ILLINOIS POLLUTION CONTROL BOARD
May 16, 2002

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

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

DANIEL P. MERRIMAN, SPECIAL ASSISTANT ATTORNEY GENERAL, OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF RESPONDENT; and

STEPHEN F. HEDINGER, SPECIAL ASSISTANT STATE'S ATTORNEY, OF HEDINGER & HOWARD, APPEARED ON BEHALF OF INTERVENOR.

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

Petitioner Saline County Landfill, Inc. (SCLI) owns and operates a landfill approximately five miles southeast of Harrisburg in Saline County. The landfill, which receives municipal solid waste, is known as the Saline County Landfill and was originally sited in 1982. In November 1996, SCLI received siting approval from the Saline County Board (County Board) to expand the landfill vertically and laterally. 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 separated waste in the existing landfill from waste in the lateral expansion.

This interior separation 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. The berm was to have been a minimum of 50 feet wide and made of clean soil. The change in design called for waste to be placed in the airspace that would have been occupied by the berm. 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. The Board allowed the County of Saline (County) to intervene in support of the Agency's decision. For the reasons provided below, the Board affirms the Agency's decision to deny SCLI's application for a development permit.

Before turning to the substance of this appeal, the Board addresses several procedural matters.

PROCEDURAL MATTERS

On February 4, 2002, SCLI filed a petition for review of the Agency's January 4, 2002 denial of SCLI's permit application. On February 7, 2002, the Board accepted this case for hearing. The Board also granted SCLI's motion for expedited review due to the rapidly diminishing disposal capacity of the landfill. On April 2, 2002, SCLI filed the Agency's answers to SCLI's requests to admit.[1] The Agency, on April 4, 2002, filed the administrative record, which is over 6,200 pages long.[2]

On April 18, 2002, the Board denied a motion for summary judgment filed by SCLI and granted a motion to intervene filed by the County. *See* Saline County Landfill, Inc. v. IEPA and County of Saline, PCB 02-108, slip op. at 4-5, 20 (Apr. 18, 2002). Consistent with the Board's prior grant of SCLI's motion for expedited review, the Board directed the case to hearing on April 23, 2002, to be followed by an expedited, simultaneous briefing schedule. Hearing Officer Steven C. Langhoff held a hearing on April 23, 2002. Four witnesses testified: Joyce Munie, Manager of the Permit Section of the Agency's Bureau of Land; Christine Roque, an engineer in the Agency's Permit Section; Paul Eisenbrandt, a geologist in the Agency's Permit Section; and Andrew Inman, an engineer with STS Consultants on behalf of SCLI.[3]

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

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

[3] The hearing transcript is cited as "Tr. at _." SCLI's hearing exhibits are cited as "SCLI Exh. _."

At hearing, on SCLI's motion and over the County's objection, the hearing officer accepted into evidence depositions taken by SCLI of three Agency employees on April 10, 2002: Roque; Eisenbrandt; and Michael Summers, a geologist in the Agency's Permit Section. The hearing officer also accepted the depositions as an offer of proof from SCLI that they constituted an admission by the Agency. Tr. at 168-69.

The Board affirms the hearing officer's allowance of the depositions as evidence.[4] The Agency and the County were present to cross-examine the witnesses, and the deposition testimony explains the administrative record. Concerning SCLI's offer of proof, however, the Board will not consider the depositions as an admission by the Agency that the area of the interior separation berm at issue today received siting approval for waste placement in 1982. Such use of the depositions is unnecessary. Munie, Manager of the Agency's Permit Section, testified at hearing that the berm area fell within an area designated on a map as having received siting approval in 1982. Tr. at 181-82; SCLI Exh. 8; R. at 0200, 6197.

Last, the hearing officer ordered all initial post-hearing briefs to be received by May 1, 2002, and all response briefs to be received by May 3, 2002, with no reply briefing. The hearing officer, at the Board's direction, ordered this expedited briefing schedule to give the Board adequate time to decide this case. All three parties filed briefs on May 1, 2002.[5] SCLI and the County filed response briefs on May 3, 2002.[6] On May 13, 2002, however, the County filed a motion for leave to file a reply brief, attaching the reply brief. The County asserts that its reply is necessary to respond to an argument that SCLI allegedly raised for the first time in SCLI's response brief. County Motion at 2. SCLI had argued in its response brief that the County's position in this case could preclude environmentally beneficial design changes required during permitting. SCLI Resp. Br. at 2-5. On May 14, 2002, SCLI filed a response opposing the County's motion, and a motion to strike the County's reply brief.

