

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:)
)
MAHOMET VALLEY WATER AUTHORITY,)
CITY OF CHAMPAIGN, ILLINOIS, a municipal)
corporation, DONALD R. GERARD,)
CITY OF URBANA, ILLINOIS, a municipal corporation,)
LAUREL LUNT PRUSSING,)
CITY OF BLOOMINGTON, ILLINOIS,)
a municipal corporation, COUNTY OF CHAMPAIGN,)
ILLINOIS, COUNTY OF PIATT, ILLINOIS,)
TOWN OF NORMAL, ILLINOIS, a municipal)
corporation, VILLAGE OF SAVOY, ILLINOIS,)
a municipal corporation, and CITY OF DECATUR,)
ILLINOIS, a municipal corporation,)
)
Complainants,)
) PCB 2013 - 022
v.)
) (Enforcement - Land)
CLINTON LANDFILL, INC.,)
an Illinois corporation,)
)
Respondent.)

NOTICE OF ELECTRONIC FILING

TO: All Parties of Record

PLEASE TAKE NOTICE that on February 28, 2013, I filed the following documents electronically with the Clerk of the Pollution Control Board of the State of Illinois:

1. Notice of Electronic Filing
2. Entry of Appearance
3. Motion for Leave to File Amicus Curiae Brief
4. Amicus Curiae Brief

Copies of the above-listed documents are being served upon you via U.S. Mail, First Class Postage Prepaid, sent on February 28, 2013, as is stated in the Certificate of Service appended hereto.

Respectfully submitted,

NATIONAL SOLID WASTES MANAGEMENT
ASSOCIATION, Amicus Curiae

BY: James M. Morphew
One of its Attorneys

Sorling Northrup
James M. Morphew, of counsel
1 North Old State Capitol Plaza, Suite 200
P.O. Box 5131
Springfield, IL 62705
Telephone: 217/544-1144
Telefax: 217/522-3173
jmmorphew@sorlinglaw.com

{S0884110.1 2/28/2013 JMM DAW }

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

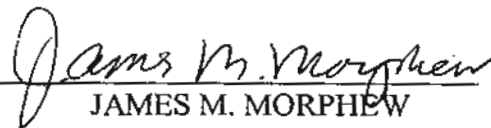
In the Matter of:)
))
MAHOMET VALLEY WATER AUTHORITY,)
CITY OF CHAMPAIGN, ILLINOIS, a municipal)
corporation, DONALD R. GERARD, CITY OF)
URBANA, ILLINOIS, a municipal corporation, LAUREL)
LUNT PRUSSING, CITY OF BLOOMINGTON,)
ILLINOIS, a municipal corporation, COUNTY OF)
CHAMPAIGN, ILLINOIS, COUNTY OF PIATT,)
ILLINOIS, TOWN OF NORMAL, ILLINOIS, a)
municipal corporation, VILLAGE OF SAVOY,)
ILLINOIS, a municipal corporation, and CITY OF)
DECATUR, ILLINOIS, a municipal corporation,)
))
Complainants,)
) PCB 2013 - 022
v.)
) (Enforcement - Land)
CLINTON LANDFILL, INC., an Illinois corporation,)
))
Respondent.)

ENTRY OF APPEARANCE

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

Please enter our appearance as counsel of record in this case for NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, *Amicus Curiae*.

Respectfully submitted,
SORLING NORTHRUP

BY: 
JAMES M. MORPHEW

Sorling Northrup
James M. Morphey, of counsel
1 North Old State Capitol Plaza, Suite 200
P.O. Box 5131
Springfield, IL 62705
Telephone: 217/544-1144
Telefax: 217/522-3173
jmmorphey@sorlinglaw.com

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:)
)
MAHOMET VALLEY WATER AUTHORITY,)
CITY OF CHAMPAIGN, ILLINOIS, a municipal)
corporation, DONALD R. GERARD,)
CITY OF URBANA, ILLINOIS, a municipal corporation,)
LAUREL LUNT PRUSSING,)
CITY OF BLOOMINGTON, ILLINOIS,)
a municipal corporation, COUNTY OF CHAMPAIGN,)
ILLINOIS, COUNTY OF PIATT, ILLINOIS,)
TOWN OF NORMAL, ILLINOIS, a municipal)
corporation, VILLAGE OF SAVOY, ILLINOIS,)
a municipal corporation, and CITY OF DECATUR,)
ILLINOIS, a municipal corporation,)
)
Complainants,)
) PCB 2013 - 022
v.)
) (Enforcement - Land)
CLINTON LANDFILL, INC.,)
an Illinois corporation,)
)
Respondent.)

