ILLINOIS POLLUTION CONTROL BOARD
September 19, 2013

MAHOMET VALLEY WATER AUTHORITY; CITY OF CHAMPAIGN, ILLINOIS; DONALD R. GERARD; CITY OF URBANA, ILLINOIS; LAUREL LUNT PRUSSING; CITY OF BLOOMINGTON, ILLINOIS, COUNTY OF CHAMPAIGN, ILLINOIS; COUNTY OF PIATT, ILLINOIS; TOWN OF NORMAL, ILLINOIS; VILLAGE OF SAVOY, ILLINOIS; and CITY OF DECATUR, ILLINOIS,	)	
Complainants,	)	
v.	)	PCB 13-22
	)	(Citizens Enforcement - Land)
CLINTON LANDFILL, INC.,	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by J.A. Burke):

The Mahomet Valley Water Authority; City of Champaign; Donald R. Gerard; City of Urbana; Laurel Lunt Prussing; City of Bloomington; County of Champaign; County of Piatt, Illinois; Town of Normal; Village of Savoy; and City of Decatur (collectively, complainants) bring this enforcement action against Clinton Landfill, Inc. (CLI). The complaint (Comp.) alleges that CLI violated various provisions of the Environmental Protection Act (Act) "when it transformed a municipal solid waste disposal unit into a Chemical Waste Unit (CWU) specifically designed for disposal of at least [two] types of highly toxic environmental contaminants without obtaining prior siting authority from the DeWitt County Board." Comp. at 2.

CLI moves to dismiss the complaint on various grounds: (1) the Board lacks jurisdiction to hear this case; (2) complainants lack standing to appeal a permit issued by the Illinois Environmental Protection Agency (Agency); and (3) the case is frivolous because "it is both 'a request for relief that the Board does not have authority to grant' and 'fails to state a cause of action upon which the Board can grant relief.'" Motion to Dismiss at 2, 12.

The Board has considered all filings received from parties and non-parties in this docket. For the reasons below, the Board grants CLI's motion to dismiss, dismisses this case, and closes the docket. Pursuant to complainants' request, the Board will forward the complaint to the Agency for informal investigation.

PROCEDURAL HISTORY

On November 9, 2012, complainants filed a four-count complaint alleging that CLI violated the Act. Five exhibits accompanied the complaint:

> Agency Permit No. 2005-070-LF, including Modification No. 1, dated June 22, 2007 (Comp. Exh. A);
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> Certification of Siting Approval by applicant CLI (Comp. Exh. B);
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> Letter regarding "Application to Develop and Operate a Chemical Waste Unit Within the Permitted Clinton Landfill No. 3" dated October 19, 2007 and Executive Summary (Comp. Exh. C);
>
> Agency Permit No. 2005-070-LF, including Modification No. 9, dated January 8, 2010 (Comp. Exh. D); and
>
> Agency Permit No. 2005-070-LF, including Modification No. 29, dated July 5, 2012 (Comp. Exh. E).

On December 5, 2012, CLI filed a motion to dismiss (Mot.). Attached to the motion was a letter dated June 2011 from the Agency to WATCH Clinton Landfill (Mot. Exh.). On December 24, 2012, complainants responded to the motion to dismiss (Resp.). On January 7, 2013, CLI filed a motion for leave (Mot. Leave 1) to file a reply to complainants' response, along with a reply (Reply 1).

On December 21, 2012, the Attorney General, on behalf of the People of the State of Illinois (People), filed a motion to intervene and requested leave to file a response to CLI's motion to dismiss. The Board granted the motion on February 7, 2013 and ordered that the People's response must be filed by February 21, 2013. The People filed a response on February 21, 2013 (People Resp.). On March 6, 2013, CLI filed a motion for leave (Mot. Leave 2) to reply to the People's response, with the reply (Reply 2) attached. On March 8, 2013, the People filed an objection to CLI's motion to file a reply (People Obj.).

