ILLINOIS POLLUTION CONTROL BOARD
February 1, 1996

THE COUNTY OF KANE, ILLINOIS, and WASTE MANAGEMENT OF ILLINOIS, INC.,	)	
Petitioners,	)	
v.	)	PCB 96-85
	)	(Permit Appeal - Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

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

On October 19, 1995, pursuant to Section 40(a)(1) of the Illinois Environmental Protection Act (Act) (415 ILCS 5/40(a)(1)), the County of Kane, Illinois (Kane County) and Waste Management of Illinois, Inc. (WMII) (the petitioners or applicants) timely filed a petition for review of the Illinois Environmental Protection Agency's (Agency) final decision denying a permit for the significant modification of Settler's Hill Recycling and Disposal Facility (Settler's Hill or Settlers' Hill landfill). Kane County and WMII seek reversal of the Agency's denial. The basis for that denial, set forth in a September 15, 1995 final determination letter, was that Section 39(c) and 35 Ill. Adm. Code 812.105 would be violated if the Agency were to grant a permit for the development and operation of Settler's Hill. Specifically, the Agency's final determination letter stated:[1]

> The application proposes a "new pollution control facility" as defined in Section 3.32(b) of the Act. However the application does not provide proof that the applicant has obtained siting from the City of Geneva for the facility through the process described in Section 39.2 of the Act. While the applicant has obtained siting from Kane County, they must also receive siting approval from the City of Geneva because concurrent jurisdiction exists pursuant to Section 39(c) of the Act. Therefore, if this permit were issued, Section 39(c) of the Act and 35 IAC 812.105 may be violated.

This matter is now before the Board pursuant to two cross-motions for summary judgment filed by each of the parties in this proceeding. On December 1, 1995, the petitioners filed a motion for summary judgment and supporting memorandum of law, and on December 4,

[1] Although the Agency's final determination letter cited various technical inadequacies relating, in addition to siting, to location standards, hydrogeology/groundwater monitoring program and groundwater impact assessment, the petition for review solely challenges the Agency's decision as to pollution control facility siting pursuant to Section 39(c).

1995, the Agency filed a motion for summary judgment. In addition to the Board receiving timely-filed responses, pursuant to a hearing officer order allowing for such a filing, the City of Geneva (Geneva) also submitted an amicus curiae response to the motions for summary judgment on December 8, 1995.[2] Geneva supports the decision of the Agency as it believes that a permit to expand the original Settler's Hill landfill should not be granted until siting authority is also conferred by Geneva as well as Kane County.

For the reasons set forth below, we grant the motion for summary judgment filed by the Agency and deny that filed by the petitioners. Accordingly, we also affirm the Agency's final determination of September 15,1995 denying Kane County and WMII a significant modification permit.

ISSUE PRESENTED FOR REVIEW

In these cross motions for summary judgment, the issue presented for review is whether the Agency was correct in its denial of a permit for significant modification of the Settler's Hill landfill on the basis that Geneva shares concurrent jurisdiction with Kane County over the siting approval process pursuant to Section 39(c) of the Act.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The Illinois Environmental Protection Act

415 ILCS 5/39(c) of the Act provides:

> Except for those facilities owned or operated by sanitary districts organized under the Metropolitan Water Reclamation District Act no 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.

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[2] On November 17, 1995, Chief Hearing Officer Michael L. Wallace issued a hearing officer order which, among other things, denied a petition for intervention filed by the Geneva on October 25, 1995. The hearing officer found that the Act does not specifically provide for third-party permit appeals, and therefore, intervention would not be appropriate as Geneva did not have standing to bring a permit appeal in the first instance. The hearing officer order did, however, give Geneva the opportunity to participate in this proceeding by allowing Geneva to file an amicus curiae response to the motions for summary judgment and to participate in any hearing held by the Board to the extent our procedural rules for public comment allow. Geneva subsequently filed a Motion for Review of Hearing Officer's Ruling on December 8, 1995, requesting that the Board overrule the hearing officer's denial of intervenor status. As we today grant summary judgment in favor of the Agency and affirm the Agency's decision that siting must be obtained from Geneva in order to receive a permit to develop and operate a proposed expansion to Settler's Hill landfill, we do not address the question of intervention.

