BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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,	)	No. PCB 2013-022
Complainants	)	(Enforcement - Land)
v.	)	
CLINTON LANDFILL, INC.,	)	
Respondent	)	

NOTICE OF ELECTRONIC FILING

To: All Parties of Record

PLEASE TAKE NOTICE that on March 5, 2012, I filed the following documents electronically with the Clerk of the Pollution Control Board of the State of Illinois:

1. Entry of Appearance
2. Motion to file *amicus curiae* brief, with Amicus Brief attached.
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 March 6, 2013, as is stated in the Certificates of Service attached to each document.

Respectfully submitted,

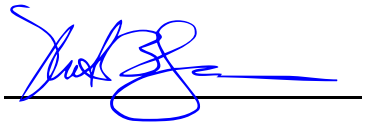
Village of Summit, Illinois, a municipal corporation

By: _____
One of its Attorneys

Michael S. Blazer (ARDC No. 6183002)
Jeffery D. Jeep (ARDC No. 6182830)
Jeep & Blazer, L.L.C.
24 N. Hillside Avenue, Suite A
Hillside, IL 60162
Telephone: (708) 236-0830
Facsimile: (708) 236-0828
mblazer@enviroatty.com
jdjeep@enviroatty.com

CERTIFICATE OF SERVICE

I hereby certify that I did on March 6, 2013, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Hillside, Illinois, a true and correct copy of the following instruments entitled Entry of Appearance, Motion to file *amicus curiae* brief and Notice of Electronic Filing upon the persons listed on the Service List.



Michael S. Blazer

SERVICE LIST

Albert Ettinger
53 W. Jackson Street, Suite 1664
Chicago, IL 60604

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

Brian J. Meginnes
Elias, Meginnes, Riffle & Seghetti, P.C.
416 Main Street, Suite 1400
Peoria, IL 61602-1153

Thomas Davis, Bureau Chief
Office of Attorney General of the State of Illinois
Assistant Attorney General
Environmental Bureau
500 South Second Street
Springfield, Illinois 62706

Sorling Northrup
James M. Morphew, of counsel
1 North Old State Capitol Plaza, Suite 200
Springfield, IL 62705

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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	)	No. PCB 2013-022 (Enforcement - Land)
v.	)	
CLINTON LANDFILL, INC., Respondent	)	

ENTRY OF APPEARANCE

To: Clerk of the Illinois Pollution Control Board and all Parties of Record

Please enter our Appearance in this matter as counsel of record on behalf of the Village of Summit, Illinois, *Amicus Curiae.*

Respectfully submitted,
The Village of Summit, Illinois

By: _____
One of its attorneys

Michael S. Blazer (ARDC No. 6183002)
Jeffery D. Jeep (ARDC No. 6182830)
Jeep & Blazer, L.L.C.
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Hillside, IL 60162
Telephone: (708) 236-0830
Facsimile: (708) 236-0828
mblazer@enviroatty.com
jdjeep@enviroatty.com

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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	)	
v.	)	
CLINTON LANDFILL, INC.,	)	
Respondent	)	
	)	No. PCB 2013-022
	)	(Enforcement - Land)

MOTION FOR LEAVE TO FILE AMICUS BRIEF

NOW COMES the Village of Summit, an Illinois municipal corporation (the "Village" or "Summit"), by its attorneys, and for its Motion pursuant to IPCB Rule 101.110(c) for Leave to File an Amicus Brief in support of Respondent Clinton Landfill, Inc.'s ("CLI") Motion to Dismiss the Complaint filed in this case by the Complainants herein, states:

1. Summit is located approximately 9 miles southwest of downtown Chicago, Illinois.[1] Summit has been designated an Illinois Enterprise Zone under the Illinois Enterprise Zone Act, 20 ILCS 655/1 *et. seq.* See Enterprise Zone Map attached hereto as Exhibit A. The Village qualified for designation as an Enterprise Zone because the

[1] Further information on the Village may be found at the Illinois Department of Commerce and Economic Opportunity's web site at http://www2.illinoisbiz.biz/communityprofiles/profiles/SUMMIT.htm.

Village is located within a "depressed area." See Section 4(c) of the Illinois Enterprise Zone Act, 20 ILCS 655/4(c) A "depressed area" is defined in the Illinois Enterprise Zone Act as an area in which pervasive poverty, unemployment and economic distress exist." 20 ILCS 655/3(c)

2. The Midwest Metallics Superfund Site (also known as the Pielet Brothers Landfill (hereafter referred to as the "Site") is a 12.84 acre highly polluted property located on 59th Street in the Village. The Site is located within a Tax Increment Financing ("TIF") District consisting of 36.89 acres that was established on June 20, 2011. The TIF District, including the Site, is depicted on the Tax Map attached hereto as Exhibit B, and photographs of the Site are attached as Group Exhibit C.[2]

3. The following is a summary of the tortured history of the Site:

Date	Event
01/03/1955	Pielet Bros. Scrap Iron and Metal, Inc. incorporated in Illinois and commenced an auto-shredding operation.
10/02/1995	The Illinois Attorney General filed suit against Midwest Metallics and James Pielet and Michael Tang to clean up the Site.
10/14/1998	The United States Environmental Protection Agency ("USEPA") ordered Midwest Metallics and James Pielet to remove 350,000 cubic yards of auto shredder residue from the Site. USEPA concluded that the Site is contaminated with lead and polychlorinated biphenyls ("PCBs").
10/18/1999	Midwest Metallics filed for bankruptcy in U.S. Bankruptcy Court for the Northern District of Illinois, Case No. 99 B 32219.
02/05/2000	Midwest Metallics, acting through the U.S. Bankruptcy Trustee, filed a Motion in the Bankruptcy Court for permission to abandon the property that includes the Site.
11/14/2000	USEPA withdrew any objection to the abandonment of the property.
12/19/2000	The State of Illinois likewise withdrew any objection to the

[2] Additional information regarding the Site may be found on the U.S. Environmental Protection Agency's web site at http://cfpub.epa.gov/supercpad/cursites/csitinfo.cfm?id=0510052.

Date	Event
	abandonment of the property, despite admitting that "there is an immediate and identifiable environmental hazard existing" at the property.
01/16/2001	The Bankruptcy Court approved the abandonment of the Site.
02/02/2004	On February 2, 2004 the Illinois Appellate Court affirmed the dismissal of the Attorney General's complaint because the State failed to allege facts establishing that the corporate officer (Tang) had personal involvement or actively participated in the acts resulting in "operator" liability. See *People ex rel. Madigan v. Tang*, 346 Ill. App. 3d 277 (1st Dist. 2004) As of that date, no one was left to address the environmental issues at the Site.
09/02/2005	USEPA declared that the presence of lead and PCBs at the Site present an "imminent and substantial threat to public health, welfare and the environment". See Action Memorandum, attached hereto as Exhibit D, at 1. USEPA proposed to place a clay cap over the Site. *Id.* at 9

4. The clay cap proposed by USEPA is not a feasible solution. The contents of the pile at the Site will migrate to the surface and will continue to pose an on-going threat to the surrounding community. See May 15, 2009 Engineering Review conducted by Stephen G. Torres, P.G., Division Manager – Chicago, Apex Companies, LLC, a copy of which is attached hereto as Exhibit E.

5. The Site is the cause of a blighted condition within the TIF District. The TIF District property can make a significant contribution to the Village's tax base and host businesses that will provide desperately needed jobs in the community. The TIF District property is uniquely positioned for redevelopment, provided a solution is devised for the contamination at the Site. The TIF District parcels are:

a. Located within a TIF District and Illinois Enterprise Zone;

b. Connected to sanitary sewer, electricity, gas and water;

c. Zoned I-2, a Limited Industrial District; and

d. Accessible by truck, rail and water. [3]

6. The USEPA and Illinois EPA have failed to implement a permanent remedy that will allow for the redevelopment of the Site and surrounding parcels. The Village has been left to its own devices to develop a realistic plan for addressing the Site. The most promising and realistic solution is to accept an application to locate a new pollution control facility on the Site and, if the application is granted, to use the host community fees paid by a developer to pay for the off-site disposal of the waste on the Site.

7. The Village has reached an agreement in principal with the owner of parcels within the Site and Peoria Disposal Company ("PDC") [4] with respect to redevelopment of the Site. A concept drawing of the proposed redevelopment is attached hereto as Exhibit F.

8. The agreement in principal includes the following:

a. The Village will enter into a host community agreement with PDC in connection with the establishment of a pollution control facility at the Site. That agreement will be subject to PDC's full compliance with the permitting requirements of the Illinois Environmental Protection Act (the "Act"), including obtaining local siting pursuant to Section 39.2 of the Act, 415 ILCS 5/39.2.

[3] Truck access is available via the Stevenson Expressway (U.S. Interstate 55), Tri-State Tollway (U.S. Interstate 294) and two Illinois Designated State Truck Routes: Archer Avenue (Illinois 171) and Harlem Avenue (Illinois 43). Rail access is available via the Argo Crossing Rail Junction of the Indiana Harbor Belt Railroad/CSX and Canadian National Railway/Union Pacific Railroad. Water access is available via the Illinois and Michigan Canal.

[4] Peoria Disposal Company is an affiliate of CLI.

b. The host agreement will provide for the payment of fees by PDC to the Village. Assuming PDC obtains siting and permitting, those fees would be applied to defray the cost of removal and disposal of the waste at the Site at the Chemical Waste Unit of Clinton Landfill No. 3. The waste would be transported to the Chemical Waste Unit via rail and/or via truck.

9. Given the foregoing, the Village has a unique and particular interest in the subject matter of this action. A decision that the Clinton Landfill permit is subject to collateral attack by a third-party will present an insurmountable obstacle to redeveloping the Site. In that event, the TIF District property will remain a blight on the community. The purpose of Section 40(a)(1) of the Act is to eliminate this very type of regulatory uncertainty, and allow the regulated community to make investment decisions in reliance on an Illinois EPA permit decision.

10. Allowing Summit's filing will neither unduly delay nor materially prejudice this proceeding or any existing party.

For all of the foregoing reasons, the Village of Summit requests leave to file its Amicus Brief instanter. A copy of the Village's Brief is attached hereto as Exhibit G.

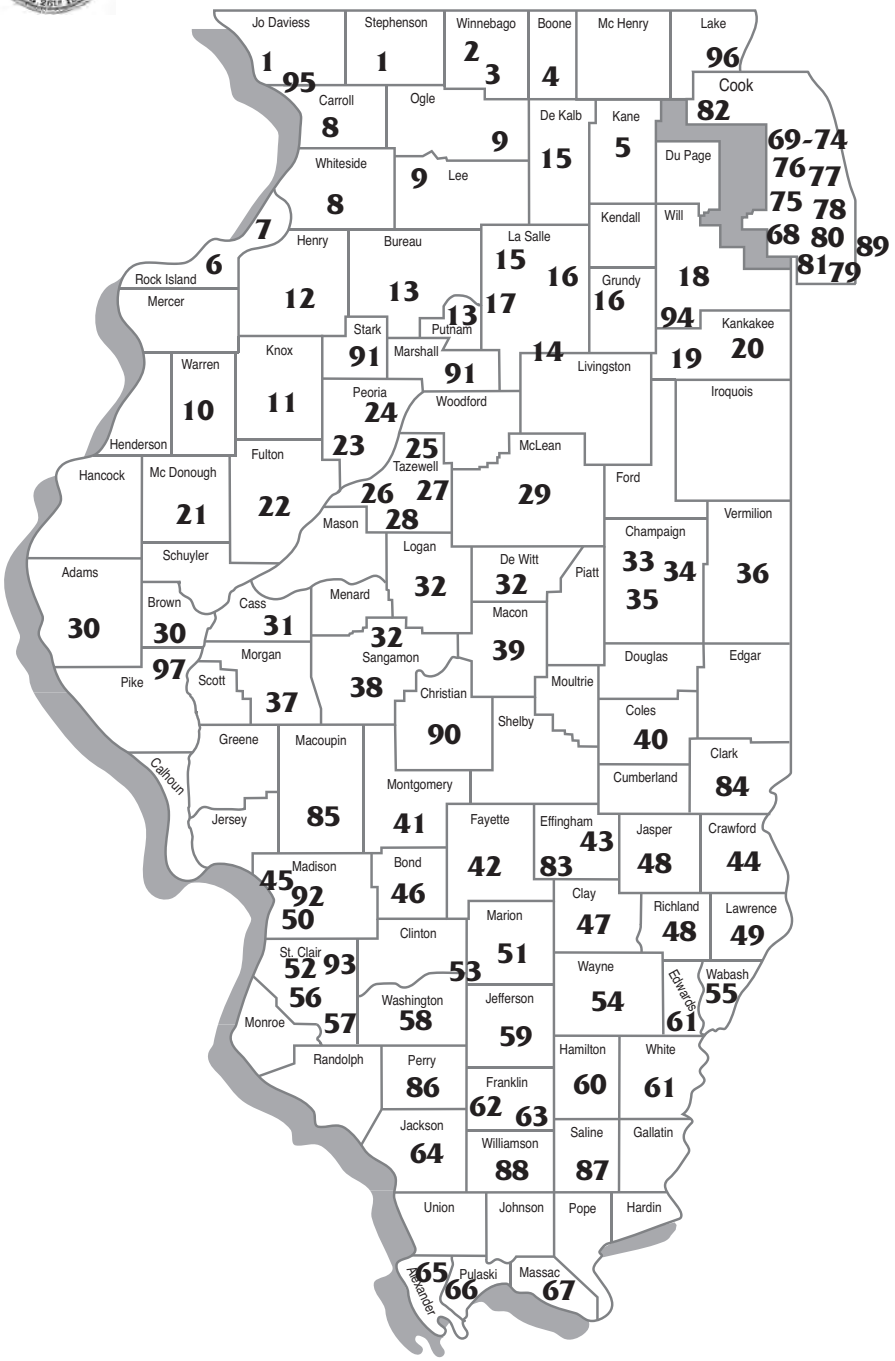
Respectfully submitted,
The Village of Summit, Illinois

By: _____
One of its attorneys

Michael S. Blazer (ARDC No. 6183002)
Jeffery D. Jeep (ARDC No. 6182830)
Jeep & Blazer, L.L.C.
24 N. Hillside Avenue, Suite A
Hillside, IL 60162
Telephone: (708) 236-0830
Facsimile: (708) 236-0828
mblazer@enviroatty.com
jdjeep@enviroatty.com

EXHIBIT A

State of Illinois
Department of Commerce and Economic Opportunity



ILLINOIS ENTERPRISE ZONES

March 2010

Altamont (83)
American Bottoms (57)
Bartonville/Peoria County (23)
Beardstown (31)
Belleville (56)
Belvidere/Boone County (4)
Benton/Franklin County (62)
Bloomington/Normal/McLean County (29)
Bureau/Putnam Area (13)
Cairo/Alexander County (65)
Cal-Sag (80)
Calumet Region (78)
Canton/Fulton County (22)
Carmi/White County/Edwards County (61)
Greater Centralia Area (53)
Champaign/Champaign County (35)
Chicago I (69)
Chicago II (70)
Chicago III (71)
Chicago IV (72)
Chicago V (73)
Chicago VI (74)
Chicago Heights (79)
Cicero (77)
Clark County (84)
Coles County (40)
Danville/Tilton/Vermilion County (36)
Decatur/Macon County (39)
Des Plaines River Valley (18)
Dixon/Lee County/Ogle County (9)
East Peoria (26)
East St. Louis/Washington Park (52)
Effingham/Effingham County (43)
Elgin (5)
Fairfield/Wayne County (54)
Flora/Clay County (47)
Ford Heights/Sauk Village (89)
Freeport/Stephenson County/Jo Daviess County (1)
Galesburg (11)
Gateway Commerce Center (92)
Greenville/Smithboro (46)
Harvey/Phoenix/Hazel Crest (81)
Hoffman Estates (82)
Illinois Valley (17)
Jackson County (64)
Jacksonville/Morgan County (37)
Jo-Carroll (95)
Joliet Arsenal (94)
Kankakee County (Manteno) (19)
Kankakee River Valley (20)
Kewanee/Henry County (12)
Lawrenceville/Lawrence County (49)
Lincoln/Logan County/De Witt County/
Sangamon County (32)
Macomb/McDonough County (21)
Macoupin County (85)
Marshall County/Stark County (91)
Massac County (67)
Maywood (76)
McCook/Hodgkins (68)
McLeansboro/Hamilton County (60)
Mendota/LaSalle County/DeKalb County (15)
Monmouth (10)
Montgomery County (41)
Morton (27)
Mound City/Pulaski County (66)
Mt. Carmel/Wabash County (55)
Mt. Vernon/Jefferson County (59)
Nashville/Washington County (58)
Olney/Richland County/Jasper County (48)
Ottawa/LaSalle County/Grundy County (16)
Pekin/Tazewell County (28)
Peoria (24)
Perry County (86)
Quad Cities (7)
Quincy/Adams County/Brown County (30)
Rantoul (33)
Riverbend (45)
Robinson/Crawford County (44)
Rockford (3)
Rock Island (6)
Salem/Marion (51)
Saline County (87)
South Beloit/Rockton/Winnebago County (2)
(Expired 3-1-10)
Southwestern Madison County (50)
Springfield (38)
St.Clair County Mid America (93)
Streator Area (14)
Summit/Bedford Park (75)
Taylorville/Christian County (90)
Urbana (34)
Vandalia/Fayette County (42)
Washington (25)
Waukegan/North Chicago (96)
Western Illinois Economic Develop. Authority (97)
West Frankfort (63)
Whiteside County/Carroll County (8)
Williamson County (88)

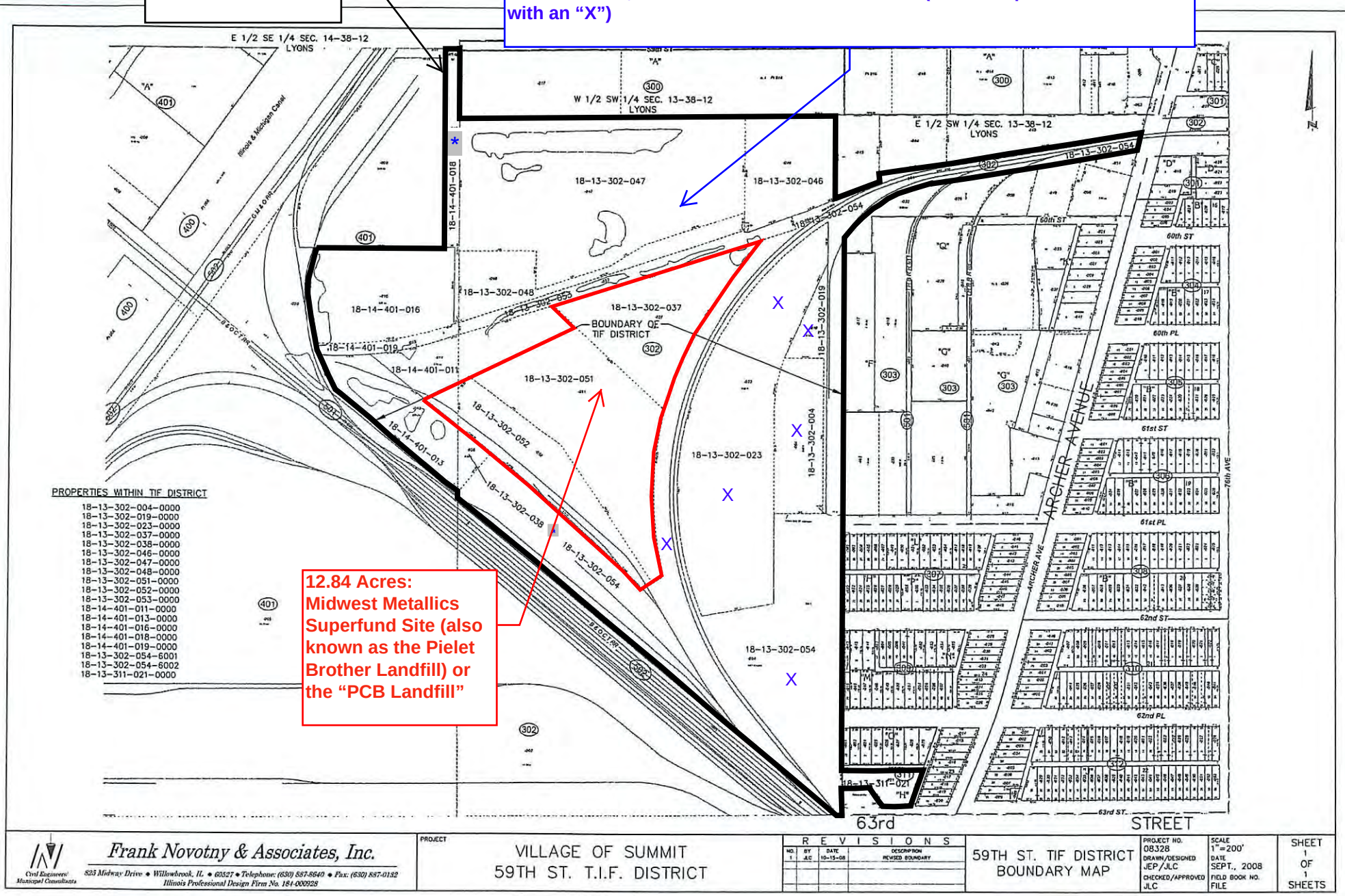
dceo

EXHIBIT B

EXHIBIT 2

49.84 Acres: TIF District Boundary

36.89 Acres: Redevelopment Site includes PCB Landfill and all of the TIF District EXCEPT parcels 18-13-302-054- 6001, 18-13-302-054- 6002, 18-13-302-004, 18-13-302-019 and 18-13-302-023 (excluded parcels are denoted with an "X")



12.84 Acres: Midwest Metallics Superfund Site (also known as the Pielet Brother Landfill) or the "PCB Landfill"

Frank Novotny & Associates, Inc. — Civil Engineers/Municipal Consultants — 825 Midway Drive • Willowbrook, IL • 60527 • Telephone: (630) 887-8640 • Fax: (630) 887-0132 — Illinois Professional Design Firm No. 184-000928	PROJECT: VILLAGE OF SUMMIT 59TH ST. T.I.F. DISTRICT	REVISIONS: NO. 1, BY JLC, DATE 10-15-08, DESCRIPTION REVISED BOUNDARY	59TH ST. TIF DISTRICT BOUNDARY MAP
PROJECT NO. 08328; DRAWN/DESIGNED JEP/JLC; CHECKED/APPROVED JLC	SCALE 1"=200'; DATE SEPT., 2008; FIELD BOOK NO. FILE	SHEET 1 OF 1 SHEETS	

