BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF ELECTRONIC FILING

TO: All Parties of Record

PLEASE TAKE NOTICE that on March 6, 2013, I filed the following documents electronically with the Clerk of the Pollution Control Board of the State of Illinois:

1. This Notice of Electronic Filing

2. Clinton Landfill, Inc.'s Motion for Leave to File Reply to Intervenor's Response to Motion to Dismiss (with Reply attached)

Copies of the above-listed documents are being served upon you via U.S. Mail, First Class Postage Prepaid, sent on March 6, 2013, as is stated in the Certificate of Service appended hereto.

Respectfully submitted,

CLINTON LANDFILL, INC.
Respondent

By:_____
One of its attorneys

Brian J. Meginnes, Esq. (bmeginnes@emrslaw.com)
Janaki Nair, Esq. (jnair@emrslaw.com)
Elias, Meginnes, Riffle & Seghetti, P.C.
416 Main Street, Suite 1400
Peoria, IL 61602
Telephone: (309) 637-6000
Facsimile: (309) 637-8514

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

MOTION FOR LEAVE TO FILE REPLY
TO INTERVENOR'S RESPONSE TO MOTION TO DISMISS

NOW COMES the Respondent, Clinton Landfill, Inc. ("CLI"), by and through its undersigned attorneys, and as and for its Motion for Leave to File a Reply responding to the Response filed on February 21, 2013, by the Intervenor, to CLI's Motion to Dismiss filed on December 5, 2012, pursuant to 35 Ill. Admin. Code §101.500(e) and other applicable regulations, states as follows:

1. CLI filed its Motion to Dismiss in this case on December 5, 2012.

2. On February 21, 2013, the Intervenor, the People of the State of Illinois (through the Office of the Illinois Attorney General) filed a Response to CLI's Motion to Dismiss, in which the Intervenor reverses the position the Intervenor has consistently taken in past cases concerning the power of the Pollution Control Board to review the need for local siting prior to permitting by the Illinois Environmental Protection Agency. In addition, the Intervenor introduces new documents for consideration by the Board, which CLI has not had an opportunity to address.

3. CLI has prepared a Reply in support of its Motion to Dismiss responding to the Intervenor's Response, which Reply is attached hereto.

4. CLI respectfully submits that the filing of the attached Reply will prevent material prejudice and injustice.

5. This Motion is being filed on March 6, 2013, within fourteen (14) days after service of the Intervenor's Response on CLI, in accordance with 35 Ill. Admin. Code §101.500(e).

WHEREFORE, CLI requests that the Pollution Control Board or the hearing officer grant CLI leave to file the attached Reply, direct the Clerk to file the attached Reply instanter, and award CLI such other and further relief as is deemed appropriate under the circumstances.

Respectfully submitted,

CLINTON LANDFILL, INC.,
Respondent

By: 

One of its attorneys

Brian J. Meginnes, Esq. (bmeginnes@emrslaw.com)
Janaki Nair, Esq. (jnair@emrslaw.com)
Elias, Meginnes, Riffle & Seghetti, P.C.
416 Main Street, Suite 1400
Peoria, IL 61602
Telephone: (309) 637-6000
Facsimile: (309) 637-8514

913-0176

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

REPLY IN SUPPORT OF MOTION TO DISMISS
RESPONDING TO INTERVENOR'S RESPONSE

NOW COMES the Respondent, Clinton Landfill, Inc. ("CLI"), by and through its undersigned attorneys, and presents this Reply in support of its Motion to Dismiss the Complaint filed in this case by the Complainants, 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, a municipal corporation (collectively, the "Complainants"), responding to the Response to CLI's Motion to Dismiss filed by the Illinois Attorney General's office, purporting to represent the People of the State of Illinois, Intervenor, (the "Intervenor"). For the purposes of this Reply, all terms are ascribed the meanings given them in CLI's Motion to Dismiss and in CLI's Reply to the Complainants' Response to CLI's Motion to Dismiss, except as otherwise defined herein. The terms "Agency" and "Illinois EPA" are used interchangeably.

I. INTRODUCTION

The Intervenor concedes that "third parties are not allowed to challenge the Agency's decision to issue permits." (Intervenor's Response, pg. 5). However, the Intervenor claims that this principle does not bar the instant case for two reasons: first, because the Agency is not a party to this case; and, second, because the Board has jurisdiction to determine whether the Chemical Waste Unit is a "new pollution control facility" requiring new local siting approval. Both of these arguments fly in the face of established law, and the second argument also directly contradicts the position advocated by the Intervenor in other recent cases. (Notably, the Intervenor apparently concedes that Count IV of the Complaint, in which the Complainants claim that manufactured gas plant (MGP) waste is "hazardous" under the law, is subject to dismissal, as the Intervenor does not address these allegations in its Response.)

II. ARGUMENT

A. The Complaint constitutes an attack on the Agency's Permit.

To say that the Complaint is not an attack on the Agency's Permit allowing the development and operation of the Chemical Waste Unit because "[t]he Complaint filed with the

Board does not name the Illinois EPA as a party" is to elevate form over substance, yet again. (Intervenor's Response, pg. 6). As the Intervenor states in its Response,

> If Respondent's current additions and modifications to its landfill do create a new pollution control facility, then Respondent was required by statu[t]e to obtain local siting approval from the DeWitt County Board. Without such siting approval, Respondent's permit is invalid and cannot be used as a shield for any violations which may occur at the landfill.

(Intervenor's Response, pg. 2). In other words, if the Complainants were to prevail in this case (contrary to all applicable law), the direct result would be the invalidation of the Agency's Permit. It is nonsensical to argue that this case is not an attack on the Agency's Permit, when the relief sought by the Complainants would directly result in the invalidation of the Agency's Permit.

In fact, the Agency should clearly be a party to this case (and the failure to join the Agency could be an additional basis for dismissal of the case). *See* 35 Ill. Adm. Code §101.403(a). As CLI stated in its Reply to the Complainants' Response to CLI's Motion to Dismiss (which CLI requested leave to file on January 7, 2013), if the Board denies all or any part of CLI's Motion to Dismiss, CLI intends to move for the joinder of the Agency as a necessary party in this case.

Regardless of the Complainants' failure to join the Agency as a party, the Illinois Supreme Court has clearly held that cases collaterally attacking permits issued by the Agency are impermissible even if the Agency is not itself a party to such a case, and even if the permit in question is not directly challenged. In City of Elgin v. County of Cook, 169 Ill. 2d 53, 660 N.E.2d 875 (1995), various municipalities and other entities brought actions against the Solid Waste Agency of Northern Cook County ("SWANCC"), a municipal joint-action solid waste agency, and others challenging a Cook County ordinance that granted final siting approval for

SWANCC's development of a "balefill" (a type of municipal solid waste landfill). Cook County's approval of siting for the balefill was conditioned on the issuance of a development permit by the Agency within two years. Id. at 57, 878. After extensive review and public hearings, the Agency issued a permit for development of the balefill, and Cook County issued a final approval of siting for the balefill in accordance with its earlier ordinance. Id. at 58, 878.

