ILLINOIS POLLUTION CONTROL BOARD
May 6, 2004

SALINE COUNTY LANDFILL, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 04-117
	)	(Permit Appeal - Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent,	)	
	)	
COUNTY OF SALINE,	)	
	)	
Intervenor.	)	

BRIAN E. KONZEN OF LUEDERS, ROBERTSON & KONZEN APPEARED ON BEHALF OF THE PETITIONER;

JOHN J. KIM OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY APPEARED ON BEHALF OF RESPONDENT; and

ROB WOLF, SALINE COUNTY STATE'S ATTORNEY AND STEVE HEDINGER OF HEDINGER LAW OFFICE APPEARED ON BEHALF OF SALINE COUNTY.

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

On January 8, 2004, Saline County Landfill, Inc. (SCLI) filed a petition for review of a determination by the Illinois Environmental Protection Agency (Agency) to deny a permit for expansion of the landfill located in Harrisburg, Saline County. On February 19, 2004, the Board granted a motion by Saline County[1] to intervene in this proceeding. The Agency denied the permit because the Agency determined that SCLI did not provide proof pursuant to 39(c) of the Environmental Protection Act (Act) (415 ILCS 5/39(c) (2002) that SCLI had local siting approval for the expansion of the landfill pursuant to Section 39.2 of the Act (415 ILCS 5/39.2 (2002)).

Based on the record, the Board finds that SCLI provided proof of local siting approval pursuant to Section 39.2 of the Act (415 ILCS 5/39.2 (2002)) and the Agency's determination that SCLI failed to provide proof of local siting approval pursuant to Section 39(c) of the Act is

[1] The Board notes that the County Board of Saline County adopted a resolution on February 26, 2004, stating that the "State's Attorney of Saline County does not represent the position of the County Board when he seeks to intervene". Tr. at 74-80; P.C. 2.

incorrect. The Board remands the permit to the Agency and directs the Agency to issue the requested permit.

PROCEDURAL HISTORY

On January 8, 2004, SCLI filed a petition for review of a December 5, 2003 Agency denial of a permit. SCLI challenges the Agency's determination that SCLI did not have local siting approval for the landfill expansion sought in the permit application. The landfill is located Harrisburg, Saline County. On February 19, 2004, the Agency filed the record in this proceeding (R.). Hearing was held before Board Hearing Officer Carol Sudman on March 3, 2004 (Tr.).

On March 29, 2004, SCLI filed a motion to file a corrected brief. Neither the Agency nor Saline County has filed a response to the motion and pursuant to 35 Ill. Adm. Code 101.500(d), any objection to granting the motion is waived. The Board grants the motion to file a corrected brief, all citations in this opinion and order are to the corrected brief (Pet. Br.). On April 5, 2004, the Agency (Ag. Br.) and Saline County (SC Br.) filed their briefs.

PRELIMINARY MATTERS

On March 2, 2004, the Agency filed a motion for order of protection and privilege log (MOP) with the hearing officer concerning items included in the Agency's record. The Agency sought protection for seven documents specified by date in the motion. MOP at 2. SCLI filed a response on March 4, 2004 (Resp. MOP) and the Agency filed a reply on March 5, 2004. At hearing, the Board's hearing officer ruled that "the documents in question are covered by the attorney-client and work product privilege, and the inadvertent disclosure does not waive the privilege." Tr. at 21.

Although the parties have not sought Board review of the hearing officer's decision by motion, the Agency in effect seeks to have the hearing officer's decision reviewed by the Board in the Agency's brief. The Agency's brief bases arguments on correspondences from the Illinois Attorney General's Office (AGO). The Agency sought protection for the AGO's correspondences in the motion for protection. *See* Ag. Br. at 7, 11, and 14. Thus, the Agency is relying on documents that the hearing officer had ruled were not properly a part of the record.

In reviewing the hearing officer's decision, the Board finds that the hearing officer incorrectly extended the attorney-client privilege to four documents generated from the AGO's office. For the reasons discussed below, the Board finds that the March 10, 2003 letter (R. at 149), the May 15, 2003 letter (R. at 148), the June 11, 2003 letter (R. at 147) and the December 4, 2003 letter (R. at 7) do not meet the parameters of attorney-client privilege. Therefore, the Board lifts the protection from those documents and will include those documents in the record. The Board further finds that the protection of those documents by the hearing officer order was harmless error.

The four letters are all from Mr. Tom Davis with the Environmental Bureau of the AGO and are addressed to various Agency employees. The March 10, 2003 letter is addressed to Ms. Joyce Munie manager of the bureau of land permit section for the Agency and indicates that Mr.

Davis received an inquiry from Saline County State's Attorney Rod Wolfe. R. at 149. The letter further states that the passage of time would preclude a granting of a developmental permit and asks that Mr. Davis be advised as to what type of permit SCLI was seeking. *Id*. The May 15, 2003 letter was also addressed to Ms. Munie and is nearly identical to the March 10, 2003 letter. R. at 148. The June 11, 2003 letter is addressed to Mr. Scott Phillips Deputy Counsel, Division of Legal Counsel with the Agency. R. at 147. The June 11, 2003 letter stated that two prior letters had been sent to Ms. Munie and asks for a reply to Mr. Davis's inquiry. R. at 147. The December 4, 2003 letter is addressed to Mr. John Kim, assistant counsel with the Division of Legal Counsel at the Agency and indicates that the AGO's position is that the local siting approval has expired. R. at 7.