The Board finds that the argument in SCLI's response brief was both responsive to the County's initial post-hearing brief and based on evidence introduced by SCLI at hearing. SCLI's argument should have come as no surprise to the County. The Board finds that the County suffers no material prejudice by not being able to file a reply brief. The parties have had ample opportunity to argue their positions in this proceeding—at the summary judgment stage, at hearing, and in two post-hearing briefs. Moreover, the parties have been aware for some time that the Board would issue its final decision today. Response briefs were due two days after the initial post-hearing briefs were due. Yet the County filed this motion and reply brief only three days ago, ten days after SCLI's response brief was received. The Board

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[4] The deposition transcripts are cited as "[name of deponent] Dep. at _."

[5] The Agency's brief is cited as "Agency Br. at _." SCLI's initial brief is cited as "SCLI Br. at _." The County's initial brief (copy correcting non-substantive errors received May 2, 2002) is cited as "County Br. at _."

[6] SCLI's response brief is cited as "SCLI Resp. Br. at _." The County's response brief is cited as "County Resp. Br. at _."

denies the County's motion to file a reply brief. Having done so, the Board denies SCLI's motion to strike the County's reply brief as unnecessary.

FACTS

The Board incorporates by reference its findings of facts from its April 18, 2002 order. Below, the Board summarizes those findings and makes additional ones.

Siting Approval to Expand the Existing Landfill

On November 21, 1996, the County Board granted SCLI siting approval to expand the Saline County Landfill. R. at 4247-57. 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 (an approximately 30-acre, square-shaped parcel) and the proposed expansion. The proposed 53.5-acre expansion had two components: (1) a vertical expansion over approximately 21 acres of the existing 30-acre landfill; and (2) a lateral expansion of approximately 32.5 acres (a five-sided, irregularly-shaped parcel) to the north of the existing landfill. R. at 4247-57, 79-81.

The County Board approved a specific waste footprint by incorporating by reference the siting record into the County Board's siting approval. The siting record includes SCLI's siting application, itself a local hearing exhibit which depicts a specific waste footprint. R. at 6202-13.

Siting Application Process

SCLI's siting application, which was filed with the County Board in July 1996, is also 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 siting application shows and describes a berm that would be between the northern edge of the existing landfill and the southern edge of the lateral expansion. R. at 4915. In SCLI's siting application, the berm was described as a "separation berm" between Unit 1 (the existing landfill, including its vertical expansion) and Unit 2 (the lateral expansion):

> Separation Berm. 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.
>
> * * *

> Unit 1 and 2 Separation Berm. A berm will be constructed to isolate the waste in Units 1 and 2. R. at 4675, 4745; *see also* R. at 4649 ("Proposed Landfill. The proposed landfill will consist of two units that will be separated by a minimum 50 foot berm." ("Site Overview" portion of "Design Report" section of SCLI's siting application)); R. at 4284 ("There will be a 50-foot zone, separation zone, between the two units . . . ." (Inman testimony to County Board at 1996 siting hearing)).

SCLI proposed that groundwater monitoring wells for Unit 1 would be installed in the separation berm (R. at 4915 (berm cross-section with well)) "to allow independent monitoring" for each unit (R. at 4284-85):

> As construction of the separation berm progresses, these wells will be extended to a sufficient height to allow continued sampling of the wells. Extreme caution will be used when constructing the separation berm around the wells. R. at 4746; *see also* R. at 4284-85 ("That 50-foot separation zone will be used for things such as monitoring between the two units . . . ." (Inman testimony to County Board at 1996 siting hearing)).

At the 1996 siting hearing before the County Board, SCLI provided testimony about groundwater and groundwater monitoring:

> [W]ater moves through the ground . . . below the landfill. *** It's one of the ways that contamination could leave the site. *** [Groundwater monitoring wells] monitor the groundwater quality in the groundwater regime in and around the landfill. *** If there's a leak from the landfill, it will be detected within those groundwater monitoring wells. R. at 4385, 4407-08 (engineer Devin Moose).

SCLI's application stated that groundwater monitoring will "provide an early warning system" if a release occurs (R. at 4754; *see also* R. at 4761, 4778), which, in turn, could lead to "corrective action" (R. at 4777). SCLI's application also included information on groundwater flow direction under the site, describing groundwater flow as to the north, northwest, and west. R. at 4635-36.

