siting approval in 1996, it created no property right in SCLI, but to the contrary only created a condition that is required before the Agency could issue a permit: "Requiring renewed applications for local siting approval does not prevent

the transferability of an owner's property right because siting approval is not a property right. See *Foster & Kleiser v. City of Chicago*, 146 Ill. App. 3d 928, 934, 100 Ill. Dec. 481, 497 N.E.2d 459 (1986) (even permits are only privileges from which no vested property rights attach). Permits in general can conceivably be assigned, but the local siting approval given pursuant to the Act is only a condition that is required before permits can be issued. While a permit gives the holder specified rights, local siting approval only gives the specific applicant the right to apply for a permit." Medical Disposal Services, 286 Ill. App. 3d at 569, 677 N.E. 2d at 433. The Medical Disposal Services court also noted that requiring siting applicants to return for new siting approvals is not unfair or duplicative: "Requiring MDS to another review by Harvey [the local siting authority] will not be needlessly duplicative because it is essential to implement the legislative intent of providing meaningful local approval of the siting of pollution-control facilities." 286 Ill. App. 3d at 569, 677 N.E.2d at 432.

The Environmental Protection Act should not be read in a vacuum, but instead should be considered in conjunction with other statutes that pertain to a county's pollution control facility interests. In particular, the Illinois Solid Waste Planning and Recycling Act, 415 ILCS 15/1 et seq., requires that counties (including Saline County) develop and maintain a plan for the management of waste generated within their boundaries. See 415 ILCS 15/4(a). Indeed, the General Assembly has identified counties, and not any other governmental unit, as primarily responsible for planning for solid waste management facilities! Among other things, such plans must identify existing facilities available for waste management, and must also identify facilities that are proposed during the next 20 years. See 415 ILCS 15/4(c)(2) and (3). Perhaps most importantly, each county must describe the "time schedule for the development and operation of each proposed facility or program" for which planning is being conducted. 415 ILCS 15/4(c)(5).

The counties must also identify "potential sites within the county where each such...facility would be located or an explanation of how the sites will be chosen." 415 ILCS 15/4(c)(6). These plans are required by law to be updated and revised every five years. 415 ILCS 15/5(e).

In complying with the solid waste planning requirements, counties are expressly required to follow the waste hierarchy set forth in the Illinois Solid Waste Management Act (see 415 ILCS 15/4(a)), section 2(d) of which specifically places landfilling as last in the preferred waste management strategies. 415 ILCS 20/2(b).

Finally, the county's significant role in overall waste management planning is recognized even in the siting statute itself. The eighth siting criterion, in fact, specifically requires siting applicants to assure that their proposed facility is consistent with the solid waste management plan approved by a particular county. 415 ILCS 5/39.2(a)(viii).

The Statute Declares SCLI's Siting Approval Has Expired

The very words of the Environmental Protection Act support the Agency's decision to deny SCLI's permit application for the reason that the local siting approval had expired. Specifically, the statute provides as follows:

> A local siting approval granted under this Section shall expire at the end of...3 calendar years from the date upon which it was granted...unless within that period the applicant has made application to the Agency for a permit to develop the site. 415 ILCS 5/39.2(f).

On its face, this statutory language reveals that, unless SCLI had sought permitting for the approved facility within three (3) years after the siting approval was granted, the siting approval expired. Here SCLI neither sought a permit for the facility which was approved, nor a permit for the site upon which the facility was located, within the time required by law. The siting has therefore expired.

SCLI appears to argue that the statute requires only that a small portion of the approved airspace be subject to a permit application, which will then keep alive the siting approval for the entire sited airspace. Thus, SCLI claims that a small portion of sited airspace was the subject of a permit application filed only a month after the siting approval was granted in 1996, which has subsequently been permitted and constructed; this circumstance, according to SCLI, has rendered the entire remainder of the sited airspace immune from expiration pursuant to Section 39.2(f).

SCLI's argument fails for a number of reasons. First, **although for purposes of this argument Saline County will assume the correctness of SCLI's assertions**, in point of fact SCLI has utterly failed to prove what portion of the 1996 airspace was permitted, or when all of that occurred. SCLI does no more than point to some legal conclusions included in the record, but of course legal conclusions cannot be admitted to, and in any event, legal conclusions without a factual basis or framework are meaningless. In short, this record does not support that any portion of the facilities subject to the 1996 siting approval were ever permitted, and since the burden is upon SCLI, this factor alone should warrant affirmance of the Agency permit denial.