One purpose of the attorney-client privilege:

> is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client. Balla v. Gambro, Inc. 164 Ill. 2d 492, 594 N.E.2d 104, 109-110 (1991), citing Upjohn Company v. United States 449 U.S. 383, 389 (1981).

"Nevertheless, because the privilege effectively withholds relevant information from the factfinder, it should be applied only when necessary to achieve its purpose." Monfardini v. Quinlan, 2004 Westlaw 533132 (N.D.Ill. Mar. 15, 2004), citing Fisher v. United States, 425 U.S. 391, 403 (1976). The attorney-client privilege applies "to communications made in confidence by client seeking legal advice of any kind to professional legal advisor acting in that capacity." Regan v. Garfield Ridge Trust & Savings Bank 220 Ill. App. 3d 1078, 581 N.E.2d 759, 768 (2nd Dist. 1991), citing Cesena v. DuPage County, 201 Ill. App. 3d 96, 103 (2nd Dist. 1990). In this instance, the communications from the AGO to the Agency are not in the nature of communications made in confidence in response to a client seeking legal advice, protection of the documents is not necessary to encourage full and frank communication between an attorney and client, and the AGO initiated the contact with the Agency in response to an inquiry by a third party.

The nature of the communication is revealed in other documents in the Agency's record. On September 22, 2003, Steve Hedinger wrote a letter addressed to both Mr. Dan Merriman of the Agency's Division of Legal Counsel and Mr. Davis. In that letter, Mr. Hedinger explained the Saline County State's Attorney's position that local siting approval had occurred over seven years ago and therefore should have expired. R. at 15. On September 24, 2003, Mr. Davis wrote a letter to Mr. Merriman indicating that the AGO shared the concerns articulated in the letter from Mr. Hedinger. R. at 145. This letter was not one of the correspondences which the Agency sought protection for in the motion. *See* MOP at 2.

The contents of the September 24, 2003 letter indicate that the Agency was being advised of AGO concerns based on an independent AGO investigation and the September 22, 2003 letter by Mr. Hedinger. R. at 145. Mr. Davis goes on to recommend that the Division of Legal

Counsel at the Agency provide a legal assessment to the Bureau of Land in this proceeding. *Id*. Thus, the letter establishes that the Agency was offered an opinion by the AGO as a result of communications from a third party rather than the Agency itself seeking legal advice. Furthermore, the letter recommends that the Bureau of Land seek legal advise from the *Agency's own* Division of Legal Counsel. Thus, the AGO's communications to the Agency are not in the nature of an attorney advising a client but in the nature of an officer of the State advising an agency of the State of potential concerns. Therefore, the Board finds that the communications on the issue of local siting approval are not subject to protection under the attorney-client privilege.

The Board also finds that the protection extended to the communications from the AGO to the Agency is however harmless error. Even though SCLI argued that the communications lacked privilege (SCLI did not include the December 4, 2003 letter in the argument) because of waiver, the presence of the September 24, 2003 letter in the record was sufficient to direct the attention of the Board to these issues. The remaining correspondences further reinforce the information in the September 24, 2003 letter.

FACTS

The landfill has previously been permitted and received siting approval. R. at 345-360; Pet. at Attach. On November 21, 1996, the Saline County Board granted landfill siting approval to SCLI for the landfill expansion in Harrisburg. R. at 345-360. On December 31, 1996, the Agency issued a permit for the development and operation of the landfill expansion. R. at 234.

From October 1999 to December 2001, SCLI submitted application materials to the Agency for a development permit for landfill expansion. Saline County Landfill, Inc. v. IEPA, PCB 02-108 (May 16, 2002). In January of 2002, the Agency denied SCLI application for development permit on the grounds that the waste footprint in the permit application was not the footprint approved under the local siting. Saline County Landfill, slip op. at 1. The Board affirmed the Agency's determination that the footprint of the landfill expansion was not the same and as a result, SCLI lacked proof of siting approval. Saline County Landfill, slip op. at 19.

While the Board was considering PCB 02-108, SCLI had pending before the Agency another permit application for the landfill expansion. Pet. Exh. 6. On February 7, 2003, SCLI withdrew the request for lateral expansion. *Id*. On April 4, 2003, SCLI filed the application for expansion at issue in this proceeding. R. at 316. On December 5, 2003, the Agency denied the application for expansion of the landfill. R. at 2. The Agency's sole reason for denial is that the "application did not provide proof of local siting approval pursuant to Section 39(c) of the Act. The siting provided in the application has expired." *Id*.

Agency employee, Ms. Munie testified at hearing. Ms. Munie stated that prior to December 5, 2003, her understanding was that siting was valid for SCLI and that if the permit were technically valid, the permit could issue. Tr. at 52. Ms. Munie also indicated in a March 12, 2003 letter to Steve Hedinger that the siting was valid. Pet. Exh. 6. Ms. Munie testified that she made the December 2003 decision to deny the permit; however, she did receive a recommendation to deny from the Illinois Attorney General's Office. Tr. at 29-30.