EXHIBIT C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S Archer Rd
W 62ND St
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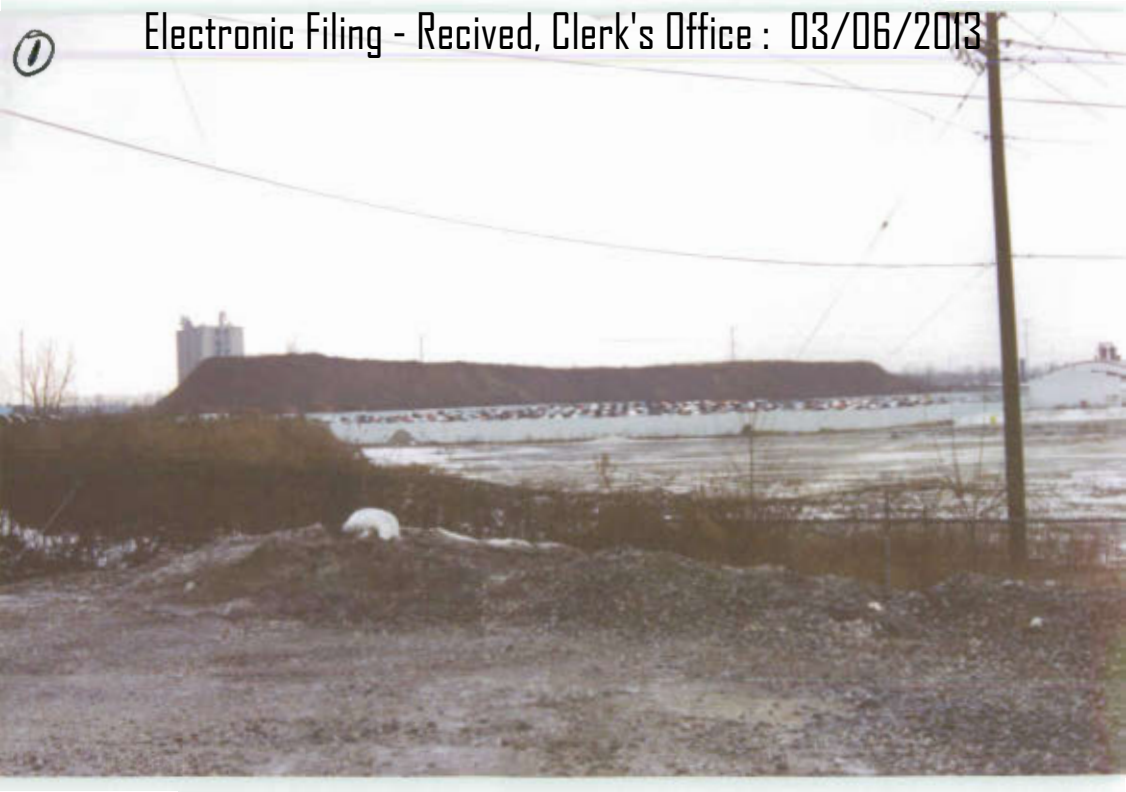
© 2006 Sanborn
© 2006 Europa Technologies
© 2006 Navteq
Google



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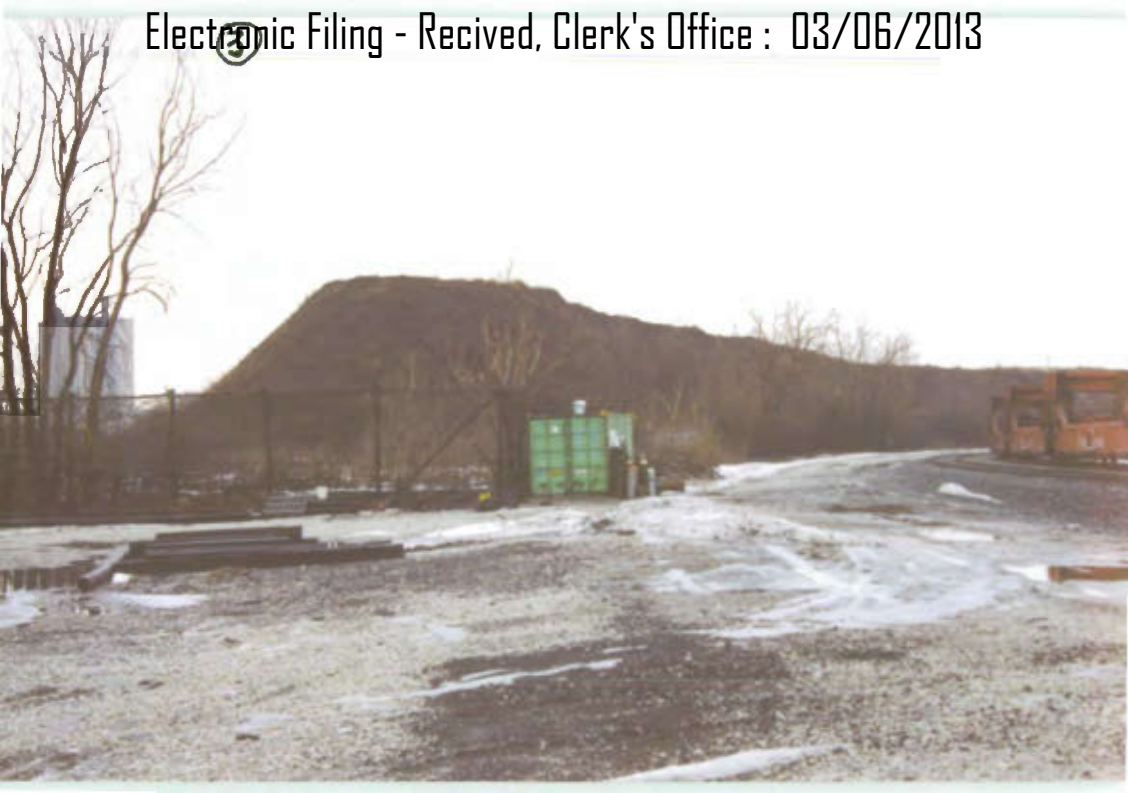

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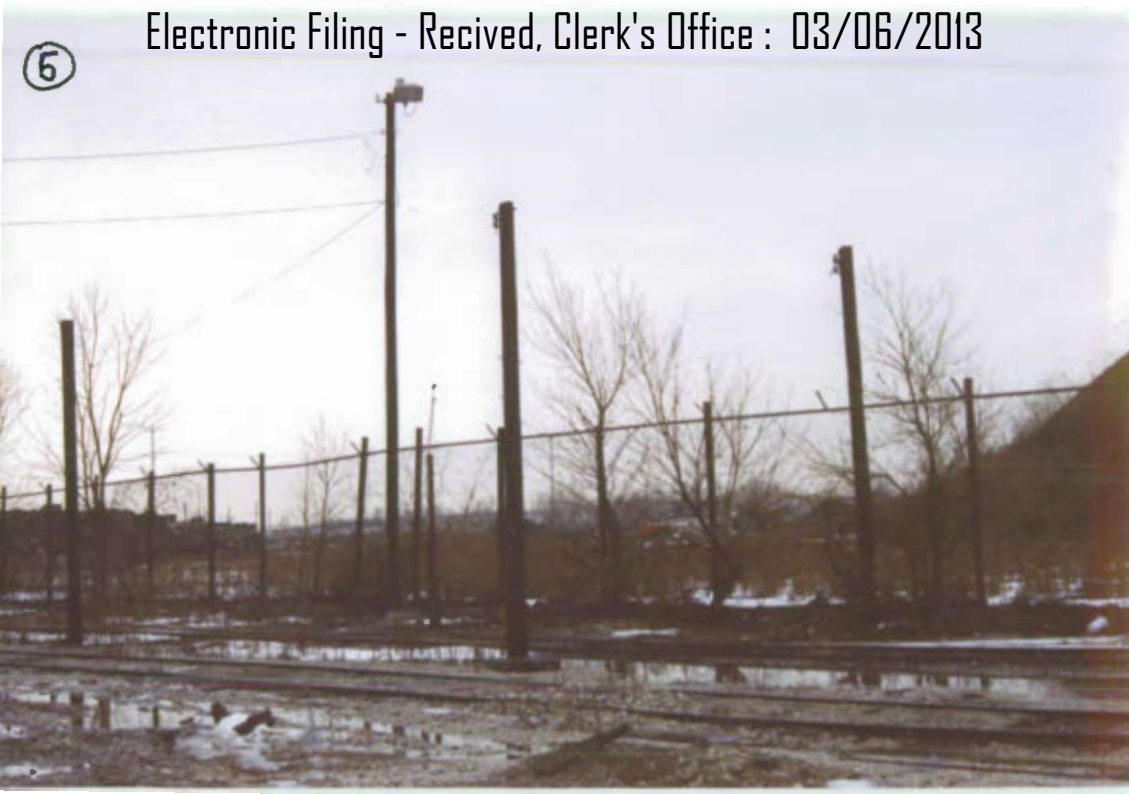

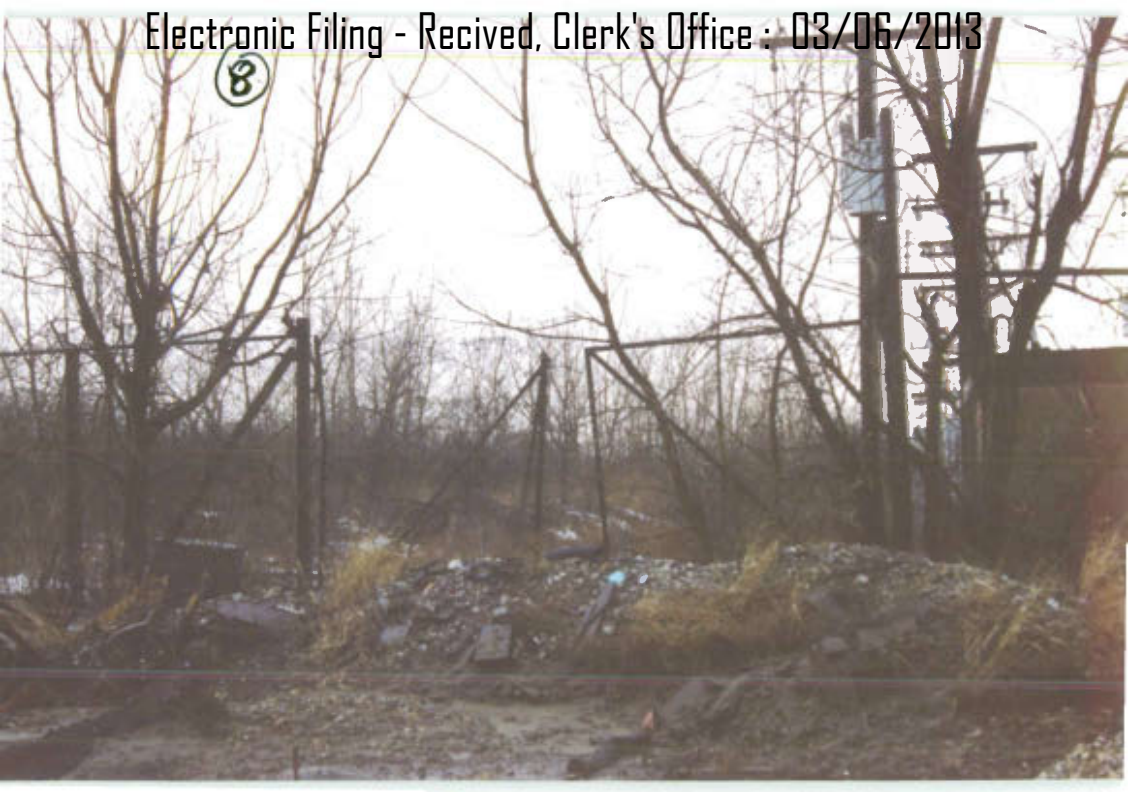
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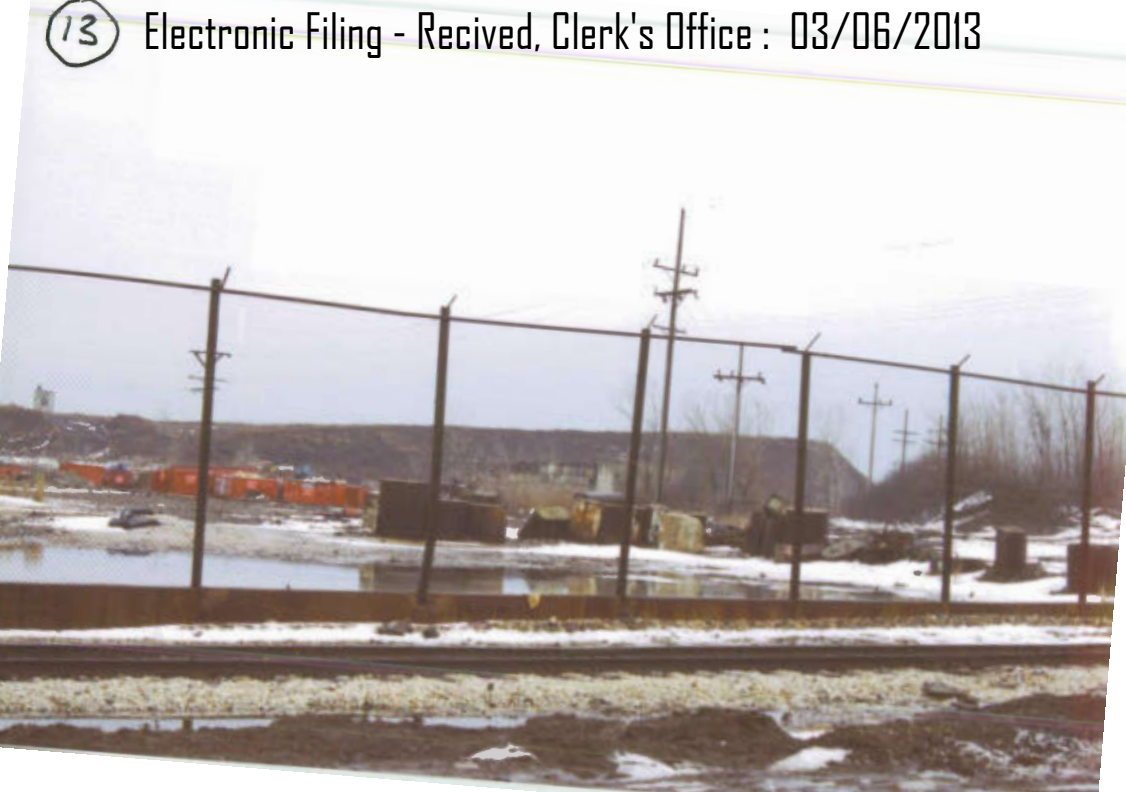

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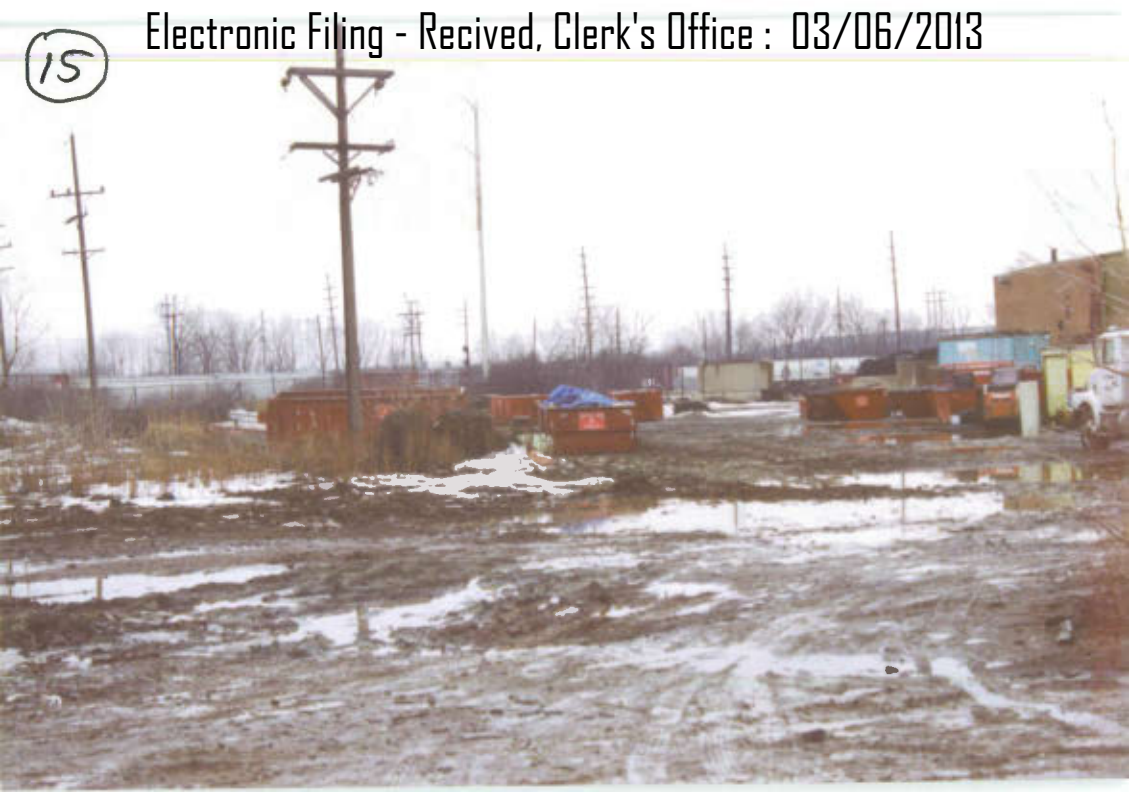

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EXHIBIT D

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF

MEMORANDUM SE-5J

DATE:

SUBJECT: **ACTION MEMORANDUM** - Request for an Exemption from the 12- Month and $2 Million Statutory Limit for the Time-Critical Removal Action at the Midwest Metallics Site, Summit, Cook County, Illinois (Site ID #B5J2)

FROM: Brad Benning, On-Scene Coordinator
Emergency Response Section II

TO: Richard Karl, Director
Superfund Division

THRU: Linda Nachowicz, Chief
Emergency Response Branch

I. PURPOSE

The purpose of this memorandum is to request an emergency exemption from the 12-Month and $2 Million statutory limits for removal actions and document your approval to expend up to $3,201,600 in order to abate an imminent and substantial threat to public health, welfare, and the environment posed by the presence of uncontrolled hazardous substances at the Midwest Metallics site, a bankrupt automobile shredding facility located in Summit, Cook County, Illinois (the "Site"). The hazardous substances consist of lead and poly chlorinated biphenyls (PCBs) contained in the automobile shredder residue ("ASR") which is present to various depths over the 23-acre site and in a large waste pile, exceeding 350,000 cubic yards at the southeast corner of the Site.

The proposed response action will mitigate threats to public health, welfare, and the environment posed by the presence of uncontrolled hazardous substances in the large waste pile. Proposed removal actions include, but are not limited to, the assessment and stabilization of chemical hazards at the Site through construction of an impervious cap. The presence of hazardous substances located on the surface of the Site, the potential for off-site migration, the unrestricted access to the property, and the Site's proximity to residential and commercial areas require that this removal be classified as time-critical. The project will require an estimated sixty 10-hour on-site working days to complete.

The Site is not on the National Priorities List ("NPL").

II. SITE CONDITIONS AND BACKGROUND

The CERCLIS ID number for the Site is ILD054348974

A. Site Description

1. Removal site evaluation

A Removal Site Assessment was conducted on March 15, 2000, to determine the extent of the automobile shredder residue ("ASR") previously observed at the Site, and to obtain additional analytical data to warrant a removal action. Samples of the ASR were collected from various locations throughout the Site. Eleven samples were collected at 200 foot intervals along the base of the large pile, and eight samples were collected on the top of the pile. Eight surface samples, a sediment sample and one water sample were also collected. The samples were analyzed for Total lead, TCLP metals, and PCBs. The results identified total lead levels ranging from 20.6 to 180,000 ppm, TCLP lead levels of 0.283 to 94.1ppm, and PCBs from 7.6 to 217.7 ppm. The ASR appears to cover an area in excess of 20 acres with depths ranging from one to 10 feet. The largest volume of ASR is located in the pile along the eastern perimeter and is estimated to contain 350.000 cubic yards. In addition to the ASR, the Site allegedly has four underground fuel storage tanks which probably contained diesel fuel for the Site vehicles. The condition and/or possible contamination from these tanks were not addressed during the initial site assessment activities. These potential fuel tanks are outside the scope of this removal action.

2. Physical location

The Site is located at 7955 West 59th Street in the City of Summit, Cook County, Illinois. Approximately 23 acres in size, the Site is located 10 miles southwest of Chicago, Illinois. The Site is located in the west-central section of Summit, and has the geographic coordinates of latitude 41.46.39 N, longitude 87.49.13 W. The Site is bordered by an industrial complex and 59th Street to the north; by railroad tracks and an automobile junkyard to the east; and by railroad tracks and railroad yard to the south and west. Although the Site is located in an industrial neighborhood, there is significant residential development less than 1000 feet to the southeast of the site.

A Region 5 Superfund Environmental Justice ("EJ") analysis has been prepared for the area surrounding the Site. This analysis is presented in Attachment IV. In Illinois, the statewide population which is defined as low-income is 27 percent and the minority average is 25 percent. To meet the EJ concern criteria, the area within 1 mile of the site must have a population that is twice the state low-income percentage and/or twice the state minority percentage. That is, the area must be at least 54% low-income and/or 50% minority. At this Site, the low-income percentage is 58.1% and the minority is 81.4%, as determined by Arcview or Landview III EJ analysis. Therefore, this Site does meet the Region's EJ criteria based on demographics, as identified in "Region 5 Interim Guidelines for Identifying and Addressing a Potential EJ Case, June 1998".

3. Site characteristics

The Site previously operated as a scrap metal processing/recycling facility for more than 20 years. The scrap metal shredder was utilized for the processing of scrap metal articles, such as automobile hulks and light iron. The shredding process facilitates separation of ferrous and nonferrous metals from nonmetallic materials contained in the feed material; after separation, the remaining material is commonly referred to as shredder residue. Shredder residues consist predominantly of nonmetallic solid material, including plastic, glass, rubber, soil, carpet and fabric. It is an unconsolidated, heterogeneous solid, medium to dark brown in color and typically exhibiting a slight, musty odor.

Key Site features include the main ASR pile, two sets of abandoned railroad tracks, the former materials processing/shredder area, a surface water impoundment located along the northern edge of the Site, and two office/garage buildings currently being leased to trucking companies. The main ASR pile extends along the Site's eastern border in a north-northeast/south-southwest direction and measures approximately 875 feet along its longest axis. The pile ranges in height from 30 to 70 feet above ground surfaces and in width from 125 to 250 feet. Two separate operations are active at the Site. These companies have leased discrete areas in the west-central and northeastern sections of the Site to conduct their operations. Generally, ground elevations increase by five to 10 feet from north to south, with drainage patterns to the north and northeast. Water and/or leachate from the ASR pile was observed accumulating along the east border and flowing off the Site toward the adjacent automobile junkyard. Other small piles of ASR are located throughout the Site, and many of the berms on Site are constructed of ASR material.

4. Release or threatened release into the environment of a hazardous substance, or pollutant or contaminant

Investigations at the Site have been focused on the exposed ASR material located throughout the Site and specifically in the main ASR pile. Analytical data have indicated that elevated levels of lead and PCBs are present on Site and pose an imminent and substantial threat of release to the environment, as a result of the improper disposal of ASR material. Analytical data also has documented the off-site migration of contaminated water to the adjacent automobile scrap yard.

Inspections in 2001 and 2005 continue to indicate the possibility of elevated temperatures within the main pile of ASR, cracks on the surface of the pile have been visually observed releasing smoke and/or steam, and the most recent inspection in February 2005, steam was observed rising from the entire east slope of the pile.

5. Maps, pictures and other graphic representations

Attachment V

B. Other Actions to Date

1. Previous actions

U.S. EPA's involvement at this Site began as part of an enforcement initiative of the Greater Chicago Geographic Initiative team. Cooperating agencies included the Illinois Environmental Protection Agency and the Illinois Attorney General's Office, which had begun previous enforcement efforts against Midwest Metallics, the facility owner/operator, when that entity was still in business. Sampling was conducted by U.S. EPA's RCRA contractor to determine the contaminant levels present in and RCRA regulatory status of the pile of auto shredder residue. Due to the need to ensure that the initial results were representative of the large ASR pile, on July 29, 1988, U.S. EPA issued an Order to Midwest Metallics pursuant to Section 3013 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6934, requiring investigation of the Site in Summit, Illinois. Midwest Metallics was the most recent owner/operator of the Site, although the previous operator had stockpiled ASR on the subject Site for a number of years. The Remedial Investigation required by the Section 3013 Order was never conducted, as the company filed for bankruptcy shortly after the sampling plan required by the Order had been approved.

In October 1998, the case against Midwest Metallics was referred to the Department of Justice to enforce a possible RCRA 7003 order; however, the referral was returned when questions arose regarding quality assurance issues with the analytical data upon which the Section 3013 Order was based. Upon Midwest Metallics' filing of bankruptcy and the discovery of the data quality assurance issues, U.S. EPA Superfund Division was then contacted to conduct a removal assessment at the Site.