The Board also received two motions by amici curiae for leave to file briefs responding to CLI's motion to dismiss. On March 1, 2013, the National Solid Wastes Management Association (NSWMA) filed its motion for leave to file a brief (NSWMA Mot. Leave) accompanied by its brief (NSWMA Br.). On March 6, 2013, the Village of Summit filed its motion for leave to file a brief (Summit Mot. Leave) accompanied by its brief (Summit Br.).

PRELIMINARY PROCEDURAL MATTERS

CLI Motion for Leave to File Reply to Complainant's Response

Pursuant to 35 Ill. Adm. Code 101.500(e), CLI timely filed a motion for leave to file a reply to respond to complainants' response to the motion to dismiss. CLI argues that filing of its

reply will prevent material prejudice and injustice. Mot. Leave 1 at 2. No objection to CLI's motion has been filed. The Board grants the motion for leave to file a reply and will consider CLI's reply.

CLI Motion for Leave to File Reply to People's Response

CLI timely filed a motion for leave to file a reply to respond to the People's response to the motion to dismiss. CLI argues that the People reversed their position "consistently taken in past cases concerning the power of the [Board] to review the need for local siting prior to permitting by the [Agency]." Mot. Leave 2 at 2. In addition, CLI argues that the People attached documents to their response that CLI has not had an opportunity to address. *Id.* CLI states that being allowed to file its reply "will prevent material prejudice and injustice." *Id.*, citing 35 Ill. Adm. Code 101.500(e).

The People object to CLI's request for leave to file a reply. The People first object that CLI attached its reply to its motion without leave having been granted. People Obj. at 2. The People next argue that CLI did not explain how filing its reply will prevent material prejudice and injustice. *Id.* The People contend that CLI's assertion that the People have reversed a position taken by the Attorney General in prior cases does not "suggest that any material prejudice has resulted already or, absent the filing of a reply, might result." *Id.* The People observe that the Attorney General, in this case, is not acting as an advocate of any regulatory agency but rather is acting on her own motion as an intervenor "to ensure compliance with the statutory mandates as to the permitting and local siting approval for pollution control and hazardous waste disposal facilities." *Id.* at 5-6. Similarly, the People argue that the excerpt of the hearing transcript attached to their response does not suggest prejudice to CLI. *Id.* at 2. The People note that CLI was present at that hearing and argue that the transcript is relevant to the allegations in the complaint and "is admissible both under the Board's rule regarding official notice and Illinois Evidence Rule 201(b)." *Id.* at 6. Further, according to the People, any lack of opportunity for CLI to respond to this transcript is not pertinent to the motion to dismiss. *Id.* at 6-7.

The Board finds that material prejudice may result to CLI if it is not allowed to address the response filed by the People to whom the Board granted leave to intervene three months after the complaint was filed and two months after CLI filed its motion to dismiss. Allowing CLI to reply to intervenor's arguments on the motion to dismiss is therefore appropriate. *See* People v. NACME Steel Processing, LLC, PCB 13-12 (June 6, 2013) (Board allowed reply over an objection that the movant ignored 35 Ill. Adm. Code 101.500 by filing the reply before the Board granted leave and that the movant offered no support for its statement that it would be prejudiced if not allowed to reply). Under the circumstances of this case, the Board grants the motion for leave to file a reply and will consider CLI's reply.

Motions for Leave to File *Amicus Curiae* Briefs

The Board received two motions for leave to file *amicus curiae* briefs responding to CLI's motion to dismiss. *Amicus curiae* briefs are briefs filed by an interested person who is not a party. 35 Ill. Adm. Code 101.202. The Board's procedural rules provide that "[*a*]*micus curiae*

briefs may be filed in any adjudicatory proceeding by any interested person, provided permission is granted by the Board." 35 Ill. Adm. Code 101.110(c). Any *amicus curiae* brief must consist only of argument, must not raise facts that are not in evidence, and must not delay the Board's decision. *Id.*

NSWMA filed a motion for leave to file an *amicus curiae* brief. NSWMA is an association that promotes waste management "that is environmentally responsible, efficient, profitable and ethical, while benefiting the public and protecting employees." NSWMA Mot. Leave at 1. NSWMA asserts that it has an interest in this case and "can offer argument that will assist the Board in its consideration of this case, including specifically in its consideration of the Motion to Dismiss filed by [CLI]." *Id.* at 2. The Board received no objection to NSWMA's motion. NSWMA filed its motion prior to ruling by the Board on CLI's motion to dismiss and did not delay the Board's decision. The Board grants NSWMA's motion for leave to file an *amicus curiae* brief and will consider NSWMA's brief.