415 ILCS 5/39.2(a) of the Act provides:

> The county board of the county or the governing body of the municipality, as determined by paragraph (c) of Section 39 of this Act, shall approve or disapprove the request for local siting approval for each pollution control facility which is subject to such review. (415 ILCS 5/39.2(a))

415 ILCS 5/3.32 of the Act provides:

> (a) "Pollution Control facility" is any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility or waste incinerator.***
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> (b) A new pollution control facility is
>
> (1) a pollution control facility initially permitted for development or construction after July 1, 1981; or
>
> (2) the area of expansion beyond the boundary of a currently permitted pollution control facility; or
>
> (3) a permitted pollution control facility requesting approval to store, dispose of, transfer or incinerate, for the first time, any special or hazardous waste.

The Illinois Pollution Control Board Regulations

35 Ill. Adm. Code 810.103 provides:

> "Facility" means a site and all equipment and fixtures on a site used to treat, store, or dispose of solid or special wastes. A facility consists of an entire solid or special waste treatment, storage or disposal operation. All structures used in connection with or to facilitate the waste disposal operation shall be considered a part of the facility. A facility may include, but is not limited to, one or more solid waste disposal units, buildings, treatment systems, processing and storage operations, and monitoring stations.

35 Ill. Adm. Code 812.105 provides:

> Approval by Unit of Local Government.
>
> The applicant shall state whether the facility is a new regional pollution control facility[3], as defined in Section 3.32 of the Act, which is subject to the

[3] "Regional" was removed from the term "new pollution control facility" in Section 39(c) of the Act by P.A. 88-861, effective December 22, 1994; however "regional" has not yet been removed from the regulatory definitions.

site location suitability approval requirements of Sections 39(c) and 39.2 of the Act. If such approval by a unit of local government is required, the application shall identify the unit of local government with jurisdiction. The application shall contain any approval issued by that unit of local government. If no approval has been granted, the application shall describe the status of the approval request.

FACTUAL AND LEGAL BACKGROUND

This permit appeal concerns Settler's Hill landfill which is owned by Kane County and operated by WMII, and is a currently-permitted and operating sanitary landfill located at 1031 East Fabyan Parkway in Kane County, Illinois. (R. at 30.)[4] Settler's Hill received original siting approval to develop and operate as a sanitary landfill in1982 until approximately 1993. Because the landfill site would be located within the boundaries of both Kane County and Geneva, Settler's Hill was originally approved by both Kane County and Geneva as the two jurisdictions authorized to conduct the siting process and render a siting decision pursuant to Section 39.2 of the Act. (Pet. at 2.) Each unit of local government reviewed and rendered a siting decision covering the entire landfill.

The facility's 1982 design called for the site to be located in Kane County with 27 acres specifically in the incorporated limits of Geneva.[5] Within Geneva's city limits and on the 27 acres, at the time of the landfill's original siting and at the present time, are the landfill's access road, the landfill entrance gate, the scales, and the administrative buildings. (R.XI at 3611; Supp. R. at 17.) The 1982 siting approvals also gave Geneva some operational responsibility for oversight of Settler's Hill. Those responsibilities, which continue today, include: monitoring the landfill operations (in addition to monitoring the initial construction and development); receiving documents relating to the waste stream; performing groundwater monitoring activities and reporting; performing all construction reporting and documentation; and monitoring the City of Geneva's Well No. 7. (*Geneva v. WMII and Kane County* (July 21, 1994) PCB 94-58, slip op. at 4.)[6]

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[4] Hereinafter, the record will be referred to as "R. at ___." The petition will be referred to as "Pet. at ___." The petitioners' motion for summary judgment will be referred to as "Pet. Mot. at ____." The Agency's motion for summary judgment will be referred to as "Agency Mot. at ____."

