

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WILLIAM SPENCER	)	
	)	
Complainant,	)	PCB 2015-063
	)	
v.	)	
	)	
CLINTON LANDFILL, INC.	)	
AND	)	
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondents.	)	

**NOTICE OF ELECTRONIC FILING**

TO: All Parties of Record

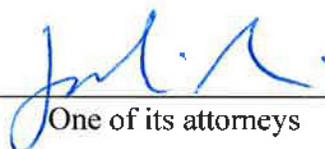
PLEASE TAKE NOTICE that on September 29, 2014, I filed the following documents electronically with the Clerk of the Pollution Control Board of the State of Illinois:

1. Entries of Appearance
2. Motion to Dismiss
3. Notice of Electronic Filing

Copies of the above-listed documents were served upon you via U.S. Mail, First Class Postage Prepaid, sent on September 29, 2014, as is stated in the Certificates of Service attached to each document.

Respectfully submitted,

CLINTON LANDFILL, INC.  
Respondent

By:   
One of its attorneys

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914-0981

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	)	
Respondents.	)	

**MOTION TO DISMISS**

NOW COMES Respondent, Clinton Landfill, Inc. (“CLI”), by and through its undersigned attorneys, and as and for its Motion to Dismiss the Complaint filed in this case before the Illinois Pollution Control Board (the “Board”) by the Complainant, WILLIAM SPENCER, pursuant to the Illinois Environmental Protection Act, 415 ILCS §5/1 *et seq.* (the “Act”), 415 ILCS §5/31(d)(1), 35 Ill. Admin. Code §103.212(b), 35 Ill. Admin. Code §101.506, and other applicable regulations, states as follows:

**INTRODUCTION**

Mr. Spencer’s Complaint filed in this matter is duplicative and frivolous. It appears that Mr. Spencer is actually seeking leave to intervene in the permit appeal case filed by CLI against the Illinois Environmental Protection Agency (the “Agency”) in PCB 2015-060, which is prohibited as a matter of law and is therefore frivolous. This matter is entirely duplicative of the issues raised in PCB 2015-060. Insofar as Mr. Spencer is seeking any other relief, he has failed to state a cause of action upon which relief could be based, for which additional reason the

Complaint is frivolous. For all these reasons, CLI respectfully submits that this case should be dismissed.

## STATEMENT OF FACTS

### 1. PCB 2015-060

CLI filed a Petition for Review with the Board on August 28, 2014, which was docketed by the Board as PCB 2015-060. In its Petition, CLI asked that the Board review Modification No. 47 to CLI's Permit No. 2005-070-LF, issued by the Illinois Environmental Protection Agency (the "Agency") on July 31, 2014. In particular, CLI asks that the Board review three substantive changes to CLI's permit made in Modification No. 47:

The Agency made three substantive changes to the Permit in Modification No. 47. First, the Agency modified Special Condition Section II.10.f, "to add obtaining local siting approval as a precondition to accepting PCB waste." (Ex. A, pg. 2 of cover letter). In particular, as of July 30, 2014, Section II.10.f provided that there were three (3) conditions before the Chemical Waste Unit could accept certain types of polychlorinated biphenyl (PCB) wastes. (See Ex. D, pg. 18, §II.10.f). On July 31, 2014, the Agency added a fourth condition: "The local siting authority for Clinton Landfill 3 (currently the DeWitt County Board) grants local siting approval specifically allowing such waste to be disposed of in CWU." (Ex. A, pg. 17, §II.10.f).

Second, the Agency modified Special Condition Section III.A.2.f "to prohibit the disposal of Manufactured Gas Plant (MGP) waste exceeding the regulatory levels specified in 35 Ill. Adm. Code 721.124(b) in the CWU." (Ex. A, pg. 2 of cover letter). In particular, as of July 30, 2014, Section III.A.2.f included the following exception to the Agency's general policy prohibiting disposal of Manufactured Gas Plant (MGP) waste exceeding the regulatory levels specified in 35 Ill. Adm. Code 721.124(b) in landfills in Illinois: "Manufactured gas plant waste exceeding the regulatory levels specified in 35 Ill. Adm. Code 721.124(b) can be disposed in the CWU." (Ex. D, pg. 25, §III.A.2.f). On July 31, 2014, the Agency deleted this exception. (See Ex. A, pg. 25, §III.A.2.f).