U.S. EPA did participate for a period of time in negotiations with Midwest Metallics subsequent to the bankruptcy filing. However, because the State of Illinois preferred to pursue its previously-filed enforcement action against Midwest Metallics principals (and predecessors), U.S. EPA's enforcement role became secondary to that of the State, and the Agency primarily supported the State's enforcement action.

2. Current actions

U.S. EPA conducted a Removal Assessment at the Site on March 15, 2000, to further characterize the ASR located on Site. Twenty-nine samples were collected and confirmed that the ASR was contaminated with lead and PCBs. The Agency began working with the two trucking companies on Site, which were leasing portions of the property from the bankruptcy trustee, as both had expressed an interest in purchasing the property. Meetings were held with both parties to discuss prospective purchase agreements with the Agency. These meetings were unsuccessful as the cost for removal of the ASR was well beyond the value of the property. The Agency continued to monitor the Site while the Illinois EPA continued its enforcement activities against the previous PRPs.

In the summer of 2001, routine inspections revealed the possibility of an underground fire at the south end of the ASR pile. Smoke was emanating from cracks at the surface of the pile and charred ASR was visible along the southern slope. On June 15, 2001, an infrared flyover was conducted to confirm the potential of an internal fire within the pile. The flyover confirmed a hot spot at the southern end of the pile, although subsequent inspections indicated no external evidence of a fire. U.S. EPA's most recent inspection, conducted on February 23, 2005, (discussed below), indicates the possibility that the internal temperature of the ASR pile remains very high. Over the next two years, the Site remained relatively inactive, the Illinois EPA pursued its case against the PRPs, the two trucking firms continued to utilize the property primarily for parking, and the Agency continued to conduct random inspections.

The Site was inspected on February 1, 2005, and the Agency found that significant activity had taken place. Apparently, a new owner has purchased the back taxes on a portion of the Site, which does not include the large pile of ASR material. Individuals employed by this new owner have removed the vegetation along the north and south perimeters; ASR material in these areas has been graded, and the lagoons along the north perimeter were in the process of being filled. ASR material has been moved and transported to the base of the existing pile. Additionally, cars and trucks are now being parked on the northern portion of the Site; apparently the new owner is preparing these areas for parking and storage. This new owner is aware of the Site conditions and has hired an environmental consultant. The Agency will work with the new owner on all future negotiations regarding mitigation at the Site; Agency strategy is discussed further in the Enforcement Addendum.

A subsequent inspection was conducted on February 23, 2005, to obtain additional photo documentation of the change in Site conditions. Approximately 75 photographs were taken during the inspection depicting various site changes and current conditions. These photographs documented that: (1) ASR had been moved to the base of the pile along the west side; (2) ASR had been pushed and graded along the south boundary just east of the old shredder; (3) the north and southwest perimeters were cleared of all vegetation; (4) lagoons along the north perimeter were being filled with debris and ASR; (5) sections of fence were missing along the north and west perimeter; (6) an old fuel tank was missing from the west base of the pile, creating a large

pool of oil/water which has been released along the west base of the pile; (7) cracks were present at the south end of the pile, releasing steam and/or smoke; (8) the entire east slope showed the presence of steam and/or smoke although the temperature was in the 30's and it was a partly cloudy day; and (9) water and/or leachate continue to move off Site along the east Site perimeter.

C. State and Local Authorities' Roles

1. State and local actions to date

The Illinois Attorney General's office is currently pursuing legal action against the two principal operators of the Site. The trial occurred in July of 2004, and the State is seeking a complete removal of the ASR material present at the Site. The trial outcome and any relief ordered by the court will be discussed in the Enforcement Confidential Addendum.

On April 19, 2005, the Illinois EPA conducted a GPS survey of the area proposed for this removal action to better define the volume of ASR material that would require cover. The GPS data indicates a substantially larger volume of ASR than originally estimated, slightly over 350,000 cu. yds., which is 100,000 cu. yds. higher than the original volume estimate.

2. Potential for continued State/local response

Although the State is pursuing legal action, the State and local authorities do not have the financial resources to take response actions at the Site. The Illinois EPA has indicated that it will undertake the post removal Site control, after the response actions described in this Action Memorandum have been conducted.

III. THREATS TO PUBLIC HEALTH OR WELFARE OR THE ENVIRONMENT, AND STATUTORY AND REGULATORY AUTHORITIES

A removal action is necessary at the Midwest Metallics Site to abate the threat to public health, welfare or the environment posed by the release and potential release of hazardous substances. The NCP, 40 C.F.R. 300.415(b)(2), provides eight specific criteria for evaluation of a threat and the appropriateness of a removal action. Observations documented during the Site investigation indicate that the Site meets the following criteria for a time-critical removal action. Although there are threats associated with the ASR which is located outside of the large waste pile, the principal threats, as discussed below, derive from the 350,000 cubic yard waste pile. Threats associated with the ASR scattered on the remainder of the Site are expected to be addressed using EPA's enforcement authority, are discussed in the Enforcement Addendum, and are outside the scope of this removal action.

A. Actual or potential exposure to hazardous substances or pollutants or contaminants by nearby populations, animals, or the food chain.

This factor is present at the Site due to the threat of wind and water dispersal of contaminants from the waste pile; additionally, the Site is located within 1000 feet of a residential area. Analytical results from the samples collected at the Site confirm the presence of total PCBs, TCLP lead, cadmium and total lead at elevated levels. The maximum reported concentrations for these compounds were 217.7 ppm, 94.1 ppm, 1.07 ppm, and 180,000 ppm, respectively, for the ASR samples. These values all exceed the regulatory or guideline limits established by U.S. EPA for these compounds. Exposure to PCBs can result in chloracne; impaired liver function; a variety of neuro-behavioral symptoms; menstrual disorders; and an increased incidence of cancer. Lead exposure has been shown to produce infertility, retarded mental development in young children, tiredness, constipation, muscle pains, seizures, memory and concentration difficulties, and other symptoms. Contaminant levels for mercury 0.0052 ppm, chromium 0.148 ppm, and lead 7.0 ppm in sample LC-1 exceed Illinois EPA effluent standards set forth in Title 35 of the Illinois Administrative Code, Sections 304.124, and U.S. EPA National Primary Drinking Water Standards set forth in 40 C.F.R. § 141.62 for chromium, lead and mercury. These elevated levels are especially significant because off-site migration of storm water runoff was observed during the Site reconnaissance. The potential health effects of chromium include skin ulcers, stomach ulcers, nose bleed, stomach irritation, convulsions, liver and kidney damage. Headaches, chest pains, nausea, lung irritation and fever are among the acute symptoms of mercury exposure.

B. High levels of hazardous substances or pollutants or contaminants in soils largely at or near the surface, that may migrate.

This factor is present at the Site as almost all the samples collected at the Site were surface or near-surface samples (within 24 inches of ground) and exceeded the recommended regulatory or guideline limits established for these compounds. This indicates that the sample locations are susceptible to erosion impacts. Material from sample locations T-1 through T-8 and S-2 through S-7 have a greater likelihood of erosional impact because the samples were collected within 3-6 inches of the ground surface. The most likely erosion mechanisms at the Site are wind and rain, both excellent mechanisms for off-site material transport. Mechanical transport of contaminants also poses a threat as truck traffic appears to travel over the contaminated areas and potentially may track material off Site.

C. Weather conditions that may cause hazardous substances or pollutant or contaminants to migrate of be released;

This factor is present at the Site as strong winds potentially could carry the light components of the ASR material off Site, allowing lead and PCB contaminants to impact nearby commercial and residential areas. The main waste pile which varies from between 30 and 70 feet above ground surface is likely to be impacted by high wind conditions. The off-site migration of

hazardous substances via storm water runoff was documented in the Removal Assessment. An elevated level of lead (7.0 ppm) was detected in a sample of water that was migrating off Site to an adjacent commercial property. Analytical results from samples collected from the top of the main pile reveal PCBs present at concentrations almost seven times the U.S. EPA cleanup standard (25 mg/kg) and total lead present at concentrations up to 30 times the minimum guideline concentration (1,000 ppm). These levels, combined with the high potential for weather impacts and the proximity of residential housing (less than 1000 feet), represent a substantial threat.

D. Threat of fire or explosion.

This factor is present at this Site due to the existence of combustible ASR material, which if involved in a fire, may pose a health risk to residents that live within 1000 feet of the Site. Among the identifiable material types that were observed in the ASR at the Site were foam, plastics, fabrics, and rubber. These materials are all combustible under certain conditions and, when involved in a fire, have the potential to produce noxious and/or toxic emissions, along with the potential to release the known hazardous substances lead and PCBs. Due to the volume of ASR on-site, a fire would pose an imminent and substantial endangerment to public health and welfare. Prior indication of an internal fire was evident in 2001, and additional inspections in 2005 indicate the internal temperature of the pile may be elevated and that the possibility of an underground fire is extremely high and would pose an imminent risk to the public health.

IV. ENDANGERMENT DETERMINATION

Given the current conditions at the Site and the nature of the hazardous substances on-site, actual or threatened releases of hazardous substances from this Site, if not addressed by implementing and completing the response actions selected in this Action Memorandum, may present an imminent and substantial endangerment to public health, welfare, or the environment. The possibility of further releases of the hazardous substances present a threat to the nearby population and the environment via the exposure pathways described in Section III.

V. PROPOSED ACTIONS AND ESTIMATED COSTS

There are obvious time-critical elements present at the Site. The hazardous substances are located in an unsecured Site, with signs of public trespass as fly dumping has been observed at the Site, located near industrial and residential areas, and must be immediately addressed. The proposed removal actions at the Site would eliminate the imminent and substantial threats to human health, welfare, or the environment, as outlined in this memorandum.

The On-Scene Coordinator (OSC) proposes to undertake the following response actions to mitigate threats posed by the presence of hazardous substances at the Midwest Metallics Site:

a. Develop and implement a Site-specific work plan, including a proposed time line for the main ASR pile and adjacent areas, excluding the property recently purchased through the County tax sale.

b. Develop and implement a Site-specific health and safety plan.

c. Establish and maintain Site security measures during the removal actions, which may include security guard service.

d. Develop and implement an air monitoring and sampling program during removal activities.

e. Identify, sample and characterize the hazardous substances located at the Site.

f. Excavate contaminated soil and ASR; stage on-site, as necessary.

g. Consolidate ASR/soil material in preparation for on-site remediation.

h. Construct a modified Subtitle D cap to secure the ASR/soil materials.

i. Provide measures to prevent erosion and control runoff.

j. Install fencing as needed to secure the disposal (capped) area.

The proposed removal actions outlined above target the large waste pile only.

All hazardous substances, pollutants or contaminants removed off-site pursuant to this removal action for treatment, storage or disposal will be treated, stored, or disposed of at a facility in compliance, as determined by U.S. EPA, with the U.S. EPA Off-Site Rule, 40 CFR 300.440, 58 Federal Register 49215 (Sept. 22, 1993).

The removal action will be taken in a manner not inconsistent with the NCP. The OSC has begun planning for provisions of post removal Site control, consistent with the provisions of Section 300.415(1) of the NCP. The following post removal Site control provisions are currently envisioned: (1) fence monitoring and maintenance, (2) cap monitoring and maintenance, and after implementation of this removal action, the post removal Site control will be conducted by the Illinois EPA.

All applicable and relevant and appropriate requirements ("ARARs") of federal and state law will be complied with, to the extent practicable. A federal ARAR determined to be applicable for the Site is the RCRA Off-Site Disposal Policy. A state ARAR determined to be applicable for the Site is the 35 Illinois Administrative Code, Sec. 724, Subpart G, Closure and Post-Closure Care.

Because PCBs were found at the Midwest Metallics Site, the regulations under the Toxic Substances Control Act are applicable to the Site. 40 C.F.R. Part 761, Subpart D, Storage and Disposal, and particularly 40 C.F.R. § 761.61, define the disposal requirements for bulk PCB remediation waste. 40 C.F.R. § 761.61(a)(4)(i)(B) states that PCBs may remain in place at a site in low occupancy areas for PCB concentrations at less than 100 ppm.

Some of the analytical results at the Midwest Metallics Site showed PCBs concentrations above the 100 ppm concentration limit for on-site disposal, as defined by 40 C.F.R. §761.61. However, the EPA document *Sampling Guidance for Scrap Metal Schredders - Field Manual* (EPA 747-R-93-009), was published in order to provide PCB sampling methodology for addressing ASR, in situations such as those presented by the Site, a large volume, non-homogeneous waste stream. Part of that guidance uses confidence intervals, a means of addressing the concentration of a large pile as a whole. The confidence interval, as applied to ASR, will provide a range of concentrations that the true value of the pile as a whole falls within. The accuracy of that representation is dependent upon the number of samples taken. At Midwest Metallics, samples were taken on November 26, 1996 and March 15-16, 2000. A total of 26 samples were collected. Using the sampling data with the methodology described above, the confidence interval can be expressed, that with 95% certainty, the PCB concentration of the material on site is from 57 ppm to 96 ppm. This would allow for on-site disposal, consistent with the requirements of 40 C.F.R. § 761.61(a)(4)(i)(B).

Under the TSCA regulations, the necessary cap requirements are defined by § 761.61(a)(7); this provision also incorporates the RCRA closure and post closure care requirements of 40 C.F.R. §264.310(a) and the permeability, sieve, liquid limit, and plasticity index parameter of 40 C.F.R. § 761.75(b)(1)(ii) through (b)(1)(v). The necessary deed restriction requirements are defined by 40 C.F.R. § 761.61(a)(8).

Because TCLP lead levels above the RCRA regulatory limits were also found at the Site, a hazardous waste landfill cap could also be considered applicable at the Site. However, the rules for corrective action management units ("CAMUs"), set forth at 40 C.F.R. § 264.552, could also be considered to be relevant and appropriate and offer significant flexibility in terms of the cap design requirements. 264.552(e)(3)(iv) defines the cap requirements for a CAMU. In the preamble discussion to the federal register notice defining this standard, U.S. EPA made it clear that a number of flexible approaches would meet the requirements of this regulation, 67 Fed. Reg. 2962, 2980 (January 22, 2002) and also made reference to the July 29, 1997 preamble discussions for municipal solid waste landfills (62 Fed. Reg. 40710). A Subtitle C cap would provide a barrier layer next to the waste, a gas migration layer, and a drainage layer, none of which would be present in a Subtitle D solid waste landfill cap.

The Subtitle D cap that would be constructed over the ASR pile is meant to protect against the direct contact threat, the threat of erosion, wind migration of contamination, and spontaneous combustion or fires due to vandalism. Construction of a Subtitle C cap would also add at least $50,000 per acre, or approximately $350,000-$400,000 total, to the costs of the removal action, resources which are simply not available. Given the exigencies of the situation present at the Midwest Metallics Site, such as the high internal temperature of the ASR pile, the possibility that the pile could catch fire, the danger of wind and water dispersal of contaminants, and the proximity of residences to the ASR pile, as well as the fact that a solid waste cap would protect against the principal threats presented by the Site, U.S. EPA has determined that a solid waste municipal landfill cap is appropriate at the Site. In this regard, Illinois EPA has identified 35 IAC Section 811.204, Final Cover, as an ARAR for the design of the solid waste cap. This section requires a minimum of three feet of soil material that will support vegetation which prevents or minimizes erosion over all disturbed areas. U.S. EPA will meet this State ARAR.

Any additional federal and state ARARs will be addressed to the extent practicable.

The response actions described in this memorandum directly address the actual or threatened releases of hazardous substances, pollutants or contaminants at the Site which may pose an imminent and substantial endangerment to public health, welfare, or the environment. These response actions do not impose a burden on the affected property disproportionate to the extent to which that property contributes to the conditions being addressed.

The estimated costs to complete the above actions are summarized below. These activities will require an estimated sixty 10-hour on-site days to complete. Detailed contractor costs are presented in Attachment II.

REMOVAL PROJECT CEILING ESTIMATE

EXTRAMURAL COSTS

Cleanup Contractor Costs	$2,140,000
Contingency (20%)	428,000
Subtotal	$2,568,000

Extramural Costs not funded from Regional Allowance

START Costs	100,000
Extramural subtotal	$ 2,668,000
Extramural contingency (20%)	533,600
TOTAL, REMOVAL PROJECT CEILING	**$3,201,600**

VI. EXPECTED CHANGE IN THE SITUATION SHOULD ACTION BE DELAYED OR NOT TAKEN

A delay or non action at the Site may result in an increased likelihood of direct contact by human populations to the hazardous substances. Since the Site is easily accessible, the various threats to human health and/or the environment are significantly magnified. Additionally, any delay or non-action will also increase the likelihood of contamination migration off-site into the surrounding commercial and residential neighborhood.

VII. EXEMPTION FROM STATUTORY LIMITS

CERCLA Section 104 (c) states that removal actions can exceed the 12-Month and $2 million statutory limit if conditions meet either the "emergency exemption" criteria or the consistency criteria. As discussed above, the environmental conditions, and the proposed budget that would be required to address those conditions, necessitate the exemption from the 12-Month and $2 million statutory limit for the Midwest Metallics Site.

EMERGENCY WAIVER

1. **"There is an immediate risk to public health or welfare or the environment;"**

A large volume of ASR, contaminated with high levels of lead and PCBs, is present at or near the surface in an area which is close to residences; the ASR remains unsecured. The risks presented by this material are described in detail elsewhere in this Action Memorandum.

2. **"Continued response actions are immediately required to prevent, limit, or mitigate an emergency;"**

For the reasons stated above, this is a time critical removal action, and response activities must be initiated as soon as practicable. Because of the large volume of ASR that must be contained by this removal action, the removal action will cost more than two million dollars. However, in order to insure financial integrity within the Region, it is possible that it will be necessary to conduct this removal action over a two to three year period.

3. **"Assistance will not otherwise be provided on a timely basis;"**

Neither state nor local agencies have any resources to complete the removal actions at this Site.

VIII. OUTSTANDING POLICY ISSUES

No significant policy issues are associated with the Midwest Metallics Site.

IX. ENFORCEMENT

For administrative purposes, information concerning confidential enforcement strategy for this Site is contained in the Enforcement Confidential Addendum. The total costs for this removal action based on full-cost accounting practices that will be eligible for cost recovery are estimated to be $5,015,378.[1]

(Direct Costs) + (Indirect Costs) = **Estimated EPA Costs for a Removal Action**
($3,201,600 + $31,000) + (55.15% x $3,232,600) = **$5,015,378**

Direct Costs include direct extramural costs and direct intramural costs. Indirect costs are calculated based on an estimated indirect cost rate expressed as a percentage of Site-specific direct costs, consistent with the full cost accounting methodology effective October 2, 2000. These estimates do not include pre- judgment interest, do not take into account other enforcement costs, including Department of Justice costs, and may be adjusted during the course of a removal action. The estimates are for illustrative purposes only and their use is not intended to create any rights for responsible parties. Neither the lack of a total cost estimate nor deviation of actual costs from this estimate will affect the United States' right to cost recovery.

X. RECOMMENDATION

This decision document represents the selected removal action for the Midwest Metallics Site located in Summit, Cook County, Illinois, developed in accordance with CERCLA as amended, and is not inconsistent with the NCP. This decision is based on the Administrative Record for the Site (see Attachment III).

Conditions at the Site meet the criteria of Section 300.415(b)(2) of the NCP for a removal action and meet the statutory criteria. Based on the emergency waiver, I recommend your approval of the proposed removal action and exemption from the 12-Month and $2 Million statutory limits on removal actions. The total estimated project ceiling, if approved will be $3,201,600. Of this, an estimated $3,101,600 may be used for cleanup contractor costs. You may indicate your decision by signing below:

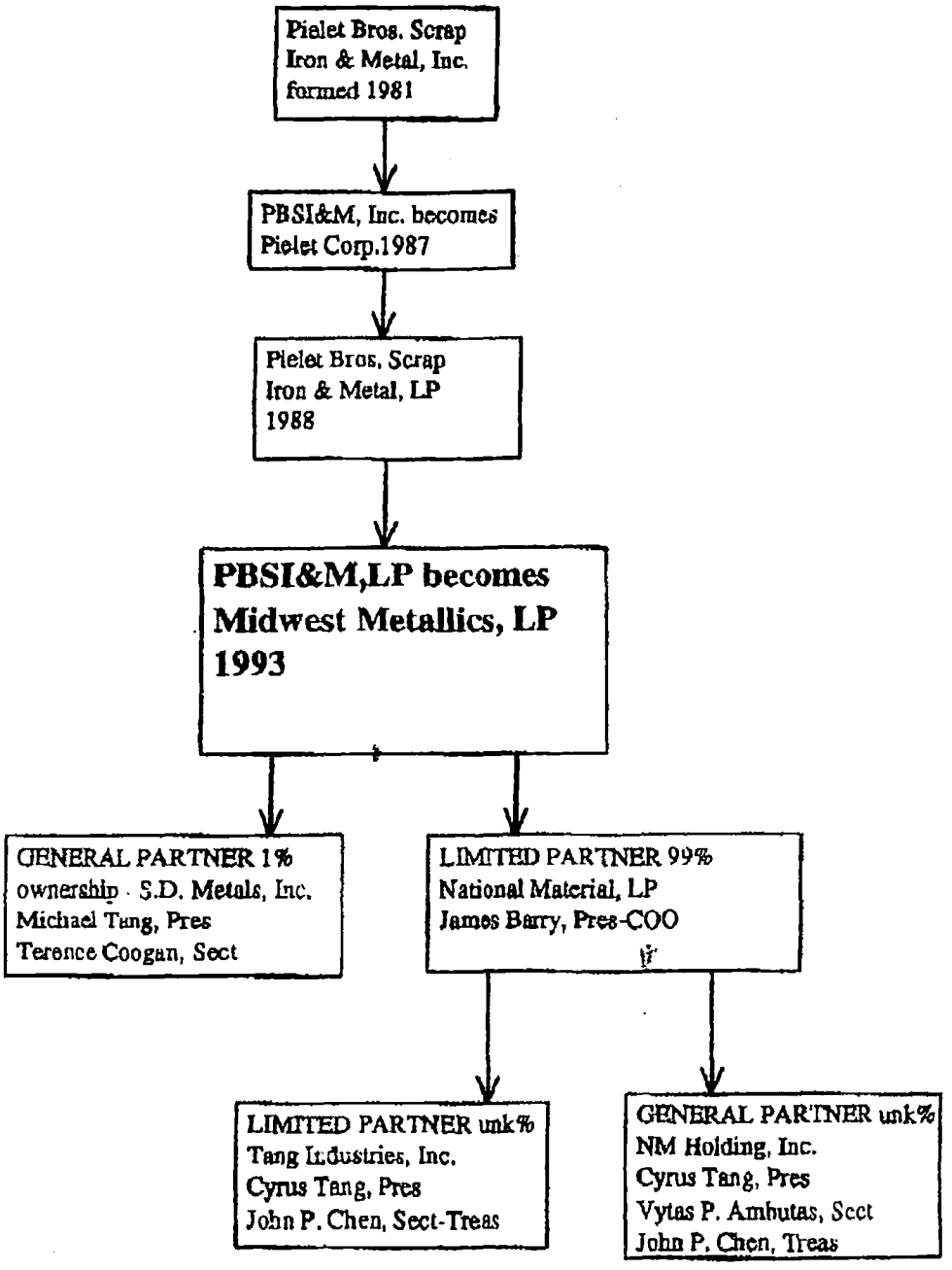
APPROVE: _____ DATE: 9/2/05
Director, Superfund Division