[5] As approved in 1982, the original landfill contained 150 acres with 101 acres for actual waste disposal at a maximum vertical height of 800 feet. (*Geneva*, slip op. at 4.)

[6] In 1987, Kane County approved an additional vertical expansion of Settler's Hill. That siting decision was the subject of a third-party appeal to the Board. (*Valessares et al. v. Kane County* (July 16, 1987) 79 PCB 106, PCB 87-36.) Geneva was not a party to that proceeding. The issues in that appeal, however, are not relevant to this instant matter other than the fact that in that case, we were not asked by any party (or interested person) to review the question of whether Geneva shared concurrent jurisdiction with Kane County. We note that, according to WMII and Kane County, the 141-acre vertical and horizontal expansion which occurred at that time, was located only in Kane County, and Kane County's decision did not contemplate any change (other than continued use) of the access roads, the gate, the scales, or the administration buildings. The approval did extend the life of the landfill for an additional 9.96 years, or until 2003. (*Geneva*, slip op. at 4.)

Regarding the proposed expansion at issue, in the spring of 1993 WMII submitted a landfill siting application to Kane County for a proposed expansion for Settler's Hill landfill and received site location suitability approval on January 11, 1994. The proposed expansion would increase the landfill by seven acres (horizontally and vertically) from 291 to 298 acres and provide an additional 8.96 years of life until the year 2012. (*Geneva*, slip op. at 6.) The area for waste acceptance planned to be increased is physically located outside of Geneva's corporate limits and is actually drawn up to the border of Geneva's city boundary. (*Id.*) WMII plans to continue using the only ingress and egress road to the landfill which is located on the Geneva portion of the landfill and, additionally, plans to continue the use of the entrance gate, the scales and the administrative buildings which are all also located within Geneva's city limits. (*Id.*) WMII did not submit an application for the proposed expansion to Geneva.

Kane County's 1994 decision was challenged by Geneva when it filed a petition for review contesting Kane County's decision on both fundamental fairness grounds and on whether the siting approval satisfied several of the statutory criteria (relating to "need", "safety" and the "Solid Waste Management Plan"). Geneva also requested, alternatively, that if the Board were to uphold Kane County's decision, that the Board add a condition to the siting decision requiring WMII to submit an expansion application to Geneva. On July 21, 1994, the Board affirmed Kane County's decision regarding the statutory criteria and for the reasons stated below, declined to grant Geneva's request for additional relief:

> Geneva's request for "alternative relief" is denied. Geneva has failed to cite the Board to any authority for the novel proposition that the Board may add conditions to any local siting approval. Such action would be inconsistent with the Board's role as reviewing body in SB172 cases. [Citations omitted]. Our duty is to review the local government decision, as written, and to affirm or reverse, not to rewrite it by adding conditions. The question of whether additional siting approvals are or are not needed by Settler's Hill prior to expansion is not properly before the Board in this proceeding. There has been no dispute that Kane County's approval is needed, and this appeal may properly challenge only the merits of its decision and decision-making process. *** The Agency will determine pursuant to Section 39(c) whether it has received evidence of necessary approvals when and if WMII files a [permit] application for expansion of Settler's Hill. If the Agency should determine that any approvals are lacking, WMII may challenge such determination in a permit appeal. [Citation omitted.] (*Geneva*, slip op. at 23-24.)

After entering our decision, WMII and Kane County submitted a permit application to the Agency to expand the existing facility on March 20, 1995 (R. at 22) subsequent to which the Agency held a public hearing on August 3, 1995 in Kane County. On September 15, 1995, the Agency issued a final determination letter which is the subject of this petition for review and the cross motions for summary judgment.

ARGUMENTS OF THE PARTIES

Regarding the petitioners', the Agency's and Geneva's positions on the issue of summary judgment, all agree that summary judgment is appropriate in this case, but each for different reasons. They also all agree that there are no material issues of fact which require that this matter proceed to hearing.