Finally, the Agency modified Special Condition Section VII.12 “to reflect the need to obtain local siting approval before accepting PCB waste....” (Ex. A, pg. 2 of cover letter). Section VII.12 of the Permit relates to management of leachate from the CWU. (See Ex. D, pg. 47, §VII.12). On July 31, 2014, the Agency added the following as a condition to triggering of the leachate management protocols in the section: “the local siting authority for Clinton Landfill 3 grants local siting approval specifically allowing PCB waste to be disposed of in the CWU....” (Ex. A, pg. 46, §VII.12).

(Petition in PCB 2015-060, pgs. 4-5). CLI argues that these modification were arbitrary, capricious, unreasonable, unlawful, and beyond the regulatory authority of the Agency. (Petition in PCB 2015-060, pg. 6). On September 4, 2014, the Board accepted the Petition in PCB 2015-060 for hearing. The Record in PCB 2015-060 is due to be filed by September 29, 2014.

## **2. PCB 2015-063**

Mr. Spencer filed his “Formal Complaint Third Party Petition to Participate Case # PCB 2015-060” (the “Complaint”) with the Board on September 3, 2014. The Board docketed Mr. Spencer’s Complaint as PCB 2015-063.

This Motion is being filed within 30 days after service of the challenged document, in accordance with 35 Ill. Admin. Code §101.506, 415 ILCS §5/31(d)(1), and 35 Ill. Admin. Code §103.212(b).

### **APPLICABLE LAW**

Pursuant to the Act, citizens’ enforcement complaints are required to conform to Section 31(c) of the Act, which requires that complaints “specify the provision of the Act, rule, regulation, permit, or term or condition thereof under which such person is said to be in violation and a statement of the manner in and the extent to which such person is said to violate the Act, rule, regulation, permit, or term or condition thereof....” 415 ILCS §5/31(c)(1).

The Act provides, in pertinent part, that in regard to citizen's enforcement suits, "[u]nless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing and serve written notice thereof upon the person or persons named therein, in accord with subsection (c) of this Section." 415 ILCS §5/31(d)(1). Pursuant to the Board regulations, a respondent in a citizen's enforcement proceeding may file a motion alleging that a citizen's complaint is duplicative or frivolous within 30 days following the date of service of the complaint. 35 Ill. Admin. Code §103.212(b).

The Board's regulations provide that "[t]he definition for duplicative and frivolous can be found at 35 Ill. Adm. Code 101.Subpart B." 35 Ill. Admin. Code §103.212(a). "Duplicative" is defined as follows: "'Duplicative' means the matter is identical or substantially similar to one brought before the Board or another forum." 35 Ill. Admin. Code §101.202. "Frivolous" is defined as follows: "'Frivolous' means a request for relief that the Board does not have the authority to grant, or a complaint that fails to state a cause of action upon which the Board can grant relief." Id.

The Board's regulations further provide that "[t]he Board may entertain any motion the parties wish to file that is permissible under the Act or other applicable law, these rules, or the Illinois Code of Civil Procedure." 35 Ill. Admin. Code §101.500(a). "In ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See, e.g., Beers v. Calhoun*, PCB 04-204, slip op. at 2 (July 22, 2004)." Anielle Lipe, et al. v. Village of Richton Park, PCB 2012-44, pg. 5, 2011 WL 5891395 (November 17, 2011).

**ARGUMENT**

**1. Mr. Spencer cannot intervene in PCB 2015-060.**

In his Complaint, Mr. Spencer requests three forms of relief:

WHEREFORE:

I request to be allowed as a third party in case #PCB 2015-060 as the original complainant.

I request that the Illinois Environmental Protection Agency decision to remove two listed waste PCBs and MGP streams from permit NO. 2005-070-LF due to false and misleading information supplied to the Agency by Clinton Landfill in application of modification NO. 9 that redesigned 22.5 acres of the municipal landfill #3 in Clinton Illinois be made permanent.

I also request that all changes made to permit due to modification NO. 9 be removed permanently from permit NO. 2005-070-LF and that all waste be removed from the redesigned 22.5 acres of municipal landfill #3.

(Complaint, pg. 4). Based on the above, it appears that Mr. Spencer may actually be seeking to intervene in Case No. PCB 2015-060 pending before the Board, rather than to file an independent enforcement action against CLI and the Agency. Mr. Spencer states as follows regarding the reasons for his request for leave to participate in PCB 2015-060:

Question of siting in Case # PCB 2015-060 was original presented to the Agency by me and clearly the major issue of action in this case, communications between me and the Agency are a KEY part of the case. I wish to maintain my position and wish defend my question concerning the need for a new siting and other requirements of 39.2.