The plaintiffs filed two suits seeking to stop the development of the balefill. In the first suit, filed in Cook County, the plaintiffs sued SWANCC (the developer of the balefill), the Northwest Municipal Conference, the Cook County board, and the Chicago Gravel Company (the seller of the land). Id. at 58, 879. In the second suit, filed in Kane County, the plaintiffs sued SWANCC only. Id. at 72, 885. ***The Agency was not named as a party in either suit.***

In the Cook County suit, the plaintiffs challenged the validity of the Cook County ordinance approving the siting for the balefill, arguing "that the balefill ordinance was arbitrary and capricious; the procedures employed in approving the balefill ordinance were deficient; the balefill will cause environmental damage; and the balefill will economically injure the plaintiff municipalities in their corporate capacity." Id. at 59-60, 879. Similarly, in the Kane County suit, the plaintiffs "alleged various environmental injuries, some of which mirrored those of the Cook County complaint, and, for relief, sought that all balefill-related construction be halted until such time as SWANCC received the required section 404 permit from the Army Corps of Engineers." Id. at 73, 885. ***The Agency's development permit was not directly challenged in either suit.***

The Illinois Supreme Court held that both suits constituted impermissible collateral attacks on the Agency's development permit for the balefill, even though the Agency was not named as a party in either suit and the Agency's development permit was not directly challenged in either suit.

Regarding the Cook County suit, the Illinois Supreme Court stated that, as a matter of law, "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" Id. at 61, 880. The Court found that the challenge to the county board's siting ordinance was a proxy for challenging the permit: "Yet, what the plaintiff municipalities cannot do directly they attempt to do indirectly through their complaint challenging the Cook County board's zoning ordinance authorizing the siting and development of the balefill." Id. at 61-62, 880. The Court concluded that the plaintiff municipalities in the Cook County suit lacked standing to pursue the suit (in addition to finding other infirmities in the suit). Id. at 70, 884.

Similarly, regarding the Kane County suit, the Court held that "[i]n issuing the development permit, the Agency determined that the balefill development plan comports with the entire range of environmental regulations governing the development of such facilities which seek to ensure they do not harm the environment. * * *. Thus, any claims of environmental harm by Kane County at this juncture constitute an attempt to second-guess the Agency, which is not permitted under the Act." Id. at 79, 888. Interestingly, the Intervenor *does not cite to City of Elgin* in the relevant section of its Response, even though this is a seminal case on this subject.

Based on the foregoing, it is clear that the Complainants' failure to join the Agency as a party to this case does not save the Complaint (though it might provide an additional basis to dismiss the Complaint, because the Agency is a necessary party). If the Board were to review the need for additional siting approval in this case (which would clearly constitute usurpation of the Agency's permitting authority, as is discussed in Section II(B), below, and the DeWitt County Board's local siting authority, as is discussed in Section II(C), below), and decided that

such additional siting approval was required, then the Agency's Permit would be invalidated. Therefore, this case is an attack on the Agency's Permit, which is not allowed pursuant to Landfill, Inc. v. Pollution Control Bd., 74 Ill. 2d 541, 387 N.E.2d 258 (1978) and its progeny.

B. The Agency is the appropriate body to determine which projects constitute a "pollution control facility" and require siting approval under the Act.

The Intervenor argues that because the chemical waste facility was a "new pollution control facility" requiring siting under the Act, the Agency lacked jurisdiction to issue the Permit without proof of new local siting approval. (Intervenor's Response, pgs. 6-11). This ***exact*** argument has already been considered and dismissed by the courts.

In the case of City of Waukegan v. Illinois E.P.A., the City argued that a "Biosolids Reuse Project" being developed by the North Shore Sanitary District pursuant to permits issued by the Agency, "(1)…constitutes a 'new pollution control facility' that requires local siting approval before the Agency may issue permits, and (2) the Agency's permits are void due to the District's failure to obtain local siting approval." 339 Ill. App. 3d 963, 967, 791 N.E.2d 635, 638 (2nd Dist. 2003). The trial court dismissed the City's case on the basis "that the City may not collaterally attack the Agency's permitting decision." Id. at 967, 639. On appeal, the Second District Appellate Court affirmed the trial court's decision, citing to City of Elgin v. County of Cook, *supra*.

Just as the Intervenor argues in this case, the City in City of Waukegan argued that siting approval was a jurisdictional pre-requisite for the Agency to issue a permit, and was therefore subject to review: "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…." 339 Ill. App. 3d at 975, 791 N.E.2d at 645. The Court held that "[t]his argument does not withstand scrutiny," because "[a]lthough 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."*** Id. at 975, 645 (emphasis added). Furthermore, the Court held that "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." Id. at 975, 645. (The same criticism is true of the Intervenor in this case).

The Court concluded, as a matter of law, that the Agency is the sole authority with the power to determine whether a facility is a "new pollution control facility" requiring siting approval prior to permitting under the Act:

> The express language of section 39(c) instructs the Agency that it may not issue a permit for a new pollution control facility absent proof of local siting approval. Thus, section 39(c) requires the Agency to decide, before issuing a permit, whether local siting approval is required and, if it is, to make sure that the applicant has submitted proof thereof. Section 39(c) thereby bestows upon the Agency the power to determine causes of the general class of cases to which this case belongs. Further, we believe the Agency's expertise is a necessary part of determining whether a facility constitutes a "new pollution control facility." ***There is no allegation in this case that the Agency failed to make the necessary determinations under section 39(c).*** Rather, the City simply disagrees with the Agency's decision that local siting approval is not required. The City has not demonstrated that the Agency exceeded the scope of its authority.

Id. at 975-76, 645 (emphasis added). Therefore, the Court held that "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." Id. at 975, 645.

As in City of Waukegan, "[t]here is no allegation in this case that the Agency failed to make the necessary determinations under section 39(c)." 339 Ill. App. 3d at 976, 791 N.E.2d at

645. Again as in City of Waukegan, the Intervenor and the Complainants in this case "simply disagree[] with the Agency's decision that local siting approval is not required." Id.[1]

It is the well-established position of the Intervenor itself (at least up until the instant Response) that the Agency is solely responsible for determining whether a facility is a "new pollution control facility" that requires siting under the Act. On April 27, 2010, the Intervenor filed a Motion to Dismiss in the case of Mill Creek Water Reclamation District v. Illinois Environmental Protection Agency and Grand Prairie Sanitary District, PCB No. 10-74, in which the Intervenor (correctly) argued that "***Illinois courts have established that the Illinois EPA is the appropriate body to determine which projects constitute a 'pollution control facility' and require siting approval under the Act.***" (*See* the Intervenor's Motion to Dismiss, attached hereto as Exhibit 1 for the Board's convenience, pg. 7). In its Motion to Dismiss, the Intervenor concluded that, as in the City of Waukegan case, "the Illinois EPA was not only the appropriate body to determine whether [the permittee] was required to go through the local siting approval process prior to the issuance of its Permits, but the Illinois EPA correctly determined that no such local siting approval process was necessary or proper under the Act." (Ex. 1, pg. 8). The Board held that "Mill Creek does not have standing to initiate this appeal of the wastewater treatment facility construction and operation permits issued to Grand Prairie by the Agency under Section 39(a) of the Act," and therefore "the Board lacks jurisdiction to hear Mill Creek's third-party petition for review." 2010 WL 3167245, *7 (Ill. Pol. Contr. Bd. August 5, 2010).