STATUTORY AND REGULATORY BACKGROUND

Section 39(c) of the Act provides in part that "no permit for development" of a landfill may be issued by the Agency "unless the applicant submits proof to the Agency" of local siting approval. 415 ILCS 5/39(c) (2002)

Section 39.2(f) of the Act provides that:

> A local siting approval granted under this Section shall expire at the end of the 2 calendar years from 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 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. 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.
>
> If a first development permit for a municipal waste incineration facility expires under subsection (k) of Section 39 after September 30, 1989 due to circumstances beyond the control of the applicant, any associated local siting approval granted for the facility under this Section may be used to fulfill the local siting approval requirement upon application for a second development permit for the same site, provided that the proposal in the new application is materially the same, with respect to the criteria in subsection (a) of this Section, as the proposal that received the original siting approval, and application for the second development permit is made before January 1, 1990. 415 ILCS 3/29.2(f) (2002).

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

> If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the applicant may, within 35 days, petition for a hearing before the Board to contest the decision of the Agency. 415 ILCS 5/40(a)(1)(2002).

STANDARD OF REVIEW

After the Agency's final decision on a permit is made, the permit applicant may appeal that decision to the Board. 415 ILCS 5/40(a)(1)(2000). The question before the Board in permit appeal proceedings is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Act would have occurred if the requested permit had been issued. ESG Watts v. IEPA, PCB 01-63, 64 (consld.) (Apr. 4, 2002); Joliet Sand & Gravel Co. v. PCB, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (3rd Dist. 1987), citing IEPA v. PCB, 118 Ill. App. 3d 772, 455 N.E. 2d 189 (1st Dist. 1983). The Agency's denial letter

frames the issues on appeal and the burden of proof is on the petitioner. ESG Watts, Inc. v. PCB, 286 Ill. App. 3d 325, 676 N.E.2d 299 (3rd Dist. 1997).

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

ISSUE

The sole issue in this appeal is whether or not SCLI has local siting approval for the expansion of the landfill. If the answer is yes, then the application as submitted to the Agency demonstrates that the issuance of the permit will not violate the Act or Board regulations. If the answer is no, then the application as submitted to the Agency did not demonstrate that the issuance of the permit will violate the Act or Board regulations.

SCLI'S ARGUMENTS

SCLI puts forth five general areas of argument in support of granting a permit to SCLI. The first is that the basic rules of statutory construction support granting a permit. Second, SCLI argues that the reversal in the Agency's interpretation of Section 39(f) of the Act (415 ILCS 5/39(f) (2002) is suspect and not entitled to deference. Third, SCLI asserts that all parties and the Board agree siting has not expired. Fourth, SCLI maintains that the local siting approval could not have expired because the Agency had issued a permit for a portion of the locally approved site. Fifth, SCLI addresses the arguments of Saline County.

Basic Rules of Statutory Construction

SCLI argues that basic rules of statutory interpretation require the Agency to issue the requested permit. Pet. Br. at 8. SCLI asserts that the words chosen by the legislature are to be given their plain meaning and the intent of the legislature should be ascertained primarily from the language itself. Pet. Br. at 7. SCLI maintains that no rule of statutory construction authorizes a court to declare that the legislature did not mean what the plain language of statute imports. *Id.*, citing Envirite Corporation v. IEPA, 158 Ill. 2d 210, 632 N.E.2d 1035 (1994). Furthermore, SCLI opines that a basis rule of statutory construction is that the inclusion of one limitation is the exclusion of other limitations. *Id.*, citing Browning Ferris Industries v. PCB, 127 Ill. App. 3d 509, 468 N.E.2d 1015 (3rd Dist. 1984); Rochelle Disposal Service, Inc. v. PCB, 266 Ill. App. 3d 192, 639 N.E.2d 988 (2nd Dist. 1994).

SCLI also concedes that an agency's interpretation of the agency's own regulations is entitled to great weight, and that the interpretations are reviewed *de novo* by a court. Pet. Br. at 7. This general rule of statutory interpretation is usually applied where the language of the statute is ambiguous and the interpretation by the agency is long and consistent so that the by inference the argument can be made that the legislature concurred, according to SCLI. *Id*., citing Moy v. Department of Registration and Education, 85 Ill. App. 3d 27, 406 N.E.2d 191 (1st Dist. 1980). Thus, SCLI maintains that an agency's interpretation of a statute that conflicts with an earlier interpretation is entitled to considerably less deference. Pet. Br. at 8, citing Mobile Oil v. USEPA, 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 (1987); INS v. Cardoza-Fonseca, 480 US 421, 446 (1987); Watts v. Alaska, 452 US 259 (1981).

SCLI argues that the language of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)) is plain and unambiguous and supports SCLI's position that local siting approval has not expired. Pet. Br. at 8-9. SCLI asserts that under the plain language of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)), a local siting approval does not expire if the Agency receives a permit application to develop the site within three years of the siting approval. Pet. Br. at 9. SCLI maintains that the Board should follow the plain language of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)). *Id*. SCLI asserts that to hold that siting expires after an unsuccessful appeal of an Agency denial or to hold that an application must be continuously on file with the Agency to preserve local siting approval requires reading into Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)) language that is not there. Pet. Br. at 9.