Second, even assuming that proof exists that this happened, SCLI's argument overlooks the wording of the statute itself. Curiously absent from SCLI's argument, in fact, is recognition that the statute requires an application "for a permit to develop the site" (emphasis added). The statute does not say that seeking a permit for a portion of the site is acceptable, or in any other way supports SCLI's tacit assertion that piecemeal development permitting is acceptable under the siting statute. The General Assembly understands the difference between the entire site and portions of the site; with respect to facilities for which a development permit was issued before November 12, 1981 (the effective date of Section 39.2's siting process), Section 39(c) (4th paragraph) states: "[I]f an operating permit has not been issued by the Agency prior to August

31, 1989 for any portion of the facility, then the Agency may not issue or renew any development permit nor issue an original operating permit for any portion of such facility unless the applicant has submitted proof to the Agency that the location of the facility has been approved by the appropriate county board or municipal governing body pursuant to Section 39.2 of this Act." 415 ILCS 5/39(c). In other words, even the landfills grandfathered in without siting approval in 1981 were required to be operating by 1989--any portion not operating had to go through siting approval! Hence, the Environmental Protection Act clearly recognizes that Section 39.2(f) requires a development permit application for the entire approved site, and not merely for a portion of it.

This interpretation is borne out, as well, in the words employed in the siting statute itself. The word "site," in fact, is a defined term: "'site' means any location, place, tract of land, and facilities, including but not limited to buildings, and improvements used for purposes subject to regulation or control by this Act or regulations thereunder." 415 ILCS 5/3.43. Section 39.2, of course, requires siting approval for any new "pollution control facility," which is defined to include "any waste storage site, sanitary landfill," etc. (415 ILCS 5/3.32). Moreover, a "new pollution control facility" includes: "the area of expansion beyond the boundary of a currently permitted pollution control facility." (415 ILCS 5/3.32(b)(2)).

Section 39.2 repeatedly utilizes both the term "facility" and the term "site." Moreover, Section 39(c), 415 ILCS 5/39(c), requires as a precondition to permitting proof "that the location of said facility has been approved by the County Board" in accordance with Section 39.2. The third paragraph of Section 39(c) discusses a "facility for which the proposed site is located" (emphasis added), and Section 39(k) provides that a development permit for "any facility or site"

will expire unless action is taken within 2 years to develop such facility or site. 415 ILCS 5/39(k).

Putting these statutory provisions together, it is clear that a "site" is made up of one or more "facilities." When obtaining approval, though, the "site" is the place where the facilities will be located, with thus determines a number of critical matters, including which body will be the siting authority for the facilities, who is entitled to notice, etc. In any event, Section 39.2(f) clearly requires that a development permit be sought for the entire site, and not merely for discrete "facilities" within such a site for which siting approval may be granted (let alone only a portion of a "facility", as suggested by SCLI).

Notably, SCLI's interpretation would work substantial mischief upon the General Assembly's obvious intentions in carefully crafting the scheme that exists. As discussed above, counties (including Saline County) play a lead role in overall planning activities, and in approval of specific facilities that will serve waste disposal purposes within their confines. Counties are required by law to remain current and actively involved in activities which impact the development of pollution control facilities, and must continually update planning documents to address developments as they occur. In SCLI's view, once a siting applicant has achieved basic siting approval, the county should be removed from involvement by the mere expedient of the siting applicant seeking development for a small discrete portion of its landfill. Indeed, that is the very thing that has happened here; according to SCLI, the mere fact that it has (allegedly) sought a development permit for a very small portion of the sited airspace precludes either Saline County or the Agency from interfering with SCLI's future intentions with respect to the remainder of its airspace. This would allow SCLI to "mothball" its airspace indefinitely until it can demand a monopoly market, or other market conditions solely under its review and control.

This is, of course, in direct contradiction to the General Assembly's expectation that counties, and not siting applicants or even the Agency, will play the primary role in solid waste management planning!