Even more recently, on January 26, 2012, the Intervenor filed a Motion to Dismiss in the case of Annielle Lipe and Nykole Gillette v. Illinois Environmental Protection Agency, PCB No. 12-95, in which the Intervenor again argued that "***Illinois courts have established that the***

[1] Frankly, the Intervenor's incomplete description of the holding in City of Waukegan at page 8 of its Response may be an improper attempt to confuse and mislead the Board.

Illinois EPA is the appropriate body to determine which projects constitute a 'pollution control facility' and require siting approval under the Act." (*See* the Intervenor's Motion to Dismiss attached hereto as Exhibit 2 for the Board's convenience, pg. 6). As in the Mill Creek Water Reclamation District case, in Lipe and Gillette, the Intervenor again concluded that "the Illinois EPA was not only the appropriate body to determine whether [the permittee] was required to go through the local siting approval process prior to the issuance of its Permit, but the Illinois EPA correctly determined that no such local siting approval process was necessary or proper under the Act." (Ex. 2, pg. 6). Again, the Board dismissed the case. 2012 WL 1650149, *8 (Ill. Pol. Contr. Bd. May 3, 2012).

There have been no changes to the law since the Lipe and Gillette case in 2012, or even since the Mill Creek Water Reclamation District case in 2010. It is unclear why the Intervenor has so radically changed its interpretation of the law in this case (or why the Intervenor has turned its back on the Agency).

Regardless of any lack of consistency on the part of the Intervenor, the law itself is crystal clear: the Agency has the sole responsibility for determining whether a project is a new pollution control facility under the Act. "[S]ection 39(c) requires the Agency to decide, before issuing a permit, whether local siting approval is required and, if it is, to make sure that the applicant has submitted proof thereof." 339 Ill. App. 3d at 975, 791 N.E.2d at 645. There is no allegation in this case that the Agency failed to make the necessary determinations under section 39(c) of the Act. (In fact, the Agency ***did*** make the necessary determinations under Section 39(c) of the Act. If the Intervenor had any lingering doubts in this regard, the Agency's letter dated June, 2011, attached as Exhibit A to CLI's Motion to Dismiss, surely dispelled same.) The Board lacks jurisdiction to review the alleged need for additional siting authority from the

DeWitt County Board prior to permitting of the Chemical Waste Unit, as this power is vested solely in the Agency as a matter of law. Therefore, the Motion to Dismiss should be granted.

C. The Board should not second-guess the final decision regarding Clinton Landfill No. 3 rendered by the DeWitt County Board pursuant to its siting authority under the Act.

Furthermore, insofar as the Intervenor urges the Board to review a portion of the transcript of the siting hearing before the DeWitt County Board to determine the scope of the siting that was conditionally approved by the DeWitt County Board in 2002, such an exercise would impermissibly usurp the siting authority of the DeWitt County Board. The DeWitt County Board's final decision regarding siting is manifested in the Conditional Siting Resolution (Exhibit B to the Complaint filed in this case). If the Board were to engage in any investigation or analysis of the siting process beyond a review of the Conditional Siting Resolution, the Board would be inserting itself into the siting process in place of the DeWitt County Board.

To obtain local siting approval, an applicant submits an application for local siting approval to the relevant siting authority, which examines the application, conducts its own review and a public hearing, and analyzes the application pursuant to the nine statutory criteria for local siting approval set forth in Section 39.2(a) of the Act. 415 ILCS §5/39.2(a). At the conclusion of this process, the siting authority issues a written decision denying the application or granting the application, with or without conditions:

> Decisions of the county board or governing body of the municipality are to be in writing, specifying the reasons for the decision, such reasons to be in conformance with subsection (a) of this Section. In granting approval for a site the county board or governing body of the municipality may impose such conditions as may be reasonable and necessary to accomplish the purposes of this Section and as are not inconsistent with regulations promulgated by the Board.

415 ILCS §5/39.2(e). If the siting authority grants the application, the final written decision of the local siting authority is submitted to the Agency and the siting authority's involvement in the process ends. As the Board stated in Christian County Landfill, Inc. v. Christian County Board,

> Once the county or local unit of government renders its decision, the power of the county or local unit of government under Section 39.2 of the Act is exhausted. To allow the county or local government to maintain power under Section 39.2 would threaten the finality of decisions rendered thereunder and could compromise the Agency's statutory permitting process.

PCB 89-92, 1989 WL 137286, *10 (Ill. Pol. Control Bd., Oct. 18, 1989).

In accordance with this process, on April 11, 2002, CLI filed an application for siting approval with the DeWitt County Board relative to the expansion of its then-existing landfill in DeWitt County, Illinois, to develop the waste disposal unit known as Clinton Landfill No. 3. The DeWitt County Board conducted public hearings concerning the siting application on July 11, 2002, and on July 15, 2002. Subsequently, on September 12, 2002, the DeWitt County Board unanimously passed and approved the "Resolution Conditionally Approving the Application for Local Siting Approval of a Pollution Control Facility Filed by Clinton Landfill, Inc.," along with the Findings of Fact and list of conditions appended thereto. The DeWitt County Board certified its siting approval to the Agency on October 17, 2002. A copy of the Certification of Siting Approval (LPC-PA8) executed by the DeWitt County Board Chairman and DeWitt County Clerk, which includes the DeWitt County Board's Resolution, is attached to the Complaint filed in this case as Exhibit B (collectively, the "Conditional Siting Resolution").

The Conditional Siting Resolution (Complaint Ex. B) is the "[d]ecision[] of the county board … in writing, specifying the reasons for the decision" that is the required result of the statutory siting procedure. 415 ILCS §5.39.2(a). It is a lengthy document, including ***seventeen (17)*** specific conditions on approval of siting (none of which purports to limit or bar the disposal

of PCBs or MGP waste). This is the "proper local siting documentation" that the Intervenor calls for in its Response. (Intervenor's Response, pg. 11). CLI submitted the Conditional Siting Resolution to the Agency with its initial application for Permit No. 2005-070-LF. (Complaint, ¶37).

