ILLINOIS POLLUTION CONTROL BOARD
April 18, 2002

SALINE COUNTY LANDFILL, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 02-108
	)	(Permit Appeal - Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent,	)	
	)	
COUNTY OF SALINE,	)	
	)	
Intervenor.	)	

ORDER OF THE BOARD (by C.A. Manning):

Petitioner Saline County Landfill, Inc. (SCLI) owns and operates a landfill in Harrisburg, Saline County. The landfill, which receives municipal solid waste, is known as the Saline County Landfill. In November 1996, SCLI received siting approval from the Saline County Board (County Board) to expand the landfill. To obtain a development permit for the landfill expansion, SCLI submitted application materials to the Illinois Environmental Protection Agency (Agency) from October 1999 to December 2001.

On January 4, 2002, the Agency denied SCLI's permit application on one ground. The ground for denial was that SCLI's proposed waste disposal area, also described by the Agency as the waste "footprint," for the lateral expansion had changed from the waste footprint that SCLI had proposed before the County Board in 1996. The difference in the waste footprint results from eliminating an interior berm that would have been between the existing landfill and the lateral expansion. The interior berm was part of the design that SCLI presented to the County Board during the 1996 siting process, but SCLI removed the berm from the design during the permit application process before the Agency. Because the County Board had not approved this change, the Agency concluded that SCLI lacked the necessary local siting approval.

SCLI appealed the Agency's permit denial to the Board and moved the Board to grant SCLI summary judgment. The Agency asserts that summary judgment is inappropriate because SCLI and the Agency dispute material facts. In support of the Agency's permit denial, the County of Saline (County) filed a motion to intervene and a counter-motion for summary judgment.

For the reasons provided below, the Board grants the County party status as an intervenor, denies SCLI's motion for summary judgment, and denies the County's counter-motion for summary judgment. In this order, the Board first addresses several procedural matters, including the County's motion to intervene. Second, the Board sets forth its findings of fact. Third, the Board discusses the standards for summary judgment and the statutory framework of this case. Fourth, the Board discusses the issues involved in SCLI's motion for summary judgment and rules on that motion. Lastly, the Board sends the parties to hearing on April 23, 2002, with directions to the hearing officer on the scope of the hearing. The Board's findings today greatly narrow the dispute among the parties and the hearing will be limited accordingly.

PROCEDURAL MATTERS

Procedural Background

On February 4, 2002, SCLI filed a petition for review of the Agency's January 4, 2002 denial of SCLI's permit application.[1] On February 7, 2002, the Board accepted this matter for hearing and granted SCLI's motion for expedited review.[2]

Hearing Officer Steven C. Langhoff scheduled a hearing for April 16, 2002. On March 14, 2002, SCLI filed a motion for summary judgment.[3] On April 2, 2002, SCLI, with the hearing officer's authorization, filed the Agency's answers to SCLI's requests to admit.[4] On April 4, 2002, the Agency filed a response to SCLI's motion for summary judgment,[5] along with an agreed motion for leave to file the response *instanter*. The Board grants the Agency's motion. The Agency also filed the 6,231 page administrative record on April 4, 2002, with a motion for leave to file the record *instanter*. In its motion, the Agency represents that the record was hand-delivered to SCLI on March 28, 2002, and to the County on April 1, 2002. The Board grants the Agency's motion.[6]

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[1] SCLI's petition for review is cited as "SCLI Pet. Rev. at _."

[2] SCLI's motion for expedited review is cited as " SCLI Mot. Exp. at _."

[3] SCLI's motion for summary judgment is cited as "SCLI Mot. Summ. J. at _."

[4] The Agency's answers to SCLI's requests to admit are cited as "Agency Ans. at _."

[5] The Agency's response to SCLI's motion for summary judgment is cited as "Agency Resp. at _."

[6] The Agency's record is cited as "R. at _."

On March 25, 2002, the Saline County State's Attorney filed a motion to intervene on behalf of the County.[7] On April 1, 2002, SCLI filed a response opposing the County's motion to intervene.[8] On April 1, 2002, the County filed a motion to strike SCLI's motion for summary judgment.[9] On April 3, 2002, the hearing officer notified SCLI, the Agency, and the County that the hearing scheduled for April 16, 2002, would be continued on the record until April 23, 2002, to allow time for the Board's rulings today.

On April 5, 2002, the County filed a response to SCLI's motion for summary judgment and a counter-motion for summary judgment.[10] On April 5, 2002, SCLI filed a motion to strike the County's counter-motion for summary judgment.[11] On April 8, 2002, the County filed a response to SCLI's motion to strike the County's counter-motion for summary judgment.

On April 10, 2002, the hearing officer issued an order accepting a stipulation from the parties regarding the conduct of depositions on April 10-12, 2002. The County was allowed to attend the depositions, make legal objections, and question witnesses. The hearing officer order also provided for an April 16, 2002 telephone conference to exchange witness lists and to provide notice of any evidence to be introduced at hearing that is not part of the Agency record. A hearing originally scheduled for April 16, 2002, was continued on the record until April 23, 2002. The hearing was contingent upon the Board's ruling on the issue of summary judgment. For the reasons set forth below, the Board will proceed with the hearing on April 23, 2002.

Pending Procedural Motions

Below, the Board rules on three procedural motions: (1) the County's motion to intervene; (2) the County's motion to strike SCLI's motion for summary judgment; and (3) SCLI's motion to strike the County's counter-motion for summary judgment.

County's Motion to Intervene

[7] The County's motion to intervene is cited as "Cty Mot. Interv. at _."

[8] SCLI's response to the County's motion to intervene is cited as "SCLI Resp. Interv. at _."

[9] The County's motion to strike SCLI's motion for summary judgment is cited as "Cty Mot. Str. at _."

[10] The County's response to SCLI's motion for summary judgment is cited as "Cty Resp. Summ. J. at _."

[11] SCLI's motion to strike the County's counter-motion for summary judgment is cited as "SCLI Mot. Str. at _."

On March 25, 2002, the Saline County State's Attorney filed a motion to intervene on behalf of the County in this permit appeal. The County supports the Agency's permit denial, noting that the Agency's sole ground for permit denial is the inconsistency between SCLI's permit application and the County Board's 1996 siting approval. Cty Mot. Interv. at 1. The County further notes that its State's Attorney "is a constitutional officer, is the chief legal officer for Saline County, and is clothed with the duty and authority to represent the interests of the people of Saline County to ensure a healthful environment within Saline County." *Id.* The County asserts that its State's Attorney represents the public interest of the County and "in particular the interest of Saline County in assuring its siting approvals and authorizations are complied with." *Id.* at 1-2.