The petitioners argue that summary judgment is proper on the grounds that siting jurisdiction is conferred under Section 39(c) and Section 3.32(b) only to a unit of local government for new pollution control facilities which are within that government's borders. In this case, the only area being expanded is the area of waste disposal acceptance and no portion of this expansion is located within Geneva's incorporated limits. Therefore, WMII and Kane County argue that the access road, the scales, etc., are not part of the "subject site" or the "sanitary landfill" and therefore, the activities that take place on them are purely "ancillary" to the landfill activity itself, are not part of the "facility" or the "new pollution control facility." According to the petitioners, because these structures are not part of the facility or the new pollution control facility, that WMII intends to continue their use does not confer Geneva with concurrent jurisdiction. The petitioners also strongly argue that the proposed expansion will not "impact" the roads, the scales, the entrance gate or the administrative buildings to any greater extent than already provided for in the prior siting processes. Therefore, the petitioners reason that they cannot be considered part of the "new pollution control facility" and Geneva need not engage in a siting process to approve the new pollution control facility. (*See* Pet. Mot. at 11.) Specifically, petitioners cite to, among other cases, *Laidlaw Waste Systems v. McHenry County Board* (June 16, 1988) PCB 88-27 and *City of Elgin et al v. The County of Cook* (Ill. Sup. Ct. November 2, 1995) 1995 Ill. Lexis 205) for these and other propositions.

Regarding the Agency's motion for summary judgment, the Agency argues that the definitions at issue for "new pollution control facility" in the Act at 3.32(b) and "facility" in the Board's regulations at Section 810.103 (35 Ill. Adm. Code 810.103) encompass the portion of the facility within the Geneva city limits and, therefore, confer siting jurisdiction on Geneva. (*See* Agency Mot. at 6-7.) For its part, Geneva, in its amicus curiae response to the motions for summary judgment, argues that Geneva retains jurisdiction over the site because the city rendered the original siting approval in 1982 and is greatly concerned about the continued use of the structures located on the landfill site within its borders beyond the end-use date approved in 1982.

ANALYSIS

The basic purpose of the Illinois pollution control facility siting process is to allow units of local government greater control over the waste disposal practices in their communities and thus to give them the power to determine the site location suitability of a proposed new pollution control facility. (*American Fly Ash Co. v County of Tazewell* (3rd Dist. 1983) 120 Ill. App. 3d 57, 457 N.E.2d 1069, 1073, 75 Ill. Dec. 627.) The Illinois Environmental Protection Act has established a system of checks and balances integral to the Illinois system of environmental governance and in particular to the Illinois siting process to effectuate this control over siting.

Section 39.2 of the Act sets forward the procedures and criteria for conducting a pollution control facility siting process at the local government level and Section 39(c) ensures that when a facility has reached the permitting stage of the process, the Agency determines whether the proper siting approvals have been obtained which authorize the location of the new pollution control facility in the community. Pursuant to Section 40 of the Act, the Agency's determination is appealable to the Board.

The local siting process (Sections 39(c) and Section 3.32(b)of the Act) also clearly provides the local governments with a voice in any proposed expansions that may be planned for an existing pollution control facility. It is undisputed that an expansion of an existing facility constitutes a "new pollution control facility" and is required to go through the siting process for site location suitability approval at the local community level. (*See M.I.G. Investments v. IEPA* (1988) 122 Ill.2d 392, 400, 523 N.E.2d 1, 4, 119 Ill. Dec. 533 ("it is clear that the legislature intended to invest local governments with the right to address not merely the location, but also the impact of alterations in the scope and the nature of previously permitted landfill facilities."))

In this case, while there is no question that it is appropriate for the proposed expansion to Settler's Hill go through the local siting process as it did when WMII submitted an application for expansion to Kane County, we must determine whether the proposed expansion must also be approved through a siting process before Geneva as a unit of local government sharing concurrent jurisdiction over the new pollution control facility with Kane County.[7] We agree with the Agency and find that there is concurrent jurisdiction in this case.