Again SCLI has attempted to defend its actions by claiming that the facts before this Board do not reveal any such "mothballing," but instead reflect "diligent efforts." Even if this were true, it would not be relevant in light of the express statutory language and the clear legislative intent. Moreover, SCLI's claim is ludicrous in light of the facts. It has repeatedly attempted to obtain permitting for a facility that has never been approved by the Saline County Board. This first happened, of course, in the earlier permit appeal case. Then, even after that permit was finally denied by the Agency, SCLI resubmitted the same plan to the Agency, apparently for another review. Even in this very proceeding, in fact, SCLI is still attempting to secure Agency approval for features never approved by the Saline County Board! As Joyce Munie testified, even if this permit had been granted, a condition would have been imposed requiring SCLI to seek siting approval if it ever wanted to develop the berm as landfill airspace--such a condition was necessary because SCLI had included language in its permit application purporting to retain the "right" to seek approval for permitting that airspace at a later date! (Tr. 64).

Hence, far from having diligently sought permitting for the airspace it had sited in 1996, SCLI has played games with the Agency and this Board, attempting to permit facilities which never have received siting approval. Its suggestion that those efforts should be counted in its favor with respect to the facility that was sited makes no sense.

The Board's and Appellate Court's Medical Disposal Services Cases Control This Decision

SCLI does not even mention in its brief the Medical Disposal Services cases decided by this Board and the appellate court. This is clearly an intentional oversight, because the Medical Disposal Services decisions control most of the salient issues in this case.

This Board's Medical Disposal Services, Inc. v. Illinois Environmental Protection Agency case was decided on May 4, 1995 (PCB 95-75 and PCB 95-76 (cons.)). A company known as Industrial Fuels & Resources/Illinois, Inc. had been denied local siting approval for a new medical waste treatment facility to be located in Harvey, Cook County, Illinois; by opinion entered March 19, 1992, the appellate court reversed that decision and ordered that the siting approval be granted. This Board thereafter entered an order dated June 25, 1992, which indicated that the Board's order itself would stand as proof that local siting had been approved, and that Industrial Fuels & Resources/Illinois, Inc. could proceed with the permitting process. Thereafter, MDS purchased the siting approval from Industrial Fuels & Resources/Illinois, Inc., and submitted both air and land construction permit applications to the Agency, relying upon the Board's June 25, 1992 order as proof of siting approval.

At first, the Agency assured MDS that the siting approval was transferable, and that MDS therefore would qualify for the requested permits. As summarized by the appellate court, "[a]n assistant counsel for the Agency responded in a letter dated January 10, 1994, that, consistent with previous interpretations in similar situations, the Agency's policy remained that siting approval was location specific so that it remained with land upon sale. The letter also stated that the siting approval granted to Industrial Fuels was valid for MDS' development of the facility." Medical Disposal Services, Inc. v. Illinois Environmental Protection Agency, 286 Ill. App. 3d

562, 564, 677 N.E.2d 428, 429 (1st Dist. 1997). The appellate court continued with its discussion of the factual background:

> In May 1994 MDS submitted applications to the Agency for permits to construct the facility. In September the Illinois Attorney General's office wrote to MDS that Harvey had not granted local siting approval to MDS. In October the Illinois Attorney General's office wrote a letter to the general counsel for the Agency that its view was that local siting approval was "not only site-specific but facility-specific and applicant-specific." On January 13, 1995, the Director of the Agency wrote to the Attorney General that the two agencies had differing interpretations of the siting approval law, but on January 31 the Agency denied MDS' permit applications.

286 Ill. App. 3d at 564-65, 677 N.E.2d at 429.

In considering MDS' subsequent permit appeal, this Board noted that the Environmental Protection Act did not specifically address the issue, but that case law, as cited above, clearly has found that local siting bodies constitute the most critical phase of the landfill site approval process (see Kane County Defenders v. Pollution Control Board, 139 Ill. App. 3d 588, 487 N.E.2d 743 (2d Dist. 1985) (quoted at Medical Disposal Services, Inc., PCB 95-75 and 95-76 (cons.), slip op. at 7)). This Board noted that allowing siting approval transference would "bypass the scrutiny of the hearing process at the local level, it would deprive the local siting authority of its statutorily defined right..." to consider the relevant statutory factors. This Board also considered legislative amendments which had specifically allowed a certain degree of scrutiny by the local decision making body into an applicant's background, and concluded that the statute mandated that the siting be considered specific to an individual applicant.

The Board noted that "the Agency was correct in its denial of the construction permits. Section 39.2(f) [of] the Act provides in pertinent part that the applicant has two years from the date upon which siting approval is obtained in which to make application to the Agency for permits to develop the site. If the siting applicant does not do so, the siting approval expires.