In May 2001, the Agency directed a letter to the County Board requesting a statement from the County Board on whether "the designs proposed in the pending [SCLI] permit application are consistent with the local siting approval granted on November 21, 1996." R. at 0030-31. The Agency letter states:

> [T]he [Agency] does not interpret and does not intend to make a determination regarding the constraints placed on the siting approval by the Saline County Board. It is up to the Saline County Board to determine whether re-siting is needed. R. at 0030.

The Agency admits that, in denying the permit, it relied on a September 2001 resolution of the County Board stating that SCLI must file a new siting application because of design changes since the 1996 siting approval. Agency Ans. at 2.

In Pioneer Processing, Inc. v. IEPA, 102 Ill. 2d 119, 464 N.E.2d 238 (1984), the Illinois Supreme Court held that the Attorney General could seek appellate review of a Board permit decision even though the Attorney General was not a party to the Board proceeding. The court stated that the Attorney General, "as chief legal officer of this State, . . . has the duty and authority to represent the interests of the People of the State to insure a healthful environment." Relying on Pioneer Processing, the Third District Appellate Court in Land and Lakes Co. v. PCB, 245 Ill. App. 3d 631, 616 N.E.2d 349 (3d Dist. 1993), affirmed the Board's allowance of a State's Attorney's intervention in a siting appeal, holding that the State's Attorney's "rights and duties are analogous to those of the Attorney General."

The Board finds this case law controlling and further finds, especially given the Agency's reliance on the County Board's 2001 resolution, that the citizens of the County may be materially prejudiced absent the County's intervention. *See* 35 Ill. Adm. Code 101.402(d)(2). The decision cited by SCLI (SCLI Resp. Interv. at 1-2) to oppose the County's intervention (Riverdale Recycling, Inc. v. IEPA, PCB 00-228 (Aug. 10, 2000)) is distinguishable. There the Board denied a motion to intervene of a municipality, not a State's Attorney. Further, that case was decided prior to the Board's new procedural rules which changed the Board's prior rule and policy on third party intervention (*see* 35 Ill. Adm. Code 101.402).

The Board therefore grants the County's motion to intervene. The County has all the rights of an original party to this proceeding, except that the County is bound by Board and hearing officer orders already issued and evidence already admitted. *See* 35 Ill. Adm. Code 101.402(e). The County does not control the statutory deadline for the Board to decide this case. *Id.*

County's Motion to Strike SCLI's Motion for Summary Judgment

On April 1, 2002, the County moved the Board to strike SCLI's motion for summary judgment as untimely. Cty Mot. Str. at 2. Section 101.516(a) of the Board's procedural rules provides that a party may file a motion for summary judgment "no fewer than 30 days prior to the regularly scheduled Board meeting before the noticed hearing date." 35 Ill. Adm. Code 101.516(a).

The Board's February 7, 2002 order granted SCLI's motion for expedited review, noting that SCLI had represented that it intended to file a motion for summary judgment. SCLI Pet. Rev. at 3. SCLI mailed its motion for summary judgment on March 13, 2002, stating that it was timely under 35 Ill. Adm. Code 101.516 because "[a]s of the filing by mail of this motion, there is no noticed hearing date." SCLI Mot. Summ. J. at 1. SCLI had not yet received the hearing officer's notice of the April 16, 2002 hearing, which the hearing officer issued on March 12, 2001. It appears then that SCLI's motion and the hearing officer's notice crossed each other in the mail.

The Board denies the County's motion to strike SCLI's motion for summary judgment. The Agency, the only other party at the time SCLI filed the motion for summary judgment, had the 14-day period to respond to SCLI's motion, as provided in the Board's procedural rules. *See* 35 Ill. Adm. Code 101.516(a). In addition, though the County had no party status at the time, the hearing officer afforded the County an opportunity, which the County used, to file a response to SCLI's motion for summary judgment pending the Board's ruling on the County's motion to intervene. Moreover, the April 16 hearing will be continued on the record until April 23, 2002.

SCLI's Motion to Strike the County's Counter-Motion for Summary Judgment

On April 5, 2002, the County filed a response to SCLI's motion for summary judgment, along with a counter-motion for summary judgment. On the same day, SCLI moved the Board to strike the County's counter-motion for summary judgment. SCLI asks the Board only to strike the County's request for relief (*i.e.*, summary judgment affirming the Agency's permit denial), not the County's response to SCLI's summary judgment request. SCLI Mot. Str. at 1-2.

The hearing officer contacted the Agency, SCLI, and the County on March 27, 2002, to set a filing schedule, which was memorialized in the hearing officer order of March 28,

2002. The hearing officer order set a deadline for receipt of responses to SCLI's motion for summary judgment. It also provided that the Board would not entertain any reply from SCLI or any counter-motion for summary judgment from the only other party at the time, the Agency. In addition, the hearing officer allowed the County, as a potential intervenor, to file a response to SCLI's motion for summary judgment pending the Board's decision on intervention.

The hearing officer's order properly reflects that the Board granted SCLI's motion for expedited consideration and that the Board anticipated ruling on SCLI's motion for summary judgment today. The County became a party to this case only today. In his discretion, the hearing officer gave the County an opportunity to file a response before it became a party, pending the Board's ruling on the motion to intervene. The hearing officer order only allowed the County to file a response to SCLI's motion for summary judgment.

Like any intervenor, the County must take the case as it finds it. The hearing officer order struck the proper balance between allowing for a full briefing of the issues and allowing for expedited Board review. To allow the County to then file a counter-motion for summary judgment in favor of the Agency, with no opportunity for response and even though the Agency could not file such a counter-motion, would frustrate the purpose of the hearing officer order. The Board grants SCLI's motion to strike, which does not include the County's response to SCLI's summary judgment motion.

FACTS

The following facts are undisputed unless stated otherwise.

Siting Approval to Expand the Existing Landfill

SCLI is the owner and operator of a municipal solid waste landfill in Harrisburg, Saline County. The landfill is known as the Saline County Landfill. R. at 374. On November 21, 1996, the County Board granted SCLI siting approval to expand the landfill. SCLI Mot. Summ. J. at 2. The County Board's siting approval was memorialized in a one-page resolution and a nine-page set of fact findings. The County Board's 1996 resolution and findings of fact are referred to collectively as the siting approval. R. at 4248-57. The siting approval states:

> [T]he Saline County Board grants the Application for Siting Approval filed by [SCLI] and approves the site location set forth in the Application . . . . R. at 4248.
>
> * * *
>
> An official transcript of the [October 16, 2001 public] hearing [before the County Board on SCLI's siting application] was made and filed for the record and is incorporated herein by reference as if fully set forth in these Findings of Fact. R. at 4251.
>
> * * *

> SCLI offered into evidence, and the [County] Board received into evidence, exhibits incorporated as part of the transcript and record of proceedings, which exhibits are incorporated herein by reference as if fully set forth in these Findings of Fact. *Id.*
>
> * * *
>
> [T]he [County] Board finds that the Application for Siting Approval filed by SCLI for a sanitary landfill that (A) is approximately 53.5 acres in size which includes a vertical increase over approximately 21 acres of the existing facility and approximately 32.5 acres for the new area to the north of the existing facility, and (B) is located within an approximately 166 acre site boundary, contains sufficient evidence to demonstrate compliance with the siting criteria set forth in the [Environmental Protection] Act and therefore APPROVES the Application on the property described in the Application. R. at 4256-57.