Furthermore, SCLI argues that where the legislature articulates in the plain language of the statute scenarios of when siting approval can expire, the Board should not read into the language other scenarios. Pet. Br. at 9. SCLI points out that the legislature specified in Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)) that siting expires where the landfill applicant fails to apply for a development permit within three years from the date that local siting was approved. Pet. Br. at 9. SCLI also points out that the legislature specified that three years shall not commence until the conclusion of all appeals. Similarly, SCLI notes that the legislature specifies that local siting approval may expire upon the expiration of a development permit under Section 39(k) of the Act (415 ILCS 5/39(k) (2002)). SCLI argues that, given that the legislature articulates when siting approval may expire, the Board should not read new exceptions into the Act. Pet. Br. at 9-10.

SCLI argues that the record establishes, and the Agency and Saline County agree, that a development permit application was filed within three years of the local siting approval. Pet. Br. at 9. SCLI asserts the Board need look no further than the plain language of 39(f) of the Act (415 ILCS 5/39(f) (2002) to resolve this issue. Pet. Br. at 10. SCLI maintains that the Agency is creating a new statutory limitation on the validity of local sitings not found in the Act and a new requirement that an applicant must have a continuous ongoing permit application which is also not in the Act. *Id*.

Reversal of Agency's Interpretation

SCLI argues that the courts have stressed consistency in interpreting the Act and have stated: "'[o]f great concern to us is the fact that the Pollution Control Board is not consistent in its reading of the Act.' Chemetco v. PCB, 140 Ill. App. 3d 283, 488 N.E.2d 639,643 (5th Dist. 1986)." Pet Br. at 10. SCLI also points to Alton Packaging Corporation v. PCB and IEPA, 146 Ill. App. 3d 1090, 497 N.E.2d 864 (5th Dist. 1986) wherein the court noted that "administrative bodies are bound by prior custom and practice in interpreting their rules and may not arbitrarily disregard them." Pet. Br. at 10, citing Alton Packaging at 497 N.E.2d 864, 866. SCLI asserts that the Board and the Agency are bound by prior custom and practice as well as the need for consistency in interpreting the Act. Pet. Br. at 11. SCLI argues that thus granting SCLI a permit in this instance will not violate the Act because the Agency should read Section 39(f) of the Act (415 ILCS 5/39(f) (2002)) consistently, as the Agency has done for ten years prior to the instant application. Pet. Br. at 11.

SCLI concedes that the Illinois Appellate Court consistently give deference to an agency's interpretation of the agency's statute; however, that deference is granted when the statute is ambiguous and the interpretation is long standing. Pet. Br. at 11, citing Moy. SCLI argues that given the courts' view, the only interpretation that is entitled to deference is the long standing interpretation of the Agency that local sitings do not expire so long as an application for development permit is made within three years. Pet. Br. at 11-12. SCLI asserts that the record contains ample evidence that for over ten years the Agency has interpreted Section 39(f) of the Act (415 ILCS 5/39(f) (2002) to mean that local siting does not expire if an application for developmental permit is filed within three years. Pet. Br. at 12. SCLI emphasizes that the Agency's long standing interpretation is undisputed. *Id*.

SCLI also argues that the Board has recognized the importance of consistency in the actions of the Agency. Pet. Br. at 12. SCLI points to Owens Oil Company v. IEPA, PCB 98-32 (Oct, 18, 1997) where the Board stated that when the Agency departs from a prior practice the Agency must do so for good cause such as a change in the law, different facts, or a determination that the prior practice was in error. Pet. Br. at 12, citing Owens Oil, slip op. at 2. SCLI argues that the Agency departed from the long standing practice without determining that the prior practice was in error, without a change in the statute, or without a determination that the facts are different. Pet. Br. at 13.

Parties and Board Agree Local Siting has not expired

SCLI asserts that the Agency made a "judicial admission" before the Board that SCLI did not need to seek new siting approval. Pet. Br. at 13. SCLI points to language in the Board's opinion and order in Saline County Landfill, Inc. PCB 02-108 and notes that neither the Agency nor Saline County appealed that decision. Pet. Br. at 13. SCLI maintains that the Agency "admitted of record" that a new siting application was not required in PCB 02-108 and therefore, the Agency's decision in the instant appeal is "all the more vulnerable to challenge" by SCLI. Pet. Br. at 13-14.

Portion of Locally Approved Expansion Permitted

SCLI argues that the permit issued by the Agency in December 1996 included vertical expansion into the air space included in the November 1996 landfill siting approval. Pet. Br. at 14. SCLI argues that therefore, the local siting approval cannot expire because areas approved for siting in November 1996 were permitted for development and operation in December 1996. *Id*. SCLI emphasizes that no matter how the Board interprets Section 39(f) of the Act (415 ILCS 5/39(f) (2002)), SCLI's timeframe did not expire because multiple development permits were filed with the Agency concerning the new air space approved for siting in November 1996 and at least one permit was issued. Pet. Br. at 15.