The Intervenor urges the Board to review an excerpt from the transcript of one day of the siting hearing, arguing that the development of a chemical waste unit "was not considered during the local siting process…." (Intervenor's Response, pg. 8). However, it is not for the *Intervenor* (or, for that matter, the Pollution Control Board) to decide what the DeWitt County Board should or should not have considered important (or did or did not consider important) during the siting process. The DeWitt County Board considered *at least* the following in rendering its siting decision:

- The siting application (consisting of four (4) binders, containing hundreds of pages of analyses, designs, and other materials)
- Written public comment
- The analysis and advice of Envirogen, an independent expert subject matter consultant retained by the DeWitt County Board
- The analysis and advice of Christine G. Zeman, Esq., of Hodge, Dwyer, Zeman, an expert attorney retained by the DeWitt County Board (in addition to the DeWitt County Assistant State's Attorney who was assigned to the matter)
- Two days of testimony, on July 11, 2002 (163-page transcript) and July 15, 2002 (197-page transcript)
- The deliberations of the DeWitt County Regional Pollution Control Site Hearing Committee on September 2, 2002 (46-page transcript)

Out of all of this information, the DeWitt County Board rendered a written decision, namely, the Conditional Siting Resolution. As above, not one of the seventeen (17) conditions imposed in the Conditional Siting Resolution limits or bars the disposal of PCBs or MGP waste at Clinton Landfill No. 3. Any second-guessing of the DeWitt County Board's final written decision by the Pollution Control Board would clearly usurp the authority of the local siting body.

Finally, insofar as the Intervenor is actually concerned that "the DeWitt County Board should have had an opportunity to determine if Respondent's new operations were suitable for[] their location," the Intervenor should take comfort in the fact that CLI sought and received unanimous approval of the Chemical Waste Unit from the DeWitt County Board ***before*** pursuing permitting of same (even though CLI was under no legal obligation to do so). *See* Section 2 of the First Amendment to Host County Agreement dated August 24, 2007, attached hereto as Exhibit 3, amending Paragraph 33 of the Host County Agreement, which states: "***The County supports and approves the permitting, development, construction and operation of the Chemical Waste Landfill by CLI*** " (emphasis added).

III. CONCLUSION

Based on all the foregoing, CLI submits that the Complaint filed in this case must be dismissed.

WHEREFORE, CLI respectfully requests that this Board dismiss the Complainants' Complaint in its entirety, and award CLI such other and further relief as is deemed appropriate under the circumstances.

Respectfully submitted,

CLINTON LANDFILL, INC.,
Respondent

By: _____
One of its attorneys

Brian J. Meginnes, Esq. (bmeginnes@emrslaw.com)
Janaki Nair, Esq. (jnair@emrslaw.com)
Elias, Meginnes, Riffle & Seghetti, P.C.
416 Main Street, Suite 1400
Peoria, IL 61602
Telephone: (309) 637-6000
Facsimile: (309) 637-8514

913-0176.2

Electronic Filing - Received, Clerk's Office, April 27, 2010

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MILL CREEK WATER RECLAMATION DISTRICT	)	
Petitioner,	)	
v.	)	PCB No. 10-74 (Third-Party Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and GRAND PRAIRIE SANITARY DISTRICT,	)	
Respondents.	)	

ILLINOIS ENVIRONMENTAL PROTETION AGENCY'S MOTION TO DISMISS PETITION FOR REVIEW

NOW COMES Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by its attorney, LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Illinois Pollution Control Board ("Board") Procedural Rule 101.506, 35 Ill. Adm. Code 101.506, and hereby moves the Board to dismiss Petitioner's, MILL CREEK WATER RECLAMATION DISTRICT ("MCWRD"), Petition for Review. In support of its Motion to Dismiss, Illinois EPA states as follows:

I

INTRODUCTION

On February 19, 2010, the Illinois EPA issued two permits authorizing the Grand Prairie Sanitary District (the "District") to construct, own, and operate a wastewater treatment facility, spray irrigation system, and a lift station to provide sanitary sewerage service within its corporate boundaries.

On or about March 25, 2010, MCWRD filed a Petition for Review ("Petition")

1

EXHIBIT
tabbies
1

seeking review of the decision by Illinois EPA to issue the two construction permits to the District. This Petition was received by Illinois EPA on or about March 29, 2010.

MCWRD's Petition raises three grounds for the relief it seeks. First, MCWRD requests that the permits be set aside on the grounds that issuance violates the Clean Water Act's prohibition against multiple treatment permits within the same FPA. The second ground for MCWRD's appeal is its allegation that the Illinois EPA violated the Illinois Environmental Protection Act ("Act") by failing to hold a public hearing before granting the permit. Finally, MCWRD has alleged that issuing the permit violated Illinois EPA guidelines setting forth requirements for conflict resolution in revising water quality management plans.

MCWRD has requested that the permits issued to the District be set aside and that any application for permits to the District should be denied on the basis that issuance is contrary to State and Federal law. Illinois EPA respectfully requests that the Board enter an order denying MCWRD's Petition.

II

ARGUMENT

A. THE BOARD LACKS JURISDICTION TO HEAR THE APPEAL

The Board lacks jurisdiction to reverse the issuance of a permit by the Illinois EPA to the District. Where the tribunal has no jurisdiction an appeal can confer no jurisdiction on the reviewing court. Citizens Utilities Co. of Illinois v. Illinois Pollution Control Board, 265 Ill.App.3d 773, 777, 639 N.E.2d 1306 (3rd Dist. 1994). The Board's principal function is to adopt regulations defining the requirements of the permit system. Landfill, Inc. v. Pollution Control Bd., 74 Ill.2d 541, 557, 387 N.E.2d 258 (Ill. 1978).

The Illinois EPA's role is to determine whether specific applicants are entitled to permits. Id. If the Board were to become the overseer of the Illinois EPA's decision making process through the evaluation of challenges to permits, it would become the permit granting authority, a function not delegated to the Board by the Act. Id. To confer jurisdiction on the Board in this instance would improperly usurp a power from the Illinois EPA in a manner that is contrary to the Act.

The one exception is when a permit has been denied. Id. Specific procedural requisites are established for Board review of a permit denial. Citizens Utilities Co. of Illinois, 265 Ill.App.3d at 780. There are no comparable statutory provisions for Board review on either substantive or technical grounds of the Agency's grant of a permit, thus indicating a legislative intent not to provide for such a proceeding. Id.

The relief requested by MCWRD from the Board is exactly the type of relief the Board is without power to give. Further, the scenario in this case does not fall within the single exception that grants the Board review of an Illinois EPA permit decision because there was no denial of a permit. Since this case involves the grant of a permit by the Illinois EPA, the Board is without power to reverse the Illinois EPA's decision to grant the permit.