The Village of Summit also filed a motion for leave to file an *amicus curiae* brief. Summit is located nine miles southwest of downtown Chicago. Summit Mot. Leave at 1. Summit's motion describes the Midwest Metallics Superfund Site and activities at that site. *Id.* at 2-5. Attached to Summit's motion are seven exhibits, six of which relate to that site and Exhibit G is Summit's *amicus curiae* brief. Summit argues that it "has a unique and particular interest in the subject matter of this action." *Id.* at 5. Specifically, Summit plans to dispose waste from the Superfund site at the CWU of Clinton Landfill No. 3. *Id.* The Board received no objection to Summit's motion. Summit filed its motion prior to the Board ruling on CLI's motion to dismiss and did not delay the Board's decision. The Board grants Summit's motion for leave to file an *amicus curiae* brief and will consider Summit's brief.

SUMMARY OF COMPLAINT

Complainants are a regional water authority, units of local government, and individual residents who use groundwater from the Mahomet Aquifer for drinking water. Comp. at 6 (¶11). Complainants allege that CLI operates Clinton Landfill No. 3 which is a municipal solid waste landfill in DeWitt County situated over a part of the Mahomet Aquifer. *Id.* at 2 (¶1). Complainants further allege that the Mahomet Aquifer "is a regional aquifer and single hydraulic unit in the Mackinaw Bedrock Valley and the Mahomet Bedrock Valley beneath fifteen east-central Illinois counties." *Id*. (¶2). Complainants also allege that the Mahomet Aquifer contains "resource groundwater." *Id*., citing 415 ILCS 55/3(j) (2012)[1] ("resource groundwater" is defined as "groundwater that is presently being or in the future capable of being put to beneficial use by reason of being of suitable quality").

Complainants allege that CLI changed a municipal solid waste disposal unit at Clinton Landfill No. 3 into a CWU for disposal of "at least [two] types of highly toxic environmental contaminants." Comp. at 2 (¶1). Complainants claim that CLI intends to dispose polychlorinated biphenyls (PCBs) and manufactured gas plant (MGP) remediation waste in

[1] All references to the Illinois Compiled Statutes will be to the 2012 version, unless stated otherwise.

concentrations greater than allowed in a municipal solid waste landfill and which must typically be disposed of in a hazardous waste landfill. *Id*. Complainants allege that CLI violated the Act when it failed to obtain local site approval under Section 39.2 of the Act from the DeWitt County Board for the CWU and proposed disposal of PCBs and MGP wastes. *Id*. at 4 (¶5), citing 415 ILCS 5/39(c), 39.2. Complainants claim that the CWU and proposed disposal of PCBs and MGP wastes constitute a "new pollution control facility" requiring local site approval. *Id.*, citing 415 ILCS 5/3.330(b). Complainants allege that "[b]y virtue of the Agency's issuance of the Permit Renewal," CLI has "commenced or [has] been permitted to commence" PCB and MGP waste disposal. *Id.* at 5, (¶10).

Complainants cite Section 31(d)(1) of the Act as authority for filing this complaint, which provides that any person may file with the Board a complaint "against any person allegedly violating this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order." Comp. at 5 (¶7), citing 415 ILCS 5/31(d)(1). The complaint alleges that the Board's procedural rules allow complainants to bring this enforcement case and that the Board has authority to conduct proceedings on the complaint. *Id.* (¶8), citing 2 Ill. Adm. Code 2175.600; 35 Ill. Adm. Code 101.106(b), 103.106, 103.200.