In discussing the nine siting criteria of Section 39.2 of the Environmental Protection Act (Act) (415 ILCS 5/39.2 (2000)), the County Board states in its findings of fact that its determination that SCLI met each criterion was based on "careful consideration of the record from public hearing, including testimony, exhibits, and the Application itself." R. at 4256.

The County Board approved an approximately 53.5-acre expansion of the landfill within the approximately 166-acre site boundary. The 166-acre site boundary would encompass both the existing landfill (a square-shaped parcel) and the proposed expansion (a polygon-shaped parcel). SCLI Mot. Summ. J. at 2. The proposed 53.5-acre expansion had two components: (1) a vertical expansion over approximately 21 acres of the existing landfill; and (2) a lateral expansion of approximately 32.5 acres to the north of the existing landfill. *Id.*

The parties disagree over whether the County Board approved a specific waste footprint for the lateral expansion. SCLI argues that all location restrictions are expressly set forth in the County Board's findings of fact, *i.e.*, the lateral expansion need be no bigger than 32.5 acres and entirely within the 166-acre site boundary. SCLI Mot. Summ. J. at 2-3. The Agency and the County, on the other hand, assert that the County Board did approve a specific waste footprint by incorporating by reference, into the County Board's siting approval, the siting record. Agency Resp. at 8; Cty. Mot. Interv. at 6. The siting record includes SCLI's siting application, itself a hearing exhibit, which depicts a specific waste footprint.

Siting Application Process

Waste Footprint

SCLI's siting application, which was filed with the County Board in July 1996, is part of the Agency record. The siting application contains a contour map identifying the existing landfill and the proposed 53.5-acre expansion. The map depicts the waste footprint of the approximately 32.5-acre lateral expansion, which is adjacent to and north of the existing landfill. R. at 4909. The lateral expansion consists of four waste cells, cells 1 through 4.

Cell 1 would be at the southern end of the lateral expansion (*i.e.*, north of and adjacent to the existing landfill), with cells 2, 3, and 4 of the lateral expansion then respectively located from south to north. *Id.*

Interior Separation Berm

The siting application also shows and describes a berm that would be between the northern edge of the existing landfill and the southern edge of cell 1 of the lateral expansion. In SCLI's siting application, the berm was described as a "separation berm" between Unit 1 (the existing landfill) and Unit 2 (the lateral expansion):

> A soil barrier will be used as a separation between the new and existing units. The north side of Unit 1 and the south side of Unit 2 will be separated by a minimum of 50 feet of recompacted cohesive soil and clean soil fill. *** Although the barrier itself will not be used for waste disposal, the barrier will provide structural support for the waste in the existing and new units. R. at 4675.

SCLI's siting application proposed that groundwater monitoring wells for Unit 1 would be installed in the berm. The application also contained a cross-section drawing of the berm entitled "Unit Separation." The drawing shows the minimum 50-foot width of the berm and a monitoring well within berm, and describes how SCLI would augment and maintain the berm as waste elevations increased on each side of the berm, *i.e.*, in Units 1 and 2. R. at 4915.

At the October 16, 1996 siting hearing before the County Board, an SCLI representative responded to a question about the connection between the existing landfill and the proposed expansion:

> Q. [W]ill the existing landfill area and the area of proposed expansion be connected in any way?
>
> A. Yes, it will essentially be connected as one single landfill. In other words, one hill. There will be a 50-foot zone, separation zone, between the two units . . . . That 50-foot separation zone will be used for things such as monitoring between the two units to allow independent monitoring for each of them. R. at 4284-85.

Permit Application Process

To obtain a development permit for the landfill expansion, SCLI submitted application materials to the Agency from October 1999 to December 2001.

Interior Separation Berm

During the permit application review process, the Agency, on April 3, 2000, sent SCLI a draft denial letter. R. at 282. Among the concerns articulated in the Agency's draft denial letter, the Agency stated that SCLI's permit application failed to demonstrate that the separation berm between Unit 1 and Unit 2 met the safety and stability requirements of the Board's landfill regulations at 35 Ill. Adm. Code 811.304(d) and (e). R. at 283. The Agency's draft denial letter also stated that the separation berm was insufficient to establish a zone of attenuation (as defined in the Board's landfill regulations at 35 Ill. Adm. Code 810.103) between Unit 1 and Unit 2. The Agency maintained that unless the two units could be monitored separately, SCLI should model them as one unit instead of two for purposes of the groundwater impact assessment. R. at 287.

SCLI's response to the Agency's concerns about the separation berm was to submit a revised design, eliminating the separation berm. R. at 3435-38. As revised, the design no longer called for waste in the existing landfill to be kept separate from the waste in the lateral expansion. SCLI's new design would result in waste being placed in the area that had previously been designated for a berm of clean fill, and SCLI proposed corresponding changes for the lateral expansion's liner. Agency Resp. at 3; R at 3437-38. The existing landfill and the expansion would constitute one unit, with one groundwater monitoring system, with no monitoring wells in the space previously proposed for the berm. R. at 3587. The design SCLI presented to the County Board had called for two units (separated by the interior berm), with two separate groundwater monitoring systems, including monitoring wells for Unit 1 in the berm. R. at 4671, 4757-62.

The Agency asked whether the new design was consistent with the County Board's 1996 siting approval, which SCLI had submitted to the Agency earlier. Agency Resp. at 4; R. at 312-13 SCLI in turn submitted to the Agency copies of SCLI's siting application and the transcript of the October 1996 siting hearing. R. at 4196–6136. SCLI also submitted the transcript of a September 12, 2001 County Board meeting at which the County Board passed a resolution (discussed below) stating that SCLI needed to reapply for siting approval because of SCLI's design changes since the 1996 approval. R. at 6138–72.

Other Main Differences Between SCLI's Siting and Permit Applications

There are three other main differences between the permit application that SCLI submitted to the Agency and the siting application that SCLI submitted to the County Board. R. at 4200-02. First, the permit application proposed a wider structural berm along the western edge of cells 1 and 2 of the lateral expansion. Second, the permit application proposed to raise the elevation of the liner and base of cell 1 of the lateral expansion. Third, the permit application proposed to turn the sharp corners of the lateral expansion's northern and western exterior berms into rounded corners.