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

NOW COMES the NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, Amicus Curiae ("NSWMA"), by and through its attorneys, Sorling Northrup, James M. Morphew, of counsel, and as and for its Motion for Leave to File Amicus Curiae Brief pursuant to 35 Ill. Adm. Code 101.110(c), states as follows:

1. The mission of NSWMA is to promote the management of waste in a manner that is environmentally responsible, efficient, profitable and ethical, while benefiting the public and protecting employees. NSWMA's members operate in all 50 states and the District of Columbia,

and consist of large publicly-traded companies and both small and large privately-owned companies. NSWMA members own or operate 39 landfills throughout Illinois.

2. NSWMA is an interested person in relation to this case.

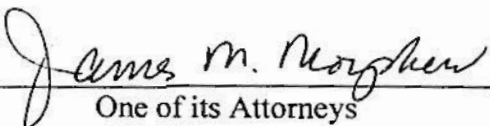
3. NSWMA believes that it can offer argument that will assist the Board in its consideration of this case, including specifically in its consideration of the Motion to Dismiss filed by Respondent Clinton Landfill, Inc. on December 5, 2012.

4. Therefore, NSWMA seeks permission from the Board to file the Amicus Curiae Brief attached herewith, instanter, pursuant to and in accordance with 35 Ill. Adm. Code 101.110(c).

WHEREFORE, NSWMA respectfully requests that the Board grant it leave to file the attached Amicus Curiae Brief, instanter.

Respectfully submitted,

NATIONAL SOLID WASTES MANAGEMENT
ASSOCIATION, Amicus Curiae

BY: 
One of its Attorneys

Sorling Northrup
James M. Morphey, of counsel
1 North Old State Capitol Plaza, Suite 200
P.O. Box 5131
Springfield, IL 62705
Telephone: 217/544-1144
Telefax: 217/522-3173
jmmorphey@sorlinglaw.com

{S0883496.3 2/28/2013 JMM DAW }

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:)
)
 MAHOMET VALLEY WATER AUTHORITY,)
 CITY OF CHAMPAIGN, ILLINOIS, a municipal)
 corporation, DONALD R. GERARD, CITY OF)
 URBANA, ILLINOIS, a municipal corporation, LAUREL)
 LUNT PRUSSING, CITY OF BLOOMINGTON,)
 ILLINOIS, a municipal corporation, COUNTY OF)
 CHAMPAIGN, ILLINOIS, COUNTY OF PIATT,)
 ILLINOIS, TOWN OF NORMAL, ILLINOIS, a)
 municipal corporation, VILLAGE OF SAVOY,)
 ILLINOIS, a municipal corporation, and CITY OF)
 DECATUR, ILLINOIS, a municipal corporation,)
)
 Complainants,)
) PCB 2013 - 022
 v.)
) (Enforcement - Land)
 CLINTON LANDFILL, INC., an Illinois corporation,)
)
 Respondent.)

AMICUS CURIAE BRIEF

NOW COMES the NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, Amicus Curiae ("NSWMA"), by and through its attorneys, Sorling Northrup, and as and for its Amicus Curiae Brief, filed pursuant to 35 Ill. Adm. Code §101.110(c), states as follows:

Introduction

The mission of NSWMA is to promote the management of waste in a manner that is environmentally responsible, efficient, profitable and ethical, while benefiting the public and protecting employees. NSWMA's members operate in all 50 states and the District of Columbia, and consist of large publicly-traded companies and both small and large privately-owned companies. NSWMA members own or operate 39 landfills throughout Illinois. NSWMA therefore has a strong interest in the public policy of landfill regulation. NSWMA respectfully

submits that this case should be dismissed, for the reasons stated in the Motion to Dismiss filed by Respondent Clinton Landfill, Inc. and for the reasons set forth herein.

Argument

The Illinois Environmental Protection Act, 415 ILCS §5/1, *et seq.* (the “Act”) provides that local governmental authorities and the public should have a role in determining whether a location is suitable for the development of a new pollution control facility, namely, local siting approval. The Act also provides that the Illinois Environmental Protection Agency (the “Agency”) cannot issue a permit for the development or construction of a new pollution control facility without local siting approval. The Act and sound public policy both require that local siting approvals and Agency permits become, at some point, final and unappealable. The Complaint filed in this case would undermine both the Act and public policy, opening up the Agency’s permits to perpetual review based on purported deficiencies in siting approvals or on the Agency’s decision not to require local siting approval. This cannot be permitted, as a matter of law and policy.