B. MCWRD IS WITHOUT STANDING TO CHALLENGE THE ISSUANCE OF THE COMPLAINT

MCWRD, as a third-party appellant, is without standing to challenge the permit issued to the District. Generally, third party standing to attack issued permits and permit conditions is well settled: Third party challenges to permits are not allowed. Koers v. Illinois EPA, PCB 88-163 (October 20, 1988)(citing Landfill, Inc. v. Pollution Control Bd., 74 Ill.2d 541, 557, 387 N.E.2d 258 (Ill. 1978)). Some exceptions have been made

by the legislature, but the Board does not have general authority to allow third party challenges without explicit statutory authority. Riverdale Recycling, Inc. v. Illinois Environmental Protection Agency, PCB 00-228 (August 10, 2000)(citing Citizens Utilities Co. of Illinois, 265 Ill.App.3d 773, 775, 639 N.E.2d 1306 (3rd Dist. 1994). There is no explicit statutory authority granting a third party to attack a permit granting the right to construct and operate Wastewater Treatment Facilities. Since there is no affirmative grant, the Board is without authority to allow the challenge.

In further support of the case law cited above, the General Assembly has provided which entities are authorized to appeal the issuance of permits by the Illinois EPA. The Act provides, "If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the applicant may, within 35 days after the date on which the Agency served its decision on the applicant, petition for a hearing before the Board to contest the decision of the Agency." 415 ILCS 5/40(a)(1) (2008). Only the applicant can appeal the issuance of a general permit issued with conditions under Section 39. The Permits issued to the District do not fall within any of the categories in which the Act authorizes a third-party appeal.

Given the clear statutory language governing appeals before the Board, MCWRD's appeal may not be heard. "An administrative agency possesses no inherent or common law powers and any authority that the agency claims must find its source within the provisions of the statute by which the agency was created." *Illinois Department of Revenue v. Illinois Civil Service Commission*, 357 Ill.App.3d at 363. "To give validity to its findings and orders, an administrative agency must comply with the procedures and rules promulgated by the legislature." *Ragano v. Civil Service Commission*, 80

Ill.App.3d 523, 527 (1st Dist. 1980). "Any action outside the authority granted by its enabling statute is void." *Pickering v. Illinois Human Rights Commission*, 146 Ill.App.3d 340, 352 (2nd Dist. 1986), *see also Homefinders, Inc. V. City of Evanston*, 65 Ill.2d 115, 129 (1976). MCWRD's appeal is outside the scope of appeals authorized under the Act, and case law in Illinois confirms that such an appeal may not be heard. The Board should deny MCWRD's Petition for Review.

C. ILLINOIS EPA'S PERMITS COMPLY WITH ALL RELEVANT LAWS

In the event the Board finds that the MCWRD has standing to pursue this Petition, the Illinois EPA asserts that its permits were properly issued and comply with all appropriate laws and MCWRD's Petition should be denied.

1. Illinois EPA's Permits Did Not Violate the Clean Water Act

MCWRD asserts in the Petition that MCWRD has the permits to serve the property located within the District's corporate boundaries and Federal Law prohibits the subsequent issuance of permits to the District to construct the treatment facilities that are the subject of the Illinois EPA permits. (See Petitioner's Petition, para. 19).

First, a Facility Planning Area ("FPA") is not a device for apportioning responsibility for providing sanitary sewerage services. Rather, it is a planning tool:

> Facilities planning should focus upon the geographic area to be served by the waste treatment system(s) of which the proposed treatment works will be an integral part. The facilities plan should include the area necessary to prepare an environmental assessment and to assure that the most cost-effective means of achieving the established water quality goals can be implemented.

40 CFR 35.917-2(a).

As a planning tool, the creation or amendment of a FPA does not give any specific authority to serve the area. In fact, the selection of Designated Management

Agent ("DMA") in a FPA is not determined by the FPA *per se,* but by whether "a public or private entity ... has the responsibility of planning, treating, or transporting wastewater and its residual solids." 35 Ill. Adm. Code 399.20. That responsibility is determined not by the CWA, but by State law: "While the federal clean water program provides for the use of various state and local governments in pursuing environmental goals, it does not constitute a grant of substantive powers to political subdivisions of another sovereign. ... The Clean Water Act does not authorize petitioners to do what they cannot do under state law." *Northern Colorado Water Conserv. Dist. v. Board of County Comm'rs of Grand County,* 482 F. Supp. at 1118 (D. Colo. 1980). The permits issued by the Illinois EPA were issued pursuant to the Act, not the CWA. As such, it is the Act which governs construction, not the CWA.

In its Petition, MCWRD attempts to argue that the fact that it is in the "Mill Creek Facilities Planning Area," which was established per federal law as a planning tool gives it authority over the District and federal laws controls construction of treatment facilities. However both the MCWRD and the District are units of local government within the Mill Creek FPA and both are charged with providing sanitary sewer service only within its jurisdictional boundaries, not to the entire FPA.

Furthermore, the Illinois Appellate Court for the Second District has recently reached the same conclusion regarding a DMA's role in an FPA in the case of *Northern Moraine Wastewater Reclamation Dist. v. Illinois Commerce Comm'n,* 392 Ill. App. 3d 542 (2d Dist. 2009). In that case, the Court expressly rejected an argument by a DMA that it had a right to serve a property in a FPA by virtue of its DMA status. Specifically, the Court ruled: "Nothing in the ... regulation grants a DMA a federal monopoly in

providing services." *Id.* at 559.

The Illinois EPA issued the permits pursuant to its authority contained in the Act, and the Federal CWA is not relevant. The Board should deny the Petition.

2. The Illinois EPA Permits Were Issued in Compliance With Section 39 of the Act

MCWRD next argues that the permits issued by the Illinois EPA to the District are invalid because the District failed to go through "local siting" pursuant to Section 39.2 of the Act, 415 ILCS 5/39.2 (2008) and failed to submit evidence of such pursuant to Section 39© of the Act, 415 ILCS 5/39(c)(2008).

The Illinois Environmental Protection Act defines "sewage works" as "individually or collectively those constructions or devices used for collecting, pumping, treating, and disposing of sewage, industrial waste or other wastes or for the recovery of by-products from such wastes. 415 ILCS 5/3.455. A "pollution control facility" is defined as "any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility, or waste incinerator. This includes sewers, sewage treatment plants, and any other facilities owned or operated by sanitary districts organized under the Metropolitan Water Reclamation District Act." 415 ILCS 5/3.330. The District is not organized under the Metropolitan Water Reclamation District Act. Furthermore, the General Assembly expressly excludes "Solid or dissolved material in domestic sewage" from the definition of "waste." 415 ILCS 5/3.535. Thus, by definition, the District was establishing sewage works rather than a pollution control facility.