With the elimination of the interior separation berm and these other changes, the landfill expansion's waste capacity and waste footprint acreage decreased from that provided in the siting application approved by the County Board. Specifically, the expansion's capacity

decreased by approximately 291,000 cubic yards (from 4,600,000 cubic yards to 4,309,000 cubic yards) and the acreage of the footprint decreased from approximately 53.5 acres to 53.2 acres (*i.e.*, the lateral expansion changed from 32.5 acres to 32.2 acres). R. at 4198. However, the changes in the permit application had no effect on the final grade elevation of the single hill that would eventually cover the entire landfill, which remained 495 feet Mean Sea Level. *Id.* The permit application did not propose any increase in the vertical expansion approved by the County Board. The lateral expansion proposed in the permit application would remain within the approximately 166-acre site proposed in the siting application. Nor would any exterior waste boundary of the lateral expansion or the rest of the landfill expand. SCLI Mot. Summ. J. at 3.

Environmental and Safety Issues

The Agency admits that the landfill expansion that SCLI proposed in the revised permit application, with one groundwater monitoring system and the elimination of the separation berm, is environmentally safe and consistent with the Board's substantive landfill regulations. Agency Ans. at 3. The Agency further admits that it found no safety flaw in SCLI's revised permit application. *Id.*

Saline County Board's September 12, 2001 Resolution

The Agency states that it relied on a November 30, 2001 letter addressed to the Agency from Mr. Jim Grimes, a member of the County Board. Agency Resp. at 4. Mr. Grimes states in the letter that on September 12, 2001, the County Board determined that SCLI "be required to apply for a new siting." Mr. Grimes' letter forwarded a September 12, 2001 resolution of the County Board. Both the letter and the resolution are part of the Agency record. R. at 26-27.

The one-page resolution states:

> [T]he Illinois Environmental Protection Agency has requested a statement from the Saline County Board with respect to [SCLI's] local Siting Approval. R. at 27.
>
> * * *
>
> [T]he Egyptian Health Department by letter to the Landfill Committee dated August 13, 2001 stated: 'Considering the structural changes made in design of the landfill since the original siting, the Saline County Board may consider requiring a new siting of the area.' *Id.*
>
> * * *
>
> [T]he Landfill Committee has considered a Certificate of Dissolution of [SCLI] issued by the Secretary of the State of Illinois dated August 16, 2001 *Id.*

> [T]he Landfill Committee has considered the letter from Rod Wolf, Saline County State's Attorney, dated September 10, 2001 with respect to involuntary dissolution of [SCLI] *Id.*
>
> * * *
>
> [T]he Saline County Board herewith determines that structural changes have been made in the design of the landfill since the original siting and the Saline County Board requires a new local Siting Application. *Id.*

Agency's Permit Denial

The Agency denied SCLI's permit application on January 4, 2002. Agency Resp. at 4; R. at 2-3. The Agency gave the following reason for denying the permit:

> Section 39(c) of the Act states that the Illinois EPA cannot grant a permit for the development of a new pollution control facility, unless the applicant submits proof that the local siting authority has approved the facility through the process described in Section 39.2 of the Act. [SCLI's permit] application . . . does not demonstrate that the waste boundaries, proposed therein, are consistent with the local siting approval granted by the local siting authority on November 21, 1996. Furthermore, the application does not demonstrate that local siting approval has been obtained for the new pollution control facility, delineated by the proposed waste boundaries. R at 2.
>
> On November 21, 1996, the Saline County Board granted local siting approval for a lateral expansion of this landfill, as set forth in the "Application for Siting Approval", filed by Saline County Landfill, Inc. and dated July 1996. This application for siting approval specified that there would [be] a 50-foot separation berm between the existing waste footprint (Unit 1) and the lateral expansion footprint (Unit 2). According to the Application for Siting Approval, the separation berm was to be constructed of clean soil and its purpose was to isolate the waste from Unit 1 and Unit 2. R. at 3.
>
> [SCLI's permit] application . . . proposes to eliminate the separation berm and to merge the lateral expansion into the existing landfill, thereby forming a single landfill unit. The proposed change to the waste footprint would result in the placement of waste beyond the boundary approved by the Saline County Board on November 21, 1996. *Id.*

The vertical expansion over the existing landfill is not at issue in this permit appeal. Rather, one aspect of the lateral expansion is at issue: eliminating a proposed berm between the existing landfill (Unit 1) and the lateral expansion (Unit 2). The Agency admits that, for purposes of its permit denial, the only material difference between SCLI's permit application and siting application is that the former proposes to eliminate a single interior berm within the one continuous landfill mount planned for final cover. Rec. at 3.

SUMMARY JUDGMENT

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998); *see also* 35 Ill. Adm. Code 101.516(b). When ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Dowd & Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment "is a drastic means of disposing of litigation," therefore the Board should grant it only when the movant's right to relief "is clear and free from doubt." Dowd & Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

STATUTORY FRAMEWORK

Below the Board provides the Act's framework for permitting generally, landfill permitting specifically, and landfill siting.

Permitting Under the Act Generally

Section 39(a) of the Act sets the standard by which the Agency must determine whether to issue a permit:

> 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 Agency for such permit and it shall be the duty of the Agency to issue such a permit upon proof by the applicant that the facility . . . will not cause a violation of this Act or of regulations hereunder. 415 ILCS 5/39(a) (2000).

Section 39(a) also requires that the Agency identify, in a permit denial, the provisions of the Act or Board regulations that may be violated if it granted the permit. *Id.*

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

> [I]f 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) (2000).

Section 40(a)(1) also provides that petitioner has the burden of proof on appeal. *Id*. On appeal:

> [T]he sole question before the Board is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Act would occur if the permit was granted. Panhandle Eastern Pipe Line Co. v. IEPA, PCB 98-102, slip op. at 10 (Jan. 21, 1999), quoting Centralia Environmental Services, Inc. v. IEPA, PCB 89-170, slip op. at 9 (Oct. 25, 1990); *see also* 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 (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. *See* Centralia, PCB 89-170, slip op. at 8; Pulitzer Community Newspapers, Inc. v. IEPA, PCB 90-142, slip op. at 6 (Dec. 20, 1990).

The Board's review of permit appeals is generally 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); Panhandle, PCB 98-102, slip op. at 2; American Waste Processing v. IEPA, PCB 91-38, slip op. at 2, (Oct. 1, 1992). However, it is the proceeding before the Board that provides a mechanism for the petitioner to prove that issuing the requested permit would not result in a violation of the Act or Board regulations. Further, the Board proceeding affords the petitioner the opportunity to challenge the information relied upon by, and the reasons given by, the Agency for denying the permit. Alton Packaging, 162 Ill. App. 3d at 738, 516 N.E.2d at 280, quoting IEPA v. PCB, 115 Ill. 2d 65, 70 (1986).