1. The Legal Framework: Siting approval and issuance of siting certificates.

Pursuant to the 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 the 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). Thus, the developer of any “new pollution control facility” must obtain local siting approval before petitioning the Agency for a permit.

{S0883519.4 2/28/2013 JMM DAW }

The term "pollution control facility" generally includes "any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility, or waste incinerator. This includes sewers, sewage treatment plants, and any other facilities owned or operated by sanitary districts organized under the Metropolitan Water Reclamation District Act" subject to exceptions listed in the Act. 415 ILCS §5/3.330(a). The term "new pollution control facility" is defined as follows in the Act:

(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.

415 ILCS §5/3.330(b).

The Act requires that a decision rendered by a local siting authority be in writing and conform to certain additional requirements:

Decisions of the county board or governing body of the municipality are to be in writing, specifying the reasons for the decision, such reasons to be in conformance with subsection (a) of this Section. In granting approval for a site the county board or governing body of the municipality may impose such conditions as may be reasonable and necessary to accomplish the purposes of this Section and as are not inconsistent with regulations promulgated by the Board. Such decision shall be available for public inspection at the office of the county board or governing body of the municipality and may be copied upon payment of the actual cost of reproduction.

415 ILCS §5/39.2(e).

{S0883519.4 2/28/2013 JMM DAW }

The Agency has promulgated a form for local siting authorities titled "Certification of Siting Approval (LPC-PA8)." The siting certificate relevant in this case is attached to the Complaint as Exhibit B. The siting certificate and its attachments (in this case, the Resolution Conditionally Approving the Application for Local Siting Approval of a Pollution Control Facility Filed by Clinton Landfill, Inc., passed by the DeWitt County Board on September 12, 2002) are then submitted by the applicant to the Agency with its permit application. Notably, the siting application, hearing transcripts and exhibits are not submitted to the Agency. Rather, the siting certificate and its attachments constitute the "written decision" of the local siting authority regarding siting.

Decisions by a local siting authority are subject to appeal by the applicant and by "a third party other than the applicant who participated in the public hearing conducted by the county board or governing body of the municipality...." 415 ILCS §5/40.1(b). The appeal must be filed with the Pollution Control Board "within 35 days after the date on which the local siting authority granted siting approval." *Id.* If no appeal is filed within 35 days, the decision of the local siting authority becomes final and unappealable.

The purpose of the siting process is to ensure that local governmental entities and the public have a chance to "weigh in" on the development of new pollution control facilities. Once a siting certificate has been issued and the time for appeal has passed, the siting approval is unassailable.

2. **The Legal Framework: Permit decisions and Agency determinations regarding the need for siting approval.**

When a permit applicant files an application with the Agency, the Agency is called upon to determine whether the application is "for the development or construction of a new pollution

{S0883519.4 2/28/2013 JMM DAW }

control facility” such that siting is required pursuant to the Act. 415 ILCS §5/39(c). If the Agency determines that the application is for a “new pollution control facility,” then the Agency must review the application to determine whether a siting certificate was issued by the appropriate local siting authority. If the Agency determines that the application is not for a “new pollution control facility,” then no siting certificate is required.

A determination by the Agency that siting is *not* required because a permit application is *not* “for the development or construction of a new pollution control facility” is not subject to review by the Board or the courts. For example, in the Board cases of Anielle Lipé and Nykole Gillette, Complainants v. Illinois Environmental Protection Agency, Respondent, PCB 12-95, 2012 WL 1650149 (Ill. Pol. Contr. Bd. May 3, 2012) and Mill Creek Water Reclamation District v. Illinois Environmental Protection Agency and Grand Prairie Sanitary District, PCB 10-74, 2010 WL 3167245 (Ill. Pol. Contr. Bd. August 5, 2010), and the Appellate Court case of City of Waukegan v. Illinois E.P.A., 339 Ill. App. 3d 963, 791 N.E.2d 635 (2nd Dist. 2003), the Agency did not require applicants to present local siting approvals with their permit applications based on the Agency’s determinations that the facilities at issue were not “new pollution control facilities” under the Act. In each case, the Board and the Appellate Court held that the determination of the Agency was not subject to review.