We reach this decision guided by the specific language of 39(c) which provides for a unit of local government to provide siting approval for proposed pollution control facilities and their expansions and additionally by the legislative history of the local siting law which explains that the legislature envisioned some instances of "concurrent jurisdiction" between municipalities and counties. Specifically on July 1, 1981, Representative Peg Breslin, the House sponsor of the SB172 bill, explained that permittees:

> must before getting a permit from the EPA, first secure the permit from the county or the local unit of government in which they lie. If they lie totally within a municipality then they get it from the municipality, if they lie in the county, in the unincorporated area they get the permission from the county, if they overlap they get it from both. And this must be granted prior to the EPA going ahead with its siting approval. (Conference Committee Report, #1, 82nd General Assembly, House of Representatives, July 1, 1981 at 191-92.) (Emphasis added.)

Though the additional seven acres of waste disposal area proposed to be added to Settler's Hill are located only in Kane County (and outside of Geneva's city limits), we find that there is an "overlap" here conferring concurrent jurisdiction. We do not agree with the overly

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[7] *See e.g. A.R.F. Landfill Corp. v Village of Round Lake Park, et al.* (July 16, 1987) PCB 87-34, 79 PCB 92 wherein the Village had tried to defer rendering a siting decision to another unit of local government and we held that because the Village shares concurrent jurisdiction, the Village was required to conduct the siting process.

literal interpretation of Section 39(c) and Section 3.32(b)(2) of the Act proponed by the petitioners that these provisions strictly require that they need only provide proof of siting approval from Kane County because the specific geographic area of the proposed waste expansion is located outside of Geneva and solely within Kane County.

Instead, we agree with the Agency that the "new pollution control facility" at issue includes not only the expansion to the waste disposal area located in Kane County, but also the planned "continued use" of the structures located on the portion of the landfill located within Geneva's corporate limits: the access road, the entrance gate, the scales and the administrative buildings. Although the definition at Section 3.32(b)(2) provides that a "new pollution control facility" is the area of expansion beyond the boundary of a currently permitted pollution control facility. "Facility" is defined at Section 810.103 as including buildings, monitoring stations, and solid waste disposal units (which are contiguous areas used for solid waste disposal under Section 810.103 of the Board's regulations). We find that "facility" encompasses the structures and access road located within Geneva's incorporated limits. Therefore, because the access roads, the administrative buildings, the scales, etc., located in Geneva's incorporated city limits will "continue in use" in some way under the proposed expansion, they are, in fact, part of the proposed expansion, triggering concurrent jurisdiction.

Importantly, because this is the petitioners' point with which we most strongly disagree, WMII and Kane County emphasize that the structures' location in Geneva cannot confer concurrent jurisdiction because no part of the plan for the proposed expansion envisions a "greater impact" or even a change in impact to the access road, the gate, the scales and the administrative buildings located within Geneva's borders of the landfill, than that which was previously approved by Geneva in 1982, or by Kane County in 1987. That WMII and Kane County claim that there will be no impact, or no greater "use" is not dispositive of the issue of whether these structures are part of the facility or the new pollution control facility, and certainly does not lead us to the conclusion Geneva lacks jurisdiction over siting.

In our opinion, what is determinative of whether these structures are a part of the "facility" definition and thus the "new pollution control facility" definition, is that there will be a "continued use" of these structures under the proposed expansion. The petitioners themselves agree that they seek to at least continue their use of these structures by: (1) extending the life of the landfill beyond the original termination date approved by Geneva in 1982; (2) increasing the area for waste disposal acceptance by seven acres; (3) continuing the use of the main access road through Geneva onto the portion of the site currently accepting waste; (4) checking sanitary waste loads at the gate; (5) using the scales to weigh in the sanitary waste trucks; and (6) continuing to headquarter the landfill's administrative buildings within borders of Geneva. We believe these continued uses are sufficient to conclude that the structures located in Geneva's city limits are encompassed within the definition of "facility."