SCLI's siting application estimated that Unit 2 (*i.e.*, the lateral expansion) would be full in 20 to 25 years and that Unit 1 (*i.e.*, the existing landfill and its vertical expansion) would be full in 5 years. R. at 4676. The application also stated that "Unit 1 will have final cover placed and certified as closed as soon as practical after filling is completed in Unit 1." R. at 4671. SCLI's final cover would entail placing a composite layer of compacted soil and synthetic material over the waste, and topping that composite layer with soil and vegetation. R. at 4677-80, 4783.

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. R. at 0346, 6176.

Interior Separation Berm

In SCLI's original permit application, submitted in October 1999, SCLI maintained the two-unit design with the interior separation berm. R. at 0370, 0463. This berm for "unit separation" was to be made of 52,400 cubic yards of clean fill and 13,100 cubic yards of clay. R. at 0555-56. As proposed in this original application, the berm was to house four groundwater monitoring wells to provide "discreet monitoring between units." R. at 0554, 0660, 0668.

However, on April 3, 2000, during the permit application review process, the Agency sent SCLI a draft denial letter. R. at 0282. The letter stated that SCLI's permit application failed to demonstrate that the separation berm (proposed to be 50 feet wide) 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 0283; Tr. at 27. The draft denial letter also stated that the separation berm was not wide enough to establish, for groundwater purposes, a zone of attenuation (as defined in the Board's landfill regulations at 35 Ill. Adm. Code 810.103) between Units 1 and 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 0287; Tr. at 27-28; Eisenbrandt Dep. at 54; Summers Dep. at 16-17, 21, 25.

SCLI and the Agency met to discuss the concerns raised in the draft denial letter. The Agency explained that either of the following options could address the stability and groundwater issues concerning the interior berm: (1) widening the interior berm to 100 feet, thereby maintaining the two unit design of the landfill; or (2) eliminating the interior berm, thereby eliminating the separating wall between Units 1 and 2 and creating a one-unit landfill. Tr. at 29, 31-32, 40-41, 50-51, 76, 83, 96-97; Eisenbrandt Dep. at 30-31; Summers Dep. at 29-30, 43-44.

SCLI's response to the Agency's concerns was to submit a revised design, eliminating the separation berm. R. at 3195, 3435-38; Eisenbrandt Dep. at 30; Summers Dep. at 30-31. 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 to tie into the existing landfill's liner. R. at 3349-50, 3437-38. The existing landfill and the expansion would constitute one unit, with one groundwater monitoring system, and with no monitoring wells in the space previously proposed for the separation berm. R. at 3587; Eisenbrandt Dep. at 34. 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 separation berm. R. at 4671, 4757-62.

SCLI's permit application included its assessment of the uppermost groundwater aquifer under the existing landfill and lateral expansion. That aquifer was analyzed because of the potential for the landfill to contaminate it. Tr. at 49, 63, 120; R. at 1959-2116, 2248-2806, 3272-3337, 3467-3584; Summers Dep. at 20.[7] Groundwater under the existing landfill generally flows to the north. The groundwater direction becomes northwesterly to westerly in the area of the lateral expansion's southern end. Groundwater under the lateral expansion generally flows to the west. Tr. at 47, 118-19; R. at 3331-32, 3486; Eisenbrandt Dep. at 43-44.

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 the County Board approved. First, the permit application proposed a wider exterior berm along the western edge of the lateral expansion. Second, the permit application proposed, based on the groundwater impact assessment, to raise the elevation of the liner and base of the southern part 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 for better construction. R. at 4200-02; Tr. at 90; Agency Ans. at 3.

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 roughly 4,600,000 to 4,309,000 cubic yards) and the acreage of the footprint decreased from approximately 53.5 to 53.2 acres (*i.e.*, the lateral expansion changed from roughly 32.5 to 32.2 acres). R. at 4198, 6188; Agency Ans. at 2-8; Tr. at 30, 94. 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. *Id.*

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 interior separation berm, is "environmentally safe" and consistent with the Board's substantive landfill regulations. Agency Ans. at 3; *see also* Tr. at 31, 36, 61-65, 77, 83. The Agency further

[7] A groundwater impact assessment is required by 35 Ill. Adm. Code 811.317.

admits that it found no "environmental or safety flaw" in SCLI's revised permit application. Agency Ans. at 3.

Information on Siting Approval Submitted to the Agency

After SCLI proposed to eliminate the interior separation berm, 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. R. at 0310-13. 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.

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 that it "does not interpret and does not intend to make a determination regarding the constraints placed on the siting approval by the Saline County Board" and that "[i]t is up to the Saline County Board to determine whether re-siting is needed." R. at 0030.