The reason for the decisions by the Board and the Appellate Court is that the right to appeal the issuance or denial of a permit by the Agency is narrowly restricted as a matter of law. Pursuant to the Act, only the applicant has standing to make such an appeal, and even the applicant has only 30 days to do so. See 415 ILCS §5/40(a)(1); Landfill, Inc. v. Pollution Control Bd., 74 Ill. 2d 541, 387 N.E.2d 258 (1978). The Agency’s determination that no siting

{S0883519.4 2/28/2013 JMM DAW }

approval was required in the cases cited above was not subject to review, because any such review would constitute, in effect, a review of the permit itself.

The reason for restricting the right to appeal issuance of a permit by the Agency is clear: 31 days after issuance, a permit can be relied upon by the applicant and the public for waste management planning purposes. If the validity of a permit issued by the Agency were open to attack in perpetuity, no developer would dare to propose the construction of a new pollution control facility.

3. **The Public Policy: Permits issued by the Agency must be final and unappealable.**

The implications of this case are dire. If the Board does not dismiss the case, it will cause the validity of all permits issued by the Agency to new pollution control facilities since the advent of siting to be subject to challenge. In other words, *anyone* could file a complaint with the Board claiming that *any permit* or permit modification issued to any new pollution control facility (*i.e.*, any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility, or waste incinerator initially permitted for development or construction or expanded after July 1, 1981, and any such facility that requested approval to store, dispose of, transfer or incinerate, for the first time, any special or hazardous waste after July 1, 1981) is inconsistent with the siting for such facility, *at any time*. Why would any responsible private entity expend the substantial funds required to develop a new pollution control facility under these circumstances? How could any public entity issue bonds to finance the development of a new pollution control facility?

Furthermore, events that occurred during a siting hearing that are neither reflected in a siting certificate nor the subject of a siting appeal are not relevant to validity of permit or permit

{S0883519.4 2/28/2013 JMM DAW }

modification issued by the Agency years later. Imagine an enforcement action being filed before the Board alleging that Modification 47 of a permit is inconsistent with comments made by a representative of the applicant during a siting hearing 20 years earlier. It is not the Board's job to ensure that a permit issued by the Agency is consistent with testimony offered during a siting hearing, nor should it be.

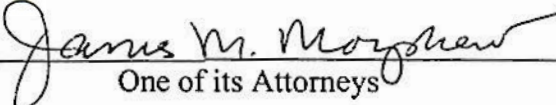
As Respondent Clinton Landfill, Inc. argues in its Motion to Dismiss., Illinois law requires that this case be dismissed. Based on the above, public policy also clearly mandates the dismissal of this case.

WHEREFORE, NSWMA respectfully requests that the Board dismiss the Complainants' Complaint in its entirety.

Respectfully submitted,

NATIONAL SOLID WASTES MANAGEMENT
ASSOCIATION, Amicus Curiae

BY:


One of its Attorneys

Sorling Northrup
James M. Morphey, of counsel
1 North Old State Capitol Plaza, Suite 200
P.O. Box 5131
Springfield, IL 62705
Telephone: 217/544-1144
Telefax: 217/522-3173
jmmorphey@sorlinglaw.com

{S0883519.4 2/28/2013 JMM DAW }

CERTIFICATE OF SERVICE

The undersigned certifies that on February 28, 2013, the foregoing document (including the Notice of Electronic Filing, the Entry of Appearance, the Motion for Leave to File Amicus Curiae Brief, and Amicus Curiae Brief attached thereto) will be served upon each party by 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.

David L. Wentworth II
David B. Wiest
Hasselberg, Williams, Grebe,
Snodgrass & Birdsall
124 Southwest Adams Street, Suite 360
Peoria, IL 61602-1320

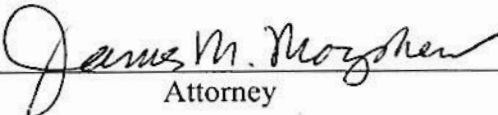
Albert Ettinger
53 West Jackson Street, Suite 1664
Chicago, IL 60604

Thomas E. Davis, Chief
Environmental Bureau/Springfield
Office of the Illinois Attorney General
500 South Second Street
Springfield, IL 62706

Tony Martig
Toxics Program Section Chief
USEPA Region 5 (Mail Code LC-8J)
77 West Jackson Boulevard
Chicago, IL 60604-3507

John J. Kim, Interim Director
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

Brian J. Meginnes
Janaki Nair
Elias, Meginnes, Riffle & Seghetti, P.C.
416 Main Street, Suite 1400
Peoria, IL 61602


Attorney

{S0884110.1 2/28/2013 JMM DAW }