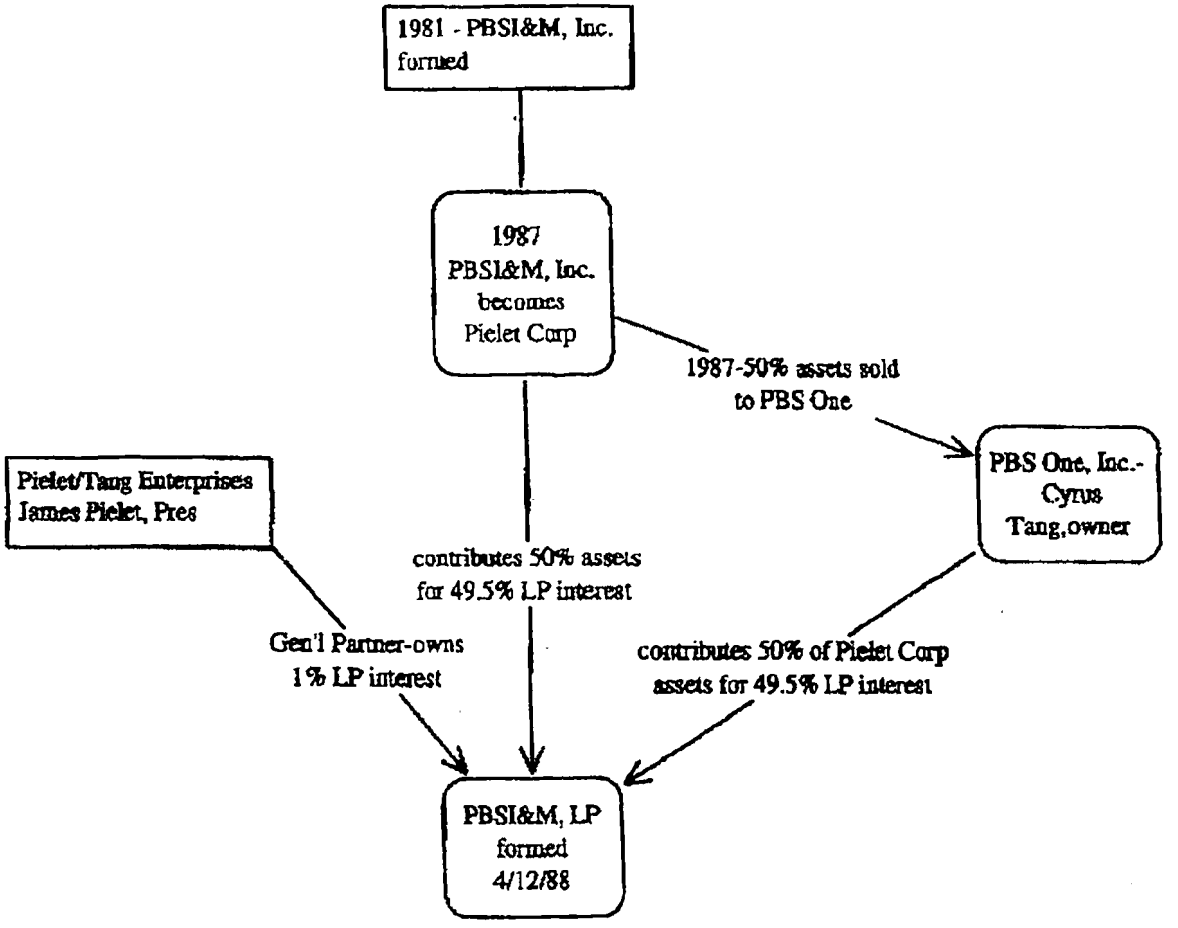
DISAPPROVE: _____ DATE: _____
Director, Superfund Division

Attachments: I. Enforcement Confidential addendum
II. ERRS Contractor Estimate
III. Administrative Record Index
IV. Region 5 Superfund EJ Analysis
V. Maps, Diagrams

cc: D. Chung, U.S.EPA, OERR, 5202G
Michael T. Chezik, U.S. Department of the Interior
Custom House, Room 244
200 Chestnut Street
Philadelphia, PA 19106 **w/o Enf. Addendum**
B. Everetts, Illinois EPA
Superfund Coordinator, **w/o Enf. Addendum**

Midwest Metallics, LP
ORGANIZATIONAL CHART

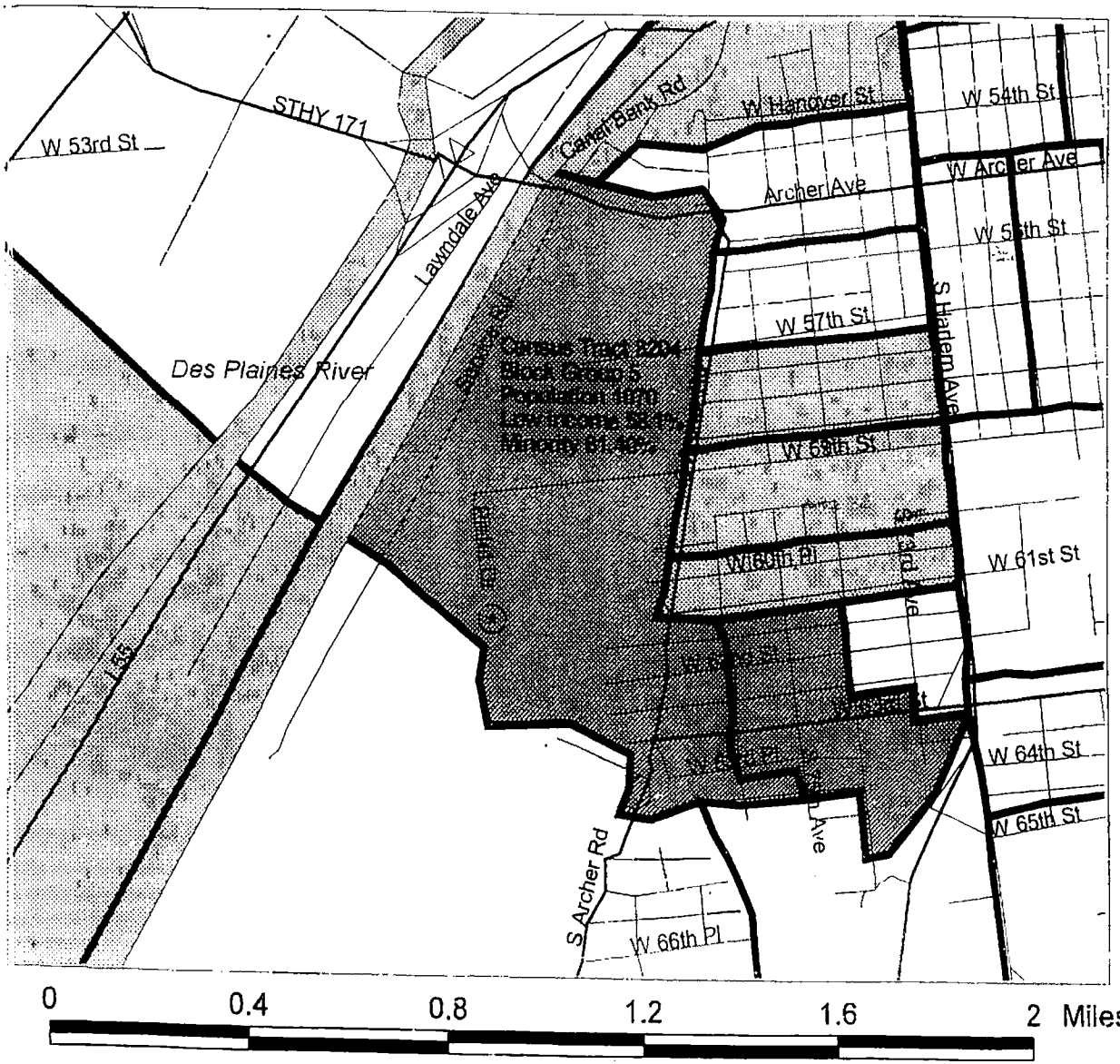



1981 - PBSI&M, Inc. formed
1987 PBSI&M, Inc. becomes Pielet Corp
1987-50% assets sold to PBS One
PBS One, Inc.- Cyrus Tang,owner
Pielet/Tang Enterprises James Pielet, Pres
contributes 50% assets for 49.5% LP interest
Gen'l Partner-owns 1% LP interest
contributes 50% of Pielet Corp assets for 49.5% LP interest
PBSI&M, LP formed 4/12/88

20

Region 5 Superfund EJ Analysis

Midwest Metallics Site Summit, Illinois



EJ Identification

- Low Income and Minority Less than State Average
- Low Income or Minority at or Greater than State Average
- Low Income or Minority 2 Times or Greater than State Average [meets Region 5 EJ Case criteria]
- Site Location
- Block Group Boundary

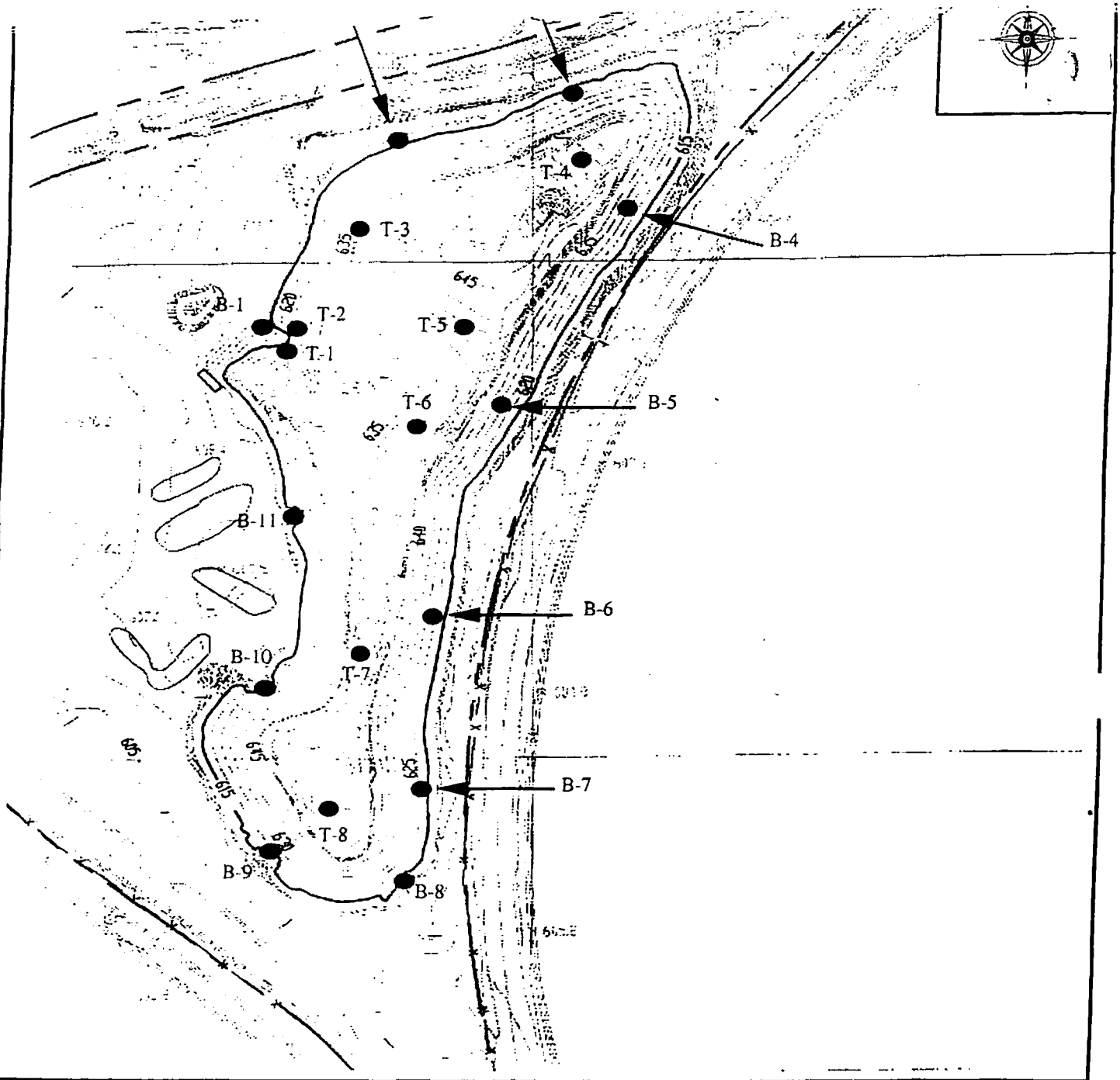
Region 5 EJ Case Criteria for Illinois
Minority: 50% or greater
Low Income: 54% or greater

N

U.S. EPA Region 5 Superfund EJ

Date of Map: 09/05/00

Source of Map: 1990 Census Database



Legend

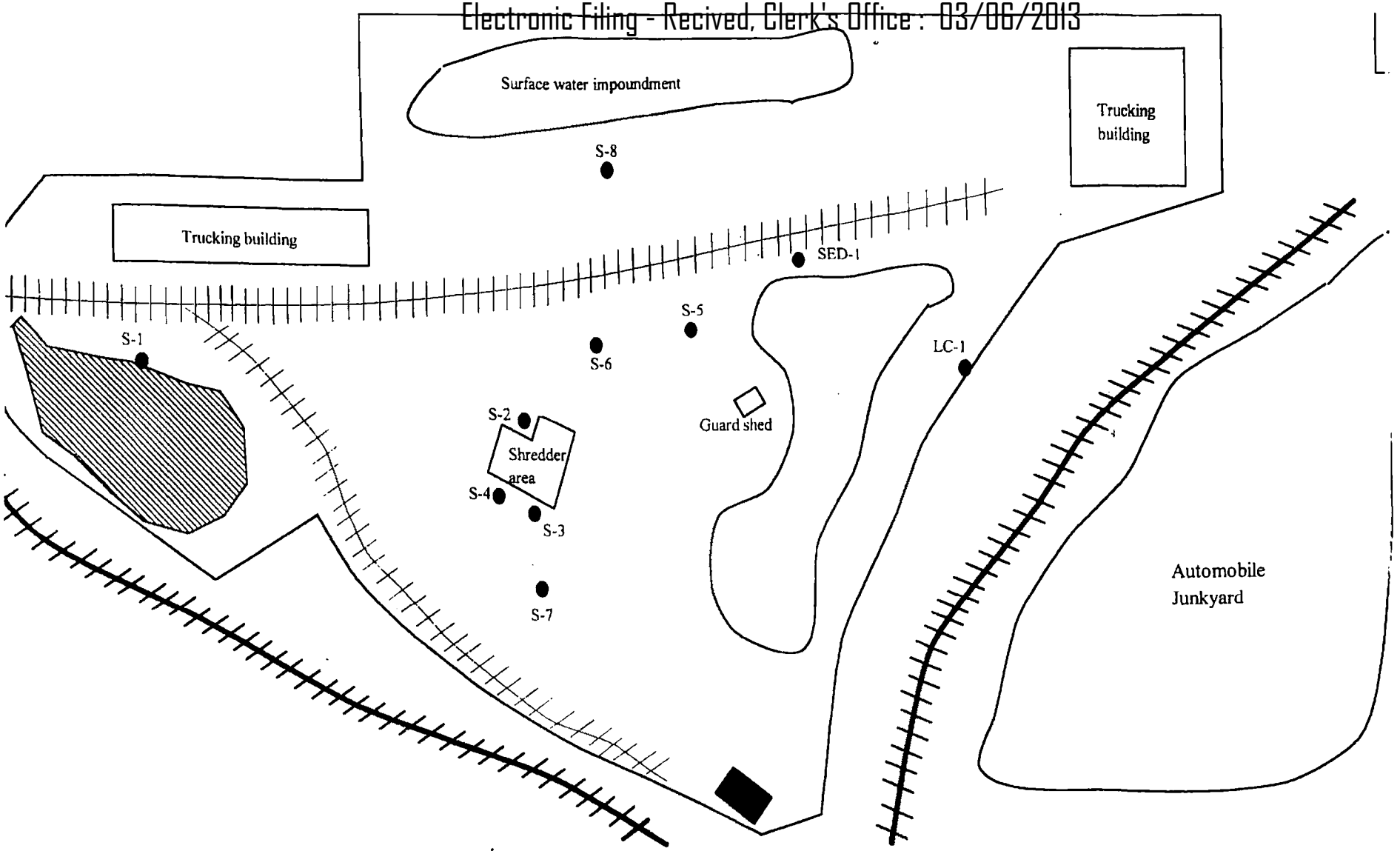
● Sample location

ecology and environment, inc.

Superfund Technical Assessment and Response Team
Region 5

33 North Dearborn Street, Suite 900, Chicago, Illinois 60602

TITLE: Sample Location Map - Main Autofluff Pile	FIGURE: 3-1
SITE: Midwest Metallics	SCALE: Not to scale
CITY: Summit STATE: Illinois	TDD: S05-0001-025
SOURCE: Ecology and Environment, Inc.	DATE: May 2000



Legend

Reprocessed autofluff storage area

Main autofluff pile

Sample location

ecology and environment, i

Superfund Technical Assessment and Response Team
Region 5
33 North Dearborn Street, Chicago, Illinois 60602

Title	Sample Location Map - Non-pile locations		Figure 3-2
Site	Midwest Metallics		Scale Not to
City	Summit	State Illinois	TDD S05-0(
Source	Ecc and Environment, Inc.		Date 2(

ANALYTICAL RESULTS FOR SAMPLES COLECTED AT BASE OF MAIN AUTOFLUFF PILE
MIDWEST METALLICS SITE
SUMMIT, ILLINOIS
MARCH 15, 2000

Units = PCBs (µg/kg), TCLP RCRA Metals (mg/L), Total lead (mg/kg), and Percent Moisture (%)

Analytes	Regulatory Limit	Sample Designation											
		B-1	B-2	B-3	B-4	B-5	B-6	B-6 (DUP)	B-7	B-8	B-9	B-10	B-11
PCBs													
PCB-1016		15,300	7,400	1,900	1,300	ND	ND	ND	2,700	3,000	2,800	3,400	ND
PCB-1221		ND	ND	ND	ND	ND	ND	ND	ND	ND	ND	ND	ND
PCB-1232		15,300	7,400	1,900	1,300	ND	ND	ND	2,700	3,000	2,800	3,400	ND
PCB-1242		50,900	39,700	9,170	6,030	ND	11,500	7,180	12,600	11,700	12,100	17,000	ND
PCB-1248		40,800	36,200	5,550	6,450	ND	ND	5,890	8,060	7,960	9,140	8,860	ND
PCB-1254		76,600	57,300	17,600	3,100	7,610	12,200	10,700	16,300	11,500	14,100	16,200	ND
PCB-1260		18,800	14,200	5,930	5,440	ND	5,030	4,330	5,870	4,160	5,360	15,000	ND
Total PCBs	50,000	**217,700**	**162,200**	42,050	23,620	7,610	28,730	28,100	48,230	41,320	46,300	**63,860**	0.0
TCLP RCRA Metals													
Arsenic	5	ND	ND	ND	0.24	0.16	ND	ND	0.13	ND	0.082	ND	ND
Barium	100	2.47	2.08	3.46	3.47	2.4	1.59	1.39	2	1.08	0.423	3.33	0.22
Cadmium	1	0.483	0.919	0.644	0.619	0.726	0.678	0.803	0.963	0.602	0.544	0.555	0.825
Chromium	5	0.015	ND	ND	ND	ND	ND	ND	ND	ND	ND	ND	ND
Lead	5	3.4	2.86	**25.9**	**11.4**	**29.4**	4.82	4.91	**14.3**	6.4	**16.3**	2.03	2.5
Mercury	0.2	0.013	ND	ND	ND	ND	ND	ND	ND	ND	ND	ND	0.0033
Selenium	1	ND	ND	ND	ND	ND	ND	ND	ND	ND	ND	ND	ND
Silver	5	ND	ND	ND	ND	ND	ND	ND	ND	ND	ND	ND	ND
Other													
Total Lead	1,000-1,500	**180,000**	**13,800**	**13,200**	**10,500**	**9,370**	**9,310**	**41,200**	**9,610**	**9,230**	**9,300**	**8,660**	**10,400**
Percent Moisture	NA	32.2	30.5	15.5	16.9	16.4	24.2	24.5	22.5	16.1	14.1	23.9	19.4

Key:

DUP	=	Duplicate sample.
PCBs	=	Polychlorinated biphenyls.
ND	=	Not detected.
TCLP	=	Toxicity characteristic leaching procedure.
RCRA	=	Resource Conservation and Recovery Act.
NA	=	Not applicable.
µg/kg	=	Micrograms per kilogram.
mg/L	=	Milligrams per liter.
mg/kg	=	Milligrams per kilogram

Notes:

1. Shaded cells represent contaminant concentrations exceeding the regulatory limit.
2. Concentrations of PCBs are reported in parts per million or mg/kg in the report text. To convert µg/kg to mg/kg, divide the reported value by 1,000.

Source: Suburban Laboratories, Inc., Hillside, Illinois.

ANALYTICAL RESULTS FOR SAMPLES FROM THE TOP OF THE MAIN AUTOFLUFF PILE
MIDWEST METALLICS SITE
SUMMIT, ILLINOIS
MARCH 15, 2000

Units = PCBs (µg/kg), TCLP RCRA Metals (mg/L), Total lead (mg/kg), and Percent Moisture (%)

Analytes	Regulatory Limit	Sample Designation								
		T-1	T-2	T-3	T-4	T-5	T-6	T-6 (DUP)	T-7	T-8
Bs										
B-1016		ND	ND	22,700	16,100	8,320	16,800	24,900	19,200	11,600
B-1221		ND	ND	ND	ND	ND	ND	ND	ND	ND
B-1232		ND	ND	22,700	16,100	8,320	16,800	24,900	19,200	11,600
B-1242		ND	16,900	59,500	43,600	ND	ND	ND	ND	ND
B-1248		12,800	ND	31,000	22,800	8,920	20,100	31,800	31,500	27,800
B-1254		ND	17,500	27,500	16,300	ND	ND	ND	ND	ND
B-1260		3,610	ND	9,260	4,090	ND	4,100	3,640	5,940	6,520
l PCBs	50,000	16,410	34,400	172,660	118,990	25,560	57,800	85,240	75,840	57,520
P RCRA Metals										
nic	5	ND	ND	ND	ND	ND	ND	ND	ND	ND
um	100	1.5	1.59	3.14	2.36	2.47	2.23	2.44	2.6	2.82
ium	1	0.574	0.813	0.31	0.839	0.418	0.789	0.733	0.94	0.844
mium	5	ND	ND	ND	ND	0.087	ND	ND	ND	ND
	5	3.72	8.2	6.01	23.3	94.1	59.8	27.3	10.4	27.8
cury	0.2	ND	0.0005	ND	ND	ND	ND	0.0007	ND	ND
nium	1	ND	ND	ND	ND	ND	ND	ND	ND	ND
er	5	ND	ND	ND	ND	ND	ND	ND	ND	ND
l Lead	1,000-1,500	15,900	14,100	2,990	10,800	4,140	11,000	10,200	9,610	30,600
nt Moisture	NA	13.3	6.7	21.1	14.7	9	15.9	17	19.8	13.4

DUP	=	Duplicate sample
PCBs	=	Polychlorinated biphenyls
ND	=	Not detected
TCLP	=	Toxicity characteristic leaching procedure.
RCRA	=	Resource Conservation and Recovery Act.
NA	=	Not applicable
µg/kg	=	Micrograms per kilogram
mg/L	=	Milligrams per liter
mg/kg	=	Milligrams per kilogram.

s

Shaded cells represent contaminant concentrations exceeding the regulatory limit.
Concentrations of PCBs are reported in parts per million or mg/kg in the report text.
To convert µg/kg to mg/kg, divide the reported value by 1,000.