SCLI submitted to the Agency the transcript of a September 12, 2001 County Board meeting. At the meeting, the County Board passed a resolution stating that SCLI needed to reapply for siting approval because of SCLI's design changes since the 1996 approval. R. at 0026- 27, 6137-72. The Agency, in denying the permit, relied in part on the September 2001 resolution of the County Board. Agency Ans. at 2.

SCLI also provided the Agency with information on the original October 7, 1982 siting approval of the existing 30-acre landfill.[8] The area sited for waste disposal in 1982, as depicted on a map, included the area proposed in 1996 for the interior berm. Tr. at 131-33, 175-78, 181-82; R. at 0200, 4566, 6185-6231; SCLI Exh. 8.

Agency's Permit Denial

Before the Agency issued the permit denial, an Agency representative spoke with an SCLI representative about whether SCLI planned to submit an amended permit application to add an interior separation berm back into the design. SCLI's representative declined. R. at 0207. The Agency denied SCLI's permit application on January 4, 2002. R. at 0002-03. The Agency gave the following reason for denying the permit:

> Section 39(c) of the Act states that the [Agency] 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

[8] Before landfilling, the area consisted of mine spoil piles and cut lakes from coal strip mining operations in the 1950's and 60's. R. at 3272, 3292.

> 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.
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> * * *
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> [SCLI's] 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). *** [T]he separation berm was to be constructed of clean soil and its purpose was to isolate the waste from Unit 1 and Unit 2.
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> [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. R. at 0002-03.

STATUTORY FRAMEWORK

Below the Board provides the framework for permitting generally, landfill permitting specifically, and landfill siting under the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (2000)).

Permitting Under the Act Generally

The Act requires the Agency to issue a permit if the applicant proves that the requested permit will not violate the Act or the Board's regulations. *See* 415 ILCS 5/39(a) (2000). The Agency also must identify, in a permit denial, the provisions of the Act or Board regulations that may be violated if it granted the requested permit. *Id.* If the Agency denies a requested permit, the applicant may appeal the Agency's decision to the Board within 35 days. *See* 415 ILCS 5/40(a)(1) (2000). The petitioner has the burden of proof on appeal. *Id.* On appeal "the 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), *aff'd sub nom* Panhandle Eastern Pipeline Co. v. PCB and IEPA, 314 Ill. App. 3d 296, 734 N.E.2d 18 (4th Dist. 2000), quoting Centralia Environmental Services, Inc. v. IEPA, PCB 89-170, slip op. at 9 (Oct. 25, 1990); *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 (3d Dist. 1987), citing IEPA v. PCB, 118 Ill. App. 3d 772, 455 N.E.2d 188 (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, citing IEPA v. PCB, 115 Ill. 2d 65, 70, 503 N.E.2d 343, 345 (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(c) (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

Under Section 39(c), the applicant for a landfill development permit therefore 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. *See* 415 ILCS 5/39.2(a)(i)-(ix) (2000). The criteria include whether the proposed facility or expansion is "so designed . . . that the public health, safety and welfare will be protected." 415 ILCS 5/39.2(a)(ii) (2000).

This is commonly referred to as the "design criterion." Other criteria include whether the proposed facility or expansion is located so as to minimize incompatibility with the character of the surrounding area, and has a plan of operations designed to minimize danger from fire, spills, or other operational accidents. *See* 415 ILCS 5/39.2(a)(iii), (v) (2000). If the local government denies or conditionally grants landfill siting, the applicant may appeal the decision to the Board. *See* 415 ILCS 5/40.1 (2000).

DISCUSSION

The Board first sets forth the legal standard that applies in this case, followed by the parties' arguments, and the Board's analysis.

Legal Standard

The issue on appeal, as framed in the Agency's January 4, 2002 denial letter, is whether issuance of SCLI's requested development permit would violate Section 39(c) of the Act. Section 39(c) requires SCLI to submit proof to the Agency that the proposed landfill expansion received the County Board's siting approval. The parties do not dispute that the vertical and lateral 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. Only one aspect of the lateral expansion is at issue: eliminating the interior separation berm.

Under SCLI's requested permit, waste would be placed in the airspace once designated for the interior separation berm. This waste would therefore be placed beyond the interior southern edge of the lateral expansion's waste footprint. However, this waste would be, as the berm would have been, under the single mound of the landfill, and there would be no increase to the vertical expansion approved at local siting. The waste in the berm airspace also would be entirely within the exterior boundary of the lateral expansion and the rest of the landfill. Indeed, as proposed in the permit application, the lateral expansion would be of smaller acreage than approved at siting, and the expansion's overall waste capacity would be almost 300,000 cubic yards less.