Further, Illinois courts have established that the Illinois EPA is the appropriate body to determine which projects constitute a "pollution control facility" and require siting approval under the Act. In *City of Waukegan v. Illinois Environmental Protection*

Agency, 339 Il.App.3d 963 (2nd Dist 2003), the City of Waukegan challenged the Illinois EPA's decision to allow a sanitary district to construct a Biosolids Reuse Project without requiring the sanitary district to go through the siting procedures outlined in Section 39(c) of the Act. The court found that "it is clear that the [IEPA] acted within its jurisdiction when determining that local siting approval was not required in order for the District to obtain its necessary permits." *Id.* at 975. The court continued, "We believe the Agency's expertise is a necessary part of determining whether a facility constitutes a 'new pollution control facility.' There is no allegation in this case that the Illinois EPA failed to make the necessary determinations under section 39(c). Rather, the City simply disagrees with the Illinois EPA's decision that local siting approval is not required." *Id.* at 976. The Court found that the Illinois EPA acted properly by *not* requiring compliance with the local siting approval process. Similarly, in this case where only sewage works are being considered and not a biosolids reuse project, the Illinois EPA was not only the appropriate body to determine whether the District was required to go through the local siting approval process prior to the issuance of its Permits, but the Illinois EPA correctly determined that no such local siting approval process was necessary or proper under the Act. Therefore, the Board should deny the MCWRD's Petition.

3. The Illinois EPA Rules Do Not Apply in This Instance

Finally, MCWRD argues that the issuance of the Permits to the District violates IEPA rules that identify when the IEPA may recognize exceptions to the boundaries of a FPA. (See Petitioners Petition, paras. 24-25). MCWRD cites to IEPA regulations, which provide, "For purposes of issuing permits, other than NPDES permits, the Agency may recognize exceptions to the boundaries of facility planning areas without revising the

8

approved WQM Plan in the following circumstances . . ." 35 Ill. Adm. Code 351.502. It is unclear why MCWRD is applying these criteria to the present circumstances. The District is located entirely within the FPA, does not necessitate the Illinois EPA to recognize an exception to the boundaries of a FPA, and the WQM Plan has been revised through the permitting process. MCWRD's attempts to apply these criteria are not relevant to these proceedings and should not be considered. The Board should deny the MCWRD's Petition.

III

CONCLUSION

WHEREFORE, Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, respectfully requests that the Board deny Petitioner's, MILL CREEK WATER RECLAMATION DISTRICT, Petition for Review of Illinois EPA's Permit Decision with prejudice, and for such other relief as the Board deems appropriate.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY
ex rel. LISA MADIGAN,
Attorney General of the State of Illinois

BY: 
GERALD T. KARR
Senior Assistant Attorney General
Environmental Bureau

69 W. Washington St.
Chicago, Illinois 60602
(312) 814-3369

CERTIFICATE OF SERVICE

I, GERALD T. KARR, an Assistant Attorney General in this case, do certify that on this 27th day of April, 2010, I caused to be served by First Class Mail the foregoing Notice of Filing and Respondent's Motion to Dismiss upon the individuals listed on the attached service list, by depositing the same in the U.S. Mail depository located at 100 West Randolph Street, Chicago, Illinois in an envelope with sufficient postage prepaid.

Gerald Karr
GERALD T. KARR

Electronic Filing - Received, Clerk's Office, 01/26/2012

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ANIELLE LIPE and NYKOLE GILLETTE	)	
	)	
	)	
Complainants,	)	
	)	
v.	)	PCB No. 12-95
	)	(Third-Party Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY	)	
	)	
	)	
Respondent.	)	

ILLINOIS ENVIRONMENTAL PROTETION AGENCY'S MOTION TO DISMISS PETITION FOR REVIEW

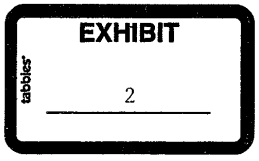
NOW COMES Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ('Illinois EPA'), by its attorney, LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Illinois Pollution Control Board ('Board') Procedural Rule 101.506, 35 Ill. Adm. Code 101.506, and hereby moves the Board to dismiss Complainant's, ANIELLE LIPE and NYKOLE GILLETTE ('Lipe/Gillette') Complaint for challenging the issuance of a Construction Permit by the Illinois EPA. In support of its Motion to Dismiss, Illinois EPA states as follows:

I

INTRODUCTION

On December 9, 2011, the Illinois EPA issued a permit authorizing TOUGH CUTS CONCRETE SERVICES, INC., ('Tough Cuts') to construct emission unit(s) and/or air pollution control equipment consisting of a clean concrete/asphalt pavement crushing plant that includes one 360 tons/hour primary crusher, two 200 tons/hour secondary crushers, one screen and two conveyors.

1



On or about December 22, 2011, Lipe/Gillette filed a Complaint ('Complaint') challenging the decision by Illinois EPA to issue the construction permit to Tough Cuts. The Complaint was received by the Illinois EPA on December 27, 2011. On January 20, 2012, the Office of the Attorney General received a request from the Illinois EPA for representation in this matter.

Lipe/Gillette have requested that the permit issued by the Illinois EPA to Tough Cuts be set aside. Illinois EPA respectfully requests that the Board enter an order dismissing Lipe/Gillette's Complaint.

II

ARGUMENT

A. THE BOARD LACKS JURISDICTION TO HEAR THE APPEAL

The Board lacks jurisdiction to reverse the issuance of a permit by the Illinois EPA to Tough Cuts. Where the tribunal has no jurisdiction an appeal can confer no jurisdiction on the reviewing court. Citizens Utilities Co. of Illinois v. Illinois Pollution Control Board, 265 Ill.App.3d 773, 777, 639 N.E.2d 1306 (3rd Dist. 1994). The Board's principal function is to adopt regulations defining the requirements of the permit system. Landfill, Inc. v. Pollution Control Bd., 74 Ill.2d 541, 557, 387 N.E.2d 258 (Ill. 1978). The Illinois EPA's role is to determine whether specific applicants are entitled to permits. Id. If the Board were to become the overseer of the Illinois EPA's decision making process through the evaluation of challenges to permits, it would become the permit granting authority, a function not delegated to the Board by the Act. Id. To confer jurisdiction on the Board in this instance would improperly usurp a power from the Illinois EPA in a manner that is contrary to the Act.

The one exception is when a permit has been denied. Id. Specific procedural requisites are established for Board review of a permit denial. Citizens Utilities Co. of Illinois, 265 Ill.App.3d at 780. There are no comparable statutory provisions for Board review on either substantive or technical grounds of the Agency's grant of a permit, thus indicating a legislative intent not to provide for such a proceeding. Id.

The relief requested by Lipe/Gillette from the Board is exactly the type of relief the Board is without power to give. Further, the scenario in this case does not fall within the single exception that grants the Board review of an Illinois EPA permit decision because there was no denial of a permit. Since this case involves the grant of a permit by the Illinois EPA, the Board is without power to reverse the Illinois EPA's decision to grant the permit.