Landfill Permitting Under the Act

The permit process described above generally applies to all permitting under the Act, including landfill permitting. Landfill permitting, however, also requires proof that the proposed new landfill or expansion has received local siting approval. Section 39(c) of the Act provides that:

> [N]o permit for the development or construction of a new pollution control facility may be granted by the Agency *unless the applicant submits proof to the Agency that the location of said facility has been approved by the County Board* of the county if in an unincorporated area, or the governing body of the municipality when in an incorporated area in which the facility is to be located in accordance with Section 39.2 of this Act. 415 ILCS 5/39 (2000) (emphasis added).

The Act's definition of "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) (2000).

Landfill Siting Under the Act

Accordingly, under Section 39(c), the applicant for a landfill development permit must submit proof that it received siting approval from the local government in accordance with Section 39.2 of the Act (415 ILCS 5/39.2 (2000)). Section 39.2, commonly referred to as "S.B. 172" for the originating legislation, provides a process through which the local government decides, based on nine statutory criteria, whether to approve or disapprove a request to site a new or expanding pollution control facility, including a new or expanding landfill.

To receive siting approval, the applicant must demonstrate to the local government that the proposed facility or expansion meets all nine criteria. The criteria include whether the proposed facility or expansion is necessary to accommodate the waste needs of the intended service area, is designed, located, and proposed to be operated so as to protect public health and safety, and is located so as to minimize incompatibility with the character of the surrounding area. *See* 415 ILCS 5/39.2(a)(i)-(iii) (2000). If the local government denies or conditionally grants landfill siting, the applicant may appeal the decision to the Board. In some instances, third parties may file an appeal with the Board to contest the local government's grant of landfill siting. *See* 415 ILCS 5/40.1 (2000).

ANALYSIS

Both SCLI and the County believe that this case is appropriate for summary judgment. Neither believes that there is any genuine issue of material fact. SCLI Mot. Summ. J. at 1; Cty. Mot. Interv. at 8. SCLI argues that the Board should reverse the Agency's permit denial as a matter of law. SCLI Mot. Summ. J. at 1. The County argues that the Board should affirm the Agency's permit denial as a matter of law. Cty. Mot. Interv. at 3. The Agency, however, which filed its response to SCLI's motion for summary judgment before the County filed its counter-motion for summary judgment, asserts that there are genuine issues of material fact over the scope of the County Board's 1996 siting approval. The Agency maintains therefore that summary judgment is inappropriate and that the case should go to hearing. Agency Resp. at 13.

The issue on appeal, as framed in the Agency's permit denial letter, is whether issuance of the requested development permit would violate Section 39(c). Section 39(c) requires the permit applicant to submit proof to the Agency that the proposed landfill expansion received local siting approval. The parties do not dispute that the vertical and horizontal expansion of the Saline County Landfill would constitute a "new pollution control facility" under Section 3.32(b) of the Act, requiring local siting approval under Section 39.2 of the Act. Nor do the parties dispute that SCLI obtained landfill expansion siting approval in 1996 from the County Board in accordance with Section 39.2.

The parties disagree, however, on whether a change in the design of the expansion between siting and permitting requires SCLI to receive another siting approval from the County Board under Section 39.2 before the requested development permit can issue under Section 39(c). The design change is the elimination of the proposed interior separation berm between the existing landfill and the lateral expansion. SCLI believes that the design change requires no additional local siting approval. The Agency and the County believe that SCLI must return to the County Board for new siting before the requested permit could issue.

Below the Board discusses the three central issues in SCLI's motion for summary judgment: (1) whether the County Board in 1996 approved a specific waste footprint location for the lateral expansion; (2) the scope of SCLI's burden of proof under Section 39(c) of the Act; and (3) the significance of removing the interior berm from the landfill's design between siting and permitting.

Location Restrictions of the County Board's 1996 Siting Approval

SCLI argues that the only location restrictions imposed by the County Board on the expansion are (1) to not exceed the acreage limits (53.5 acres total, 21 acres of vertical expansion, and 32.5 acres of lateral expansion) and (2) to stay within the 166-acre overall site boundary. SCLI Mot. Summ. J. at 2. SCLI maintains that these are the only location restrictions because only these are set forth expressly in the County Board's siting approval. SCLI asserts that the County Board did not require any specific waste footprint location. *Id.* Because SCLI's permit application proposes an expansion of 53.2 acres (21 acres of vertical expansion, 32.2 acres of lateral expansion), which would be located entirely within the 166-acre boundary for the site, SCLI argues that it has met all of the location requirements imposed in the County Board's 1996 approval.

The Agency and the County, on the other hand, assert that the County Board *did* impose a specific waste footprint location requirement. The Agency and the County maintain that SCLI's siting application depicts the waste footprint for the expansion, and that the County Board's approval incorporates by reference the siting application. Agency Resp. at 8; Cty. Mot. Interv. at .2. This position is consistent with the Agency's permit denial letter, which states that the County Board "granted local siting approval for a lateral expansion of this landfill, as set forth in the "Application for Siting Approval," filed by [SCLI]." R. at 3. The Agency argues that the disagreement with SCLI over whether the local approval included a specific waste footprint presents a genuine issue of material fact precluding summary judgment. Agency Resp. at 13. On the other hand, the County argues, in effect, that while there is disagreement over this material fact, there is no genuine issue of material fact—that is, the local siting approval clearly incorporates the siting application's waste footprint by reference. Cty. Mot. Interv. at 3.

The Board disagrees with SCLI's argument that the only location restrictions imposed by the County Board on the expansion are those expressly set forth in the County Board's

resolution and findings of fact of November 21, 1996. Besides the impracticality of requiring a local siting resolution or ordinance to set forth verbatim every location restriction from a voluminous siting record, here the County Board's approval incorporates SCLI's siting application by reference, and refers to the "site location set forth in the Application" and the "property described in the Application." R. at 4248; 4257. The Board finds no genuine issue of material fact on whether the 1996 siting approval included a specific waste footprint limitation. It did.

Scope of Section 39(c)

The parties dispute the scope of Section 39(c) of the Act. SCLI argues that Section 39(c) only requires that it submit proof to the Agency that the County Board has approved the location of the expansion, not the design of the expansion. The County and the Agency argue that Section 39(c) is not so narrow, and that SCLI must prove that the design in its permit application is consistent with the design presented to the County Board.

The terms of the Act "are not to be considered in a vacuum." M.I.G. Investments, Inc. v. IEPA, 122 Ill. 2d 392, 523 N.E.2d 1 (1988). The Act's landfill permitting and siting provisions must be construed together. Interpreting the Section 3.33(b)(2) definition of "new pollution control facility," the Illinois Supreme Court in M.I.G. stated:

> From the language of section 3(x)(2) [now 415 ILCS 5/3.32(b)(2) (2000)], it is clear that the legislature intended to invest local governments with the right to assess *not merely the location of proposed landfills, but also the impact of alterations in the scope and nature* of previously permitted landfill facilities. M.I.G., 122 Ill.2d at 400, 523 N.E.2d at 4 (emphasis added).