Under these unique circumstances, the Board must decide whether SCLI has demonstrated that there is no reasonable likelihood that eliminating the interior separation berm would substantially alter the nature and scope of the expansion approved by the County Board in 1996. If there is a reasonable likelihood that the change would so alter the project, then the change is outside of the siting approval and the requested permit would therefore violate Section 39(c). *See* M.I.G. Investments, Inc. v. IEPA, 122 Ill. 2d 392, 400, 523 N.E.2d 1, 4 (1988) ("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") (emphasis added).

Whether there is a reasonable likelihood that SCLI's design change would substantially alter the nature and scope of the sited expansion must be assessed against the Section 39.2 siting criteria. The Illinois Supreme Court in M.I.G. focused on increased waste capacity in holding that a proposed vertical expansion required local siting approval before the Agency could issue a development permit:

> 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 propriety 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.' 122 Ill. 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 applied M.I.G. in holding that local siting approval was required before a modified landfill permit could issue. The permit applicant sought to use for disposal a mine cut bisecting the site that would increase the landfill's waste capacity, which would impact 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.
>
> * * *
>
> 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. 203 Ill. App. 3d at 1026, 561 N.E.2d at 426 (emphasis added).

Likewise, in Waste Management of Illinois, Inc. v. IEPA, PCB 94-153 (July 21, 1994), the Board held that no additional local siting approval was required and reversed the Agency's permit denial where the requested permit modification to reconfigure a 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 (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.* (emphasis added).

The Board therefore held in its April 18, 2002 order that, under the specific circumstances of this case, the Agency's permit denial would be upheld unless SCLI demonstrated, based on the Agency's record, that there is no reasonable likelihood that the

design change at issue would substantially alter the nature and scope of the sited expansion, as gauged against the Section 39.2 siting criteria. Saline County Landfill, PCB 02-108, slip op. at 17, 20-23.

Parties' Arguments

The parties disagree on whether the 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 requested development permit would not require the interior separation berm. SCLI believes that eliminating the berm from the design 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.

SCLI's Arguments

SCLI argues that it is proposing "a contraction, not an expansion" of the facility approved at local siting. SCLI Br. at 14-15. SCLI further asserts that there has been no substantial change to the nature and scope of the landfill approved by the County Board. *Id.* SCLI states that the new design is more protective of the environment, and only lessens the impact that the expansion would have with respect to the Section 39.2 siting criteria. *Id.* at 3-7, 13-14. According to SCLI, with the reduced waste capacity of the permit application design, there would be approximately 6% less waste disposed of than the County Board had contemplated under the siting design, which would result in fewer waste deliveries and slightly reduced landfill visibility. *Id.* at 3, 8, 14.

SCLI states that without the interior berm, there would be environmental benefits from having one contiguous liner, leachate collection system, and landfill gas extraction system. SCLI Br. at 6.[9] SCLI further states that the former Unit 1 (*i.e.*, the existing landfill, including its vertical expansion) would close approximately 15 years later than had been expected during the local siting process—therefore, the existing landfill would have approximately 15 extra years of monitoring groundwater and gas, as well as 15 extra years of operating the leachate and gas collection systems. *Id.* This extra work, SCLI explains, would also require SCLI to provide more financial assurance. *Id.* at 6-7.

Though the existing landfill would close in an estimated 15 years instead of the estimated 5 years presented to the County Board in 1996, SCLI notes that its permit application nevertheless calls for final cover of the existing landfill, including its vertical expansion, within roughly five years. Therefore, according to SCLI, eliminating the interior berm, resulting in one landfill unit instead of two, would not delay placing final cover on the existing landfill. SCLI Br. at 6-7.

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[9] Leachate is liquid that has been or is in contact with waste. Landfill gas comes from decomposing waste and typically is composed mostly of methane and carbon dioxide. R. at 3352, 3445, 3450.

Finally, SCLI argues for the first time that the area in which the interior berm would have been placed actually received approval for waste placement when the County Board sited the existing landfill in 1982—that is, the area sited for waste disposal in 1982 overlaps the area designated for the interior berm in 1996. SCLI Br. at 2, 11.

Agency's Arguments

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 Saline County Board." Agency Ans. at 7; *see also* R. at 0003. The Agency therefore argues that by putting waste within the area designated at siting for the interior berm, waste would extend beyond the interior southern edge of the lateral expansion footprint approved by the County Board in 1996, *i.e.*, waste would be outside what was proposed as Unit 2. Agency Br. at 5, 7-8.