B. LIPE/GILLETTE ARE WITHOUT STANDING TO CHALLENGE THE ISSUANCE OF THE COMPLAINT

Lipe/Gillette, are acting as third-party appellants, and are without standing to challenge the permit issued to Tough Cuts. Generally, third party standing to attack issued permits and permit conditions is well settled: Third party challenges to permits are not allowed. Koers v. Illinois EPA, PCB 88-163 (October 20, 1988)(citing Landfill, Inc. v. Pollution Control Bd., 74 Ill.2d 541, 557, 387 N.E.2d 258 (Ill. 1978)). Some exceptions have been made by the legislature, but the Board does not have general authority to allow third party challenges without explicit statutory authority. Riverdale Recycling, Inc. v. Illinois Environmental Protection Agency, PCB 00-228 (August 10, 2000)(citing Citizens Utilities Co. of Illinois, 265 Ill.App.3d 773, 775, 639 N.E.2d 1306 (3rd Dist. 1994). There is no explicit statutory authority granting a third party to attack a permit granting the right to construct and operate concrete/asphalt pavement crushing

facilities. Since there is no affirmative grant, the Board is without authority to allow the challenge.

In further support of the case law cited above, the General Assembly has provided which entities are authorized to appeal the issuance of permits by the Illinois EPA. The Act provides, "If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the applicant may, within 35 days after the date on which the Agency served its decision on the applicant, petition for a hearing before the Board to contest the decision of the Agency." 415 ILCS 5/40(a)(1) (2010). Only the applicant can appeal the issuance of a general permit issued with conditions under Section 39. The permit issued to Tough Cuts does not fall within any of the categories in which the Act authorizes a third-party appeal.

Given the clear statutory language governing challenges to permits before the Board, Lipe/Gillette's challenge to the issuance of a permit may not be heard. "An administrative agency possesses no inherent or common law powers and any authority that the agency claims must find its source within the provisions of the statute by which the agency was created." *Illinois Department of Revenue v. Illinois Civil Service Commission*, 357 Ill.App.3d at 363. "To give validity to its findings and orders, an administrative agency must comply with the procedures and rules promulgated by the legislature." *Ragano v. Civil Service Commission*, 80 Ill.App.3d 523, 527 (1st Dist. 1980). "Any action outside the authority granted by its enabling statute is void." *Pickering v. Illinois Human Rights Commission*, 146 Ill.App.3d 340, 352 (2nd Dist. 1986), *see also Homefinders, Inc. V. City of Evanston*, 65 Ill.2d 115, 129 (1976). Lipe/Gillette's challenge is outside the scope authorized under the Act, and case law in Illinois confirms

that such a challenge may not be heard. The Board should dismiss Lipe/Gillette's complaint challenging the issuance of a construction permit by the Illinois EPA.

C. ILLINOIS EPA'S PERMITS COMPLY WITH ALL RELEVANT LAWS

In the event the Board finds that the Lipe/Gillette have standing to pursue this challenge to the issuance of a construction permit by the Illinois EPA, the Illinois EPA asserts that its permit was properly issued and complies with all appropriate laws and Lipe/Gillette's complaint should be dismissed.

The Illinois EPA Permits Were Issued in Compliance With Section 39 of the Act

Lipe/Gillette argue that the permit issued by the Illinois EPA to the Tough Cuts is invalid because of the failure to go through "local siting" pursuant to Section 39.2 of the Act, 415 ILCS 5/39.2 (2010) and failed to submit evidence of such pursuant to Section 39(c) of the Act, 415 ILCS 5/39(c)(2010).

The Illinois Environmental Protection Act defines a "pollution control facility" as "any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility, or waste incinerator. This includes sewers, sewage treatment plants, and any other facilities owned or operated by sanitary districts organized under the Metropolitan Water Reclamation District Act." 415 ILCS 5/3.330. Tough Cuts is not operating any type of waste management facility, nor is it any type of sewage works. It simply is not a "pollution control facility". Tough Cuts will be crushing concrete and asphalt pavement on a five acre portion of an 80 acre permitted clean construction and demolition debris processing facility. The Illinois EPA in issuing the construction permit made the determination that no violations of the Act would take place if construction of the facility were to take place pursuant to the permit as issued.

Illinois courts have established that the Illinois EPA is the appropriate body to determine which projects constitute a "pollution control facility" and require siting approval under the Act. In *City of Waukegan v. Illinois Environmental Protection Agency*, 339 Il.App.3d 963 (2nd Dist 2003), the City of Waukegan challenged the Illinois EPA's decision to allow a sanitary district to construct a Biosolids Reuse Project without requiring the sanitary district to go through the siting procedures outlined in Section 39(c) of the Act. The court found that "it is clear that the [IEPA] acted within its jurisdiction when determining that local siting approval was not required in order for the District to obtain its necessary permits." *Id.* at 975. The court continued, "We believe the Agency's expertise is a necessary part of determining whether a facility constitutes a 'new pollution control facility.' There is no allegation in this case that the Illinois EPA failed to make the necessary determinations under section 39(c). Rather, the City simply disagrees with the Illinois EPA's decision that local siting approval is not required." *Id.* at 976. The Court found that the Illinois EPA acted properly by *not* requiring compliance with the local siting approval process. Similarly, in this case where no waste management facility is being considered, the Illinois EPA was not only the appropriate body to determine whether Tough Cuts was required to go through the local siting approval process prior to the issuance of its Permit, but the Illinois EPA correctly determined that no such local siting approval process was necessary or proper under the Act. Therefore, the Board should dismiss Complainants' Complaint challenging the issuance of the permit by the Illinois EPA.

III
CONCLUSION

WHEREFORE, Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, respectfully requests that the Board dismiss Complainants', ANIELLE LIPE and NYKOLE GILLETTE, Complaint challenging the Illinois EPA's Permit Decision with prejudice, and for such other relief as the Board deems appropriate.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY
ex rel. LISA MADIGAN,
Attorney General of the State of Illinois

BY: Gerald Karr
GERALD T. KARR
Senior Assistant Attorney General
Environmental Bureau

69 W. Washington St.
Chicago, Illinois 60602
(312) 814-3369

CERTIFICATE OF SERVICE

I, GERALD T. KARR, an Assistant Attorney General in this case, do certify that on this 26th day of January, 2012, I caused to be served by First Class Mail the foregoing Notice of Filing and Respondent's Appearance and Motion to Dismiss upon the individuals listed on the attached service list, by depositing the same in the U.S. Mail depository located at 100 West Randolph Street, Chicago, Illinois in an envelope with sufficient postage prepaid.

Gerald T. Karr

GERALD T. KARR

FIRST AMENDMENT TO HOST COUNTY AGREEMENT

THIS FIRST AMENDMENT TO HOST COUNTY AGREEMENT ("Agreement") is made and effective August 24, 2007, between Clinton Landfill, Inc., an Illinois corporation ("CLI"), and the County of DeWitt, Illinois (the "County").