Response to Saline County

SCLI addressed potential arguments by Saline County in the opening brief as no reply brief was scheduled to be filed. Specifically, SCLI maintains that: 1) SCLI is not arguing equitable estoppel; 2) the facts of this case are distinguishable from Village of Fox River Grove v. IEPA, PCB 97-156 (Dec. 18, 1997); 3) permit denial is not the equivalent of failure to file a permit application; and 4) SCLI diligently and continuously pursued a permit. Pet. Br. at 15-17. The Board will summarize each of those arguments below.

Equitable Estoppel

SCLI argues that Saline County misstated SCLI's position in this appeal at hearing in that SCLI is not arguing equitable estoppel or detrimental reliance principles in this appeal. Pet. Br. at 15, citing Tr. at 40. SCLI emphasizes that not only is SCLI not making such an argument, the principles were not pleaded in the petition for review. Pet. Br. at 15. SCLI points out that no assertion has been made by SCLI that an Agency employee knowingly made untrue representations, which is an element in the doctrine of equitable estoppel. Pet. Br. 16. SCLI asserts that rather than equitable estoppel, SCLI is arguing that the sudden reversal of interpretation by the Agency results in an incorrect interpretation. *Id*.

Fox River Grove

SCLI speculates that Saline County may cite the Board to Fox River Grove for the propositions that the Agency claims the right to correct past misinterpretations and the Agency's previous misinterpretations are not relevant to the Board's review of this instant appeal. Pet. Br. at 16. SCLI argues that the Fox River Grove is distinguishable from this case for two reasons. *Id*. First, SCLI notes that the instant appeal involves interpretation of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)), while Fox River Grove involved interpretation of the Board's regulations. *Id*. SCLI asserts this distinction is critical because upon appellate review, the Board's interpretations of the Board's regulation is entitled to great deference while new or inconsistent interpretations of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)) are not. *Id*. Furthermore, SCLI argues that the Agency's interpretation of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)) was consistent for about ten years, "ample time to demonstrate the legislature's concurrence with the Agency's statutory interpretation." Pet. Br. at 15-16.

The second distinction between Fox River Grove and this appeal, according to SCLI, is that the Board "recognized and all parties agreed" SCLI could apply for a development permit to

expand the landfill. Pet. Br. at 17. SCLI asserts for the Board to hold otherwise now would be inconsistent with Saline County Landfill, Inc. PCB 02-108. Pet. Br. at 17.

Permit Denial Not Equivalent to Failure to File Permit Application

SCLI asserts that Saline County equates the denial of a permit by the Agency with the failure to apply for a permit within three years of local siting approval. Pet. Br. at 17. SCLI argues that Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)) contains no such language. *Id*. SCLI maintains that SCLI timely filed a complete development permit application in 1999 and the permit denial stated no issues of completeness or timeliness. *Id*. SCLI stresses that SCLI met the statutory obligation of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)) to preserve the validity of local siting approval. *Id*.

SCLI Diligently and Continuously Pursued a Permit

SCLI argues that rather than "banking" local siting approval as alleged by Saline County, SCLI diligently and continuously pursued a permit. Pet. Br. at 17. SCLI asserts that the Agency concedes that SCLI had a permit application pending almost continuously since 1999. *Id*. SCLI maintains that the facts to no support the concerns expressed by Saline County about banking of local siting approval. *Id*.

AGENCY ARGUMENTS

The Agency sets forth arguments on statutory construction and then asserts that the Agency's interpretation of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)) is correct for several reasons. The Board will summarize each of the Agency's positions below.

Basic Statutory Construction

The Agency relates that the rules of statutory construction and deference owed to an administrative agency's interpretation of statues administered by the agency are well established. Ag. Br. at 7. The Agency argues that a primary rule in statutory construction is that the intention of the legislature should be ascertained and given effect. *Id*. The Agency asserts that a court should not attempt to read a statute other than in the manner the statute was written. *Id*. Further, the Agency maintains that the terms of a statute are not to be considered in a vacuum and should be liberally construed to effectuate the purposes of the Act. Ag. Br. at 8, citing M.I.G. Investments, Inc. v. IEPA, 122 Ill. 2d 392, 397-98, 400; 523 N.E.2d 1, 3, 4 (1988).

The Agency also argues that there are guidelines established regarding deference to a state agency's interpretation of statues. Ag. Br. at 8. The Agency asserts that courts will give substantial weight and deference to interpretation of an ambiguous statue by an agency charged with administration and enforcement of the statute. *Id*. This deference is accorded to the agency based on the experience and expertise of the agency, asserts the Agency. Ag. Br. at 8-9, citing Fox River Grove. The Agency argues that this deference is accorded even if the interpretation represents a sharp break form prior interpretations. Ag. Br. at 10, citing Rust v. Sullivan, 500 U.S. 173, 186 (1990); Chevron, U.S.A. v. NRDC, 467 U.S. 837, 862 (1984). Thus, the Agency's

interpretation "as articulated and applied in this instance" should be given deference by the Board, according to the Agency. Ag. Br. at 11.