(Complaint, ¶11, pg. 4).

Insofar as Mr. Spencer is seeking leave to intervene in PCB 2015-060 in his Complaint, Mr. Spencer's request should be denied as a matter of law, and PCB 2015-063 should be dismissed. In PCB 2015-060, CLI seeks review of a permit issued by the Agency. It is black

letter law that only the Agency and the permit applicant can properly seek review of a permit, and that intervention by non-parties in permit appeals is not allowed.

For example, in the case of Sutter Sanitation, Inc., et al. v. Illinois Environmental Protection Agency, PCB 2004-187 (September 16, 2004), Sutter Sanitation, Inc. and Lavonne Hacker (together, "Sutter") filed a petition for review by the Board of the Agency's denial of Sutter's application for a development permit for a solid waste transfer station in Effingham County. Neighbors of the transfer station site filed a motion to intervene, "to ensure that their various interests are 'adequately represented and defended, in addition to the governmental interests that the Agency will be representing in defending its denial of the Application.'" (Id. at pg. 3). The Board denied the motion to intervene, stating as follows:

The Act provides no third-party appeals of transfer station permit denials. Only the permit applicant may appeal. *See* 415 ILCS 5/40(a)(1) (2002). \* \* \*.

In adopting the procedural rules' Section 101.402 on intervention, the Board never purported to overturn existing case law interpreting permissible intervention under the Act. Indeed, the Board cannot, through rulemaking or otherwise, expand intervention rights beyond that which the Act can bear. \* \* \*.

Regardless of the claimed interests that the movants here seek to protect, ***the Board lacks the authority to give party status through intervention to persons the General Assembly does not allow to become parties to this type of proceeding.*** The movants may, however, participate in this proceeding by making oral or written statements at hearing and by filing *amicus curiae* briefs or public comments. *See* 35 Ill. Adm. Code 101.110, 101.628.

(Id. at pg. 4; emphasis added).

The Board specifically discussed the statutory basis for its conclusion that third-parties cannot intervene in permit appeals in the case of Riverdale Recycling, Inc. et al. v. Illinois

Environmental Protection Agency, PCB 2000-228, 2000 WL 1160737 (August 10, 2000)

(quoted at length in Sutter, *supra*), as follows:

The Act, by its terms, does not grant general authority to the Board to allow third-party intervention in all cases appealing an Agency decision to deny a permit. In Landfill, Inc. v. PCB, 74 Ill. 2d 541, 387 N.E.2d 258, 264 (1978), the court held that the Board's procedural rules allowing third-party complaints in a sanitary landfill permit appeals case to be void. Since the Act did not authorize the Board to entertain such challenges, the Board's procedural rules were "unauthorized administrative extensions" of its authority. *Id.* at 265. If the Board grants the Village's petition to intervene, it would essentially allow a third-party challenge to the Agency's permit denial, which the court precluded in Landfill, Inc. This rationale stands even though the Village's petition to intervene appears to be premised upon the Village's support of, rather than objection to, the Agency's denial of the supplemental permit.

The Third District has affirmed the Board's denial of a third party petition "challenging the Agency's decision to issue an NPDES permit and requesting a de novo evidentiary [proceeding]." Citizens Utilities Company of Illinois v. PCB, et al. 265 Ill. App. 3d 773, 775, 639 N.E.2d 1306, 1308 (3rd Dist. 1994). In Citizens Utilities, the Village of Plainfield appealed the Agency decision to grant Bolingbrook a National Pollution Discharge Elimination System (NPDES) permit for proposed discharge from a new proposed wastewater treatment plant. The case involved a different type of permit. However, the underlying holding that the Board did not have general authority to allow third-party challenges without explicit statutory authority, directly applies to this case.

After the holdings in Landfill, Inc. and Citizens Utilities, the legislature revisited the issue of third-party appeals, and has since enacted two specific sections regarding appeals of Resource Conservation and Recovery Act (RCRA) and NPDES permit denials. See 415 ILCS 40(b), (e) (1998). The legislature never granted general authority to the Board to allow third-party appeals or interventions in other cases involving permit denials. The silence of the Illinois General Assembly after the explicit requirement for statutory authority in Landfill, Inc. and Citizens Utilities is a clear indication that the Board does not have authority under the Act to accept third-party appeals or interventions in this matter.