Industrial Fuels made no such application, and no permit has yet been issued to the siting applicant, i.e., Industrial Fuels." PCB 95-75 and 95-76 (cons.), slip op. at 5-6.

The factors guiding this Board's Medical Disposal Services decision compel a similar ruling here. The statute clearly required that SCLI file its permit application for the entire site within three years following the siting approval (notably, SCLI has failed to provide any evidence of any appeal process or other statutory-approved means of extending the expiration deadline). The three year limitation, as interpreted by Saline County and the Agency, is clearly in harmony with the obvious legislative intent that siting approvals be relevant to current conditions, that counties maintain active and up-to-date involvement with respect to solid waste planning issues, and that siting applicants diligently proceed to obtain permitting for the facilities that have been approved. In Medical Disposal Services, the applicant that sought the permit was not the applicant who had received siting approval. Here, although the applicant was the same, the facility differed in that the permit facility championed by SCLI in the earlier permit appeal is not the same as the facility that was approved by the Saline County Board. As was the case in Medical Disposal Services, the applicant attempted to obtain siting approval for something that had never been approved by the local body, and the Agency, followed by this Board, disallowed that attempt. (SCLI's chance to obtain development permitting for the 1996 sited airspace had therefore expired long before this Board's earlier permit appeal decision).

There is no prejudice to SCLI. If its proposed facility is viable, and will meet all of the environmental standards (as SCLI has constantly claimed), it need only prove as much to the Saline County Board, based upon current circumstances and conditions. Just as in Medical Disposal Services where this Board noted that the new applicant's background would be of relevant concern to the siting authority, so, too, would developments which have occurred in the

nearly eight years since the 1996 siting approval, which would include matters relevant to the "traffic" criterion, the "consistency with county plan" criterion, the "health, safety and welfare" criterion, and many of the other siting criteria over which the Saline County Board has exclusive jurisdiction (see 415 ILCS 5/39.2(a)). As in Medical Disposal Services, the only way to give life to the clear statutory intent is to send the SCLI facility back to the Saline County Board for a new review (as the transcript of the hearing states, only one current County Board member was on the County Board at the time of the 1996 siting).

Miki Pavelonis, a former County Board member (a veteran of SCLI's 1996 siting hearings), explained the context very well:

> My question is: How many applications can Saline County Landfill, Inc. file and have denied before the siting expires? The first application was filed and the permit was denied. 3 years have passed. Excuse me. At that time the landfill should have been required to go back for another siting.
>
> There is a reason why there is limitations on a number of years they have to file the permit. The situations change. The nine criteria addressed in the application approval involved health and safety consideration, market consideration, traffic consideration and property value consideration. Many of these things have changed over the 8-year period of time. They have said the reason is there are ground water questions. Questions about more than one fault line. Questions about property values, and questions about the roadway. The landfill may be able to address all these questions that have been mentioned in the newspaper.
>
> But the point is, they should have to address the question to that any decisions made by the County Board will be fully informed decisions made on consideration of the nine criteria and current circumstances.

(Tr. at 81-82).

The appellate court largely followed this Board's reasoning in its opinion affirming the Board's order. Like this Board, the appellate court noted the pivotal nature of the local siting proceedings, and the court also noted the lack of any prejudice to the siting applicant, who simply needed to resubmit the facility for a new review, particularly since that was what the statute required: "Requiring MDS to submit to another review by Harvey will not be needlessly

duplicative because it is essential to implement the legislative intent of providing meaningful local approval of the siting of pollution-control facilities. It may be that a change in ownership will not in every case significantly change the operation of a facility, but it is also possible, if not more likely, that the management would change when the ownership changes." 286 Ill. App. 3d at 569, 677 N.E.2d at 432. Similarly, the mere passage of time may not in all cases affect the issues relevant for local siting consideration, but in most cases, clearly the passage of time will have a significant impact on those issues.

The appellate court also considered arguments very similar to those made by SCLI concerning the alleged change in Agency practice that preceded the permit denial in this case. As here, the permit applicant in Medical Disposal Services complained long and hard that the Agency had misled it into proceeding with the permit application process, and then at the last moment changed its mind. The appellate court unequivocally rejected these arguments, noting among other things that applying estoppel would be inappropriate "because it would defeat the statutory intent to give approval powers to localities in a matter concerning public health and safety." 286 Ill. App. 3d at 570, 677 N.E.2d at 433. Here, too, SCLI's arguments would at best penalize Saline County for mistakes made in other unstated and unidentified cases by the Agency.