Clinton Landfill No. 3

DeWitt County Board Site Approval

Complainants allege that, on April 11, 2002, CLI filed with the DeWitt County Board an application under Section 39.2 of the Act for site approval to expand its existing municipal solid waste landfill to develop another municipal waste disposal unit known as Clinton Landfill No. 3. Comp. at 9 (¶26). Complainants further allege that CLI's 2002 application proposed that the new unit would not accept Toxic Substances Control Act (TSCA) regulated PCB wastes. *Id.* at 9 (¶27). Complainants further allege that "express terms of the Application specifically excluded the disposal of high concentration level PCBs, hazardous levels of MGP [waste], and hazardous waste." *Id*. at 11 (¶34).

Complainants allege that, during a hearing before the DeWitt County Board, CLI testified that TSCA-regulated PCB waste and hazardous waste as defined by 35 Ill. Adm. Code 721 will not be accepted at Clinton Landfill No. 3. Comp. at 10 (¶29). Complainants further allege that the same witness testified that before any special waste could be accepted for disposal at the new unit, the waste must not contain TSCA-regulated PCB waste or hazardous waste defined by 35 Ill. Adm. Code Part 721. *Id*. (¶30).

Complainants allege that, on September 12, 2002, the DeWitt County Board granted conditional approval to CLI's application for the proposed site expansion. Comp. at 10 (¶31). Complainants argue that this conditional approval "is the decision of the county board on the siting expansion Application under Section 39.2(e) of the Act." *Id*. (¶32). Complainants further argue that the DeWitt County Board based this conditional approval on, and limited it to, CLI's application for site approval and its testimony at hearing. *Id*. Complainants allege that the municipal solid waste disposal facility, as proposed in the 2002 application, "did not include the

installation of leachate collection systems and liner systems that meet the design and operational requirements of a hazardous waste facility." *Id*. at 11 (¶33).

Permit No. 2005-070-LF

Complainants allege that, on March 2, 2007, the Agency issued Permit No. 2005-070-LF for Clinton Landfill No. 3 to develop a new municipal solid waste landfill. Comp. at 11 (¶35), citing Comp. Exh. A. CLI's permit application included an Agency site approval certification dated October 17, 2002 providing that the DeWitt County Board granted local siting approval for the municipal solid waste landfill. *Id.*at 11-12 (¶37), citing Comp. Exh. B.

Complainants allege that Permit No. 2005-070-LF includes Operating Condition II.10.f prohibiting the facility "from disposing any waste containing [PCBs] in concentration greater than allowed, pursuant to [TSCA]." Comp. at 12 (¶38), citing Comp. Exh. A at 9. Complainants further allege that the permit includes Operating Condition III.A.2.f prohibiting "the disposal of manufactured gas plant waste exceeding the regulatory levels specified in 35 Ill. Adm. Code 721.124(b)." *Id.* (¶39), citing Comp. Exh. A. at 14.

Permit Modification No. 9

Complainants allege that, on February 1, 2008, CLI requested that the Agency modify its permit to allow CLI "to change 22.5 acres in the southwestern portion of the existing landfill into a [CWU]." Comp. at 14 (¶48). Complainants state that "this resulted in Permit Modification No. 9 issued by the Agency on or about January 8, 2010." *Id.* (¶48); *see also* Comp. Exh. D. Complainants allege that CLI initiated Permit Modification No. 9 to seek approval from USEPA and the Agency to dispose, for the first time, PCBs in concentrations greater than 50 parts per million. *Id.* (¶49, ¶50). Complainants further allege that CLI sought to obtain approval from the Agency for disposal, for the first time, of "[MGP] waste exceeding the regulatory levels specified in 35 Ill. Adm. Code 721.124(b)." *Id.* (¶51).

Complainants further allege that to meet TSCA requirements for PCB disposal, CLI designed the CWU to exceed design requirements for hazardous waste disposal facilities. Comp. at 15 (¶53). Complainants claim that by modifying the design of the CWU, CLI "turned a 22.5-acre portion of Clinton Landfill No. 3 into a *de facto* hazardous waste facility." *Id.*(¶54).