(Id., pgs. 2-3). Based on the above, regardless of the permissive intervention language in 35 Ill. Adm. Code §101.402, the Board cannot permit intervention by persons who are not allowed to become parties to the particular type of proceeding at issue pursuant to the Act.

PCB 2015-060 is a permit appeal. The only proper parties in a permit appeal are the permit applicant and the Agency. *See, e.g. Landfill, Inc. v. Pollution Control Bd.*, 74 Ill. 2d 541, 387 N.E.2d 258 (1978); People of Williamson County ex rel. State's Attorney Charles Garnati, et al. vs. Kibler Development Corporation, et al., PCB 08-93, 2008 WL 2721786 (July 10, 2008), *affirmed on reconsideration*, 2008 WL 4189532 (Sept. 4, 2008). Mr. Spencer is not the permit applicant or the Agency, and therefore is not a proper party in PCB 2015-060. CLI respectfully submits that the Board does not have authority under the Act to grant Mr. Spencer's request for an intervention in PCB 2015-060. Mr. Spencer's Complaint in PCB 2015-063 is "frivolous," in that it is "a request for relief that the Board does not have the authority to grant..." (35 Ill. Admin. Code §101.202), and should therefore be dismissed.

**2. PCB 2015-063 is duplicative of PCB 2015-063.**

Insofar as Mr. Spencer is seeking relief in his Complaint *other than intervention* in PCB 2015-060, CLI respectfully submits that PCB 2015-063 is duplicative of the issues in PCB 2015-060. As is stated above, "[d]uplicative' means the matter is identical or substantially similar to one brought before the Board or another forum." 35 Ill. Admin. Code §101.202. The subjects of Mr. Spencer's Complaint in this case are substantially similar to the case brought before the Board in PCB 2015-060. In particular, the issues raised by Mr. Spencer regarding (1) CLI's compliance with siting requirements relative to the Chemical Waste Unit (or CWU) at Clinton Landfill No. 3, (2) CLI's development of the Chemical Waste Unit pursuant to Modification No. 9 to CLI's Permit No. 2005-070-LF, and (3) the Agency's issuance of Modification No. 47 to

CLI's Permit No. 2005-070-LF, are all topics that are before the Board in PCB 2015-060. Therefore, CLI respectfully submits that PCB 2015-063 is duplicative of PCB 2015-060, and that PCB 2015-063 should therefore be dismissed.

**3. Mr. Spencer's Complaint is frivolous.**

Again, insofar as Mr. Spencer is seeking relief in his Complaint *other than intervention* in PCB 2015-060, CLI respectfully submits that Mr. Spencer has failed to state a cause of action upon which relief could be based and that PCB 2015-063 should be dismissed as a matter of law.

Mr. Spencer's primary allegation in his Complaint is that CLI should have sought additional siting approval before developing the Chemical Waste Unit pursuant to Modification No. 9 to Permit No. 2005-070-LF. As part and parcel of this allegation, Mr. Spencer alleges that CLI "... [f]ailed to follow all of section 39.2 of the Illinois Environmental Protection Act when it failed to acquire a new siting for its modifications to Permit NO. 2005-070-LF, starting with modification NO.9 that redesigned 22.5 acres of its municipal landfill #3 in Clinton Illinois, the purpose of this modification was to store Hazardous Waste" (Complaint, ¶1), that CLI misrepresented its intentions regarding the Chemical Waste Unit to the public and to the DeWitt County Board, and that CLI misrepresented the status of its siting to the Agency.

In the case of Mahomet Valley Water Authority, et al. vs. Clinton Landfill, Inc., PCB 2013-022, the complaint "allege[d] that CLI violated various provisions of the Environmental Protection Act (Act) 'when it transformed a municipal solid waste disposal unit into a Chemical Waste Unit (CWU) specifically designed for disposal of at least [two] types of highly toxic environmental contaminants without obtaining prior siting authority from the DeWitt County Board.'" (September 19, 2013 Order, pg. 1). The complainants in that case specifically alleged in Counts I, II, and III of their complaint, "that CLI violated Sections 21(e), 39(a), 39(c), and

39.2 of the Act by changing a municipal solid waste disposal unit into a CWU without obtaining prior siting approval from the DeWitt County Board.” (Id., pg. 22). This Board held that, as a matter of law, “[n]one of these statutory provisions is capable of being violated by CLI.” (Id.) Therefore, the Board dismissed Counts I, II, and III of the complaint in that case as frivolous. (Id., pg. 27).