The caselaw cited by the petitioners, *Laidlaw Waste Systems v. McHenry County Board* (June 16, 1988) PCB 88-27 and *City of Elgin et al v. The County of Cook* (Ill. Sup. Ct. November 2, 1995) 1995 Ill. Lexis 205, does not persuade us otherwise. Laidlaw was before us based upon Laidlaw's appeal of a denial of siting authority by McHenry County. While the issue

of dual jurisdiction over a new pollution control facility was not before us, we did address the term "facility" in dicta by responding to comments filed by the Village of the Lake of the Hills (Village), an interested participant in the Board's hearing on the petition to review siting. Specifically, the Village was concerned that Laidlaw's application for siting included a promise to make improvements to a road and move a water well, both of which would take place within the corporate limits of the Village, outside unincorporated McHenry County, and entirely off of the landfill site altogether. The Village argued that these aspects of Laidlaw's proposal could not properly be considered part of Laidlaw's "site" over which McHenry County would have jursidiction.

After discussing that the Village was confusing the word "site" with the word "facility", the Board opined, by utilizing a common usage definition of the word facility, that the features in question were not part of the proposed facility but were merely part of the "surrounding environment" and that Laidlaw and McHenry County could appropriately consider the impact to that environment. Applying again a common usage definition of facility, we are convinced that the features within Geneva's jurisdiction are indeed a part of the proposed facility. As defined in the American Heritage Dictionary, 484 (2nd ed. 1991), "facility" means "something created to serve a particular function." Certainly, the seven-acre area of waste expansion alone, without access to it and administration of it, cannot serve any function whatsoever. To conclude as WMI and Kane County would have us conclude, that the proposed new pollution control "facility" is only the seven acres of waste expansion located in Kane County is to ignore a common usage of the word.

The petitioners' reliance on the recent Illinois Supreme Court decision in *City of Elgin* is likewise misplaced. Interestingly, in that case, one of the petitioners before us today, Kane County, argued for siting jurisdiction over the Bartlett Balefill. While, the balefill was not proposed to be located in any part of Kane County, but was merely contiguous to it, Kane County argued that it should have a voice in the question of siting pursuant to the same law we analyze today. The Court held "the mere ownership of the Kane County acreage does not make this acreage part of the balefill for purposes of section 39(c)." (*City of Elgin*, 1995 Ill. Lexis 205 at 33.) Accordingly, that case stands for the proposition that jurisdictions owning contiguous but unrelated land do not have a right to conduct a siting process. It does not apply to the factual situation here where the interests of Geneva are so inextricably linked to Settler's Hill landfill. Clearly, the 27 acres within Geneva's incorporated limits are part of the facility and it is appropriate that Geneva have an opportunity to conduct a siting hearing over the proposed expansion to Settler's Hill landfill.

DECISION

We hereby affirm the Agency's denial of a significant modification permit to WMII and Kane County on the basis that Section 39(c) and Section 812.105 of the Board's regulations would be violated. The Agency cannot issue a permit for the development and operation of a proposed expansion to Settler's Hill without evidence of Geneva's issuance of approval of the proposed expansion pursuant to Section 39.2 of the Act. We find that the "continued use" of the access road, the scales, the entrance gate and the administrative buildings is beyond the siting

pproval rendered by Geneva and Kane County originally and falls within the definition of new pollution control facility as defined in Section 3.32(b)(2) of the Act.

ORDER

We hereby grant the Agency's motion for summary judgment and affirm the Agency's final determination of September 15,1995 denying Kane County and WMII a significant modification permit. In doing so, we deny WMII and Kane County's motion for summary judgment. This docket is closed.

IT IS SO ORDERED.

Board Member M. McFawn concurs.

Section 41 of the Environmental Protection Act (415 ILCS 5/41) provides for the appeal of final orders of the Board within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (*See also* 35 Ill. Adm. Code 101.246, Motions for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order were adopted on the 1st day of February, 1996, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board