Complainants allege that Permit Modification No. 9 is a significant modification to Permit No. 2005-070-LF because it:

> 1) created a [CWU]; 2) changed the capacity of the unit; 3) changed the Operating Condition II.10.f of IEPA Permit No. 2005-070-LF regarding PCB's [sic]; 4) changed the Special Waste disposal condition of III.A.2.f regarding manufactured gas plant waste; 5) changed the configuration, performance and efficiency of the leachate management system; 6) changed the permit boundary for the [CWU]; and 7) changed the post closure land use of the facility. Comp. at 15 (¶55), citing 35 Ill. Adm. Code 813.103.

Complainants further allege the following additional significant modifications:

> 1) the redesign of the single composite liner of the [CWU] to include multiple layers of composite-liner systems consisting of [three] 60-mil [high-density polyethylene (HDPE)] geomembranes; 2) the addition of a significant number of additional chemical constituents leachate monitoring parameters; 3) the prohibition of leachate re-circulation in the [CWU] (which had been allowed in the municipal solid waste unit); 4) the addition of a significant number of additional chemical constituents groundwater well monitoring parameters; and 5) the change in final cover design. Comp. at 16 (¶57).

Complainants also allege that CLI "significantly increased the usual environmental safeguards for a municipal solid waste landfill – by doubling, tripling or increasing by an even greater factor the required safeguards." Comp. at 15-16 (¶56). These increased safeguards included "an upper leachate collection and liner system, a lower leachate collection and liner system, and additional ground water monitoring systems not otherwise required by the Agency for a municipal solid waste landfill." *Id*. at 16.

Permit Modification No. 29 and Permit Renewal

Complainants allege that, on November 21, 2011, CLI filed an application to renew its permit. Comp. at 16 (¶58). Complainants further allege that CLI requested additional modifications to the CWU, which the Agency identified as Permit Modification No. 29. The Agency issued the renewed permit and Permit Modification No. 29 on July 5, 2012. *Id*., citing Comp. Exh. E.

Complainants allege that the renewed permit and Permit Modification Nos. 9 and 29 "dramatically changed the nature, extent and scope" of the facility, as well as its design, operations, and the types of waste it would accept. Comp. at 17-18 (¶64), citing 415 ILCS 5/39.2(a)(ii). Complainants further allege that the facility described in the application approved by the DeWitt County Board in 2002 is a "substantially different facility" than what is set forth in the permit renewal and Permit Modification Nos. 9 and 29. *Id.* Complainants contend that the renewed permit and Permit Modification Nos. 9 and 29 shortened the projected life of the municipal solid waste portion of Clinton Landfill No. 3 from 45 years to 41 years. *Id.* at 17 (¶63), citing 415 ILCS 5/39.2(a)(i).

"Pollution Control Facility"

Complainants allege that Clinton Landfill No. 3 is a "pollution control facility" under the Act. Comp. at 26 (¶92), citing 415 ILCS 5/3.330(a). Further, after the Agency issued Permit No. 2005-070-LF on March 2, 2007, Clinton Landfill No. 3 was a "permitted pollution control facility." *Id.* (¶93). Complainants allege that, in seeking Permit Modification No. 9 from the Agency, CLI "represented and determined that local siting authority for the [CWU] was not needed, even though it sought to dispose of TSCA-regulated PCBs and potential hazardous levels of MGP waste for the first time." *Id.* at 27 (¶96). Complainants claim that CLI

erroneously determined that the proposed CWU was not a "new pollution control facility" under the Act. *Id.*, citing 415 ILCS 5/3.330(b).