The Agency expresses concern that the legal standard articulated by the Board will impose a new obligation on the Agency to independently assess all permit application designs against the Section 39.2 siting criteria. The Agency states that it lacks expertise in the siting criteria and prefers to look solely to the waste boundaries, both horizontal and vertical, approved at siting. Agency Br. at 12-13. Nevertheless, the Agency states that, with groundwater under the existing landfill flowing generally to the north, monitoring wells placed in the interior berm could sooner detect a leak from the existing landfill, resulting in earlier corrective action. *Id.* at 11-12. The Agency acknowledges that there is an "indirect relationship" between its permit review and the design criterion of Section 39.2. *Id.* at 10, 12-13.

Finally, the Agency concedes that the area in which the interior berm would have been placed was approved for waste placement in 1982. However, the Agency maintains that the 1982 siting approval was amended by the 1996 siting approval, which called for the area in question to be used not for waste but for the interior separation berm. Tr. at 175-78.

County's Arguments

The County, like the Agency, states that the "area formerly to have been occupied by earthen materials now would, under the proposed permit, be occupied by trash," and that the airspace to be occupied by the former berm was "not approved by the Saline County Board for trash placement." County Motion to Intervene at 3. The County nevertheless does not take issue with assessing the impact of the design change at permitting against the Section 39.2 criteria. The County asserts, however, that the County Board's siting authority would be "usurped" if new siting was not required for any design change that could have "any *potential*" impact on a Section 39.2 siting criterion. County Br. at 12, 15 (emphasis in original). The County asserts that "the possibility of *any* impact on siting issues" from a design change would require local siting before the Agency could issue the requested permit. County Resp. Br. at 3

(emphasis in original). The County asserts that this standard is required by M.I.G. and Bi-State Disposal. County Br. at 12-13.

The County further argues that removing the interior berm is a "basic and fundamental change" and states that the County Board considered the presence of the berm in finding that SCLI satisfied the Section 39.2 design criterion. County Motion to Intervene at 6; *see also* County Br. at 16. The County emphasizes 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 the "separation of old and new facilities" is a valid siting concern of the County Board. County Motion to Intervene at 4. With no berm to house groundwater monitoring wells, the County states that SCLI now proposes "some other . . . location for groundwater monitoring wells" over which the County Board had no control. *Id.*

The County argues that the Agency cannot issue the development permit because SCLI "asks for something different" than the County Board approved in 1996. County Motion to Intervene 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." *Id.* at 6 (emphasis added); *see also* County Br. at 9, 17. The County reiterates after hearing that "the ultimate issue in this case is whether *SCLI's redesign* has ever been granted siting approval by the Saline County Board" and that "the facility being requested by SCLI is *not the same* as the one for which siting approval was granted in 1996." County Resp. Br. at 1 (emphasis added).

The County argues that the 1982 siting approval cannot "in any sense or to any degree contradict or counteract the undisputed fact that the 50 foot berm is *also* included in the 1996 application, but with very specific design promises and restrictions." County Br. at 18 (emphasis in original).

Board Analysis

Design Change and Local Siting Approval

The Board has stated 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, PCB 94-153, slip op. at 7. The Board was not faced with such an "extension" in Waste Management. Typically, expansions have involved extending laterally the exterior boundaries of a waste "footprint," as the Agency uses the term here, or increasing a landfill vertically, whether upward (as in M.I.G.) or downward (as in Bi-State Disposal). In this case, filling the interior separation berm airspace with waste would result in waste being placed beyond the southern *interior* edge of the lateral expansion's footprint. This design change must not be considered out of context.

Under SCLI's amended permit application, the waste in the berm airspace would be *inside* the exterior waste boundary approved by the County Board in 1996, inside a lateral

expansion waste footprint of *smaller* acreage than approved by the County Board in 1996, and remain under the single landfill mound approved by the County Board in 1996. Nor would there be any increase to the vertical expansion approved by the County Board. In fact, under SCLI's amended permit application, the waste capacity would be roughly 300,000 cubic yards *less* than what was presented to the County Board in 1996. It follows that, all other things being equal, the landfill site would receive fewer loads of waste and not be open as long.

However, for the reasons provided below, the Board finds that there is a reasonable likelihood that the design change resulting in permit denial would substantially alter the nature and scope of the expansion approved by the County Board in 1996. *See* Medical Disposal Services , Inc. v. IEPA, 286 Ill. App. 3d 562, 568, 677 N.E.2d 428, 432 (1st Dist. 1996) (suggesting no additional siting needed when the "facility is going to be substantially the same as originally proposed").