Suburban Laboratories, Inc., Hillside, Illinois

Table C-3

ANALYTICAL RESULTS FOR SAMPLES FROM NON-PILE AREAS
MIDWEST METALLICS SITE
SUMMIT, ILLINOIS
MARCH 15, 2000

Units = PCBs (µg/kg), TCLP RCRA Metals (mg/L), Total lead (mg/kg), and Percent Moisture (%)

Analytes	Regulatory Limit	Sample Designation S-1	S-2	S-3	S-4	S-5	S-6	S-7	S-8
PCBs									
PCB-1016		NA	NA	9,870	10,600	9,020	20,300	8,600	13,100
PCB-1221		NA	NA	NA	NA	NA	NA	NA	NA
PCB-1232		NA	NA	9,870	10,600	9,020	20,300	8,600	13,100
PCB-1242		48,900	41,600	26,100	27,500	26,100	49,600	19,400	30,000
PCB-1248		32,200	18,100	1,300	14,200	13,600	25,600	7,420	11,600
PCB-1254		50,000	14,600	14,500	10,100	10,900	23,200	5,490	6,040
PCB-1260		37,200	3,600	3,730	NA	4,340	13,000	1,400	1,500
Total PCBs	50,000	**168,300**	77,900	**65,370**	**73,000**	**72,980**	**152,000**	**50,910**	**75,340**
TCLP RCRA Metals									
Arsenic	5	NA	NA	NA	NA	NA	NA	NA	NA
Barium	100	0.71	1.26	2.52	1.77	2.4	2.84	1.97	1.03
Cadmium	1	**1.07**	0.178	0.366	0.274	0.336	0.403	0.256	0.248
Chromium	5	NA	NA	NA	NA	NA	NA	NA	NA
Lead	5	1.18	NA	0.283	0.879	0.14	1.39	1.55	NA
Mercury	0.2	NA	NA	NA	0.0005	NA	NA	NA	NA
Selenium	1	NA	NA	NA	NA	NA	NA	NA	NA
Silver	5	NA	NA	NA	NA	NA	NA	NA	NA
Other									
Total Lead	1,000-1,500	**8,270**	**2,780**	**2,170**	**2,570**	**3,950**	**2,700**	**2,480**	20.6
Percent Moisture	NA	34.5	42	13.1	6.6	24.8	23	4.5	19.4

Key:

PCBs	=	Polychlorinated biphenyls.
TCLP	=	Toxicity characteristic leaching procedure.
RCRA	=	Resource Conservation and Recovery Act.
NA	=	Not applicable.
µg/kg	=	Micrograms per kilogram.
mg/L	=	Milligrams per liter.
mg/kg	=	Milligrams per kilogram.

Notes:

1. Shaded cells represent contaminant concentrations exceeding the regulatory limit.
2. Concentrations of PCBs are reported in parts per million or mg/kg in the report text. To convert µg/kg to mg/kg, divide the reported value by 1,000.

Source: Suburban Laboratories, Inc., Hillside, Illinois.

Table C-3

ANALYTICAL RESULTS FOR LIQUID SAMPLE
MIDWEST METALLICS SITE
SUMMIT, ILLINOIS
MARCH 15, 2000

Units = mg/L, except Percent Moisture (%)

	Regulatory Limit		Sample Designation
Analytes	SDWA	Illinois EPA	LC-1
PCBs			
PCB-1016			ND
PCB-1221			ND
PCB-1232			ND
PCB-1242			ND
PCB-1248			ND
PCB-1254			ND
PCB-1260			ND
Total PCBs	NA	NA	0.0
Total RCRA Metals			
Arsenic	NA	0.25	ND
Barium	2	2	1.34
Cadmium	0.005	0.15	ND
Chromium	0.1	0.1	0.148
Lead	0.015	0.2	7.0
Mercury	0.002	0.0005	0.0052
Selenium	0.05	NA	ND
Silver	NA	0.1	ND
Other			
Total Lead	0.2	0.005	7.0
Percent Moisture	NA		99.2

Key:

SDWA	=	Safe Drinking Water Act.
Illinois EPA	=	Illinois Environmental Protection Agency.
PCBs	=	Polychlorinated biphenyls.
ND	=	Not detected.
RCRA	=	Resource Conservation and Recovery Act.
NA	=	Not applicable.
mg/L	=	Milligrams per liter.

Notes:

1. Shaded cells represent contaminant concentrations exceeding the regulatory limit.
2. SDWA regulatory limits are from Title 40, Code of Federal Regulations, Section 141.62.
3. Illinois EPA regulatory limits are from Title 35, Illinois Administrative Code, Section 304.124, except for mercury limit (304.126).

Source: Suburban Laboratories, Inc., Hillside, Illinois.

ANALYTICAL RESULTS FROM SEDIMENT SAMPLE
MIDWEST METALLICS SITE
SUMMIT, ILLINOIS
MARCH 15, 2000

Units = PCBs (µg/kg), TCLP RCRA Metals (mg/L),
Total lead (mg/kg), and Percent Moisture (%)

Analytes	Regulatory Limit	Sample Designation SED-1
PCBs		
PCB-1016		10,500
PCB-1221		ND
PCB-1232		10,500
PCB-1242		ND
PCB-1248		16,500
PCB-1254		ND
PCB-1260		5,300
Total PCBs	50,000	42,800
TCLP RCRA Metals		
Arsenic	5	ND
Barium	100	4.52
Cadmium	1	0.419
Chromium	5	ND
Lead	5	3.97
Mercury	0.2	ND
Selenium	1	ND
Silver	5	ND
Other		
Total Lead	1,000-1,500	7,370
Percent Moisture	NA	36.8

Key:

PCBs = Polychlorinated biphenyls.
ND = Not detected.
TCLP = Toxicity characteristic leaching procedure.
RCRA = Resource Conservation and Recovery Act.
NA = Not applicable.
µg/kg = Micrograms per kilogram.
mg/L = Milligrams per liter.
mg/kg = Milligrams per kilogram.

Notes:

1. Shaded cells represent contaminant concentrations exceeding the regulatory limit.
2. Concentrations of PCBs are reported in parts per million or mg/kg in the report text. To convert µg/kg to mg/kg, divide the reported value by 1,000.

Source: Suburban Laboratories, Inc., Hillside, Illinois.

EXHIBIT E

Subject: Auto Shredder Site

Date: Friday, May 15, 2009 5:10:43 PM CT

From: Stephen Torres

To: Jeff Jeep

Hi Jeff, I am waiting on some quotes from contractors and am not quite ready to provide a summary of conceptual options for handling the auto shredder residue. I believe the most promising option will be mixing the ASR with grout, filling an on-site excavation with the grout/ASR. In evaluating suitable locations within the confines of the two parcels, I have concluded that the USEPA has over-estimated the volume of materials at the Site. Its estimates may reflect conditions prior to the most recent metal recovery efforts, I recommend that an aerial survey is performed to better gauge the volume of material. FYI – 350,000 cubic yards (cy) would cover the entire 13.6 acre site to a height of 16 feet.

In regard to covering the ASR with a clay cap, I conclude that this action is not feasible due to the following considerations:

- The density of the ASR is less than 1,000 lbs/cy while the density of clay is much heavier, on the order of 2,600 lbs/cy. Due to gravity effects the ASR will migrate to the surface and will pose an on-going maintenance concern.
- The ASR in its current state cannot be mechanically compacted and it would not be possible to join the seams of geotextile fabric over the mass, geotextile fabric would be needed to separate the ASR from the overlying clay.

The cost for landfilling of the ASR is also prohibitive due to the following line items:

- RCRA lead must be stabilized prior to transport to a TSCA disposal facility ($25/cy)
- Loading & transport to Belleville, MI ($60/cy)
- Tipping fees for disposal as TSCA solid Waste ($90/cy)
- State of Michigan tax on solid waste disposal ($10/cy)

The estimated cost for landfilling of ASR is $185 cy

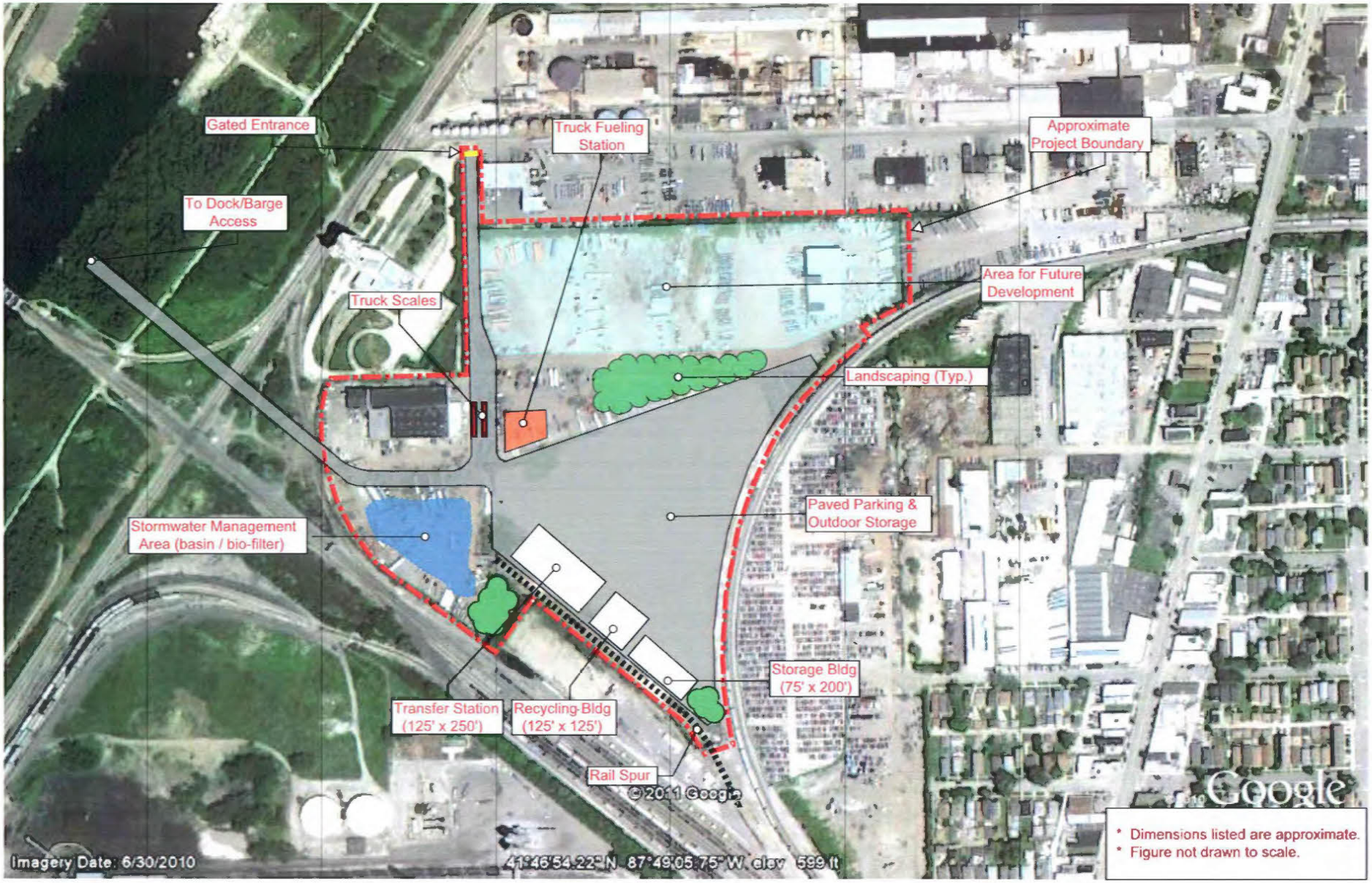
If a clay cap is placed over the waste pile and the pile is eventually removed from the Site, cleanup efforts would also require removal of the clay cap.

I hope to have a better handle on the costs for mixing ASR with grout on Monday and will submit our recommendations in a summary letter. If this option were to be selected, careful planning would be needed for locating the excavation cell to account for future development, utility corridors, storm water provisions, etc.

Steve

Stephen G. Torres, P.G.
Division Manager - Chicago
Apex Companies, LLC
531 W. Golf Road
Arlington Heights, IL 60005
ph (847) 956-8589 x 204
fax (847) 956-8619
cell (312) 215-0109
www.apexcos.com

EXHIBIT F



Summit Property Conceptual Development Plan
May, 2011

EXHIBIT G

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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	)	No. PCB 2013-022
v.	)	(Enforcement - Land)
CLINTON LANDFILL, INC.,	)	
Respondent	)	

AMICUS BRIEF OF THE VILLAGE OF SUMMIT, ILLINOIS

NOW COMES the Village of Summit, an Illinois municipal corporation (the "Village" or "Summit"), by its attorneys, and hereby submits its *Amicus* Brief in Support of Respondent Clinton Landfill, Inc.'s ("CLI") Motion to Dismiss the Complaint filed in this case by the Complainants herein.

I. COMPLAINANTS LACK STANDING TO CHALLENGE IEPA'S ISSUANCE OF A PERMIT TO CLI

Complainants ask this Board to ignore, and indeed effectively overturn, the issuance by the Illinois Environmental Protection Agency (the "Agency") of a permit, permit renewal, and permit modifications in connection with CLI's pollution control

facility. It is critical in the first instance to recognize the law applicable to Complainants' effort.

The Illinois courts and this Board have always held, without exception, that third parties "are statutorily precluded from legally challenging the Agency's decision to grant a development permit for a pollution control facility." *City of Elgin v. County of Cook*, 169 Ill.2d 53, 61 (1996) See also *City of Waukegan v. Illinois Environmental Protection Agency*, 339 Ill.App.3d 963, 974-975 (2nd Dist. 2003); *Lipe v. Illinois Environmental Protection Agency*, PCB 12-95, 2012 WL 1650149, Slip Op. Cite at 8-9 (May 3, 2012) The law in this regard is unequivocal:

> An Agency decision granting a permit cannot be appealed to the Pollution Control Board, which is only authorized to hear appeals where the Agency denies a permit or grants only a conditional permit. (415 ILCS 5/40(a)(1) (West 1992).) Further, the Act only authorizes judicial review of Pollution Control Board permitting decisions, and not Agency permitting decisions. (415 ILCS 5/41(a) (West 1992).) Consequently, judicial review of Agency decisions granting development permits for solid waste disposal sites is precluded and the instant plaintiffs cannot challenge the Agency's decision to grant the balefill development permit.

City of Elgin, 169 Ill.2d at 61

This rule is based on the distinct and separate roles assigned to the Board and the Agency by the Illinois General Assembly. Over three decades ago, the Illinois Supreme Court explained that:

> The Board's principal function is to adopt regulations defining the requirements of the permit system. The Agency's role is to determine whether specific applicants are entitled to permits. The need for a technical staff capable of performing independent investigations dictates that the job of administering the permit system be entrusted to the Agency rather than the Board. If the Board were to become involved as the overseer of the Agency's decisionmaking process through evaluation of challenges to

> permits, it would become the permit-granting authority, a function not delegated to the Board by the Act.

Landfill, Inc. v. IPCB, 74 Ill.2d 541 (1978) at 557

Given their evident motivation, Complainants' effort to have this Board ignore the express provisions of the Act and over three decades of jurisprudence is understandable. Less understandable, or defensible, is the unique position taken by the Illinois Attorney General ("IAG") in its Response to CLI's Motion. That position not only ignores the settled legal principals discussed above, but it is completely contrary to the IAG's historic position on the issue of third party standing to challenge an Agency permitting decision. Indeed, the IAG has consistently confirmed that third parties do not have standing to appeal an Agency permit.

For example, in *City of Waukegan, supra,* the Appellate Court specifically rejected an effort to circumvent Section 40(a)(1) of the Act that had been couched as a challenge to the Agency's jurisdiction to issue a permit:

> The City attempts to distinguish *City of Elgin* by arguing that it is challenging the Agency's jurisdiction to award the permit and, therefore, may attack the Agency action at any time in court (see *Daniels v. Industrial Comm'n*, 201 Ill.2d 160, 166, 266 Ill.Dec. 864, 775 N.E.2d 936 (2002) ("Because agency action for which there is no statutory authority is void, it is subject to attack at any time in any court, either directly or collaterally")). This argument does not withstand scrutiny.
>
> Although the City couches its argument in terms of "jurisdiction," **it is clear that the City is really challenging the merits of the Agency's decision to issue permits to the District and, in particular, the Agency's determination that the project does not constitute a "pollution control facility**." However, the City has not cited any authority for the proposition that proof of local siting approval is a jurisdictional prerequisite for the issuance of a permit.

***

> Moreover, it is clear that the Agency acted within its jurisdiction **when determining that local siting approval was not required** in order for the District to obtain its necessary permits. [Emphasis added]

339 Ill.App.3d at 975

A copy of the IAG's Brief in *City of Waukegan* is attached hereto as Exhibit 1. In response to the plaintiff's argument in that case, the IAG pointed out that:

> Proof of local siting approval is one of the statutory requirements for issuing certain permits. 415 ILCS 5/39(c) (2000). However, simply because proof of local siting may be required does not make the requirement jurisdictional. See *Newkirk*, 109 Ill. 2d at 39-40, 485 N.E.2d at 326. In issuing the NSSD permits without obtaining proof of local siting approval, the I**llinois EPA explicitly determined** that the NSSD's proposed facility was not a "new pollution control" facility within the meaning of section 39(c) of the [Act]. **Whether a facility is a pollution control facility within the meaning of the Act is decidedly a matter within the expertise of the Illinois EPA**. [Emphasis added]

(IAG *City of Waukegan* Brief at 16)

The IAG attempts to artificially distinguish *City of Waukegan* because:

> The Complaint filed with the Board does not name the Illinois EPA as a party. The Complaint does not ask the Board to overturn or modify any decisions made by the Illinois EPA regarding Respondent's landfill permit. Complainants are specifically not asking the Board to review that actual permit granted to CLI. The Complaint does, however, raise the issue of whether the Respondent sought its permit without obtaining local siting. Complainants are therefore challenging the Respondent's compliance with the statutory requirements established by the legislature.

(IAG Response Memo at 6) In the first instance, the IAG ignores the fact that, for example, the Agency was not named as a defendant in *City of Elgin*, and the claimed

"distinction" is wholly irrelevant to the court's rejection of the plaintiff's argument in *City of Waukegan*.

More to the point, the above-quoted language reflects indefensible doubletalk. The IAG pays lip service to the assertion that Complainants do not seek to overturn or modify the Agency's permitting decision (since they are legally prohibited from doing so), but at the same time assails the validity of the permit that the Agency in fact granted. Notably, the IAG rejected the same challenge to the IEPA's plenary authority in *City of Waukegan,* arguing that, "The Illinois EPA had jurisdiction to issue the permit to the NSSD; thus, the City of Waukegan's challenge to the permitting decision attacks the Illinois EPA's application of the [Act], not its authority to act." (IAG *City of Waukegan* Brief at 16)

The IAG took the identical position in another similar case, *Village of Frankfort v. Illinois Environmental Protection Agency*, Circuit Court of Cook County No. No. 04 CH 03825. A copy of the IAG's Memorandum in Support of its Motion to Dismiss in that action is attached hereto as Exhibit 2. Again rejecting a plaintiff's effort to pierce an Agency permitting decision, the IAG stated that:

> Frankfort lacks standing to challenge the Illinois EPA's issuance of a permit to Richton Park. As Richton Park argued in its March 5, 2004 Answer to Plaintiffs Motion for Temporary Restraining Order and Preliminary Injunction, **a third party has no authority to challenge the validity of a permit issued by the Illinois EPA or to claim it was improperly issued**. In addition to the cases cited by Richton Park in that pleading (Landfill, Inc. v. Pollution Control Board, 74 Ill.2d 541,25 Ill.Dec. 602 (1978); White Fence Farm v. Land and Lakes Company, 99 Ill.App.3d 234, 54 Ill.Dec. 467 (4th Dist. 1981); Village of Lake in the Hills v. Laidlaw Waste Systems, 143 Ill.App.3d 285, 97 Ill.Dec. 310 (2nd Dist. 1986)), the Second District recently held, in a case involving a sanitary district's proposed construction of a "biosolids reuse project", that the

> plaintiff municipality was not entitled to judicial review of the Illinois EPA's decision to issue a permit to the sanitary district. City of Waukegan v. Illinois Environmental Protection Agency, 339 Ill.App.3d 963, 791 N.E.2d 635, 644-646 (2003) [Emphasis added]

(IAG *Village of Frankfort* Memorandum at 6)

The IAG most recently reiterated its consistent and long-standing position in *Lipe v. Illinois Environmental Protection Agency*, *supra*:

> The Agency first argues that the Board lacks jurisdiction to reverse issuance of the permit granted by the Agency to Tough Cut. Mot. at 2. According to the Agency, **determining whether applicants should receive permits is the role of the Agency**. If the Board reviewed those Agency determinations, it would become the permit granting authority, **a function not delegated to the Board**. *Id*., citing *Landfill, Inc. v. Pollution Control Bd*., 74 Ill. 2d 541, 557, 387 N.E.2d 258 (1978). The Agency adds that, although the Board may review a permit denial, the Board has no statutory authority to review the Agency's grant of a permit. Mot. at 3. Furthermore, the Agency asserts that the Board does not have authority to grant the requested relief and revoke the permits granted by the Agency. Id.
>
> Additionally, the Agency argues that the complainants lack standing to challenge the granting of the permit as third parties. Mot. at 3, citing *Koers v. Illinois EPA*, PCB 88-163 (Oct. 20, 1988). In addition to citing case law in support of this argument, the Agency cites Section 40(a)(1) of the Act, which establishes those entities entitled to appeal issuance of a permit. Mot. at 4; citing 415 ILCS 5/40(a)(1) (2010). This section provides that "[i]f the Agency refuses to grant or grants with conditions a permit ... the applicant may, within 35 days after the date on which the Agency served its decision on the applicant, petition before the Board to contest the decision of the Agency." Mot. at 4. Given the statutory provision, the Agency argues that **only the applicant may challenge the Agency's issuance of a permit**. *Id*. Furthermore, the permit does not fall within any of the categories of Section 40 of the Act authorizing a third-party appeal. Id. [Emphasis added]

2012 WL 1650149, Slip Op. Cite at 4

Despite over three decades of consistent rulings by the Illinois courts and this Board, and its own consistent and unequivocal acknowledgment of those rulings, the

IAG now, for the first time, claims that rejection of Claimants' arguments "means that the Agency's failure to follow the law would be shielded from any review. This is obviously an incorrect result." (IAG Response Memo at 6) It is notable that the IAG does not cite to a single case in support of its novel and historically contradictory assertion. This is not a surprising omission, since there are no such cases.

Nevertheless, without explanation (there really is none), the IAG turns a blind eye to every case that has ever addressed this issue, and to every statement it has ever made on this issue, and supports its position by arguing that "where an application is incomplete or is not properly filed with the Agency, the Agency itself lacks the jurisdiction to entertain the permit request, and that is precisely the case before the Board". (IAG Response Memo at 5) The IAG reiterates this unsupportable position at the end of its Memorandum, asserting that, "Due to its failure to obtain local siting, Clinton Landfill failed to vest the Agency with the jurisdiction to review the permit application, create a permit, and issue a permit." (IAG Response Memo at 11)

Apart from the ethical obligations imposed on its attorneys, the IAG has a statutory obligation to represent the State of Illinois and its agencies. 15 ILCS 205/4 On the issue of third-party challenges to Agency permits, the IAG has for decades fulfilled those obligations by faithfully following the Act, the decisions of the Illinois courts, and the decisions of this Board. Yet those obligations, and those consistent positions, have now been abandoned, in the name of…what? Again, Complainants' motivation is clear, and their effort to convince this Board that the law is not what it in fact is can be excused as "zealous representation". But what about the IAG? We can only speculate

as to the reason for the dramatic and legally baseless shift reflected in the IAG's Response Memorandum.