Count I
Development, Construction and Operation of
Chemical Waste Unit Without Local Siting Authority

Complainants allege that, when CLI submitted to the DeWitt County Board its 2002 application for site approval, CLI "was prohibited and knew it was prohibited" from developing a "chemical waste landfill or unit under TSCA" at Clinton Landfill No. 3. Comp. at 29 (¶101). Complainants further allege that CLI's 2002 application to the DeWitt County Board did not request local siting approval to develop a chemical waste landfill at Clinton Landfill No. 3. *Id.* (¶102). Thus, pursuant to Sections 39(c) and 39.2 of the Act, CLI has not sought DeWitt County Board approval and the DeWitt County Board has never given approval to develop a chemical waste landfill at Clinton Landfill No. 3. *Id.* (¶103, ¶104), citing 415 ILCS 5/39(c), 39.2.

Complainants allege that CLI's application to the Agency for Permit No. 2005-070-LF did not request approval to develop a chemical waste landfill. Comp. at 30 (¶106). Complainants also allege that CLI "was prohibited and knew it was prohibited from developing or constructing a chemical waste landfill or unit under TSCA" when the Agency issued Permit No. 2005-070-LF on March 2, 2007. *Id.* (¶105).

Complainants allege that, after the Agency issued Permit No. 2005-070-LF to CLI for a municipal solid waste landfill, CLI requested USEPA approval under TSCA to develop a chemical waste landfill. Comp. at 30 (¶107). CLI also requested from the Agency a "significant permit modification" to develop a chemical waste landfill. *Id.* (¶108).

Complainants allege that the CWU at Clinton Landfill No. 3 constitutes a "new pollution control facility" under Section 3.330(b)(3) of the Act. Comp. at 30 (¶109), citing 415 ILCS 5/3.330(b)(3). Complainants contend that such a new facility requires prior local siting authority from the DeWitt County Board. *Id.* at 31 (¶111), citing 415 ILCS 5/3.330(b)(3), 39(c), 39.2. Complainants allege that CLI failed to obtain local siting authority from the DeWitt County Board for the CWU in Clinton Landfill No. 3. *Id.* (¶112). According to complainants, this failure violates Sections 39(a), 39(c), and 39.2 of the Act. *Id.*, citing 415 ILCS 5/39(a), 39(c), 39.2. Complainants further allege that, by violating or threatening to violate these provisions, CLI also violated or threatens to violate Section 21(e) of the Act. *Id.* (¶113), citing 415 ILCS 5/21(e).

Complainants request that the Board order the following relief: (1) find that CLI violated Sections 21(e), 39(a), 39(c), and 39.2 of the Act; (2) order CLI to cease and desist from the identified violations of the Act, including closing the CWU at Clinton Landfill No. 3 in accordance with the Agency's closure plan and other immediate action to correct the violations; (3) submit to the Agency complainants' request for an informal Agency investigation pursuant to Section 103.208 of the Board's rules; and (4) assess a statutory maximum civil penalty. Comp. at 32.

Count II
Disposal of TSCA-Regulated PCB Waste Without Local Siting Authority

Complainants allege that, when CLI submitted to the DeWitt County Board its 2002 application for site approval, CLI "was prohibited and knew it was prohibited" from disposing "any waste containing [PCBs] at concentration greater than allowed, pursuant to [TSCA]" at Clinton Landfill No. 3. Comp. at 33 (¶101). Complainants allege that CLI's 2002 application to the DeWitt County Board did not request local siting approval to dispose TSCA-regulated PCB waste. *Id.* (¶102). Complainants further allege that CLI has not sought site approval nor has the DeWitt County Board given site approval to dispose TSCA-regulated PCB waste. *Id*. at 33-34 (¶103, ¶104).

Complainants allege that CLI was prohibited from disposing TSCA-regulated PCB waste in Clinton Landfill No. 3 when the Agency issued Permit No. 2005-070-LF on March 2, 2007. Comp. at 34 (¶105). CLI's permit application did not request approval to dispose TSCA-regulated PCB waste. *Id*. (¶106). Complainants further allege that the permit expressly prohibited disposal of TSCA-regulated PCB waste. *Id*. (¶107).

