BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

SALINE COUNTY LANDFILL, Petitioner,	)	
v.	)	PCB No. 04-117
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	(Permit Appeal)
Respondent.	)	

NOTICE

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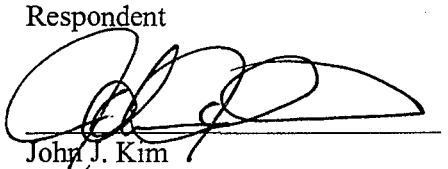
PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a RESPONSE TO PETITIONER'S BRIEF, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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Dated: April 5, 2004

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

SALINE COUNTY LANDFILL, INC., Petitioner,	)	
v.	)	PCB No. 04-117
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	(Permit Appeal – Land)
Respondent.	)	

RESPONSE TO PETITIONER'S BRIEF

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to the briefing schedule set by the assigned Hearing Officer, hereby submits its response to the Petitioner's brief.

I. INTRODUCTION

A. Standard of review

Section 39(a) of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/39(a)) sets forth the standard the Illinois EPA shall apply when deciding whether to issue a permit. Specifically, Section 39(a) provides that when the Board has, by regulation, required a permit for the construction, installation or operation of any type of facility, the applicant shall apply to the Illinois EPA for such a permit. The Illinois EPA shall issue the permit upon proof by the applicant that the facility will not cause a violation of the Act or of the regulations thereunder. Community Landfill Company and City of Morris v. Illinois Environmental Protection Agency, PCB 01-170 (December 6, 2001), p. 4 ("Community Landfill I"); Panhandle Eastern Pipe Line Company v. Illinois Environmental Protection Agency, PCB 98-102 (January 21, 1999), p. 7. Here, the Illinois EPA denied a permit sought by the Petitioner on the basis that a statutory requirement (i.e., providing adequate proof of local siting approval) had not been met.

The Petitioner had the burden to prove to the Illinois EPA that approval of the permit sought would not violate the Act or regulations if the Illinois EPA granted the permit as requested. If Saline County Landfill, Inc. ("SCLI") failed to prove that no violation would occur upon issuance, it would be proper for the Illinois EPA to deny or condition the permit accordingly. Browning-Ferris Industries of Illinois, Inc. v. Pollution Control Board, 179 Ill. App. 3d 598, 534 N.E.2d 616 (2nd Dist 1989); Panhandle, p. 7; John Sexton Contractors Co. v. Illinois, PCB 88-139 (February 23, 1989), p. 4.

The Board has previously held that the sole question before it in a permit appeal is whether the applicant proves that the application, as submitted to the Illinois EPA, demonstrated that no violations of the Act would have occurred if the requested permit had been issued as applied for. Community Landfill Company and City of Morris v. Illinois Environmental Protection Agency, PCB 01-48, 01-49 (April 5, 2001) ("Community Landfill II"), p. 2; Panhandle, p. 8; Sexton, p. 6. Thus, the Petitioner must demonstrate to the Board that issuance of the permit at issue would not result in a violation of the Act or Board regulations.

It is well-settled that the Board's review of permit appeals is limited to information before the Illinois EPA during the Illinois EPA's statutory review period. The Board will generally not consider information developed by the permit applicant, or the Illinois EPA, after the Illinois EPA's decision. Community Landfill I, p. 4; Alton Packaging Corp. v. Pollution Control Board, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987).

The hearing before the Board 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 Illinois EPA's reasons for denying the permit by means of cross-examination and also allows the Board the opportunity to receive

testimony to test the validity of the information relied upon by the Illinois EPA. Community Landfill I, p. 4; Alton Packaging, 162 Ill. App. 3d at 738, 516 N.E.2d at 280.

Evidence that was not before the Illinois EPA at the time of its decision is typically not admitted at hearing or considered by the Board. Community Landfill I, p. 4; West Suburban Recycling and Energy Center, L.P. v. Illinois Environmental Protection Agency, PCB 95-199, 95-125 (October 17, 1996); Panhandle, p. 8.

B. Burden of proof

In a permit appeal, the burden of proof is upon the permit applicant to demonstrate that the regulatory and statutory bases for the Illinois EPA's denial are inadequate to support that denial. ESG Watts, Inc. v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, 286 Ill. App.3d 325, 331, 676 N.E.2d 299, 303 (3rd Dist. 1997); 35 Ill. Adm. Code 105.112(a). The permit applicant, not the Illinois EPA, bears the burden of providing the information necessary to demonstrate that no violation would occur. The applicant is entitled to a favorable decision if, and only if, it has successfully borne its burden of proof. Therefore, the primary focus must remain on the adequacy of the permit application and the information submitted by the applicant to the Illinois EPA. Sexton, p. 5.