Based on the above, it is clear that Mr. Spencer’s Complaint fails as a matter of law, for the reasons stated by the Board in PCB 2013-022. The Board has already considered the specific points raised by Mr. Spencer regarding the CWU, and the general legal principles underlying Mr. Spencer’s Complaint in regard to siting, and has found none that give rise to a cognizable enforcement case before the Board.

Finally, in his Complaint filed in this case, Mr. Spencer also alleges that CLI intends to dispose of “hazardous waste” in the CWU. Mr. Spencer provides no specifics regarding this allegation. He does not state what “hazardous waste” is proposed to be disposed of in the CWU, or whether any such waste has already been placed in the CWU. CLI submits that the allegations in the Complaint regarding “hazardous waste” do not conform to Section 31(c) of the Act, which requires that complaints include “a statement of the manner in and the extent to which [the respondent] is said to violate the Act, rule, regulation, permit, or term or condition thereof...” 415 ILCS §5/31(c)(1).<sup>1</sup> The allegations clearly do not provide a basis for any relief from the Board.

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<sup>1</sup> It is possible that Mr. Spencer’s allegations regarding “hazardous waste” might actually be references to certain Manufactured Gas Plant (MGP) wastes. Issues regarding MGP waste were raised in Count IV of the complaint filed in PCB 2013-022: “Complainants allege[d] that CLI violated Sections 21(f), 39(a), 39(c), 39(d), and 39.2 of the Act and 35 Ill. Adm. Code Sections 703.121(a) and (b) by disposing hazardous waste, namely MGP waste, without a RCRA permit.” (September 19, 2013 Order, pg. 27). The Board found that Count IV of the complaint in PCB 2013-022 was frivolous, and dismissed it along with Counts I, II, and III. (Id., pgs. 30-31).

**CONCLUSION**

As the prayer for relief in Mr. Spencer's Complaint makes clear, what Mr. Spencer really wants is to step into the shoes of the Agency in defense of its Modification No. 47 to CLI's Permit No. 2005-070-LF. Mr. Spencer has no right to do this under the law. The only proper parties to a permit appeal are the applicant and the Agency. The validity of Modification No. 47 is already before the Board in PCB 2015-060. The Agency has appeared in that case. Mr. Spencer has no right to intervene in PCB 2015-060, or to attempt to "re-try" the issues therein in this case. Insofar as Mr. Spencer seeks anything other than to defend the Agency's Modification No. 47, Mr. Spencer's Complaint is frivolous, for the reasons set forth in PCB 2013-022.

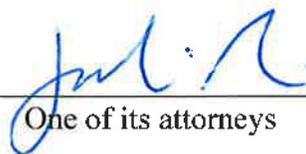
For all the reasons discussed above, CLI respectfully submits that Mr. Spencer's Complaint is frivolous and duplicative, and that PCB 2015-063 should be dismissed as a matter of law.

WHEREFORE, CLI respectfully requests that this Board dismiss PCB 2015-063 on the grounds that it is frivolous, and award CLI such other and further relief as is deemed appropriate under the circumstances.

Respectfully submitted,

CLINTON LANDFILL, INC.,  
Respondent

By: \_\_\_\_\_



One of its attorneys

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PROTECTION AGENCY,	)	
	)	
Respondents.	)	

**ENTRIES OF APPEARANCES**

TO: Clerk of the Illinois Pollution Control Board and All Parties of Record

Please enter our appearances as counsel of record in this case for

CLINTON LANDFILL, INC

Respectfully submitted,

ELIAS, MEGINNES & SEGHETTI, P.C.

By:   
 Brian J. Meginnes, Esq.

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914-0982

**CERTIFICATE OF SERVICE**

The undersigned certifies that on September 29, 2014, the foregoing document will be served upon each party to this case in the following manner:

X Enclosing a true copy of same in an envelope addressed to the attorney of record of each party or the party as listed below, with FIRST CLASS postage fully prepaid, and depositing each of said envelopes in the United States Mail at 5:00 p.m. on said date.

William Spencer  
2358 1150<sup>th</sup> St.  
Kenney, IL 61749

\_\_\_\_\_ Enclosing a true copy of same in an envelope addressed to the attorney of record of each party or the party as listed below, for delivery by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, and depositing each of said envelopes in the United States Mail at 5:00 p.m. on said date.

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\_\_\_\_\_ Via Federal Express - Express Package Service - Priority Overnight

  
\_\_\_\_\_  
Attorney

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\_\_\_\_\_  
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