The Agency argues that the focus of the Agency's attention and now the Board's attention is the proviso relating to local siting approval expiration. Ag. Br. at 11. The Agency acknowledges that previously the Agency interpreted the language of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)) to mean that "any" application within three calendar years effectively saved the local siting approval from expiration. *Id.* However, the Agency notes that the interpretation followed by the Agency, after receiving an interpretation by the AGO, is that the permit for development must include proof that local siting approval was granted within three calendar years of the application for the current permit. Ag. Br. at 11-12. The distinction according to the Agency between the two interpretations is that a previous submittal does not preserve local siting approval. Ag. Br. at 12.

Agency's Interpretation of Section 39.2(f) is Correct

The Agency argues that a previous submittal of a development permit application does not preserve the local siting approval. Ag. Br. at 11-12. The Agency maintains that in the case now before the Board, siting approval was granted six and a half years ago. Ag. Br. at 12. The Agency states that there is no dispute the current permit application was submitted well beyond the three year limitation of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)). *Id.* The Agency asserts that the "backdoor" sought by SCLI is that a previous application was submitted during the three year period and as a result the local siting did not expire.

The Agency sets forth several "flaws" in the SCLI arguments that siting did not expire. First, the Agency expresses concern that if the filing of any application protects the local siting approval, a "sham" application could be filed. Ag. Br. at 12. A "sham" application could preserve the grant of local siting approval in perpetuity, argues the Agency. *Id.*

Second, the Agency asserts that SCLI reads language into Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)) which is not there. Ag. Br. at 12. Specifically, the Agency argues that for SCLI's argument to prevail, Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)) would have to read "unless within that period the applicant has made <u>any</u> application to the Agency for a permit to develop the site." Ag. Br. at 12. The Agency maintains that the Act does not read that way. Further, the Agency opines that SCLI cannot read into the Act that actually receiving a development permit based on a timely submitted application prevents the expiration of local siting approval. Ag. Br. at 13.

Third, the Agency argues that the purpose behind the imposition of the three-year expiration "is clearly to encourage the timely acting upon a sitting approval." Ag. Br. at 13. The Agency asserts that the "'evil'" to be remedied is the possibility of a "sham" application to preserve local siting approval. *Id.* The Agency points out that the instant application was submitted six years after local siting approval and "that was exactly the scenario that was intended to be avoided." *Id.*

A fourth flaw in SCLI arguments according to the Agency is that the interpretation advanced by SCLI would allow for the future submission of development permits in perpetuity. Ag. Br. at 13. However, the Agency argues that "circumstances change, communities change and permitted facilities change." *Id*. The Agency emphasizes that the legislature sought to allow local governments to "maintain consistent and timely oversight of landfill development" and SCLI's arguments would defeat that intent. Ag. Br. at 13-14.

Finally, the Agency takes issue with SCLI's claim that SCLI has diligently pursued a permit. Ag. Br. at 14. The Agency concedes that the facts may support SCLI's assertion; however, the only relevant consideration is whether the instant permit was submitted within three calendar years of local siting approval. *Id*. Because the instant permit was not submitted during that three-year window, the Agency maintains that the Agency could not approve the permit sought. *Id*.

SALINE COUNTY'S ARGUMENTS

Saline County presents four general arguments in opposition to SCLI's contention that local siting approval did not expire. First, Saline County summarizes the role of the local governing body in landfill issues. Second Saline County argues that local siting has expired and delineates three reasons why SCLI's arguments are flawed. Third, Saline County argues that Medical Disposal Service v. IEPA, PCB 95-75,76 (May 4, 1995) (consld.) affirmed Medical Disposal Services, Inc. v. IEPA, 286 Ill. App. 3d 562, 677 N.E.2d 428 (1st Dist. 1997) is applicable to this case. Fourth, Saline County argues that the "dicta" in Saline County Landfill is irrelevant. The Board will summarize each of the four arguments below.

Saline County's Role in Landfill Issues

Saline County argues that the courts and the Board have long recognized that Section 39.2 of the Act (415 ILCS 5/39.2 (2002)) represents the "singular most important state of the continuum of siting and approving pollution control facilities such as landfills." SC Br. at 6, citing Medical Disposal, 677 N.E.2d at 432. Saline County notes that when local siting approval was granted to SCLI in 1996, no property right was created in SCLI. SC Br. at 6-7, citing Medical Disposal, 677 N.E.2d at 433.

Saline County asserts that the Act should not be read in a vacuum but instead should be read in conjunction with other statutes that pertain to landfills. SC Br. at 7. Saline County particularly points to the Illinois Solid Waste Planning and Recycling Act 415 ILCS 15/1 *et seq*. (2002) which requires counties to develop and maintain a plan for the management of waste generated within the counties' boundaries. SC Br. at 7. Saline County points to this statue to demonstrate the counties' overall involvement in planning waste management in individual counties. SC Br. at 7-8.

Local Siting Approval Has Expired

In this portion of Saline County's brief, Saline County's arguments can be characterized in two ways. First, Saline County argues that the language of Section 39.2(f) of the Act (415

ILCS 5/39.2(f) (2002)) demonstrated that siting has expired. Second, Saline County points to three alleged flaws in the arguments of SCLI. The following discussion will summarize both arguments.