The Board finds that the local siting authority can, indeed, consider whether a new landfill or expansion proposed for siting is "so designed . . . that the public health, safety and welfare will be protected." 415 ILCS 5/39.2(a)(ii) (2000); *see also* City of East Peoria v. PCB, 117 Ill. App. 3d 673, 679, 452 N.E.2d 1378, 1382 (3d Dist. 1983) (the Act "unambiguously requires the county board to consider the public health ramifications of the sanitary landfill's design at a given site"); Kane County Defenders, Inc. v. PCB, 139 Ill. App. 3d 588, 592-93, 487 N.E.2d 743, 746 (2d Dist. 1985). If an applicant were allowed to substantially change its landfill design between siting approval and permitting, without reapplying for siting approval, the Section 39.2 design criterion could be rendered meaningless.

The First District Appellate Court addressed the scope of the permit applicant's Section 39(c) burden of proof in Medical Disposal Services, Inc. v. IEPA, 286 Ill. App. 3d 562, 677 N.E.2d 428 (1st Dist. 1996). The court affirmed the Board's decision requiring new local siting approval before a landfill permit could issue because ownership of the facility changed after siting approval:

> Section 39(c) does not expressly provide that the applicant for the permit must be the same entity that received local siting approval, but *reading section 39(c) and section 39.2(a) together*, we infer that section 39(c) contemplates that the applicant must be the same entity that had obtained local siting approval. Although section 39(c) refers only to the approval of the location of the facility as a condition required for permit issuance, we find determinative of the transferability issue that section 39.2(a) of the Act permits localities to consider the applicant's previous operating experience. Pursuant to section 39.2(a), which is referenced in section 39(c), localities are to approve not just the site's location and the facility but also the operator of the facility.
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> * * *
>
> [T]he local site approval process is the most critical stage of the [landfill siting] process. In this case, the Pollution Control Board did take into consideration the last sentence of Section 39.2(a) [allowing the local siting authority to consider the siting applicant's prior operating history and record of violations and convictions] and found that to allow location site approval to be transferred from an applicant to someone else would allow one to *bypass the scrutiny of the hearing process at the local level*.
>
> * * *
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> We hold that local siting approval is applicant specific and is not transferable to a new permit applicant and that a new permit applicant must reobtain such approval before permits under section 39(c) can be granted. Medical Disposal, 286 Ill. App. 3d at 565-567, 677 N.E.2d at 431-433 (emphasis added).[12]

Likewise, Section 39(c) does not expressly refer to the design of the facility. Section 39.2, however, requires the local siting authority to consider whether the facility's design will protect public health, safety, and welfare. The Board finds that a permit applicant's burden of proof under Section 39(c) is not limited to showing only that the proposed facility's location has been approved by the local government.

Significance of Eliminating the Interior Separation Berm

At its core, this dispute is about whether eliminating the interior berm fundamentally alters the nature and scope of the expansion approved by the County Board in 1996. The parties are nearly at opposite ends of the spectrum when describing the impact that removing the berm would have on the expansion approved by the County Board.

The Agency states that, by eliminating the interior berm, SCLI now proposes an expansion that "extends over the [interior] berm, outside the waste boundaries approved by the

[12] The General Assembly subsequently changed Section 39(c) to allow siting approval to be transferred. Now, when the subsequent owner or operator applies for a development permit, the local siting authority is notified and the Agency, under Section 39(i) (415 ILCS 5/39(i) (2000)), evaluates the applicant's prior experience and record of violations and convictions before issuing the permit.

Saline County Board." Agency Ans. at 7. The Agency's denial letter likewise states that the "proposed change to the waste footprint [eliminating the interior berm] would result in the placement of waste beyond the boundary approved by the Saline County Board on November 21, 1996." R. at 3. The County similarly states that the "area formerly to have been occupied by earthen materials now would, under the proposed permit, be occupied by trash," and that airspace of the former berm was "not approved by the Saline County Board for trash placement." Cty. Mot. Interv. at 3.

The Board finds, and SCLI does not dispute, that the roughly 50-foot wide area of the once-proposed clean fill berm, which would have run the length of the lateral expansion's southern edge, would contain waste under SCLI's permit application. The berm, as a "separation" berm, was by definition beyond the southern waste boundary of the lateral expansion. The Board further finds, and SCLI does not dispute, that eliminating this internal separation berm will result in waste being placed outside of the waste footprint presented in SCLI's siting application. Because SCLI's siting application was incorporated by the County Board, the Board finds that the currently proposed waste footprint extends beyond the waste footprint that received local siting approval.

The Board has stated in *dicta* that when the local siting authority establishes "boundaries for the waste 'footprint' in its siting resolutions, any proposed extension would almost certainly require additional siting approval." Waste Management of Illinois, Inc. v. IEPA, PCB 94-153, slip op. at 7 (July 21, 1994). SCLI maintains, however, that it is actually proposing "a contraction of, and not an expansion of, the facility approved at local siting." SCLI further asserts that "the nature and scope of the landfill proposed in the instant application remain the same as that approved by the local siting authority," and that its permit application "reduces the impact on the nine local siting criteria."

The Board finds that the interior berm airspace that would now be filled with waste rather than clean fill is a relatively narrow strip, wedged entirely between the old landfill and the new expansion. The Board further finds that with or without the interior berm, the exterior boundary of the entire landfill waste footprint on the 166-acre site, including the exterior waste boundary of the lateral expansion, would remain unchanged. If SCLI installed the interior berm as originally proposed, waste would have been placed immediately to the south and north of it and the ends of the interior berm would have joined the structural exterior berms on the eastern and western edges of the lateral expansion. Nor is it the case that SCLI is proposing the lateral expansion for a completely different area within the 166-acre site boundary—as proposed in the permit application, the lateral expansion remains north of and adjacent to the existing landfill as originally proposed, only smaller.

It is undisputed that the vertical expansion and the exterior boundary of the lateral expansion would remain unchanged by removing the berm. The Board finds that with or without the interior berm, both the existing landfill and the expansion would eventually be under one hill of final cover, the elevation of which would remain unchanged. Further, it is uncontested that the waste capacity of the expansion and the acreage of the lateral expansion

waste footprint would actually be smaller under the permit application than was proposed to the County Board in 1996. Accordingly, the Board finds that there would be less waste disposed at the site and less acreage devoted to waste than the County Board had contemplated.

The County nevertheless argues that removing the berm is a "basic and fundamental change" and states that it considered the presence of the berm in finding that SCLI satisfied the Section 39.2 design criterion. Cty. Mot. Interv. at 6. Besides waste being placed beyond the County Board-approved footprint, the County asserts that during the siting process, SCLI had described the interior berm as necessary for the landfill's structural support. The County states that SCLI's permit application proposes "some other methods of structural support" over which the County Board had no say. Cty. Mot. Interv. at 8. The County maintains that without the interior berm, waste from the existing landfill would not be kept separate from waste to be placed in the lateral expansion, *i.e.*, there would be one landfill unit instead of the two separate units proposed to the County Board. The County argues that these issues of "structural stability and separation of old and new facilities" are valid siting concerns of the County Board and that SCLI's "suggestion that technical promises made during siting hearings can be ignored in permit applications is simply unsupportable." Cty. Mot. Interv. at 4.