More to the present point, however, despite the doublespeak, artificial efforts to convert this case into something it is not, and legally baseless arguments, this Board is faced with a simple, routine, and uncomplicated set of facts. Notably, Complainants' effort to shift the focus away from the Agency's permitting decision (something they cannot legally do) is highlighted by what their Complaint does not say. The Complaint conveniently fails to mention whether the Agency (1) exercised its expertise and made an informed judgment that the Chemical Waste Unit is not a new pollution control facility; (2) failed to make a determination; or (3) based its decision, as apparently suggested by the Attorney General, on a "whim". (IAG Response Memo at 9) Instead, the allegations regarding the Agency's actions are that:

> On January 8, 2010 the Agency issued a permit modification authorizing design modifications to change 22.5 acres in the southwestern portion of the existing landfill into a Chemical Waste Unit.
>
> ***
>
> CLI determined and represented to the Agency that the Chemical Waste Unit was not a new pollution control facility.

(Complaint, ¶¶48, 96)

The Complaint is noticeably silent regarding the Agency's determination that the Chemical Waste Unit is not a new pollution control facility. This is no accident. Complainants know very well that the Agency made an informed judgment based on its experience and expertise concerning the central issue in this case – whether the Chemical Waste Unit constitutes a new pollution control facility. That determination is

set forth in the June 2011 Agency letter attached to CLI's Motion to Dismiss as Exhibit A (and attached hereto as Exhibit 3). The IAG completely ignores the Agency's express determination. Complainants, while not completely ignoring the letter, would clearly like this Board to do so. As if asking that this Board not look at the man behind the curtain, Complainants ask that the Agency's letter be stricken because it is outside the record of this case. (Complainants' Response at 13, n. 3)[1]

In its letter, the Agency confirmed that:

> As WATCH is aware, the Illinois EPA is prohibited from issuing a development or construction permit to certain "pollution control facilities" (i.e., waste management facilities) unless the applicant submits proof that the local siting authority has approved the proposed location of the facility in accordance with Section 39.2 of the Environmental Protection Act. 415 ILCS 5/39(c), 39.2. Clinton Landfill, Inc. submitted the proof in the required Form LPC·PA8, a notarized document signed by the Board Chairman certifying that the facility was approved for waste storage, waste treatment, waste disposal and landfilling. As further required by the LPC-PA8, the Board resolution approving the siting and stating conditions of the approval was attached to the certification. The LPC-PA8 clearly states that the conditions are provided for information only and the Illinois EPA has no obligation to monitor or enforce local conditions. Even if there were such an obligation, the document contains no conditions excluding the acceptance of PCB wastes or MGP wastes at Clinton Landfill 3.
>
> Clinton Landfill. Inc. submitted an application for the development and construction of a combined municipal solid waste landfill unit and chemical waste unit authorized to receive nonhazardous solid waste and non-hazardous special waste. The application was reviewed and issued in accordance with the regulations for such facilities at 35 Ill. Adm. Code 810 - 813 and, in particular, in accordance with Part 811 standards and requirements for municipal solid waste landfills and chemical waste landfills, the state's most stringent standards applicable to non-hazardous landfills. The permit modification issued by the Illinois EPA does not authorize

[1] Complainants ignore the fact that the Board may take official notice of the contents of the Agency's determination letter pursuant to 35 Ill.Adm.Code 101.630.

> the acceptance of "hazardous waste" within the meaning of state and federal environmental laws. However, the permit does authorize the acceptance of non-hazardous special waste including non-hazardous MGP waste. PCB waste may not be accepted unless authorized by the USEPA. If acceptance is authorized by the USEPA, only PCB waste considered non-hazardous special waste may be accepted at the facility. In addition, **there was nothing in the application making the unit a "new pollution control facility" and triggering a second local siting approval procedure**. The application did not propose an expansion to the area that was approved by the Board in the 2002 siting approval resolution, and it did not propose the acceptance of special or hazardous waste for the first time. 415 ILCS 5/3.330(b). Therefore, the Illinois EPA's issuance of the permit modification in January 2010 complied with all statutory and regulatory requirements applicable to the review of the application. [Emphasis added]

In a backhanded effort to diminish the impact of the Agency's determination, a determination that is not subject to review by this Board, Complainants suggest that "the Agency may too have gotten it wrong". (Complainants' Response at 13-14) As noted above, this case does not present a unique set of facts, or a unique effort by complaining parties to circumvent the dictates of the Act, the Illinois Courts and this Board. Simply stated, the question of whether "the Agency may too have gotten it wrong" (an assertion without support in the record) is not a matter subject to review by this Board.

II. CONCLUSION

Complainants and the IAG seek to proverbially convert a sow's ear into a silk purse. Despite their contrived protestations to the contrary, it is clear that they are challenging the merits of the Agency's decision to issue a permit to CLI and, in particular, the Agency's determination that the Chemical Waste Unit does not constitute a new "pollution control facility". For all the foregoing reasons, and particularly because

Complainants' claims are contrary to the law, the Village requests that the Complaint be dismissed with prejudice.

Respectfully submitted,
Village of Summit,
Amicus Curiae

By: _____
One of its attorneys

Michael S. Blazer (ARDC No. 6183002)
Jeffery D. Jeep (ARDC No. 6182830)
Jeep & Blazer, L.L.C.
24 N. Hillside Avenue, Suite A
Hillside, IL 60162
Telephone: (708) 236-0830
Facsimile: (708) 236-0828
mblazer@enviroatty.com
jdjeep@enviroatty.com

EXHIBIT 1

No. 2-02-0635

IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

CITY OF WAUKEGAN, a municipal corporation, et al., Plaintiffs/Appellees/Cross-Appellants, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Defendant/Cross-Appellee, and the NORTH SHORE SANITARY DISTRICT Defendant/Appellant/Cross-Appellee.	Appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake County Illinois. No. 01 CH 1777
NORTH SHORE SANITARY DISTRICT, Counter-Plaintiff/Appellant, v. CITY OF WAUKEGAN, a municipal corporation, et al., Counter-Defendants/Appellees/Cross-Appellants.	The Honorable STEPHEN E. WALTER, Judge Presiding. FULL CAPTION ON NEXT PAGE

BRIEF OF DEFENDANT/CROSS-APPELLEE
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

JAMES E. RYAN
Attorney General
State of Illinois

BRIAN F. BAROV
Assistant Attorney General
100 West Randolph St, 12th Fl.
Chicago, Illinois 60601
(312) 814-2234

JOEL D. BERTOCCHI
Solicitor General
100 West Randolph St. 12th Fl.
Chicago, Illinois 60601
(312) 814-3312
Attorneys for Cross-Appellees.

ORAL ARGUMENT REQUESTED

NATURE OF THE CASE

This is a cross-appeal from the circuit court's dismissal of Counts I and II of the amended verified complaint for declaratory and injunctive relief brought by the plaintiffs, City of Waukegan, the City of Waukegan's mayor, the Waukegan City Council and its various members (collectively "City of Waukegan"), and other city officials against the Illinois Environmental Protection Agency ("Illinois EPA"). The roots of the City of Waukegan's suit against the Illinois EPA lay in the City's dispute with the North Shore Sanitary District ("NSSD"), which sought to build a sludge treatment facility at its Waukegan wastewater treatment location. The Illinois EPA had issued the appropriate permits to the NSSD so that it could build the sludge treatment facility.

The City of Waukegan sought a declaration that, under section 39(c) of the Illinois Environmental Protection Act ("EPAct"), 415 ILCS 5/39(c), the Illinois EPA could not issue the permits absent proof that the NSSD had obtained local siting approval for the sludge treatment facility. The City of Waukegan also sought to enjoin the NSSD from constructing or operating the facility without first obtaining local siting approval. The NSSD filed counterclaims seeking declaratory relief and an injunction against the City of Waukegan's use of its zoning powers to block NSSD's construction of the sludge treatment facility.

On June 18, 2002, the circuit court entered an order dismissing Counts I and II against the Illinois EPA, and it also entered various orders denying the NSSD's request for injunctive relief. On all of these matters the circuit court made findings pursuant to Supreme Court Rule 304(a), and it also certified two questions for interlocutory appeal under Rule 308. The NSSD timely appealed and the City of Waukegan timely cross-appealed seeking, among other things, review

of the circuit court's dismissal of Counts I and II against the Illinois EPA.

This is not an appeal from a jury verdict. The questions presented are on the pleadings.

ISSUES PRESENTED FOR REVIEW

Whether the City of Waukegan's claims for declaratory and injunctive relief were properly dismissed because the City could not contest the Illinois EPA's permitting decision in the circuit court.

Whether the City of Waukegan's claims for declaratory and injunctive relief were properly dismissed because proof of local siting approval was not required before the Illinois EPA could issue permits to the NSSD to build and operate the sludge treatment facility.

JURISDICTIONAL STATEMENT

On June 18, 2002, the circuit court entered an order which dismissed Counts I and II of the amended verified complaint against the Illinois EPA, and, *inter alia,* denied the NSSD's counterclaim for injunctive relief against the City of Waukegan. (Vol. V, C944).[1] The circuit court's order included a Supreme Court Rule 304(a) statement that "there is no just reason for delaying either the enforcement of or appeal" from those parts of the court's order. (*Id.*). On June 19, 2002, the NSSD timely filed its notice of appeal in the circuit court. (NSSD's Appendix at Vol. II, A567-73). The NSSD also timely filed an amended notice of appeal in the circuit court. (NSSD's Appendix Vol. II, A575-84). This Court has jurisdiction over the underlying appeal under Supreme Court Rules 304(a) and 307.[2]

On June 20, 2002, the City of Waukegan timely filed its notice of cross-appeal from the circuit court's dismissal of Counts I and II against the Illinois EPA. (City of Waukegan's Appendix at 13-19). This Court has jurisdiction over the cross-appeal under Supreme Court Rule 303(a)(3).

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1 The record is in six volumes. The first five volumes, consisting of the common law record, will be cited to by volume and page number, i.e, Vol. ___, C___. Volume VI consists of a report of proceedings and the page numbers will be preceded by "RP." In addition, the NSSD filed a two volume appendix with its brief which is also cited by volume and appendix page number, i.e, Vol. ___, A____. Finally, on August 28, 2002, the NSSD filed a motion for leave to file a one volume amendment to the record.

2 This Court also accepted the NSSD's Rule 308 appeal of certain other questions not pertinent to this cross-appeal but also arising out of the amended complaint and the circuit court's order of June 18, 2002.

STATEMENT OF FACTS

Background

The NSSD is a sanitary district established under Illinois law and operates three wastewater treatment plants in Lake County, Illinois. (Vol. II, C221, ¶ 5, C222. ¶ 7). One of the plants is located in Waukegan, Illinois. (Vol. II, C222, ¶ 7). The Waukegan plant treats wastewater by separating solids in the wastewater from the water. (*Id.* at ¶ 7-8). The semi-solid product of this process, known as "sludge" is disposed of in a landfill. (*Id.*). The NSSD sought and received permits from the Illinois EPA to build a facility on its property to process municipal sewage into sludge and to store, dry and thermally treat the sludge. (Vol. II, C223, ¶ 10; C243-54, C256-60).

The Amended Complaint

On May 5, 2002, the City of Waukegan filed its amended verified complaint seeking, in Counts I and II, a declaration that the Illinois EPA was prohibited from granting the NSSD the permits without the NSSD first proving that it had obtained local siting approval for the facility under section 39(c) and 39.2 of the EPAct, 415 ILCS 5/39(c) & 5/39.2 (2000). (Vol. II, C234, ¶ D). The City of Waukegan also sought a declaration that the Illinois EPA's permits were void and an order enjoining the NSSD from constructing its facility without first obtaining local siting approval. (Vol. II, C234). According to the City of Waukegan, local siting was required under section 39(c) of the EPAct because the NSSD's proposed construction was a "new pollution control facility" within the meaning of section 3.32(b) of the Act, 415 ILCS 5/3.32(b) (2000). (Vol. II, C233).

The Motion to Dismiss

The Illinois EPA moved to dismiss Counts I and II under section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615 (2000). (Vol. II, C416-26). The Illinois EPA explained that the NSSD's proposed sludge treatment facility was not a "pollution control facility" within the meaning of section 3.32(a)(3) of the EPAct. (Vol. II, C420-21). The sludge treatment facility did not qualify as a pollution control facility because the municipal sewage that it received was exempt from the definition of waste under the EPAct. (Vol. II, C420, *see also* Vol. II, C257). The sludge – which was waste – that the facility would generate was generated by its own on-site activities. (Vol. II, C421). A facility that treats waste generated from its own on-site activities is exempt from the definition of pollution control facility under section 3.32(a)(3) of the EPAct, and, therefore, does not need local siting approval. (Vol. II, C421).

In addition, the Illinois EPA pointed out that the City of Waukegan was contesting the issuance of a permit to the applicant – the NSSD. (Vol. II, C422). However, under the EPAct, only an applicant can directly appeal a permitting decision, and that appeal must be made to the Illinois Pollution Control Board. (Vol. II, C423). The City of Waukegan could bring an enforcement action under section 31 of the EPAct, 415 ILCS 5/31 (2000), but that action too must be brought before the Illinois Pollution Control Board. (*Id.*). The EPAct does not authorize a third-party to bring an action in circuit court challenging a permitting decision of the Illinois EPA. (*Id.*).

The Circuit Court's Decision

On June 11, 2002 and June 18, 2002, the circuit court entered orders granting the Illinois EPA's motion to strike and dismiss the Counts I and II of the amended complaint. (Vol. V, C939,

C948). The circuit court also granted the NSSD's motion for judgment on the pleadings on these same counts. (*Id.*). The circuit court found that the City of Waukegan lacked standing to challenge the Illinois EPA's permitting decision in the circuit court. (Vol. VI, RP207, 226). Further, the circuit court found that the Illinois EPA had not acted outside its authority in issuing the NSSD the permits without obtaining proof of local siting approval. (Vol. VI, RP208, 226).

An appeal by the NSSD and cross-appeal by the City of Waukegan followed.

ARGUMENT

The Circuit Court Correctly Dismissed Counts I and II of the Amended Complaint Brought Against the Illinois EPA.

A. Standard of Review

This portion of the case is a cross-appeal from the circuit court's dismissal, under section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615 (2000), of Counts I and II of the City of Waukegan's amended complaint for declaratory and injunctive relief. Actions for declaratory and injunctive relief are governed by the general pleading rules. *See American Federation of State, County and Muncipal Employees v. Ryan*, No. 4-02-0527, 2002 WL 1507488 at *3 (Ill. App. Ct. July 10, 2002) (petition for leave to appeal pending No. 94329); *McDonald v. County Board*, 146 Ill. App. 3d 1051, 1054, 497 N.E.2d 509, 511 (2nd Dist. 1986).

The standards for reviewing the sufficiency of a complaint are well-known. A plaintiff is required to allege facts sufficient to bring its claim within the scope of the cause of action asserted. *See Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 408, 667 N.E.2d 1296, 1300 (1996). It is not enough to plead legal conclusions. *Anderson*, 172 Ill. 2d at 408, 667 N.E.2d at 1300. Whether a complaint states a cause of action is reviewed *de novo*. *Holloway v. Meyer*, 311 Ill. App. 3d 818, 822, 726 N.E.2d 678, 682 (2nd Dist. 2000). A judgment dismissing a complaint can be sustained on any basis supported by the record, even if not ruled on by the circuit court. *White Fence Farm, Inc. v. Land & Lakes Co.*, 99 Ill. App. 3d 234, 239, 424 N.E.2d 1370, 1374 (4th Dist. 1981).

B. The City of Waukegan Could Not Bring an Action Against the Illinois EPA in the Circuit Court.

Under the EPAct only the Illinois Pollution Control Board could review the Illinois EPA's permitting decision. The circuit court had no authority to do so and correctly dismissed the City of Waukegan's complaint against the Illinois EPA.

1. Only the Illinois Pollution Control Board Can Adjudicate the City of Waukegan's Claim.

The Illinois Constitution provides that it is an individual's right to have, and the public policy of the State to maintain, a healthy environment. Ill. Const. art. XI, §§ 1-2. In enacting the EPAct, the General Assembly found that "because environmental damage does not respect political boundaries, it is necessary to establish a unified state-wide program for environmental protection and to co-operate fully with other States and the United States in protecting the environment." 415 ILCS 5/2(a)(ii) (2000); *see also* 415 ILCS 5/2(b) (2000) (stating that the purpose of the EPAct is to "establish a unified state-wide program supplemented by private remedies to restore, protect and enhance the quality of the environment").

Both the Illinois EPA and the Illinois Pollution Control Board are charged with implementing the unified state-wide program of environmental regulation. *City of Elgin v. County of Cook*, 169 Ill. 2d 53, 60, 660 N.E.2d 875, 879-80 (1995). The Illinois Pollution Control Board establishes standards and regulations, and it adjudicates enforcement matters. *City of Elgin*, 169 Ill. 2d at 60, 660 N.E.2d at 880; *see also* 415 ILCS 5/5 (2000). The Illinois EPA applies the regulations in various contexts including issuing permits for water and air discharge and land use. *City of Elgin*, 169 Ill. 2d at 60-61, 660 N.E.2d at 880; *see* 415 ILCS 5/4(g), 5/4(h) (2000).

Title X of the EPAct governs the Illinois EPA's power to issue permits. *See* 415 ILCS 5/39 to 5/40.2 (2000). Under section 39(a), a permit applicant must apply to the Illinois EPA,

which has the duty to issue permits "upon proof by the applicant that the facility" shall not violate the EPAct or regulations promulgated under the EPAct. 415 ILCS 5/39(a) (2000). However, under section 39(a), the Illinois EPA has the power to deny or impose necessary conditions on a permit. *Id.*

Under section 40 of the EPAct, an applicant may seek review of an adverse permitting decision with the Illinois Pollution Control Board. 415 ILCS 5/40(a) (2000). The EPAct does not grant a nonapplicant a right to directly challenge an Illinois EPA permitting decision.[3] Section 31(d) of the EPAct, however, allows any person to file a complaint with the Illinois Pollution Control Board against anyone violating the Act, environmental regulations or a permit. 415 ILCS 5/31(d) (2000). The Illinois Pollution Control Board then hears and decides the matter. 415 ILCS 5/32 & 5/33 (2000). Section 41(a) of the EPAct adopts the Administrative Review Law as the means for reviewing Illinois Pollution Control Board decisions. 415 ILCS 5/41(a) (2000). Under section 41(a), judicial review of the Board's decision is made directly to the Illinois Appellate Court rather than the circuit court. 415 ILCS 5/41(a) (2000). Alternatively, under section 45(b) of the EPAct, a party adversely affected by a violation of the Act may seek injunctive relief in circuit court. 415 ILCS 5/45(b) (2000); *White Fence Farm, Inc.*, 99 Ill. App. 3d at 242-43, 424 N.E.2d at 1376. However, a section 31(d) Illinois Pollution Control Board enforcement action is a precondition to a section 45(b) circuit court action. *See* 415 ILCS 5/45(b) (2000); *White Fence Farm, Inc.*, 99 Ill. App. 3d at 242-43, 424 N.E.2d at 1376.

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3 There are a few limited exceptions to this rule, *see, e.g.,* 415 ILCS 5/40(a)(1) (2000) (allowing a third-party to contest the issuance of certain hazardous waste disposal permits but exempting from third-party actions a challenge to the grant of a permit to a publically owned sewage works for the disposal or use of sludge); 415 ILCS 5/40(c) (2000) (permitting nonapplicants to challenge a hazardous waste disposal permitting decision but only if that party had previously intervened in the permitting decision process under another provision of the EPAct), but none apply here

Thus, section 31(d) provided the appropriate means for City of Waukegan to challenge the terms and conditions of the NSSD's permit. Until it completed a section 31(d) action before the Illinois Pollution Control Board, the City of Waukegan could not seek judicial review of the permitting decision in state court. *See White Fence Farm, Inc.*, 99 Ill. App. 3d at 243-44, 424 N.E.2d at 1376-77; *City of Elgin*, 169 Ill. 2d at 65-71, 660 N.E.2d at 882-84.

In *White Fence Farm, Inc.*, the plaintiff sued in the circuit court to enjoin the Illinois EPA's issuance of a permit to a landfill operator for allegedly violating various provisions of the EPAct and environmental regulations. 99 Ill. App. 3d at 236-38, 424 N.E.2d at 1371-72. The appellate court upheld the dismissal of the lawsuit because the circuit court did not have jurisdiction to consider an attack on the Illinois EPA's issuance of a permit. 99 Ill. App. 3d at 243-44, 424 N.E.2d at 1376-77. Rather, section 31(d) (then section 31(b)) of the EPAct provided an effective remedy for any environmental law violations. *Id.* Absent exhaustion of its administrative remedies, a party could not bring an action to enjoin the Illinois EPA or the landfill operator in the circuit court. *Id.*

Similarly, in *City of Elgin*, the Illinois Supreme Court held that municipalities could not sue in circuit court to enjoin the Cook County Board's landfill siting decision as violating Illinois' environmental laws because such a lawsuit was a collateral attack on the Illinois EPA's permitting decision. 169 Ill. 2d at 65-71, 660 N.E.2d at 882-84. In so holding, the supreme court noted that section 31 authorized an enforcement action against the Cook County Board before the Illinois Pollution Control Board if the landfill violated Illinois' environmental laws. *Id.* at 70-71, 660 N.E.2d at 884. To hold that the circuit court could hear actions alleging violations of Illinois' environmental laws would undermine the General Assembly's carefully crafted system of state-wide environmental regulation. *Id.* at 69-70, 660 N.E.2d at 883-84.

White Fence Farm and *City of Elgin* control the present case. Under the uniform state-wide procedure established by the General Assembly for environmental regulation, the Illinois Pollution Control Board is the proper forum for adjudicating environmental disputes. *See City of Elgin*, 169 Ill. 2d at 70-71, 660 N.E.2d at 884. The City of Waukegan cannot circumvent that procedure by bringing an action challenging the issuance of the permit in this case. *White Fence Farm, Inc.*, 99 Ill. App. 3d at 243-44, 424 N.E.2d at 1377. The circuit court correctly dismissed the City of Waukegan's lawsuit against the Illinois EPA.

The principle animating the *White Fence Farm* decision, explicitly, and the *City of Elgin* decision, implicitly, is the exhaustion of the administrative remedies doctrine and its related principle of sole administrative review. Under these doctrines where a statute adopts the Administrative Review Law as the means of review, a party cannot bring a lawsuit outside of the statutory frame work until it has exhausted all available administrative remedies.[4] *See People v. Grau*, 263 Ill. App. 3d 874, 877, 636 N.E.2d 1085, 1087 (2nd Dist. 1994); *Union Bank v. Blackstone Sunbury-Nevada Grain Co.*, 254 Ill. App. 3d 206, 208-09, 627 N.E.2d 385, 386 (4th Dist. 1993); *Winston Plaza Currency Exchange, Inc. v. Department of Financial Institutions*, 211 Ill. App. 3d 1062, 1065, 570 N.E.2d 855, 858 (1st Dist. 1991). As courts have described it, a party that has not sought and exhausted its administrative remedies, lacks standing to bring an action in circuit court. *See Winston Plaza Currency Exchange, Inc.*, 211 Ill. App. 3d at 1065-66,

4 Illinois courts have not articulated a clear distinction between these two doctrines. However, exhaustion generally applies to prevent a party from avoiding administrative review, while the sole administrative remedies doctrine prevents parties from collaterally attacking administrative review proceedings. *Compare Marozas v. Board of Fire and Police Commissioners*, 222 Ill. App. 3d 781, 789-91, 584 N.E.2d 402, 408 (1st Dist. 1991) (holding that under the sole administrative remedies doctrine a plaintiff could not bring a complaint seeking both administrative review and collaterally attacking the administrative decision) *with Union Bank*, 254 Ill. App. 3d at 209, 627 N.E.2d at 387 (holding that under exhaustion doctrine plaintiff could not bring a suit for injunction in lieu of seeking administrative review).

570 N.E.2d at 859; *see also White Fence Farm, Inc.*, 99 Ill. App. 3d at 244, 424 N.E.2d at 1377 (holding that absent exhaustion of administrative remedies, plaintiff was not harmed by administrative action). Thus, the circuit court was correct in ruling that City of Waukegan lacked standing to challenge the Illinois EPA's permitting decision. (Vol. II, RP207, 226).