C. Issue on appeal

The issue before the Board here is whether the local siting approval issued by the Saline County Board to SCLI on November 21, 1996, expired as to the subject permit application on the basis that the permit application was not submitted within three years of the date of local siting approval.

II. STATEMENT OF FACTS

The facts in this case are straightforward and simple. On November 21, 1996, the Saline County Board granted local siting approval to SCLI. Administrative Record, pp. 329, 345-358.[1] Later, on April 4, 2003, consultants for SCLI submitted an application for the lateral expansion of the Saline County Landfill ("permit application" or "subject permit application"). The permit application is also identified as an application for significant modification. AR, p. 316. As part of the permit application, SCLI included reference to the November 1996 siting approval. AR, pp. 329, 345-358. No other proof of local siting approval was provided with the permit application.

On December 5, 2003, the Illinois EPA issued a final decision on the permit application. AR, pp. 2-3. The Illinois EPA denied the permit on the basis that the application did not provide proof of local siting approval pursuant to Section 39(c) of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/39(c)) since the siting provided in the application expired. AR, p. 2.

In its statement of the facts, the Petitioner makes reference to the Board's decision in the case of Saline County Landfill, Inc. v. Illinois EPA, PCB 02-108 (May 16, 2002). However, a review of the facts and issues raised in that case make clear that there are legal and factual distinctions between that case and the present matter. Citations to dicta issued by the Board in that case have no precedential value here, and should be kept in context since none of the issues or legal arguments being made in the case at bar were made in the older case. Any attempt to apply the arguments or holdings in that case to the present is akin to forcing a square peg into a round hole.

For example, in that case, the permit application that was based on the November 1996 siting approval was submitted to the Illinois EPA within three years of the issuance of the siting

[1] The Administrative Record will hereinafter be referenced as either "Record" or "AR"

approval. Therefore, no concerns regarding whether the siting approval had expired by operation of Section 39.2(f) of the Act (415 ILCS 5/39.2(f)) were necessary, relevant, or raised in any fashion. That is exactly the issue before the Board in the present case, thus the present case involves different legal and factual considerations. Contrary to assertions by the Petitioner, the Illinois EPA made no "judicial admissions" since in that case there the final decision under review was not based on a finding that local siting approval had expired. It was a different permit application, a different final decision by the Illinois EPA, and different review by the Board.

In a post-decision order, the Board itself noted that the statement by the Board that SCLI could avoid seeking new siting approval by submitting a new permit application was not a statement of law, but rather was an observation as to what the parties had not disputed. Saline County Landfill (July 11, 2002), p. 2. Since the Board was not reviewing a situation in which the Illinois EPA determined that siting approval had expired, there was no reason for the parties to dispute that fact. The case in PCB 02-108 is simply inapplicable to the present appeal.

The Petitioner also makes note of the fact that during the pendency of the subject permit application, certain conversations were held between the Illinois EPA and SCLI during which the topic of the validity of the November 1996 siting approval was raised. In both that situation, and the situation in which the Illinois EPA made statements on that topic in correspondence sent before the issuance of the final decision here, the Illinois EPA did not misrepresent any understanding of the relevant law or facts. Indeed, the Petitioner has not made any allegations that the Illinois EPA should be estopped from issuing the December 2003 final decision. Obviously, the relevant content of conversations between Illinois EPA and SCLI and the correspondence sent by the Illinois EPA during the review of the subject permit application

differs in position and interpretation from that which was ultimately embodied in the December 2003 final decision. As will be discussed below, however, the Illinois EPA (like any administrative agency) may change its interpretations of law if reasonable and warranted. That was the situation here.

In the present case, the final decision was issued by the Illinois EPA in the form of a letter signed by Joyce Munie, the manager of the Illinois EPA's Bureau of Land Permit Section. AR, p. 3. Ms. Munie has been granted the final authority within the Illinois EPA to make decisions on permit applications, and she is not beholden to follow any recommendations provided by her staff. Hearing Transcript, p. 68.[2]

The decision issued by Ms. Munie was done in a timely fashion. The Petitioner attempts to paint that decision in a questionable light by claiming that the decision was issued "without warning." Petitioner's Brief, p. 5. What the Petitioner fails to recognize is that there is no such requirement for any "warning" or other notice prior to the issuance of a final decision on a permit application. Section 39(a) of the Act requires that the Illinois EPA issue a final decision within the time allowed, and that the Illinois EPA cannot approve a permit application if to do so would result in the violation of the Act or underlying regulations. If the Illinois EPA denies a permit, it must provide the sections of the Act or associated regulations that may be violated if the permit were granted, the type of information the Illinois EPA deems was not provided, and a statement of the reasons why the Act and regulations might not be met if the permit were granted.