The Board agrees with the County that, contrary to the siting application, the permit application design calls for one landfill unit instead of two. Accordingly, nothing would keep waste from the existing landfill separate from waste to be placed in the lateral expansion. The Board further finds that with only one unit, the existing landfill and the lateral expansion would not have independent groundwater monitoring systems, as had been proposed to the County Board, but instead would have one groundwater monitoring system. As the County points out, SCLI's siting application had proposed having groundwater monitoring wells in the separation berm to monitor Unit 1 for contaminants. Cty. Mot. Interv. at 8. The Board notes accordingly that there would have been compliance points for Unit 1 very close to the northern edge of the existing landfill. The Board further notes that with monitoring wells in the separation berm, any potential zone of attenuation (the area within which contaminant concentrations are allowed to exceed applicable standards) could be smaller than it would be otherwise. The County states that SCLI now proposes "some other . . . location for groundwater monitoring wells" over which the County had no control. *Id.*

Moreover, the Board finds that in the siting application, with two landfill units proposed, SCLI represented that it would fill Unit 1 (the existing landfill and the vertical expansion) with waste to final grade before it would so fill Unit 2 (the lateral expansion comprised of cells 1-4). R. at 4671. The siting application further stated that Unit 1 would have final cover and be certified closed as soon as practicable after filling is complete. In the siting application, SCLI estimated that Unit 1 would be full in five years. R. at 4676. SCLI's final cover would entail placing a composite layer of compacted clay and synthetic material over the waste, and topping that composite layer with soil and vegetation.

In SCLI's permit application, as noted, the proposed removal of the separation berm would result in one landfill unit, not two. The Board notes that with one landfill unit, under

the Board's regulations, SCLI would not have to begin any final closure activities until it receives the final load of waste at the landfill site. *See* 35 Ill. Adm. Code 811.110(e), (f). SCLI's siting application estimated that the "horizontal and vertical expansions will provide waste disposal service for a period of approximately 20 years." R. at 3436. The permit application further stated that the "[c]losure of each cell will be accomplished as soon as practicable, once cells reach final grade" (R. at 3436) and that "final cover will be placed as final waste grades are attained." R. at 3628. The "general sequence of cell development will proceed from south to north." R. at 3436. SCLI stated in the permit application that the vertical expansion of the existing landfill would be filled concurrently with cells 1 and 2 of the lateral expansion to ensure stability. *Id.* According to the permit application, however, cells 1 and 2 of the lateral expansion would not be filled to final grade until sufficient waste was placed in the last two cells of the lateral expansion (cells 3 and 4) to ensure a stable landform. *Id.* Cell 4 is estimated to begin development in 16 years. *Id.*

The Board notes that the County Board, in determining that SCLI had satisfied the Section 39.2 criteria, approved the design of an interior berm about which the Agency, in a draft permit denial letter, raised concerns over safety and stability, indicating that the interior berm may not comply with Board regulations. Of course, it is the Agency, not the County Board, that is charged with reviewing the design for compliance with the Act and Board regulations. The Agency, in rendering a permit decision, must determine whether the landfill design will violate the Act or Board regulations. If it will, regardless of whether a local siting authority approved the design, a development permit cannot issue. The Agency admits that the absence of the berm does not raise an environmental or safety concern or violate the Board's landfill regulations. Indeed, the Agency's permit denial is based on no such ground.

Board Ruling on SCLI's Motion for Summary Judgment

The Board must synthesize the siting and permitting provisions of the Act, consistent with M.I.G. and Medical Disposal. The Board accordingly holds that, under the specific circumstances of this case, the Agency's permit denial will be upheld unless SCLI can demonstrate, based on the Agency's record, that there is not a reasonable likelihood that the design change at issue would result in a negative impact on any Section 39.2 siting criterion. On this score, there is a genuine issue of material fact, making summary judgment inappropriate.

Of course, this case is not a siting appeal. Neither the Agency nor the Board can substitute its judgment for that of the 1996 County Board that granted siting. But the Act requires the Agency to determine whether SCLI submitted adequate proof of local siting, and the Act in turn requires the Board to determine whether the Agency's decision was in error. The Board accordingly must consider the County Board's 1996 siting approval to decide how to ultimately rule in this permit appeal. A hearing will provide an opportunity for the parties to address the disputed significance of berm removal to the nature and scope of the expansion approved in 1996. The entire 1996 local siting record, as well as the County Board's 2001

resolution calling for new siting, is included within the Agency record, and the County is a party to this proceeding.

This approach protects the interests of the County Board and local citizens, as well as the integrity of the Section 39.2 siting process, "because it is essential to implement the legislative intent of providing meaningful local approval of the siting of pollution-control facilities." Medical Disposal, 286 Ill. App. 3d at 566, 677 N.E.2d at 432.. This approach also reflects the Act's structure—permitting necessarily follows siting, and, practically speaking, some changes from earlier designs will almost inevitably occur and indeed may have to occur to comply with the Act and Board regulations.

The County suggests that the Agency cannot issue the development permit because SCLI "asks for something different" than proposed in 1996. Cty. Mot. Interv. at 3. According to the County, "the issue is whether the application for a permit is for *the same facility* for which siting approval was granted." Cty. Mot. Interv. at 6. The Board finds that this standard, for all practical purposes, would likely be unattainable. Surely not every single design change, however slight, requires new local siting proceedings. Such a complete lack of design flexibility is neither workable nor required by the Act. Here, the Agency did not deny the permit because the liner of cell 1 would be at a higher elevation than proposed to the County Board in 1996 or because the exterior western berm of the lateral expansion would be thicker than proposed to the County Board in 1996. Nor does the County complain of those changes. However, if those had been the only changes made by SCLI after siting approval, the Agency, according to the County's logic, would have erred in issuing the development permit because there would not have been complete consistency between the siting and permitting design.

An applicant that has been through local siting, an often expensive and time-consuming process, should not have to return to get new local siting approval for every single design change without regard to the import of the change. Just as the Board will not allow the local siting process to be effectively bypassed, the Board will not send a permit applicant back to restart a process started roughly six years ago without justification grounded in the words and policies of the Act. *See* Medical Disposal, 677 N.E.2d at 432 (suggesting no additional siting needed when the "facility is going to be substantially the same as originally proposed").