In disputing the circuit court's ruling that it lacked standing to challenge the Illinois EPA's permitting decision, the City of Waukegan provides an extended discussion of standing precepts, arguing that it has alleged a sufficiently palpable injury caused by the Illinois EPA's permitting decision to be able to seek relief. (City of Waukegan Brief at 35-36). The City of Waukegan's discussion of standing is not so much incorrect as misplaced. The type of standing the circuit court was referring to in its decision had nothing to do with whether the City of Waukegan alleged that it had (or would) suffer the sort of harm that could enable it to seek relief. Rather, what the circuit court was referring to in ruling that City of Waukegan lacked standing was that its sole remedies lay in administrative review, but it had not exhausted those available administrative remedies. The City of Waukegan's standing discussion is irrelevant to whether it had could bring suit outside of administrative review.

2. The City of Waukegan Cannot Collaterally Attack the Illinois EPA's Permitting Decision.

There are exceptions to the sole administrative remedies/exhaustion doctrine. *See Union Bank*, 254 Ill. App. 3d at 208, 627 N.E.2d at 386. One exception is that administrative review is not required where an agency acts outside of its jurisdiction. *See Newkirk v. Bigard*, 109 Ill. 2d 28, 35, 485 N.E.2d 321, 324 (1985); *Union Bank*, 254 Ill. App. 3d at 209, 627 N.E.2d at 386.

The City of Waukegan primarily relies on this exception, arguing that the EPAct requires that the Illinois EPA obtain local siting approval before issuing a permit to any new pollution control facility. Therefore, the City of Waukegan concludes that to issue the permit to the NSSD without first obtaining local citing approval was outside of the Illinois EPA's authority.

However, the City of Waukegan never explains why the local siting provision is a jurisdictional prerequisite to the Illinois EPA's permitting decision. In fact, it is not. As the Illinois Supreme Court has pointed out, jurisdiction in the administrative context is a term used to designate the power to act. *County of Knox v. Highlands, L.L.C.*, 188 Ill. 2d 546, 553, 723 N.E.2d 256, 261 (1999); *Newkirk*, 109 Ill. 2d at 36, 485 N.E.2d at 324. Thus, an administrative agency's jurisdiction refers to "the power to hear and determine causes of the general class of cases to which the particular case belongs." *Newkirk*, 109 Ill. 2d at 36, 485 N.E.2d at 324. Moreover, whether a particular statutory provision governing agency action is considered jurisdictional often depends on whether "agency's particular expertise" is a necessary part of the statute's interpretation and application. *See County of Knox*, 188 Ill. 2d at 552, 723 N.E.2d at 261.

Newkirk and *County of Knox* illustrate how these principles operate. In *Newkirk*, the Illinois Supreme Court found that an agency's actions did not implicate its jurisdiction and thus a challenge to the agency's decision had to proceed in administrative review. In *County of Knox,* the supreme court found that an agency's decision making exceeded its jurisdiction, and the challenge to its decision could proceed in circuit court. A close examination of these two cases will demonstrate that obtaining proof of local siting approval is not a jurisdictional prerequisite to the Illinois EPA's exercise of its permitting power in this case.

In *Newkirk*, the plaintiff brought a declaratory judgment action seeking to void a decision

of the State mining board. 109 Ill. 2d at 31-32, 485 N.E.2d at 322. The board had issued an order relating to the plaintiff's property rights in certain oil and gas leases, but the order did not provide the information or remedies mandated by statute. *Id.* at 32-33, 485 N.E.2d at 322-23. The supreme court noted that the mandatory requirements of the statute did not make them "jurisdictional" and subject to collateral attack. *Id.* at 39-40, 485 N.E.2d at 324. Rather, because the mining board's order fell within the general class of cases it had the power to decide, its order, if faulty, involved only the misapplication of the statute, an issue which could only be resolved through appropriate administrative procedures. *Id.* at 36-40, 485 N.E.2d at at 324-26.

The *County of Knox* case was a dispute brought in circuit court over the proper zoning of a hog farm. 188 Ill. 2d at 548-50, 723 N.E.2d at 259-60. The farm's owners objected to the zoning decision claiming that the county zoning board had no authority over it because under the Counties Code, agricultural uses were exempt from the zoning requirements. 188 Ill. 2d at 550, 723 N.E.2d at 260 (citing 55 ILCS 5/5-12001 (1998)). The county zoning board claimed that it had the power to determine whether the hog farm was "agriculture," and that the owners had to exhaust their administrative remedies before seeking judicial review of the zoning board's decision. *Id.* at 552-53, 723 N.E.2d at 261.

The supreme court held that the zoning board had no authority over zoning in cases involving agricultural property. *Id.* at 553-54, 723 N.E.2d at 261-62. Further, the zoning board had no particular expertise in deciding whether property qualified as agricultural property. *See id.* at 554-55, 723 N.E.2d at 262. Thus, the dispute over whether the hog farm was "agriculture" challenged the zoning board's jurisdiction, and the dispute could be resolved in the circuit court. *Id.* at 554, 723 N.E.2d at 262.

Comparing *Newkirk* and *County of Knox* to the present case, it is clear that the Illinois

EPA's decision's to issue the permits to the NSSD without first obtaining proof of local siting approval does not involve a question of the agency's jurisdiction. The EPAct vests the Illinois EPA with the authority to issue permits. *See* 415 ILCS 5/39 to 5/40.2 (2000). The Illinois EPA, and only the Illinois EPA, has the power to issue the necessary permits "for construction, installation or operation of" a particular facility. 415 ILCS 5/39(a) (2000). The permits that the Illinois EPA issued to the NSSD clearly fell within the scope of cases that the Illinois EPA is empowered to decide. *Id.*

Proof of local siting approval is one of the statutory requirements for issuing certain permits. 415 ILCS 5/39(c) (2000). However, simply because proof of local siting may be required does not make the requirement jurisdictional. *See Newkirk*, 109 Ill. 2d at 39-40, 485 N.E.2d at 326. In issuing the NSSD permits without obtaining proof of local siting approval, the Illinois EPA explicitly determined that the NSSD's proposed facility was not a "new pollution control" facility within the meaning of section 39(c) of the EPAct. (Vol. II, C257). Whether a facility is a pollution control facility within the meaning of the EPAct is decidedly a matter within the expertise of the Illinois EPA. The Illinois EPA had jurisdiction to issue the permit to the NSSD; thus, the City of Waukegan's challenge to the permitting decision attacks the Illinois EPA's application of the EPAct, not its authority to act.

Whether the permit violated the EPAct, must be decided, in the first instance, by the Illinois Pollution Control Board, which is statutorily authorized to hear enforcement proceedings. *See* 415 ILCS 5/31 (2000). The City of Waukegan has a remedy in bringing an enforcement action before the Illinois Pollution Control Board, and, until it exhausts that remedy, it cannot proceed in the circuit court. *See White Fence Farm, Inc.*, 99 Ill. App. 3d at 244, 424 N.E.2d at 1377.

Any other result would undermine the EPAct's purpose to provide a unified state-wide program of environmental enforcement. *See City of Elgin*, 169 Ill. 2d at 60, 660 N.E.2d at 880. To accept the City of Waukegan's view that local siting is a jurisdictional prerequisite to the permitting of a pollution control facility would transfer the Illinois EPA's authority to the municipality to decide whether any proposed facility was a pollution control facility. Transferring this power to individual municipalities would eviscerate any possibility of unified enforcement of the environmental laws.

Indeed, to accept the City of Waukegan's argument that its attack on the application of section 39(c) of the EPAct challenges the Illinois EPA's jurisdiction would allow a collateral attack on an agency decision whenever any agency failed to follow "the exact letter" of any of the statutory provisions it was authorized to implement. *Newkirk*, 109 Ill. 2d at 39, 485 N.E.2d at 326. The *Newkirk* court rejected just such a proposition in holding that the plaintiffs in that case had to proceed in administrative review. *Id.*

The City of Waukegan has cited a plethora of authority in support of its position that it is contesting the Illinois EPA's jurisdiction, but it would be exacting and needless to distinguish them all. It should suffice to point out that neither *City of Elgin*, discussed in detail above, *see supra* at 10-11, nor any other case cited in the City of Waukegan's brief, has held that the Illinois EPA lacks jurisdiction to issue a permit absent local citing approval, (City of Waukegan Brief at 37; *see, e.g., M.I.G. Investments, Inc. v. Environmental Protection Agency*, 122 Ill. 2d 392, 400-401, 523 N.E.2d 1, 4-5 (1988) (construing the meaning of the term "pollution control facility" in a case of direct administrative review of an Illinois Pollution Control decision where no jurisdictional issues were involved).

Nor has any court held, as the City of Waukegan asserts, that every step in the local siting

process affects the Illinois EPA's permitting jurisdiction. (*See* City of Waukegan Brief at 34-35, *citing to Kane County Defenders v. Pollution Control Board*, 139 Ill. App. 3d 588, 593, 487 N.E.2d 743, 746-47 (2nd Dist. 1988) (ruling that the notice requirements of section 39.2 of the EPAct were jurisdictional prerequisites for the *county's*, not the Illinois EPA's, consideration of siting proposals); *Ogle County Board v. Pollution Control Board*, 272 Ill. App. 3d 184, 193, 649 N.E.2d 545, 552 (2nd Dist. 1995) (same). None of the seven cases that the City of Waukegan cites to on page 40 of its brief to support the proposition that there is a difference between a jurisdictional challenge to an administrative decision and a challenge to the decision's merits (a proposition with which the Illinois EPA has no quarrel) have any applicability here.[5] The local siting requirement of section 39(c) is not a jurisdictional limit on the Illinois EPA's power to issue permits, it is simply one of the conditions that proper permitting requires. 415 ILCS 5/39(c) (2000).

Finally, there is the City of Waukegan's assertion that "[t]he local government is . . . an agent of the State in the site location portion of the permitting process." (City of Waukegan's Brief at 32). Not only has the City of Waukegan presented no authority for this proposition, thus waiving it, *see* Sup. Ct. R. 341(e)(7), governmental units are not fungible, especially where, as here, they have divergent interests, *see ESG Watts, Inc. v. Illinois Pollution Control Board,* 191 Ill. 2d 26, 35, 727 N.E.2d 1022, 1027 (2000). In any case, since an agent must generally act at the direction of its principal, *see Milwaukee Mutual Insurance Co. v. Wessels*, 114 Ill. App. 3d 746, 749, 449 N.E.2d 897, 901 (2nd Dist. 1983) (stating "it is the duty of the agent to respond to the desires of the principal"), accepting the City of Waukegan's argument undermines its position

5 Further, "[c]itation of numerous authorities in support of the same point is not favored." Sup. Ct. R. 341(e)(7).

that it has independent authority to make the siting decision.

In sum, proof of local siting is not a jurisdictional prerequisite to the issuance of a permit by the Illinois EPA. If the Illinois EPA erred in not obtaining proof of local siting approval prior to issuing the permits to the NSSD, the City of Waukegan's sole remedy was an enforcement action under section 31 of the EPAct. The City of Waukegan has not exhausted its administrative remedies, and for this reason cannot collaterally attack the Illinois EPA's permitting decision in the circuit court.

C. The Illinois EPA Was Not Required to Obtain Proof of Local Siting Approval Before Issuing the NSSD Permits to Operate Its Sludge Treatment Facility Because the Facility Is Not a Pollution Control Facility.

Even if the circuit court had jurisdiction to hear this case, the complaint against the Illinois EPA was properly dismissed. The NSSD's proposed sludge treatment facility is not subject to the local siting requirements of section 39(c) of the EPAct, 415 ILCS 5/39(c) (2000). The Illinois EPA was thus not required to obtain proof that the NSSD had received local siting approval before issuing the permits to the NSSD.

Section 39(c) of the EPAct, 415 ILCS 5/39(c) (2000), provides that "no permit for the development or construction of a new pollution control facility may be granted" by the Illinois EPA unless the applicant submits proof that the facility has been approved for local siting by the appropriate unit of local government. A "new pollution control facility" is defined as either "a pollution control facility" permitted for development or construction after July 1, 1981, 415 ILCS 5/3.32(b)(1) (2000), or one which constitutes an expansion outside of currently permitted boundaries, 415 ILCS 5/3.32(b)(2) (2000).

Thus, before a facility can be a "new pollution control facility" it must qualify as a "pollution control facility." A pollution control facility is "any waste storage site, sanitary

landfill, waste disposal site, waste transfer station, waste treatment facility or waste incinerator." 415 ILCS 5/3.32(a) (2000). Waste includes "sludge from a waste treatment plant" or "water supply treatment plant" and includes discarded liquids and semi-solids, but it "does not include solid or dissolved material in domestic sewage." 415 ILCS 5/3.53 (2000). Sludge is "any solid, semi-solid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant" 415 ILCS 5/3.44 (2000). However, exempt from the definition of pollution control facilities are those "conducting a waste storage, waste treatment, waste disposal, waste transfer or waste incineration operation . . . for wastes generated by a person's own activities," when the waste generating activities are conducted on the same site as the waste disposal or treatment operation. 415 ILCS 5/3.32(a)(3) (2000).

Here, as the City of Waukegan alleged, the NSSD treats municipal sewage at its treatment plant. (Vol. II, C256-57). It dewaters the sewage and turns it into sludge. (Vol. II, C222). It is this sludge that the NSSD creates that will be dried and thermally treated at the NSSD's proposed facility. (Vol. II, C223, C257).

The City of Waukegan's allegations demonstrate that the proposed sludge treatment facility is exempt from the definition of a pollution control facility under section 3.32(a)(3). The municipal sewage that the NSSD receives is exempt from the definition of waste. 415 ILCS 5/3.53 (2000). The sludge that the NSSD creates is waste, *id.*, but it is generated by the NSSD's own activities, (Vol. II, C222-23). Thus, the sludge treatment facility proposed by the NSSD is exempt from the definition of a pollution control facility under the plain language section 3.32(a)(3) of the EPAct, 415 ILCS 5/3.32(a)(3) (2000).

The plain language of a statute cannot be ignored. *See In re C.T.*, 281 Ill. App. 3d 189, 194-95, 666 N.E.2d 888, 891 (2nd Dist. 1996). Under the EPAct, the local siting requirements

only apply to pollution control facilities. Regardless of whether water treatment plants or other facilities of sanitary districts qualify as pollution control facilities, the NSSD's proposed sludge treatment facility does not. The Illinois EPA did not need to obtain local siting approval for this facility prior to issuing its permits.

Two cases have construed language similar to that of section 3.32(a)(3), in the context of an early provision of section 21 of the EPAct, which prohibited waste disposal without a permit.[6] *See Pielet Brothers Trading, Inc. v. Pollution Control Board*, 110 Ill. App. 3d 752, 755-57, 442 N.E.2d 1374, 1377-78 (5th Dist. 1982) (construing section 21(e) of the EPAct, Ill. Rev. Stat. ch. 111½, ¶ 1021 (1977)); *R.E. Joos Excavating v. Pollution Control Board*, 58 Ill. App. 3d 309, 312-13, 374 N.E.2d 486, 489-90 (3rd Dist. 1978) (same). The version of section 21(e) involved in these two cases prohibited waste-disposal without a permit except for "refuse generated by the operator's own activities." *See id.* Section 21(e) was construed to apply only to minor amounts of waste that were generated on-site and incidental to the operation in question. *See Pielet Brothers Trading, Inc.*, 110 Ill. App. 3d at 757, 442 N.E.2d at 1378 (holding that the exemption did not apply to an automobile junk yard that was in the business of receiving and processing discarded automobiles); *see also Joos Excavating Co.*, 58 Ill. App. 3d at 312-13, 374 N.E.2d at 489-90 (limiting construction of section 21(e) to only exempting wastes generated by on-site activities).

Contrary to the situation in *Joos Excavating Co.*, the sludge that the NSSD manufactures will be generated from on-site activities. (Vol. II, C222-23, C256). Indeed, section 3.32(a)(3) requires the waste to be generated from on-site activities for the exemption to apply. 415 ILCS

6 Section 21 is part of Title V of the EPAct which governs the regulation of landfills. *See* 415 ILCS 5/20 to 5/22.48 (2000). The prohibition of former section 21(e) of the EPAct is now found at section 21(d) of the EPAct, 415 ILCS 5/21(d) (2000).

5/3.32(a)(3) (2000).[7] Moreover, here the sludge that will be generated is derived from municipal sewage, and, by statute, is exempt from the definition of waste. *See* 415 ILCS 5/3.53 (2000). Thus, the requirement found in *Pielet Brothers Trading, Inc.* that the waste-disposal be incidental and not directly related to the operator's other activities is statutorily abrogated in this case.

In sum, the NSSD 's proposed sludge treatment facility is not a pollution control facility within the meaning of section 3.32 of the EPAct. Because it is not a pollution control facility it cannot be a "new" pollution control facility under section 39(c) of the EPAct, 415 ILCS 5/39(c) (2000). Because the facility does not qualify as a new pollution control facility it is not subject to the local siting requirements of the statute. *See id.* As local siting was not required, the Illinois EPA did not misapply the EPAct in issuing permits to the NSSD without first requiring proof of local siting approval, and the circuit court was correct to dismiss the amended complaint against the Illinois EPA.

7 The current version of section 21(d) also explicitly requires waste to be generated by on-site activities for the permitting exemption to apply. *See* 415 ILCS 5/21(d) (2000).

CONCLUSION

For these reasons, the Defendant/Cross-Appellee, Illinois Environmental Protection Agency, respectfully requests that this Honorable Court affirm the decision of the circuit court dismissing Counts I and II of the amended verified complaint.

Respectfully submitted,

JAMES E. RYAN
Attorney General
State of Illinois

JOEL D. BERTOCCHI
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Attorneys for Respondent, Illinois
Environmental Protection Agency.

BRIAN F. BAROV
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2234

EXHIBIT 2

2004 WL 5715232 (Ill.Cir.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Illinois.
County Department
Chancery Division
Cook County

VILLAGE OF FRANKFORT, an Illinois Municipal Corporation, Plaintiff,
v.
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and the
Village of Richton Park, an Illinois Municipal Corporation, Defendants.

No. 04 CH 03825.
April 5, 2004.

Illinois Environmental Protection Agency's Memorandum of Law in Support of Its Motion to Dismiss Counts I, II and III of Village of Frankfort's Amended Complaint

Illinois Environmental Protection Agency, Lisa Madigan, Attorney General of the State of Illinois, Rebecca A. Burlingham, Senior Assistant Attorney General, Environmental Bureau, 188 W. Randolph St., 20th Fl., Chicago, Illinois 60601, (312) 814-3776.

Judge Aaron Jaffe.

NOW COMES defendant, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, by its attorney, LISA MADIGAN, Attorney General of the State of Illinois, and for its Memorandum in Support of its Motion to Dismiss Counts I, II and III of plaintiff s, VILLAGE OF FRANKFORT, Amended Complaint pursuant to Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615, states as follows.

INTRODUCTION/BACKGROUND

A facility planning area (“FPA”) is a geographical area designated by the Illinois Environmental Protection Agency (“Illinois EPA”) for the planning, treatment or transport of liquid domestic wastewater and its residual solids. (Amended Complaint ¶4) There exists a contract between the Illinois EPA and the Northeastern Illinois Planning Commission (“NIPC”) whereby NIPC performs review of requests to change FPA boundaries and makes recommendations to the Illinois EPA. (Amended Complaint ¶15)

In December 2002, defendant Village of Richton Park (“Richton Park”) filed a petition with NIPC to add 1,470 acres of unincorporated land then designated as non-FPA to the Metropolitan Water Reclamation District of Greater Chicago's (“MWRD”) FPA. (Amended Complaint 1129, 30) This same land was added to the MWRD's corporate limits by legislative enactment in 1998. Public Act 90-0780, effective August 14, 1998. (Amended Complaint ¶58) In January 2003, plaintiff Village of Frankfort (“Frankfort”) filed an objection to Richton Park's application and filed its own application a month later to include the 1,470 acres in Frankfort's FPA. (Amended Complaint ¶¶33, 34)

On March 6, 2003, the MWRD adopted a resolution supporting Richton Park's application. (Amended Complaint ¶51) On March 12, 2003, the MWRD sent the resolution to NIPC along with a cover letter stating that the MWRD supported Richton Park's application to add the subject area to the MWRD's FPA. (Amended Complaint ¶52) NIPC took the position that it did not have jurisdiction to consider Frankfort's application because the property was within the MWRD's service area. (Amended Complaint ¶¶¶54, 56)

On March 30, 2003, NIPC sent its recommendation to amend the MWRD FPA to the Illinois EPA. On May 13, 2003, the Illinois EPA approved the amendment. (Amended Complaint ¶57) On June 16, 2003, Frankfort filed an appeal with the Illinois EPA pursuant to 35 Ill. Adm. Code Part 351. (Amended Complaint ¶¶75, 76)

On December 23, 2003, Frankfort wrote to the Illinois EPA and requested that the Illinois EPA not grant Richton Park a permit to install a sewer main until the Illinois EPA had ruled on Frankfort's petition. (Amended Complaint ¶79) On December 30, 2003, the Illinois EPA wrote back to Frankfort stating that the permit had already been issued. (Amended Complaint ¶80) On February 2, 2004, Frankfort filed the instant action against the Illinois EPA in the Circuit Court of Sangamon County, which was subsequently removed to Cook County.

On February 5, 2004, the Sangamon County Circuit Court entered a temporary restraining order ("TRO") prohibiting Richton Park from constructing any sewer lines in the subject area. On March 12, 2004, the Cook County Circuit Court extended the TRO against Richton Park, enjoining the construction of any sanitary sewers east of Ridgeland Avenue and allowing construction west of Ridgeland Avenue. Hearing on Frankfort's motion for preliminary injunction is scheduled for May 3 and 4, 2004.

AUTHORITY OF THE MWRD

Frankfort's claims are based on its legal position that the Metropolitan Water Reclamation District Act, 70 ILCS 2605/1 *et seq.* ("Act"), does not grant the MWRD the exclusive right to provide sewage treatment within its statutory service area and that the requirements of the FPA amendment process must be followed in order for the MWRD to provide treatment to areas that have been added to its territory by legislative action. As discussed below, Frankfort is wrong on both counts.

The MWRD, originally the Chicago Sanitary District and then the Metropolitan Sanitary District, was established in 1889 as part of a comprehensive plan to dispose of sewage in Chicago and Cook County, which included reversing the flow of the Chicago River in order to clean up Lake Michigan. The powers of the MWRD Board of Trustees as established in the original 1889 act included

> the power to provide for the drainage of such district of both surface water and sewage, by laying out, establishing, constructing and maintaining one or more main channels, drains, ditches and outlets for carrying off and disposing of the drainage (including the sewage) of such district, together with such adjuncts and additions thereto as may be necessary or proper to cause such channels or outlets to accomplish the end for which they are designed in a satisfactory manner.

Laws 1889, p.125, Section 7, effective July 1, 1889.

After the initial project was completed, the other riparian states complained that the reversal of the Chicago River was affecting the level of Lake Michigan, and the federal government reduced the amount of water that Chicago could withdraw. As a consequence, mere dilution was no longer an effective treatment, and in 1921 the Sanitary District was directed to build actual treatment plants. [1]

Footnotes

The exclusive authority of the MWRD to provide wastewater treatment within its corporate limits [2] was established in a series of early Illinois Supreme Court opinions which remain valid today. *City of Chicago v. Green,* 87 N.E. 417 (1909); *City of Berwyn v. Berglund,* 99 N.E. 705 (1912); Judge v. Bergman, 101 N.E. 574 (1913). In those cases, the Supreme Court interpreted the original 1889 act as giving the Sanitary District exclusive authority to provide sewage treatment for the area in its corporate

limits by constructing a main channel that would provide a common outlet for all the individual sewers constructed by the municipalities within the Sanitary District boundaries.