MDS also requested that the court extend the expiration deadline of Section 39.2(f), to provide MDS the additional time necessary to submit a permit application supported by local siting approval, which the court rejected, holding that "[e]quitable tolling cannot be applied to toll the two-year expiration period to obtain local siting approval." Id. Further, the court held that, even if some tolling principles would theoretically be available, they refused to do so to benefit MDS: "MDS will suffer a delay in seeking to obtain its permits because of the change in

the Agency's policy, but MDS was not prevented by the Agency from seeking local siting approval....[T]olling of the two-year approval period will not prevent the permanent expiration of any right....[H]ere the Agency's conduct did not forever cut off MDS's ability to proceed with the development of the facility. MDS could before, and may still now, seek local siting approval from Harvey." 286 Ill. App. 3d at 571, 677 N.E.2d at 433-34.

That is all Saline County wants here. As Saline County has consistently stated, it takes no position on any issues concerning a siting application or other requests that SCLI may make in the future. At present, though, SCLI has no "live" siting approval with which to obtain any permitting, and this Board should affirm the permit denial of the Agency.

This Board's Dicta In PCB 02-108 Is Irrelevant

SCLI places most of its chips on the argument that a passing mention in the PCB 02-108 May 16, 2002 decision, which even identifies itself as dictum, somehow controls this case. The argument is meritless, as is the rest of SCLI's appeal.

This Board's May 16, 2002 ruling in SCLI's earlier permit appeal, drafted by former Board member C.A. Manning, included as its final discussion the following:

> 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. The Agency explained to SCLI during the permit application process that SCLI could have proposed widening the interior berm to 100 feet. Doing so could have addressed the Agency's concerns over compliance with the Board's landfill regulations on stability and groundwater monitoring, while maintaining the separate units of the landfill as proposed to the County Board in 1996. Though the Agency explained to SCLI that eliminating the interior berm could address concerns over compliance with the Board's regulations (the path SCLI chose), this had no effect on SCLI's obligation under Section 39(c) of the Act to submit proof of local siting approval.

PCB 02-108, slip op. at 19 (May 16, 2002).

SCLI relies primarily on the above quote as support for its untimely permit application. The reliance is woefully misplaced.

First, on its face the paragraph is pure dictum, not relevant to any issue being decided, and in fact not even ruled upon by the Board itself! Under these circumstances, it is not even clear why SCLI cites to the language.

Moreover, no mention is made in any published Board opinion in PCB 02-108 that Section 39.2(f) was of any interest or relevance in that case at all. In fact, it wasn't, and that is why the Board was so clear that the issue had no bearing on the decision and was not making any ruling. Similarly, the statement can provide no shelter for SCLI here.

Finally, it is clear that this Board can neither expand nor contract the authority granted by the General Assembly. And SCLI itself concedes that the question raised in this case is one of law (statutory interpretation). Whatever may have been said in the earlier case cannot change what the statute means--it means what it means--and therefore the language has no relevance to the issue now to be decided.

SCLI also claims that Saline County's "failure" to have appealed the dictum somehow binds it in this case to the same result. This is indeed a curious argument. Pursuant to Section 41(a) of the Environmental Protection Act, 415 ILCS 5/41(a), only a "person who has been denied a...permit under this Act," or a "party adversely affected by a final order or determination of the Board," could seek judicial review (i.e., an appeal). Saline County won PCB 02-108. There is no such thing as appealing from non-binding dictum, particularly where the Board itself stated that the issue "has no bearing on the Board's decision today, and the Board makes no ruling on it..." Simply put, there was no basis or means for appealing the language in question, and no inferences can legitimately be drawn from the circumstances. (Notably, SCLI cannot,

and does not, argue that it relied on that dictum--the dictum on its face said it was not to be relied on (and so any such reliance was by definition unreasonable), and SCLI took no new action on its permit as a result of that language. To the contrary, it waited until February 2003 to withdraw the bad permit from its renewal application, and it was not until April 2003--nearly a year after this Board spoke, and a full seven years after siting approval--that SCLI submitted a "new" application that supposedly conformed with the siting approval).

Conclusion

Intervenor Saline County requests that this Board affirm the permit denial of Respondent Illinois Environmental Protection Agency. SCLI's remedy, if any, is to obtain a fresh siting approval from the Saline County Board, after which it will be free once again to seek developmental permitting.

Respectfully submitted,

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