WHEREAS, CLI and the County entered into a certain Host County Agreement effective April 20, 2001 (the "Host County Agreement");

WHEREAS, on September 12, 2002, the County approved the site location suitability of Clinton Landfill No. 3 as a new pollution control facility in accordance with Section 39.2 of the Illinois Environmental Protection Act, 415 ILCS 5/39.2 ("Clinton Landfill No. 3");

WHEREAS, as part of the site location approval, the County imposed certain conditions on the operation of Clinton Landfill No. 3 (the "Siting Conditions");

WHEREAS, on March 2, 2007, the Illinois Environmental Protection Agency issued Permit No. 2005-070-LF to CLI for the development and construction of Clinton Landfill No. 3;

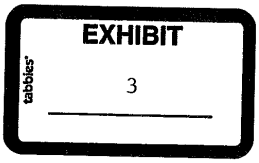
WHEREAS, Clinton Landfills No. 2 and No. 3 are already permitted to accept regulated PCB wastes, notably PCB bulk product wastes, for disposal.

WHEREAS, in order for CLI to accommodate the disposal needs of its customers, CLI intends to file an application with the U.S. Environmental Protection Agency to permit, develop, construct and operate a Chemical Waste Landfill for the disposal of PCBs and PCB Items within a section of Clinton Landfill No. 3, pursuant to the Toxic Substances Control Act (the "Chemical Waste Landfill");

WHEREAS, although receiving the support of the DeWitt County Board is not a requirement of the permit application process for a Chemical Waste Landfill under the Toxic Substances Control Act, CLI desires to maintain its positive relationship with the citizens of the County;

WHEREAS, if CLI is successful in permitting a Chemical Waste Landfill within a section of Clinton Landfill No. 3, CLI shall be responsible for providing perpetual care for the Chemical Waste Landfill pursuant to the Toxic Substances Control Act;

WHEREAS, in order to better serve its customers and reduce the number of waste vehicles entering and exiting Clinton Landfill No. 3, CLI intends to file an application with the Illinois Environmental Protection Agency to permit, develop, construct and operate a rail unloading facility at Clinton Landfill No. 3 (the "Rail Unloading Facility");



WHEREAS, operating a Rail Unloading Facility at Clinton Landfill No. 3 does not require local siting approval from the DeWitt County Board under Section 39.2 of the Illinois Environmental Protection Act, 415 ILCS 5/39.2;

WHEREAS, due to the development of the Chemical Waste Landfill and the Rail Unloading Facility, CLI and the County desire to amend the Host County Agreement to effectuate certain changes and revisions thereof;

NOW, THEREFORE, for and in consideration of the foregoing recitals, and other good and valuable consideration, the receipt of which is hereby acknowledged, CLI and the County hereby amend the Host County Agreement as follows:

1. The recitals of the Host County Agreement are hereby deleted in their entirety, and the Siting Conditions contained therein are hereby deleted.

2. Paragraph 33 through 35 are added to the Host County Agreement as follows:

33. CHEMICAL WASTE LANDFILL

The County supports and approves the permitting, development, construction and operation of the Chemical Waste Landfill by CLI.

34. DEWITT COUNTY'S SOLID WASTE MANAGEMENT PLAN

Commencing on January 1, 2008, and continuing on each January 1 thereafter until the certified closure of the Chemical Waste Landfill, CLI shall pay to the County the sum of Fifty Thousand Dollars ($50,000.00) per year to use to support implementation of the DeWitt County Solid Waste Management Plan. On or before April 15, 2014, CLI and the County shall in good faith negotiate an adjustment in the amount of this fee. In the event CLI does not receive a permit from the U.S. Environmental Protection Agency by January 1, 2010, to develop, construct and operate the Chemical Waste Landfill, then CLI shall not be required to make any further such payments to the County, until the permit is issued by the U.S. Environmental Protection Agency.

35. RAIL UNLOADING FACILITY

The County supports and approves the permitting, development, construction and operation of the Rail Unloading Facility by CLI, and the County agrees and acknowledges that operating a Rail Unloading Facility at Clinton Landfill No. 3 does not require local siting approval from the DeWitt County Board under Section 39.2 of the Illinois Environmental Protection Act, 415 ILCS 5/39.2. In addition to the Host Benefit Fee payable under Paragraph 11 of the Host County Agreement, CLI shall pay the County a Rail

Unloading Facility Fee of $1.25 for each ton of waste unloaded at the Rail Unloading Facility for deposit into Clinton Landfill No. 3. Said payments shall be paid on or before the 20th day following the end of each calendar quarter and shall be subject to the same documentation and verification requirements of the Host Benefit Fee. Pursuant to the Siting Conditions, the County hereby gives its written permission that waste unloaded at the Rail Unloading Facility shall not be included in calculating whether CLI has exceeded an average of 3,000 tons per day of waste deposited in Clinton Landfill No. 3. In order to facilitate the development of the Rail Unloading Facility, the County hereby authorizes and approves the construction of a railroad crossing by CLI across County Highway No. 1, and upon the request of CLI, the County shall provide a resolution evidencing such authorization and approval to the Illinois Commerce Commission.

3. Except as hereinabove set forth, the Host County Agreement shall remain unmodified and be in full force and effect.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their respective duly authorized officers or representatives on the date first above written.

COUNTY OF DEWITT

By: _____
Steve Lobb, Chairman

Attest:

By: _____
DeWitt County Clerk

CLINTON LANDFILL, INC.

By: _____
Royal J. Coulter, President

Attest:

By: _____
Steven C. Davison, Secretary

107-1266

CERTIFICATE OF SERVICE

The undersigned certifies that on March 6, 2012, the foregoing document (including the Notice of Electronic Filing, the Motion for Leave to File Reply, and the Reply attached thereto) will be served upon each party to this case by enclosing a true copy of same in an envelope addressed to the attorney of record of each party or the party as listed below, with FIRST CLASS postage fully prepaid, and depositing each of said envelopes in the United States Mail at 5:00 p.m. on said date.

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

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

Thomas E. Davis, Bureau Chief
Environmental Bureau/Springfield
Illinois Attorney General's Office
500 South Second Street
Springfield, Illinois 62706

Tony Martig
Toxics Program Section Chief
USEPA Region 5 (Mail Code LC-8J)
77 W. Jackson Blvd.
Chicago, Illinois 60604-3507

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

James M. Morphew
Sorling, Northrup,Hanna,Cullen & Cochran, Ltd.
1 North Old State Capitol Plaza, Suite 200
P.O. Box 5131
Springfield, Illinois 62705

Attorney

Brian J. Meginnes, Esq. (bmeginnes@emrslaw.com)
Janaki Nair, Esq. (jnair@emrslaw.com)
Elias, Meginnes, Riffle & Seghetti, P.C.
416 Main Street, Suite 1400
Peoria, IL 61602
Telephone: (309) 637-6000
Facsimile: (309) 637-8514