Complainants allege that, after the Agency issued Permit No. 2005-070-LF, CLI "requested coordinated approval and authority" from USEPA to dispose TSCA-regulated PCB waste at Clinton Landfill No. 3. Comp. at 34-35 (¶108). Complainants allege that, in the absence of USEPA approval, CLI is prohibited from disposing of TSCA-regulated PCB waste. *Id*. at 36 (¶113). CLI also applied to the Agency for a "significant permit modification" to dispose TSCA-regulated PCB waste. *Id*. at 35 (¶109).

Complainants allege that Permit Modification Nos. 9 and 29 were significant modifications because the Agency allowed, for the first time, disposal of TSCA-regulated PCB waste at Clinton Landfill No. 3. Comp. at 35 (¶110). Accordingly, these permit modifications are "subject to Section 39.2 review." *Id.*, citing 415 ILCS 5/39.2. Complainants further allege that TSCA-regulated PCB waste is classified as special waste under the Act. *Id.* (¶111), citing 415 ILCS 5/3.475(c)(1)(C).

Complainants allege that DeWitt County Board siting approval for a new pollution control facility is required to dispose TSCA-regulated PCB waste in the CWU or in any part of Clinton Landfill No. 3. Comp. at 37 (¶117, ¶118), citing 415 ILCS 5/3.330(b)(3), 39(c), 39.2; 35 Ill. Adm. Code 813.104. Complainants allege that CLI failed to obtain local siting authority from the DeWitt County Board for disposing TSCA-regulated PCB waste in the CWU or in any part of Clinton Landfill No. 3. *Id.* (¶119). Complainants allege that the failure to obtain this authority violates or threatens to violate Sections 39(a), 39(c), and 39.2 of the Act. *Id*. (¶120), citing 415 ILCS 5/39(a), 39(c), 39.2. Complainants further allege that by violating or threatening to violate Section 39(a), 39(c), and 39.2 of the Act, CLI violated Section 21(e) of the Act. *Id.* (¶120), citing 415 ILCS 5/21(e).

Complainants request that the Board order the following relief: (1) find that CLI violated Sections 21(e), 39(a), 39(c), and 39.2 of the Act; (2) order CLI to cease and desist from the identified violations of the Act, including closing the CWU at Clinton Landfill No. 3 in

accordance with the Agency's closure plan and other immediate action to correct the violations; (3) submit to the Agency complainants' request for an informal Agency investigation pursuant to Section 103.208 of the Board's rules; and (4) assess a statutory maximum civil penalty. Comp. at 38.

Count III
Disposal of MGP Waste Exceeding Regulatory Levels of
35 Ill. Admin. Code 721.124(b) Without Local Siting Authority

Complainants allege that, when CLI submitted to the DeWitt County Board its 2002 application for site approval, CLI "was prohibited and knew it was prohibited" from disposing "[MGP] waste exceeding regulatory levels specified in 35 Ill. Adm. Code 721.124(b)" at Clinton Landfill No. 3. Comp. at 39 (¶101). Complainants contend that CLI's 2002 application to the DeWitt County Board did not request local siting approval for disposing such MGP waste. *Id.* (¶102). Complainants further allege that CLI has not applied, nor has the DeWitt County Board granted, local siting approval to dispose such MGP waste in Clinton Landfill No. 3. *Id*.at 39-40 (¶103, ¶104).

Complainants allege that, when the Agency issued Permit No. 2005-070-LF on March 2, 2007, CLI was prohibited from disposing MGP waste exceeding regulatory levels in Clinton Landfill No. 3. Comp. at 40 (¶105). Complainants further allege that CLI's 2007 application for Permit No. 2005-070-LF did not request approval to dispose such MGP waste in Clinton Landfill No. 3. *Id*. (¶107). Complainants contend that Permit No. 2005-070-LF expressly prohibited disposal of such MGP waste. *Id*. (¶108).

Complainants allege that, after the Agency issued Permit No. 2005-070-LF, CLI requested from the Agency a "significant permit modification" to dispose, for the first time, MGP waste exceeding regulatory levels. Comp. at 40-41 (¶109). Complainants further allege that such MGP waste is special waste under the Act. *Id.* at 41 (¶111), citing 415 ILCS 5/3.475(b), (c). Complainants also allege that MGP waste that that does not exceed regulatory levels also is special waste under the Act. *Id.* (¶112), citing 415 ILCS 5/3.475.