Language of Section 39.2(f) of the Act

Saline County argues that Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)) on its face reveals that unless SCLI sought permitting for the approved facility within three years local siting approval expired. SC Br. at 8. Saline County maintains that within three years, SCLI did not seek: 1) a permit for a facility for which local siting had been approved, or 2) a permit for the site upon which the facility was located. *Id*. Therefore Saline County argues local siting has expired.

Flaws in SCLI's Arguments

First, regarding SCLI's contention that a portion of the airspace which was approved in 1996 was permitted later in that year, Saline County asserts that SCLI has "utterly failed" to prove what portion of the air space was permitted or when permitting occurred. SC Br. at 9. Saline County maintains that SCLI merely points to some legal conclusions in the record but the facts do not support the conclusions. SC Br. at 9. Saline County argues that since the burden is on SCLI in this proceeding and the record does not support the contention, this fact alone warrants affirmance of the Agency. *Id*.

Second, Saline County argues that the language of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)) requires an application for development of "the site" not a portion of the site. SC Br. at 9. Saline County asserts that the siting statute does not support "SCLI's tacit assertion" that piecemeal development is acceptable under the siting statute. *Id*. Saline County opines that the legislature understands the difference between the entire site and portions of the site. *Id*., citing Section 39.2(c) of the Act (415 ILCS 5/39/2(c) (2002)).

Saline County goes on to argue that a "site" is made up of one or more "facilities" based on a reading of the Section 39.2 of the Act. SC. Br. at 11. Furthermore, Saline County asserts that Section 39.2(f) of the Act clearly requires that a development permit for the entire site and not merely discrete facilities within a site be sought within three years of local siting approval. SC Br. at 11.

A third flaw in SCLI's arguments is that SCLI's interpretation would "work substantial mischief" upon the "obvious" intentions of the legislature's carefully crafted scheme, argues Saline County. SC Br. at 11. Saline County argues that counties are required by law to remain current and actively involved in the waste management needs of the county. *Id*. Saline County maintains that SCLI's interpretation would remove Saline County from the process and allow SCLI to "mothball" the local siting approval indefinitely. *Id*.

Medical Disposal Services

Saline County argues that the decisions in Medical Disposal Services control "most of the salient issues in this case." SC Br. at 13. Saline County details the facts in the Medical Disposal Services case and asserts that factors guiding the Board in that case compel a similar ruling here. SC Br. at 15. Saline County maintains in Medical Disposal Services that the applicant who sought the permit was not the applicant who had received siting approval. *Id.* In this proceeding, although the applicant was the same, the facility differed, argues Saline County. *Id.* Saline County opines that like Medical Disposal Services, SCLI is attempting to obtain siting approval for something that was never approved by the local siting body. *Id.*

Board's "Dicta" in Saline County Landfill (PCB 92-108) Is Irrelevant

Saline County argues that SCLI's reliance on the Board's opinion and order in Saline County Landfill is misplaced. SC Br. at 19. Saline County points out that the language relied upon by SCLI is pure dicta and not relevant to the issue decided in that case. *Id.* Saline County asserts that no mention is made in any published opinion in Saline County Landfill that Section 39.2(f) of the Act was of any relevance to that case and the Board made clear that the issue had no bearing on the Board's decision. *Id.* Further, Saline County maintains that the question in this proceeding is a question of law and whatever may have been said in a previous case does not alter what the statute says. *Id.*

Saline County also takes issue with the arguments by SCLI that Saline County's failure to appeal the dictum somehow binds this case to the same result. SC Br. at 19. Saline County points out that in Saline County Landfill, Saline County won the case and therefore could not appeal under Section 41 of the Act (415 ILCS 5/41 (2002)). SC Br. at 19.

DISCUSSION

Despite all the issues argued in this case, the question before the Board is simply: "Did local siting approval for SCLI's landfill expansion in Harrisburg expire"?

The following discussion will first clarify what standard the Board uses to review a permit decision and what deference the Board will afford the Agency's interpretation of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)). Then, the Board will delineate the reasons for the finding that SCLI provided proof of local siting approval in the permit application.

Standard of Review

Both the Agency and SCLI argue that the Agency's interpretation of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)) should be given deference. *See* Pet. Br. at 10-11 and Ag. Br. at 11. But, SCLI argues that the Agency's interpretation prior to the instant permit denial is the interpretation which should be given deference. Pet. Br. at 11. The basis for both arguments is that courts give deference to a state agency's interpretation of a statute in which the state agency is charged with administering and enforcing. Fox River Grove 702 N.E.2d at 662.

However, the Board's standard of review in a permit appeal is to determine whether the application as submitted to the Agency demonstrates that no violation of the Act or Board rules would occur if the permit was issued. ESG Watts v. IEPA, PCB 01-63, 64 (consld.) (Apr. 4, 2002). Furthermore, the Agency's denial letter frames the issue on appeal and the Board's review is based solely on the record before the Agency. In reviewing the Agency's decision on a permit appeal, the courts have held that the Board does not review the Agency's decision using a deferential manifest-weight of the evidence standard. IEPA v. PCB, 115 Ill. 2d 65, 70, 503 N.E.2d 343, 345 (1986).