A review of the final decision issued on December 5, 2003, shows that all those requirements were met. The Illinois EPA identified Section 39(c) of the Act as the section that would be violated, the Illinois EPA noted that proof of local siting approval was not provided,

[2] The Hearing Transcript will hereinafter be referred to as, "TR."

and the Illinois EPA explained that local siting had expired. Those statements satisfy the requirements imposed by Section 39(a) of the Act. Contrary to the Petitioner's claims, the Illinois EPA need not explain in its final decision the specific rationale and interpretation of the Act that led to the issuance of the final decisions so long as the required information is provided.

The Petitioner states that attempts by it to determine the justification for the reversal of the Illinois EPA's statutory interpretation were objected to. Petitioner's brief, p. 5. Indeed, the Illinois EPA did rightly and successfully claim that privileged and confidential material should be so protected. However, that said, the Illinois EPA has clearly stated that the final decision reached here was not done in an arbitrary or capricious manner. Rather, the Illinois EPA received correspondence from the Illinois Attorney General's Office ("Illinois AGO") that contained that office's interpretation and application of Section 39.2(f) to the review of the subject permit application. Respondent's Motion for Order of Protection and Privilege Log, p. 2.

The Illinois AGO is the constitutional officer charged with representation of the State of Illinois and state agencies, including the Illinois EPA. In this case, the Hearing Officer properly recognized that the Illinois AGO acted in the capacity of attorney to the Illinois EPA. It is not appropriate to divulge the content of the privileged correspondence, but it is appropriate for the Illinois EPA to pay all due heed to advice from the Illinois AGO.

III. RULES OF STATUTORY CONSTRUCTION AND AGENCY DEFERENCE

A. Look to language of statute

The rules of statutory construction and deference owed to an administrative agency's interpretation of statutes it administers are well-established. It is a primary rule in the interpretation and construction of statutes that the intention of the legislature should be ascertained and given effect. A court should first look to the statutory language as the best

indication of legislative intent without resorting to other aids of construction. Where the language of a statute is plain and unambiguous, a court need not consider its legislative history. A court should not attempt to read a statute other than in the manner in which it was written. In applying plain and unambiguous language, it is not necessary for a court to search for any subtle or not readily apparent intention of the legislature. Envirite Corporation v. Illinois EPA, 158 Ill.2d 210, 215-217, 632 N.E.2d 1035, 1038 (1994).

B. Look to legislative intent

In construing a statute, it is fundamental that a court is to ascertain and give effect to the legislative intent. In doing this, the court should consider not only the language of the statute but also the reason and necessity for the law, the evils to be remedied, and the objects and purposes to be obtained. If the legislative intent can be determined from unambiguous language of the statute, that intent will be given effect without necessity of resort to aids of construction. It is axiomatic that if a statute contains language with an ordinary and popularly understood meaning, courts will assume that is the meaning intended by the legislature. The terms of a statute are not to be considered in a vacuum. Further, as provided for in Section 2(c) of the Act (415 ILCS 5/2(c)), the terms and provisions of the Act shall be liberally construed so as to effectuate the purposes of the Act. M.I.G. Investments, Inc. v. Illinois EPA, 122 Ill.2d 392, 397-398, 400, 523 N.E.2d 1, 3, 4 (1988).

C. Deference for Illinois EPA's interpretation

There are also guidelines established regarding deference owed to a state agency's interpretations of statutes. Courts will give substantial weight and deference to the interpretation of an ambiguous statue by the agency charged with the administration and enforcement of the statute based upon the fact that the agencies can make informed judgments upon the issues,

based upon their experience and expertise. Village of Fox River Grove v. Pollution Control Board, 299 Ill. App. 3d 869, 878, 702 N.E.2d 656, 662 (2nd Dist. 1998).

While an appellate court is not bound by an agency's interpretation of statutory provisions, the agency's interpretation should be given great weight. It will be overturned only if it is found to be erroneous. Laidlaw Waste Systems v. Pollution Control Board, 230 Ill. App. 3d 132, 136-137, 595 N.E.2d 600, 603 (5th Dist. 1992).

However, there are certain parameters to the deference to be accorded, though these limits are not consistently defined from one court to the next. 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, 146 Ill. App. 3d 1090, 1094, 497 N.E.2d 864, 864 (5th Dist. 1986). Here though, the provision under examination is not a rule of the Illinois EPA's; rather, it is a statutory provision passed by the legislature which the Illinois EPA is charged with applying and interpreting.