First, SCLI proposed, and the County Board approved, siting an expansion that would result not in one landfill unit but in two landfill units—the old landfill would be kept separate from the new landfill to the north. The existing landfill's waste would be blocked off by the interior separation berm, and each unit would have separate groundwater monitoring. In addition, the groundwater under the existing landfill, which generally flows to the north, would be monitored along the existing landfill's northern edge by wells located in the interior berm. Monitoring wells in the berm therefore would have been downgradient of the groundwater under the existing landfill and thus could detect contaminant leaks from the existing landfill sooner than could wells along the western edge of the site. Earlier detection would allow cleanup to be started sooner. Tr. at 47, 50, 52-53, 75-76, 78.

Second, SCLI states that, even without the interior berm, final cover will be placed on the existing landfill in an estimated 5 years, as had been proposed to the County Board in 1996. Nevertheless, SCLI proposed, and the County Board approved, siting an expansion by which the existing landfill, including its vertical expansion, would be *certified* closed by the Agency in approximately 5 years, not in 20 to 25 years. Agency certification, which takes place after the Agency reviews closure documentation and inspects the site, signifies that the landfill unit has been closed in accordance with closure plans and applicable Board regulations. *See* 35 Ill. Adm. Code 813.402. The County Board approved siting an expansion that would have two Agency certifications, one for Unit 1 in about 5 years and one for Unit 2 in about 20 to 25 years.

The Board finds that there is a reasonable likelihood that these changes would substantially alter the nature and scope of the sited expansion, particularly as assessed against the design criterion of Section 39.2. Of course, that is not to say that the permit design meeting the Board's landfill regulations is not fully protective of public health and the environment. Rather, the Board is saying that if SCLI wants to make this change, the Board cannot deprive the County Board of its opportunity, nor relieve the County Board of its obligation, to review the design change under Section 39.2 of the Act.

The Board also finds that the 1982 siting approval of the berm airspace for waste disposal is not controlling. SCLI was not required to propose the interior berm in 1996. It did so to reduce its monitoring costs over time and to sooner release financial assurance funds, by closing the existing landfill sooner. Tr. at 149, 166. The Board finds that the County Board's 1996 siting approval, which was based on SCLI's proposal, necessarily amended the County Board's 1982 siting approval. To hold otherwise would render the newer plans presented to the County Board in 1996 almost meaningless. SCLI's position that once an area is approved for waste, it is always approved for waste, regardless of later siting approvals, defies logic and the Board rejects it.

Not every single design change made in permitting, without regard to the import of the change, requires, as the Agency termed it, "re-siting" before the requested permit can issue. Here, however, the Board finds that, based on the record, there is a reasonable likelihood that removing the interior separation berm from the design would substantially alter the nature and scope of the expansion approved by the County Board in 1996. Nor does the 1982 siting approval help SCLI. Accordingly, SCLI has failed to meet its burden of proving that it obtained the required local siting approval. The Agency therefore properly denied the requested development permit under Section 39(c) of the Act.

Legal Standard Applied Here

The Board will address the concerns of the County and the Agency, primarily about the legal standard applied by the Board in this case. These concerns, described above in the parties' arguments, are unfounded. The standard articulated by the Board, specifically for this case's unique circumstances, strikes the proper balance between (1) ensuring that the County Board will not be effectively bypassed, and (2) ensuring needed design flexibility in the permitting process, which necessarily follows siting and almost inevitably involves some design changes to comply with the Act or Board regulations.

As for the County's concern, almost any design change in permitting could have a "potential" impact on one of the Section 39.2 siting criteria. County Br. at 15; *see also* County Resp. Br. at 3 ("the possibility of *any* impact" (emphasis in original)). Such a standard would be too easily met and is not required by the Act or case law. Interestingly, SCLI argues that the County's suggested standard would "usurp the Agency's exclusive statutory authority" to review permit applications and grant or deny permits. SCLI Resp. Br. at 5.

The Board cannot, and did not attempt to, assess the design change's impact from the perspective of the County Board, or SCLI for that matter. Instead, the Board reviewed the record to determine whether there is a reasonable likelihood that SCLI's design change at permitting would impact a Section 39.2 siting criterion so as to substantially alter the nature and scope of the expansion approved at local siting. The siting criteria speak for themselves. Surely if SCLI's only design change was to, for example, double the number of groundwater monitoring wells or double the thickness of the liner to meet Board regulations, SCLI would

not have to return for local siting approval. To require another round of local siting in such an instance would be absurd. M.I.G. and Bi-State Disposal must be read in context. In both cases, the design changes at issue *increased* waste disposal capacity. When the Illinois Supreme Court in M.I.G. discussed the "impact" that the change would have on the Section 39.2 criteria for fire or spill protection and compatibility with the surrounding area, it cannot have meant that the increased amount of waste was an enhancement.