Given the Board and Agency responsibilities in a permit appeal, the Board finds that the Agency's interpretation of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)) prior to this appeal is not relevant to the Board's decision. Further, as the Board must decide whether or not the application as submitted demonstrates that no violation of the Act would occur if the permit is issued, the Board is not bound by the Agency's interpretation of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)). The Board will consider the Agency's arguments on statutory construction; however, the Agency's arguments are not considered with any greater or lesser weight than SCLI's arguments or Saline County's arguments. In taking this view of the Agency's interpretation of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)), the Board is consistent with both the Board's and court's decisions in Fox River Grove, (*see* Fox River Grove 702 N.E.2d at 662 and PCB 97-156, slip op. at 8).

Interpretation of Section 39.2 (f) of the Act

As noted above, the issue in this case is whether or not SCLI's 1996 has local siting approval for the expansion of the landfill continues to be valid. The resolution of that issue requires a reading of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)) which provides in part that:

> approval 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. 415 ILCS 5/39.2(f) (2002).

Section 39.2(f) of the Act (415 ILCS 5/39/2(f) (2002)) goes on to specify when the time period shall commence if local siting is appealed and when a development permit expires under subsection (k) of the Act (415 ILCS 5/39(k) (2002)). Notably, Section 39.2(f) of the Act is silent concerning an application timely applied for, but denied by the Agency.

The parties have all accurately and extensively discussed the general rules of statutory construction. The Board sees no need to repeat that recitation here. The law is well settled that the plain language of a statute should be given the common meaning of the language. Pioneer Processing, Inc. v. IEPA, 111 Ill. App. 3d 414, 444 N.E.2d 211 (4th Dist. 1952). Further, the law is also well settled that the inclusion of one limitation is the exclusion of other limitations. Browning Ferris, 468 N.E.2d at 1018. Therefore the Board examines the language of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)) by assessing the plain meaning of the words and by determining if the language includes exclusions.

The plain language of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)) states that local siting expires *unless* an application is made to the Agency for development of the site within three years of local siting approval. All parties agree that SCLI did apply for a permit within three years but that the permit was denied (*see* Saline County Landfill PCB 92-108). Thus, under the plain language of the statute, a permit application for development of the site was filed within three years of siting approval.

The statutory language is silent regarding time limitations if the Agency denies a permit. This is the point where the parties disagree. The Agency and Saline County argue here, that the statutory language means that the local siting approval has expired because the instant application was filed after the three years. SCLI argues that, having timely filed a permit application and diligently sought a permit, the 1996 siting has not expired.

The Board is persuaded that the local siting approval has not expired. The statutory language includes other scenarios for when siting expires besides the three-year time limitation. The statute is silent regarding an Agency permit denial. Clearly, the legislature understood that not all permits are granted. Thus, the Board finds that, the legislature's failure to include a scenario wherein the Agency denies a permit, indicates the legislature did not intend for a denial of a permit to have any affect on the three-year time limitation. As long as an application to develop the site is filed within three years of local siting approval, whether or not that permit is granted, the Board finds that the requirements of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)) are met and local siting does not expire.

The Board's interpretation of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)) is particularly supported by the specific facts of this case. Contrary to the arguments made by the Agency and Saline County, SCLI's permit application submitted within three years was not a "sham" permit application used to "mothball" siting. In fact, SCLI submitted the application in 1999 and continued to submit information relevant to the permit application until 1991, when the permit application was denied by the Agency. Thus, SCLI filed a comprehensive application within three years of local siting approval (*see* Saline County Landfill PCB 92-108). Furthermore, SCLI has been actively seeking other permits for the site. *See* Pet. Exh. 6. Thus, the concerns expressed by Saline County and the Agency that a petitioner could present a "sham" application or "mothball" siting are not reflected in the facts of this case.

Based on the Board interpretation of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)), the Board finds that SCLI did have proof of local siting approval in the instant application for permit. The Board further finds that because the sole denial reason was the failure to include proof of local siting approval, the permit must be issued. The Board will remand the case to the Agency for issuance of the permit.

CONCLUSION

The Board has reviewed the arguments of the parties and finds that the application for permit submitted by SCLI demonstrates that no violation of the Act or Board regulations will occur if the permit is issued. The Board further finds that under the plain language of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)) local siting approval does not expire when an

application for developmental permit is filed within three years of the granting of siting approval, even if the Agency denies the permit application. The Board will remand this case to the Agency for the issuance of the permit.

This opinion constitutes the Board's findings of fact and conclusions of law.

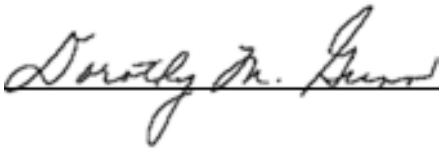
ORDER

The Board remands the Saline County Landfill, Inc. permit application to the Illinois Environmental Protection Agency for the issuance of a permit consistent with the Board's findings in this proceeding.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/31(a) (2002)); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on May 6, 2004, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board