Also, courts recognize that inconsistent readings by the Board are of great concern. Although an administrative agency may alter its past interpretation and overturn past administrative rulings and practice, such abrupt shifts constitute "danger signals" that the Board may be acing inconsistently with its statutory mandate. Thus, in the very least, a reasoned analysis is required, indicating that prior policies and standards are being deliberately changed and not casually ignored. Chemetco, Inc. v. Pollution Control Board, 140 Ill. App. 3d 283, 288-289, 488 N.E.2d 639, 644 (5th Dist. 1986).

Generally, the interpretation of a statute by an administrative body charged with applying the statute should be given great weight; this rule is usually applied in instances 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. Department of Registration and Education, 85 Ill. App. 3d 27, 31, 406 N.E.2d 191, 195 (1st Dist. 1980). That rule, however, does not state that in no circumstance should a change in interpretation result in a total lack of deference to the administrative agency's amended or revised interpretation of a statute.

Contrast those cases with holdings by the United States Supreme Court. When a court reviews an agency's construction of a statute it administers, two questions are raised. First is whether the legislative branch has directly spoken to the precise question at issue; if so, then the clear intent should be followed. But if there is no direct answer to the question at issue, and the statute is silent or ambiguous on the issue, the court is then faced with the question of whether the agency's answer is based on a permissible construction of the statute. Chevron, U.S.A. v. NRDC, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 2781-2782 (1984).

The Supreme Court noted that it has long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. Id., 467 U.S. at 844, 104 S.Ct. at 2782.

But the Court has also clearly rejected the argument that an agency's interpretation is not entitled to deference because it represents a sharp break from prior interpretations of the statute in question. The Supreme Court has held that a revised interpretation deserves deference because an initial agency interpretation is not instantly carved in stone, and the agency is not required to establish rules of conduct to last forever. Rust v. Sullivan, 500 U.S. 173, 186, 111 S.Ct. 1759, 1769 (1990); Chevron, 467 U.S. at 862, 104 S.Ct. at 2791.

Therefore, an authority no less than the Supreme Court has recognized that an administrative agency is not only entitled to revise an interpretation of a statute with which it is

charged to administer, but also that such revisions are entitled to deference by a reviewing court. Thus, the Illinois EPA's interpretation as articulated and applied in this instance should be given deference by the Board. However, regardless of the level of deference the Board ultimately finds is warranted, the Illinois EPA's final decision should still be affirmed since the interpretation on which it was based is correct.

IV. ILLINOIS EPA'S INTERPRETATION OF SECTION 39.2(F) IS CORRECT

It is certain that any interpretation of the Act should be based, if at all possible, upon the clear language of the provision in question. The provision should be read in the context of the Act as a whole, and should be liberally construed to give effect to all words and to the purpose behind the provision itself.[3]

In this case, the language in question provides as follows:

> A local siting approval granted under [Section 39.2] * * * for a sanitary landfill operation * * * shall expire at the end of * * * 3 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*. (Emphasis added.)

Section 39.2(f) of the Act. Looking at this language, the focus of the Illinois EPA's attention, and of the Board's attention now, is the proviso that acts to prevent the expiration of local siting approval. The Illinois EPA had interpreted this language to mean that if any application for a development permit was submitted to the Illinois EPA within the three calendar year window before siting approval expires, regardless of what the outcome of the application was (i.e., approval or denial), then the siting approval was effectively "saved" from expiration.

The interpretation followed by the Illinois EPA in this present situation, one followed after receiving an interpretation from the Illinois AGO, is that the permit application for development that must include proof of local siting approval must be submitted to the Illinois

[3] It should be noted that this particular provision of the Act has never been the subject of litigation or review by the Board, thus it is one of first impression.

EPA within the three calendar year window. The distinction is that a previous submittal of a development permit application does not act to preserve the siting approval.

Thus, in the case now before the Board, the Petitioner received local siting approval in November 1996. In April 2003, the Petitioner submitted the subject permit application. This application, which included as its requisite proof of local siting approval the November 1996 approval, was submitted six and a half calendar years after the siting approval was granted. There is no dispute that the subject permit application was submitted well beyond the time otherwise allowed by Section 39.2(f) of the Act to prevent the expiration of local siting approval. The backdoor sought by the Petitioner to avoid a finding that local siting approval expired was that a previous permit application was submitted within the time allowed and, as a result, the local siting approval did not expire.

There are a number of flaws with this argument. First and foremost, it allows for the possibility of submission of a "sham" permit application within three calendar years that would act to preserve local siting approval. Under the Petitioner's interpretation, an entity could receive local siting approval, then within three calendar years file a sham permit application that could not be approved. Based on that sham application, the entity would have preserved its grant of local siting approval in perpetuity, since there would be no window of expiration.