However, if there is a reasonable likelihood that placing waste in the interior berm airspace, creating a single unit landfill, would result in a negative impact on any Section 39.2 criterion, the Board will affirm the Agency's permit denial. *See* Kane County Defenders, Inc. v. PCB, 139 Ill. App. 3d 588, 487 N.E.2d 743 (2d Dist. 1985) ("the county board hearing, which presents the only opportunity for public comment on the proposed site, is the most critical stage of the of the landfill site approval process").

Assessing the design change's impact to the nature and scope of the expansion against the siting criteria is supported by case law. The Illinois Supreme Court in M.I.G. focused on increased waste capacity in holding that a vertical expansion required local siting approval:

> To expand the boundaries of a landfill, whether vertically or laterally, in effect, increases its capacity to accept and dispose of waste. An increase in the amount of waste contained in a facility *will surely have an impact on the criteria set out in section 39.2(a), which local governmental authorities are to consider* in assessing the property of establishing a new pollution control facility. Indeed, adjusting the dimensions of a landfill facility to increase the amount of waste stored will surely have an impact on "the danger to the surrounding area from fire, spills or other operational accidents" and "the character of the surrounding area." M.I.G., 122 Ill. App. 2d at 396, 523 N.E.2d at 5 (emphasis added).

In Bi-State Disposal, Inc. v. IEPA, 203 Ill. App. 3d 1023, 561 N.E.2d 423 (5th Dist. 1990), the Fifth District Appellate Court held that that local siting approval was required before a modified landfill permit could issue. The modification sought to reopen for disposal a mine cut bisecting the site that would increase the landfill's waste disposal capacity, impacting the Section 39.2 criteria:

> This increased capacity *impacts on the criteria local governmental authorities consider* in assessing the propriety of establishing a new regional pollution control facility.
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> * * *
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> Petitioners seek to vertically expand, although into a ditch instead of above the ground [as in M.I.G.], the boundaries of the landfill in question. *** Petitioners must seek local siting approval before applying to the [Agency] for a permit. Bi-State, 203 Ill. App. 3d at 1026, 561 N.E.2d at 426 (emphasis added).

Likewise, in Waste Management, the Board held that no additional local siting approval was required and reversed the Agency's permit denial: the requested permit modification to reconfigure the landfill would "result in a net loss in volumetric capacity to the landfill" and "accordingly shorten the life of the landfill, *decreasing the impacts on the criteria of Section 39.2(a)* as previously considered by Christian County." Waste Management, PCB 94-153, slip op. at 7 (July 21, 1994)(emphasis added). The Board further noted that "the stipulated purpose of the proposed redesign is to minimize the impacts of the landfill on the environment" and found that the "'nature and scope' of the landfill remain the same as that approved by Christian County." *Id*. However, in Waste Management, unlike the instant case, the local siting authority had imposed no waste footprint on the expansion.

CONCLUSION

SCLI has the burden to prove that the development permit it requested would not violate the Act. The Agency's denial letter frames the issue on appeal before the Board. The Agency's denial letter states that Section 39(c) of the Act would be violated if it issued the

requested permit. Before the Agency can issue a development permit, Section 39(c) requires the permit applicant to submit proof that the proposed landfill expansion has received local siting approval. Local siting approval under the Section 39.2 criteria entails the local siting authority considering not only the location of a proposed expansion, but also the impacts of the proposed expansion's design. During the permit application process, SCLI changed the design of the landfill expansion from that presented to the County Board during siting. The change is the removal of the interior separation berm that would have been between the existing landfill and the lateral expansion. The parties dispute the significance that the change would have on the nature and scope of the expansion approved by the County Board in 1996.

The Board notes that if each and every design change made in permitting a landfill expansion automatically meant the redesigned expansion lacks local siting approval, the result could be a nearly endless loop of siting, followed by permitting, followed by siting, *ad nauseam*. On the other hand, local siting review could be undermined if development permits were allowed to issue for designs that substantially differed from the design considered by the local siting authority. In this case, the significance of the design change from siting to permitting is necessarily gauged by the impact the change could reasonably have on the Section 39.2 siting criteria. SCLI therefore has the burden to prove that there is not a reasonable likelihood that the design change at issue would result in a negative impact on any Section 39.2 siting criterion. If SCLI fails to meet this burden, then the landfill expansion proposed in its permit application does not have local siting approval and therefore the requested permit would violate Section 39(c) of the Act.

Because SCLI has moved for summary judgment, the Board construes the filings strictly against SCLI. The Board cannot find that SCLI's right to relief "is clear and free from doubt." Dowd & Dowd, 181 Ill. App. 2d at 483, 693 N.E.2d at 370, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). "Where doubt exists as to the right to summary judgment, the wiser judicial policy is to permit resolution of the dispute by a trial." Indian Prairie Comm. Unit School Dist. No. 204 v. IEPA, PCB 93-180, slip op. at 4 (Dec. 4, 1997), quoting Jackson Jordan, Inc. v. Leydig, Voit & Mayer, 158 Ill. 2d 240, 249, 633 N.E.2d 627, 630 (1994). The Board finds that there is a genuine issue of material fact as to whether removing the interior separation berm from the landfill expansion's design, and implementing corresponding changes, fundamentally alters the nature and scope of the landfill expansion approved by the County Board in 1996. The Board accordingly denies SCLI's motion for summary judgment.

HEARING

SCLI has represented that it is rapidly running out of landfill airspace and that it could face temporary closure or drastic waste intake reductions if it cannot avail itself of the 2002 construction season to begin the expansion. SCLI Mot. Exp. at 1-2. Consistent with the Board's prior grant of SCLI's motion for expedited consideration, the Board directs this case to hearing on April 23, 2002. A hearing for April 16, 2002, had been scheduled and publicly

noticed, but the hearing was continued on the record until April 23, 2002, pending the Board's rulings today.

Today's findings considerably narrow the dispute among the parties. The Board directs the hearing officer to limit evidence to the remaining contested issue: whether there is a reasonable likelihood that the design change resulting in permit denial would result in a negative impact on any Section 39.2 siting criterion. Consistent with the Act and long-standing precedent, the Board's review is typically limited to the information relied upon by the Agency when it denied the permit, *i.e.*, the Agency's record, which, in this case, includes the 1996 siting record of the County Board. The hearing will nevertheless afford the opportunity for testimony and cross-examination on whether the design change described in the Agency's permit denial substantially changes the nature and scope of the landfill expansion approved in 1996. The Board further directs the hearing officer to arrange for the hearing transcript to be filed as soon as practicable and to place the parties on an expedited, simultaneous briefing schedule.

ORDER

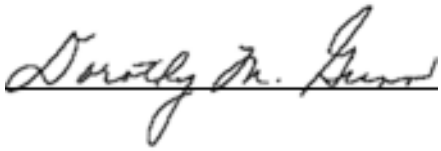
1. The Board denies SCLI's motion for summary judgment.

2. The Board grants the County's motion to intervene.

3. The Board denies the County's counter-motion for summary judgment.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 18, 2002, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board