1 The General Assembly amended Section 7 to authorize to MWRD to
> laying out, establish, construct and maintain, or provide for the laying out, establishing, constructing and maintaining of sewage disposal and treatment plants and works, within or without the territorial boundaries of such sanitary district, that may be advantageous or necessary in preventing the water in any channel, ditch, drain outlet or other improvement of the sanitary district discharged into or through any river or stream of water beyond or without the limits of the district constructing the same from becoming offensive or injurious to the health of any of the people of the State.
> Laws 1921, p.324, effective July 21, 1921.

In these early cases, the Illinois Supreme Court held that the local municipalities retained their police power authority to provide sewer service to their inhabitants and establish “special service areas” to finance the sewers, and held that the District was responsible for the ultimate treatment/disposal of the sewage within its corporate limits, which would be financed by the District's taxing authority.

Over the years, the MWRD's authority over sewers has been extended. Section 7f(a) of the Act, for example, establishes the authority of the MWRD to require permits for sewers that discharge - directly or indirectly - into the MWRD's treatment facilities from municipalities under 500,000 population. Section 7f(b) authorizes the MWRD to

> regulate, limit, extend, deny or otherwise control any new or existing connection, addition or extension to any sewer or sewerage system which directly or indirectly discharges into the sanitary district sewerage system.

from any municipality under 500,000 population. 70 ILCS 2605/7f(b).

In summary, Frankfort's assertion that it is allowed under the Act to provide sewage treatment to an area that is within the corporate limits of the MWRD is not correct. When the powers conferred on the MWRD by the Act are considered, MWRD may, by agreement, allow another entity to provide treatment in its area. Frankfort does not allege that any such agreement exists between the MWRD and Frankfort.

The MWRD is, in reality, its own FPA. This view is consistent with the Act and the statutory authority of the MWRD, and is the only way the MWRD can be treated in the FPA process. In 1998, the corporate limits of the MWRD were extended by statute to include the territory at issue. Once the legislative enactment became effective, the administrative criteria for annexation to an FPA were no longer operative. The Illinois EPA's conflict resolution rules recognize this reality by providing that in such situations a permit can be issued without waiting for a formal FPA amendment. 35 Ill. Adm. Code 351.501.

The Act does not say that once an area is annexed to the MWRD it can be served for treatment purposes by any other entity without the specific consent of the MWRD. The Act does say that if the area is under 500,000 in population, the requirements established by the MWRD under Section 7f of the Act for sewers tributary to the MWRD must be complied with. The only aspect of the FPA process that remains applicable is amendment of the FPA map to show the transfer of the property at issue into the MWRD FPA.

It would appear that under Section 7f of the Act, it is the MWRD - not NIPC or the Illinois EPA - that must choose between Richton Park and Frankfort as to who will provide the actual sewer service to the subject area, and that the choice shall be made on the basis of the MWRD's permitting authority and authority under Section 7f(b) rather than on the basis of criteria in the FPA process that are not included in the Act. In other words, even if Richton Park's application is viewed as a necessary FPA-related action in order for it to be able to provide the sewers for the 1,470 acres that are in the MWRD's FPA, the Illinois EPA, through NIPC, cannot use the FPA criteria to force or overrule the MWRD's permitting decision.

FRANKFORT IS NOT ENTITLED TO A HEARING

Frankfort is not entitled to a hearing on its application or on its appeal. Because the territory has been legislatively transferred into the corporate limits of the MWRD, the Illinois EPA cannot entertain an option that would allow treatment of the sewage from the 1,470 acres in Frankfort's plant absent an agreement from the MWRD waiving its jurisdiction.

Since the area has been added to the MWRD's corporate limits, in order for the Illinois EPA to give Frankfort a hearing solely on the question of who should supply the sewers, the Illinois EPA would have to ignore the MWRD's permitting and regulatory processes. The General Assembly has, through the Act, superseded the FPA process in regard to areas the MWRD is to serve.

STANDARD FOR DISMISSAL

Section 2-615 of the Illinois Code of Civil Procedure provides in pertinent part:
§2-615. Motions with respect to pleadings. (a) All objections to pleadings shall be raised by motion. The motion shall point out specifically the defects complained of, and shall ask for appropriate relief, such as: that a pleading or a portion thereof be stricken because substantially insufficient in law, or that the action be dismissed,...

(b) If a pleading or a division thereof is objected to by a motion to dismiss or for judgment or to strike out the pleading, because it is substantially insufficient in law, the motion must specify wherein the pleading or division thereof is insufficient.

735 ILCS 5/2-615(a), (b).

Courts have interpreted this section of the Code of Civil Procedure as follows:

> Among the principles governing a motion to dismiss pursuant to section 2-615 are the following. A section 2-615 motion to dismiss attacks only the legal sufficiency of the complaint and therefore does not raise affirmative factual defenses (as does a section 2-619 motion), but rather alleges defects on the face of the complaint. (Urbaitis v. Commonwealth Edison (1991) 143 Ill. 2d 458, 475, 575 N.E. 2d 548, 159 Ill. Dec. 50). The question presented by a section 2-615 motion to dismiss is whether sufficient facts are contained in the pleading which, if proved, would entitle the plaintiff to relief. (Kolegas v. Heftel Broadcasting Corp. (1992) 154 III. 2d 1, 9, 607 N.E. 2d 201, 180 Ill. Dec. 307). In making this determination, the court is to interpret the allegations of the complaint in the light most favorable to the plaintiff. Kolegas, 154 Ill. 2d at 9. The only matter to be considered in ruling on a section 2-615 motion to dismiss are the allegations of the pleadings themselves. (Urbaitis, 143 III. 2d at 475). Exhibits attached to the pleadings are considered part of the pleadings for all purposes where the pleading is founded on such exhibits. (Ill. Rev. Stat. 1991, ch. 110, par. 2-606). Allegations in the pleadings which conflict with facts disclosed in the exhibits are not admitted as true but, rather, the exhibits control. (In re Estate of Davis (1992), 225 III. App. 3d 998, 1000, 589 N.E. 2d 154, 168 Ill. Dec. 40). The granting of the motion to dismiss a complaint is within the sound discretion of the trial court. (Knox College v. Celotex Corp. (1981) 88 Ill. 2d 407, 422, 430 N.E. 2d 976, 58 Ill. Dec. 725).

Evers v. Edwards Hospital Association, et al., 247 Ill. App. 3d 717, 723-724, 617 N.E. 2d 1211, 187 Ill. Dec. 490 (2nd Dist. 1993).

Dismissal for failure to state a cause of action is appropriate only where it clearly appears that no set of facts can be proven under the pleadings that will entitle the pleader to recovery. *Douglas Theater Corporation v. Chicago Title & Trust Company,*

288 Ill.App.3d 880, 681 N.E.2d 564, 566 (1st Dist. 1997). It is with these principles that this court should evaluate Frankfort's Amended Complaint and the Illinois EPA's Motion to Dismiss. Frankfort cannot possibly plead any facts entitling it to relief under Counts I, II or II. Accordingly, those counts should be dismissed, with prejudice.

COUNT I - MANDAMUS

Mandamus proceedings are governed by the same pleading rules that apply to actions at law. *Noyola v. Board of Education of the City of Chicago,* 179 I11.2d 121, 688 N.E.2d 81, 86 (I11. 1997). A complaint for mandamus must allege facts establishing the plaintiff's clear right to the relief sought, the defendant's clear duty to perform, and clear authority of the defendant to comply with the writ. *Id.* Mandamus is used to enforce, as a matter of right, a public officer's performance of his or her public duties where no exercise of discretion on the officer's part is involved. *Id.* Mandamus will lie only to enforce rights already lawfully vested. Parties can acquire no new rights in mandamus proceedings. *Monat v. County of Cook,* 322 Ill.App.3d 499, 750 N.E.2d 260, 272 (1st Dist. 2001).

In considering a motion to dismiss under Section 2-615 of the Code of Civil Procedure for failure to state a claim, all well-pled facts in the complaint are admitted and taken as true. *Grund v. Donegan,* 298 Ill.App.3d 1034, 700 N.E.2d 157, 159 (1st Dist. 1998). Taking as true all well pleaded facts in Frankfort's amended complaint, those facts fail to allege that Frankfort has a clear right to the relief sought in Count I [3], and likewise fail to allege that the Illinois EPA has a clear duty and the authority to perform the actions requested by Frankfort.

2 Section 1 of the Water Reclamation District Act establishes the geographic limits of the MWRD:
The corporate limits of the Sanitary District within the territorial limits of Cook County, may be extended in such manner as may be provided by law to include any areas of contiguous territory within the limits of said Cook County wherein the construction, maintenance and operation of sewers and sewage treatment plants and the construction, enlargement and maintenance of outlets for the drainage of the territory will conduce to the preservation of the public health.
The "manner provided by law" involved here is the extension of the corporate limits of the MWRD by legislative action. Since 1905 there have been over 200 legislative actions to extend the MWRD boundaries. Note that Frankfort bases all of its legal arguments on Section 1 and completely ignores Section 7.

The key factual allegations for purposes of this discussion are as follows:
•NIPC reviews, considers, conducts hearings and makes recommendations to the Illinois EPA on applications to change FPA boundaries, and the Illinois EPA has the ultimate decision as to whether the application for modification should be approved. (¶14)

There is a contract between the Illinois EPA and NIPC whereby NIPC performs reviews of requests to change FPA boundary recommendations and makes recommendations to the Illinois EPA which are non-binding, and thus acts as an agent of the Illinois EPA. (115)

The subject area was added to the MWRD's corporate limits by legislative act in 1998, to which Frankfort refers in ¶58 and is a matter of law (Public Act 90-0780, effective August 14,1998).

#On December 16, 2002 Richton Park filed an application with NIPC to transfer the subject area into the MWRD's FPA. (¶¶29, 30)

•On March 6, 2003, MWRD adopted a resolution supporting Richton Park's application. (¶51)

• On March 25, 2003, NIPC issued a recommendation to support Richton Park's application. (153)

• On May 13, 2003, the Illinois EPA accepted NIPC's recommendation and approved Richton Park's application to transfer the subject area into MWRD's FPA. (157)

• On June 4, NIPC returned Frankfort's application and application fee. NIPC's letter stated NIPC was without jurisdiction to consider the application submitted by Frankfort. NIPC reached its conclusion based on the MWRD's support for Richton Park's application and the fact that the area in question had been added to the MWRD by legislative act. (158)

• On June 16, 2003, Frankfort filed an appeal with the Illinois EPA pursuant to 35 Ill. Adm. Code Part 351. (¶¶75, 76)

• To date, the Illinois EPA has taken no action with respect to Frankfort's appeal. (177)

• On December 23, 2003, Frankfort wrote to the Illinois EPA and requested that Richton Park not be granted a permit to install a sewer main until the Illinois IEPA ruled on Frankfort's petition. (179)

• On December 30, 2003, the Illinois IEPA wrote back to Frankfort stating that the permit had already been issued. (180)

Given these facts, and regardless of any other facts Frankfort may have alleged, the Illinois EPA has no authority to grant Frankfort's application to include the subject area in its FPA or to revoke the permit it issued to Richton Park to commence sewer construction in the subject area.

As discussed above, once the subject area was added to the MWRD's corporate limits by the General Assembly, as Section 1 of the Act authorizes, the MWRD had the exclusive authority, according to the early case law cited above, to decide who provides sewer services within that area. The MWRD selected Richton Park in this instance, and expressed its support for Richton Park's application by way of a formal resolution. NIPC correctly recognized that NIPC was obligated to approve Richton Park's application and had no jurisdiction to consider Frankfort's. Likewise, the Illinois EPA was constrained to take the same actions as NIPC. As Richton Park was the entity chosen by the MWRD to provide sewer services in the subject area, the Illinois EPA's issuance of a permit to Richton Park was proper.

The allegations relative to the FPA amendment process and the Illinois EPA's purported failure to comply with the regulatory procedures for revising the Water Quality Management Plan (35 Ill. Adm. Code Part 351) are tangential to the to the cause of action Frankfort attempts to assert. As stated above, it is the MWRD, not NIPC or the Illinois EPA, who has the right to choose who provides sewer treatment services in the subject area. Both the Act and the Part 351 FPA amendment procedures recognize that annexation of a geographic area to the MWRD and the Illinois EPA's issuance of a permit to an entity providing sewer services in an FPA incorporated therein are independent of the FPA amendment process and the necessity of complying with FPA criteria.

Moreover, Frankfort lacks standing to challenge the Illinois EPA's issuance of a permit to Richton Park. As Richton Park argued in its March 5, 2004 Answer to Plaintiffs Motion for Temporary Restraining Order and Preliminary Injunction, a third party has no authority to challenge the validity of a permit issued by the Illinois EPA or to claim it was improperly issued. In addition to the cases cited by Richton Park in that pleading (*Landfill, Inc. v. Pollution Control Board*, 74 Ill.2d 541,25 Ill.Dec. 602 (1978); *White Fence Farm v. Land and Lakes Company*, 99 Ill.App.3d 234, 54 Ill.Dec. 467 (4th Dist. 1981); *Village of Lake in the Hills v. Laidlaw Waste Systems*, 143 Ill.App.3d 285, 97 Ill.Dec. 310 (2nd Dist. 1986)), the Second District recently held, in a case involving a sanitary district's proposed construction of a “biosolids reuse project”, that the plaintiff municipality was not entitled to judicial review of the Illinois EPA's decision to issue a permit to the sanitary district. *City of Waukegan v. Illinois Environmental Protection Agency*, 339 Ill.App.3d 963, 791 N.E.2d 635, 644-646 (2003).

Frankfort fails to allege facts showing its clear right to an Illinois EPA decision incorporating the subject area into Frankfort's FPA and revoking Richton Park's permit. Frankfort fails to allege facts demonstrating either a duty or the authority on the part of

the Illinois EPA to grant such relief. Indeed, the facts Frankfort alleges, when viewed in the light of relevant statutes, regulations and case law, establish unequivocally that the Illinois EPA's duty and authority required that it took precisely the action it did.

Illinois EPA's granting of Richton Park's application, its issuance of the permit to Richton Park and its failure to consider Frankfort's application and appeal were nondiscretionary an element of mandamus but the Illinois EPA was constrained by law to take those actions. Frankfort's requests seek to have the Illinois EPA act in a manner contrary to law. It is Richton Park that, as a matter of right, was entitled to the actions the Illinois EPA was mandated to take. In asking this court to compel the Illinois EPA to support Frankfort's application for inclusion of the subject area in its FPA, Frankfort seeks to acquire new rights through this mandamus proceeding, which is improper.

In short, Frankfort does not, and cannot possibly, allege any facts showing its clear right to mandamus relief or the Illinois EPA's clear duty or authority to grant it. Frankfort fails to state a claim upon which relief can be granted, and Count I should be dismissed, with prejudice.

COUNT II -WRIT OF CERTIORARI

The purpose of a writ of certiorari is to have the entire record of the inferior tribunal brought before the court to determine from the record alone whether that body proceeded according to applicable law. *Reichert v. Court of Claims of State of Illinois,* 327 Ill.App.3d 390, 763 N.E.2d 402, 407 (5th Dist. 2002). Review is strictly limited to an inspection of the record of the inferior tribunal. The court cannot consider any matter not appearing of record. *Id.* If the circuit court, on the return of the writ of certiorari, finds from the record that the inferior tribunal proceeded according to law, the writ is quashed. However, if the proceedings are not in compliance with the law, the judgment and proceedings shown by the return will be quashed. *Id.*

Based on the facts alleged, Frankfort cannot possibly plead anything other than that the Illinois EPA complied with the law in approving Richton Park's application without considering Frankfort's, and in issuing a sewer construction permit to Richton Park. Frankfort fails to state, and could not possibly state, a claim of certiorari.

Moreover, Frankfort's request that the Illinois EPA revoke Richton Park's permit [4] suffers from the same flaw -Frankfort's lack of standing to challenge its issuance -- as in the mandamus count, and is another basis for dismissal of Frankfort's request for a writ of certiorari.

3 WHEREFORE, Plaintiff requests that this Court enter an order directing the IEPA to:
1) conduct a review and fair hearing of Frankfort's Application;
2) conduct a hearing on Frankfort's appeal;
3) revoke its acceptance of Richton Park's Application because the application was not filed by an entity that had standing;
4) Revoke any permits issued by the IEPA that were based upon IEPA's granting of Richton Park's Application;
5) consider the environmental and cost effectiveness of both the Richton Park and Frankfort plans in compliance with 35 Ill. Adm. Code 351.402; and
6) revoke any permit that was based upon the IEPA's acceptance of Richton Park's Application.

In its Answer to Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, Richton Park cites the *City of Highwood* case for the proposition that certiorari is not available to review ministerial, executive or legislative acts. *City of Highwood v. Obenberger,* 238 Ill.App.3d 1066, 605 N.E.2d 1079 (2nd Dist. 1992). The Illinois EPA concurs with Richton Park's argument on this point, that in adding the subject area to the MWRD's FPA through Public Act 90-0870, the Illinois EPA was merely executing the directive of the General Assembly in annexing the subject area to the MWRD's corporate limits. Thus, the Illinois EPA's actions were nondiscretionary, ministerial and not reviewable by certiorari, under the *City of Highwood* rationale.

Accepting as true all well pled facts in the Amended Complaint, those facts demonstrate that Frankfort, as a third party, cannot have standing to object to the Illinois EPA's issuance of a permit to Richton Park, that the actions and omissions of which

Frankfort complains clearly constituted the Illinois EPA's performance of nondiscretionary, mandatory obligations imposed upon it by the legislature and applicable law, and that every reasonable inference and conclusion to be drawn from the factual allegations is that the Illinois EPA in every respect complied with the law. Frankfort fails to plead, and cannot possibly plead, facts supporting a claim for certiorari, and Count II should be dismissed, with prejudice.

COUNT III - ADMINISTRATIVE REVIEW ALTERNATIVE TO COUNT I AND II

Count III is titled *Administrative Review Alternative to Count land II* and requests an order
1) setting aside the ruling of the IEPA on Richton Park's Application, and

2) directing the IEPA to accept Frankfort's Application to expand its FPA.

Section 2-603 of the Code of Civil Procedure, 735 ILCS 5/2-603, provides in pertinent part as follows:

> Form of pleadings. (a) All pleadings shall contain a plain and concise statement of the pleader's cause of action, counterclaim, defense, or reply.

Section 2-612(b), 735 ILCS 5/2-612(b), provides:

> No pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet.

In this count, Frankfort merely realleges the allegations contained in Counts I and II, and cites no statutory or common law basis or theory for the claim it purports to assert. Count III fails to meet the requirement that it contain a plain and concise statement of the cause of action. Moreover, because the Illinois EPA is left to guess at Frankfort's theory of recovery, Count III fails to reasonably inform the Illinois EPA of the nature of the claim it is called upon to meet. Count III is legally defective, fails to state a claim and should be dismissed, with prejudice.

CONCLUSION

For all of the foregoing reasons, defendant ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, respectfully requests that this court dismiss Counts I, II and m of plaintiff VILLAGE OF FRANKFORT's Amended Complaint, with prejudice.

4 WHEREFORE, the Village of Frankfort requests that the Court enter an order:
1) directing the IEPA to produce all materials which constitute a record of its review of the Richton Park and Frankfort Applications.
2) setting aside the ruling of the IEPA on Richton Park's Application, and
3) directing the IEPA to accept Frankfort's Application to expand its FPA.
4) directing the IEPA to revoke any permit that was based upon the IEPA's acceptance of Richton Park's Application.

End of Document

EXHIBIT 3

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 North Grand Avenue East, P.O. Box 19276, Springfield, Illinois 62794-9276 • (217) 782-2029
James R. Thompson Center, 100 West Randolph, Suite 11-300, Chicago, IL 60601 • (312) 814-6026

PAT QUINN, GOVERNOR DOUGLAS P. SCOTT, DIRECTOR

217/782-3397

June , 2011

Mr. Bill Spencer, Vice-President
Mr. David E. Holt, Secretary
WATCH Clinton Landfill
P.O. Box 104
Clinton, IL 61727-0104

Re: 0390055036 – DeWitt County
Clinton Landfill 3

Dear Mr. Spencer and Mr. Holt:

This letter is in response to Mr. Holt's letter on behalf of WATCH Clinton Landfill ("WATCH") to Doug Clay, Manager of the Illinois Environmental Protection Agency's Bureau of Land, Division of Land Pollution Control. The letter was sent via e-mail dated May 16, 2011. The letter concerns Clinton Landfill 3 ("Landfill"), its application pending before the United States Environmental Protection Agency ("USEPA") for authorization to accept polychlorinated biphenyl ("PCB") waste, and its current acceptance of manufactured gas plant ("MGP") waste, which WATCH characterizes as hazardous. More specifically, WATCH claims that the permit modification issued to the Landfill in January 2010 by the Bureau of Land Permit Section is in "violation of conditions established by the DeWitt County Board in 2002 . . . ."[1] The letter notes that excerpts from transcripts of the hearings held by the DeWitt County Board ("Board") on July 11 and 15, 2002, include statements by representatives of Clinton Landfill, Inc. "voluntarily [excluding] hazardous waste and PCB waste" from acceptance at the Landfill. WATCH asserts that this testimony became a condition of the Board's siting approval resolution and that issuance of permit modifications by the Illinois EPA in furtherance of acceptance of PCB waste or MGP waste for disposal constitutes violation of the condition.

The Illinois EPA disagrees with these characterizations and conclusions. As WATCH is aware, the Illinois EPA is prohibited from issuing a development or construction permit to certain "pollution control facilities" (i.e., waste management facilities) unless the applicant submits proof that the local siting authority has approved the proposed location of the facility in accordance with Section 39.2 of the Environmental Protection Act. 415 ILCS 5/39(c), 39.2. Clinton Landfill, Inc. submitted the proof in the required Form LPC-PA8, a notarized document

[1] The DeWitt County Board is the local siting authority for Clinton Landfill 3 for purposes of the local siting provision of the Environmental Protection Act. 415 ILCS 5/39.2. The DeWitt County Board adopted a resolution approving siting for Clinton Landfill 3 on September 12, 2002.

EXHIBIT A TO MOTION TO DISMISS

signed by the Board Chairman certifying that the facility was approved for waste storage, waste treatment, waste disposal and landfilling. As further required by the LPC-PA8, the Board resolution approving the siting and stating conditions of the approval was attached to the certification. The LPC-PA8 clearly states that the conditions are provided for information only and the Illinois EPA has no obligation to monitor or enforce local conditions. Even if there were such an obligation, the document contains no conditions excluding the acceptance of PCB wastes or MGP wastes at Clinton Landfill 3.

Clinton Landfill, Inc. submitted an application for the development and construction of a combined municipal solid waste landfill unit and chemical waste unit authorized to receive non-hazardous solid waste and non-hazardous special waste. The application was reviewed and issued in accordance with the regulations for such facilities at 35 Ill. Adm. Code 810-813 and, in particular, in accordance with Part 811 standards and requirements for municipal solid waste landfills and chemical waste landfills, the state's most stringent standards applicable to non-hazardous landfills. The permit modification issued by the Illinois EPA does not authorize the acceptance of "hazardous waste" within the meaning of state and federal environmental laws. However, the permit does authorize the acceptance of non-hazardous special waste including non-hazardous MGP waste. PCB waste may not be accepted unless authorized by the USEPA. If acceptance is authorized by the USEPA, only PCB waste considered non-hazardous special waste may be accepted at the facility. In addition, there was nothing in the application making the unit a "new pollution control facility" and triggering a second local siting approval procedure. The application did not propose an expansion to the area that was approved by the Board in the 2002 siting approval resolution, and it did not propose the acceptance of special or hazardous waste for the first time. 415 ILCS 5/3.330(b). Therefore, the Illinois EPA's issuance of the permit modification in January 2010 complied with all statutory and regulatory requirements applicable to the review of the application.

Sincerely,

Lisa Bonnett
Interim Director

cc: Scott Phillips
Doug Clay
Steve Nightingale
Imran Syed
John Kim
Kyle Rominger