Also, the Petitioner's interpretation reads language into the Act that is not found. For the Petitioner's argument to prevail, the language in question must read, "[u]nless within that period the applicant has made <u>any</u> application to the Agency for a permit to develop the site." The Act must be read to mean any application of any kind, regardless of whether that application was approved or denied, can serve to halt the expiration of local siting approval. Unfortunately for the Petitioner, the Act does not so read. Similarly, the Petitioner cannot argue that the fact that it

actually received a development permit based on a timely submitted application (i.e., within three calendar years of the siting approval) acts to prevent expiration of the siting approval, because to do so would read further words not found in Section 39.2(f). The language in question would then have to read, "[u]nless within that period the applicant has made any successful application to the Agency for a permit to develop the site." That reading strains ever further the otherwise clear language of the Act.

The purpose behind the imposition of a window upon which siting approval would expire is clearly to encourage the timely acting upon a siting approval. The "evil" to be remedied is the possibility that an entity will take the minimal steps necessary (i.e., submission of a sham application) to once and for all prevent the expiration of local siting approval. Here, that would allow for the submission of a permit application over six years after the underlying siting approval was granted. Certainly, that was exactly the scenario that was intended to be avoided. The Petitioner argues that the Illinois EPA seeks to impose a new statute of limitations that is not found in the Act. Petitioner's brief, p. 10. To the contrary, the Illinois EPA seeks to enforce the time period currently set forth in the Act. It is the Petitioner that seeks to avoid that period by reading into the Act words and circumstances that do not exist.

Consider the possibility that the Petitioner's arguments are taken as being meritorious. The Petitioner argues that a previously-issued development permit, which was based on a timely submitted permit application, allows for the future submissions of development permit applications in perpetuity without the need to ever seek new local siting approval. But circumstances change, communities change, and permitted facilities change. The General Assembly rightly sought to allow local units of government to maintain consistent and timely

oversight of landfill development within their local boundaries, and the Petitioner's arguments would defeat that intent.

The Petitioner would claim that it has been diligent in its pursuit of a permit, and that it has almost continuously had an application on file with the Illinois EPA. While those facts may be true, the only relevant consideration is whether the subject permit application was submitted within three calendar windows of the siting approval. Since it was not, there is no way the Illinois EPA could approve the permit sought.

The Illinois EPA's reading of the Act is consistent with the purposes of the Act and the imposition of a time certain for acting upon local siting approval. The Illinois EPA's interpretation does not require a strained reading of the Act, nor does it result in an overly restrictive reading of the Act, since it would be consistent with the General Assembly's finding that three calendar years is a sufficient time to file all necessary permit applications based on siting approval. If a permit application is sought outside that window that requires local siting approval, it is clear the General Assembly intended that an applicant must return to the siting body to request additional siting approval. This would allow for the local unit of government to continue to maintain the oversight and control of the development of landfills as contemplated by the whole concept of local siting approval.

The Illinois EPA acknowledged that the interpretation now being taken was not always followed. However, as the Supreme Court has acknowledged, and as the Board must note, the Illinois EPA can and sometimes should revise its interpretations of the Act. Here, the receipt of an interpretation from the Illinois AGO, the state's legal officer, resulted in the change of interpretation. And while the Petitioner repeats several times that the Illinois EPA's interpretation was followed for a number of years, the Petitioner did not present any testimony or

evidence that would demonstrate exactly how many times that interpretation was dispositive in a permit decision. In other words, though the Illinois EPA may have taken that interpretation in the past, there is no evidence that the interpretation was relevant in anything other than the present situation.

V. CONCLUSION

Based on the arguments made herein, and the fact that the Illinois EPA correctly interpreted and applied Section 39.2(f) of the Act, the Illinois EPA respectfully requests that the Board enter an order affirming the denial of the subject permit application. The Illinois EPA's interpretation is consistent with the plain wording of the Act, serves to meet the intent of the General Assembly, and was done following input by the Illinois AGO. The Petitioner has not met its burden in this case, as the interpretation espoused by it is inconsistent with the Act and the relevant facts and dates. For these reasons, the Board should affirm the Illinois EPA's decision dated December 5, 2003.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

John J. Kim/BB

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Dated: April 5, 2004

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on April 5, 2004, I served true and correct copies of a RESPONSE TO PETITIONER'S BRIEF, by telefaxing and by placing true and correct copies in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. mail drop box located within Springfield, Illinois, with sufficient First Class Mail postage affixed thereto, upon the following named persons:

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