Though SCLI argues that its design change will result in a number of environmental benefits, this is a permit appeal. The Board's role here is not to weigh the evidence to determine which approach is *better* designed to protect the public health, safety, and welfare of the citizens of Saline. That is the job of the Saline County Board. The Board is not deciding whether the design proposed at permitting would result in "net" environmental benefits. In this case, the Board need only find that there is a reasonable likelihood that the design change resulting in permit denial would substantially alter the nature and scope of the sited project. The Board has found that, and therefore determined that SCLI did not meet its burden to prove that the requested permit could issue without violating the Act. However, the Board is in no way suggesting that, with this design change, SCLI could not satisfy any particular Section 39.2 siting criterion. That decision will be within the County Board's purview if SCLI returns for siting approval.

As for the Agency's concern, the Board never professed to articulate a new "test" for the Agency to apply in all its Section 39(c) determinations in the future. Nor did the Board hold that the Agency must now make landfill permit determinations by applying the Section 39.2 siting criteria. The standard articulated and applied by the Board here, as the Board stated, is specific to the unique circumstances of this case.

The Agency states that "any design change that does not exceed the waste boundaries of the facility, as sited, would not require additional proof of local siting approval." Agency Br. at 12. The Board appreciates the Agency's desire for a bright-line test—that is, to look solely at whether the expansion proposed at permitting fits within the local siting authority's waste boundaries. The applicable case law, however, discussed above, holds that the local siting authority considers not only the location of a proposed landfill expansion, but also its design. *See* M.I.G.; *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). An expansion's design, proposed in a development permit application, that substantially differs from the design proposed at siting could happen to fall within the waste boundaries approved by the local government. As the Board stated in it April 18, 2002 order, however, "[i]f 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." Saline County Landfill, PCB 02-108, slip op. at 16.

Moreover, in this case, the Agency did *not* limit its review to the waste boundaries approved by the County Board in 1996. On the contrary, during the permit application process, the Agency asked the 2001 County Board 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 (emphasis added). In turn, the Agency received and admittedly relied on a resolution of the 2001 County Board calling for SCLI to apply for new siting because of "structural changes . . . made in the *design* of the landfill since the original siting." R. at 0027 (emphasis added).

The Agency correctly notes that such a resolution, for the Agency's purposes, is merely an "advisory opinion" and "does not abrogate [the Agency's] responsibility to determine the existence of adequate proof of local siting approval." Agency Br. at 13. Yet the Agency's inquiry here about design consistency belies its plea to look only at waste boundaries when determining whether the permit applicant has met its burden under Section 39(c). In fact, when Munie was asked at hearing to describe the Agency's reason for denying the permit, she testified that the County Board "had required that there be two units" and that "changing it to a one unit design appeared to be inconsistent with the local siting approval." Tr. at 73.

Finally, though it has no bearing on the Board's decision today, and the Board makes no ruling on it, the parties do not dispute that SCLI can avoid returning for siting if it submits an amended permit application, proposing a *wider* interior separation berm, 100 feet wide instead of 50. The Agency explained to SCLI during the permit application process that SCLI could have proposed widening the interior berm to 100 feet. Doing so could have addressed the Agency's concerns over compliance with the Board's landfill regulations on stability and groundwater monitoring, while maintaining the separate units of the landfill as proposed to the County Board in 1996. Though the Agency explained to SCLI that *eliminating* the interior berm could address concerns over compliance with the Board's regulations (the path SCLI chose), this had no effect on SCLI's obligation under Section 39(c) of the Act to submit proof of local siting approval.

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

ORDER

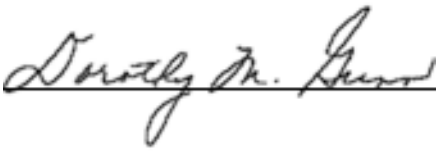
The Board affirms the Agency's January 4, 2002 decision to deny SCLI's application for a development permit to expand the Saline County Landfill. The Agency correctly determined that SCLI lacked the proof of local siting approval required by Section 39(c) of the Act.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2000); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906,

102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on May 16, 2002, by a vote 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board