Complainants allege that to dispose MGP waste exceeding regulatory levels, CLI must apply to the Agency to develop a Resource Conservation and Recovery Act (RCRA) Subtitle C hazardous waste facility. Comp. at 41 (¶113). Complainants further allege that CLI requested Agency approval to dispose such MGP waste in Clinton Landfill No. 3. *Id*. (¶115).

Complainants allege that CLI must obtain DeWitt County Board site approval for a new pollution control facility to dispose in Clinton Landfill No. 3 MGP waste exceeding the regulatory levels. Comp. at 42-43 (¶118), citing 415 ILCS 5/3.330(b)(3), 39(c), 39.2. Complainants further allege that CLI must submit proof of this approval to the Agency before CLI disposes such MGP waste in Clinton Landfill No. 3. *Id*. at 42 (¶117), citing 415 ILCS 5/3.330(b)(3), 39(c), 39.2. Complainants contend that CLI has not obtained local siting authority from the DeWitt County Board to dispose such MGP waste. *Id.* at 43 (¶119). According to complainants, CLI's failure to obtain this authority violates or threatens to violate Sections 39(a), 39(c), and 39.2 of the Act. *Id*., citing 415 ILCS 5/39(a), 39(c), 39.2. Complainants further allege

that, by violating or threatening to violate Section 39(a), 39(c), and 39.2 of the Act, CLI also violated Section 21(e) of the Act. *Id.* (¶120), citing 415 ILCS 5/21(e).

Complainants request that the Board order the following relief: (1) find that CLI violated Sections 21(e), 39(a), 39(c), and 39.2 of the Act; (2) order CLI to cease and desist from the identified violations of the Act, including closing the CWU at Clinton Landfill No. 3 in accordance with the Agency's closure plan and other immediate action to correct the violations; (3) submit to the Agency complainants' request for an informal Agency investigation pursuant to Section 103.208 of the Board's rules; and (4) assess a statutory maximum civil penalty. Comp. at 44.

Count IV
Disposal of Hazardous Waste
(MGP Waste Exceeding Regulatory Levels of 35 Ill. Admin. Code 721.124(b))
Without RCRA Permit

Complainants allege that MGP waste exceeding regulatory levels in 35 Ill. Adm. Code 721.124(b) is hazardous waste. Comp. at 45 (¶122, ¶123). Complainants further allege that CLI's applications to renew and modify its permit "proposed the acceptance" and "sought to dispose" hazardous waste in Clinton Landfill No. 3 for the first time. *Id*. (¶124, ¶125). Complainants allege that CLI designed the CWU to exceed the design requirements for hazardous waste disposal facilities. *Id.* at 46 (¶130), citing 35 Ill. Adm. Code 724.401(c). Complainants further allege that the Agency published documents "indicating that the [CWU] 'meets design standards for a hazardous waste landfill.'" *Id.* (¶131). Complainants state

> [a]s a result of CLI's operation of the [CWU], CLI was and is a "person" conducting, owning and operating a "hazardous waste disposal operation" without a "RCRA permit" at a "hazardous waste management facility" as those terms are defined in Section 702.110 of the Board's Waste Disposal Regulations. *Id.* at 47 (¶133), citing 35 Ill. Adm. Code 702.110.

Complainants allege that CLI has not obtained a RCRA permit, pursuant to Section 39(d) of the Act and 35 Ill. Adm. Code 703.121(a) and (b), to dispose "hazardous" MGP waste in Clinton Landfill No. 3. Comp. at 46, 47 (¶129, ¶134), citing 415 ILCS 5/39(d); 35 Ill. Adm. Code 703.121(a), (b). Therefore, according to complainants, disposal of MGP waste violates Section 21(f) of the Act. *Id.* at 46 (¶128, ¶129), citing 415 ILCS 5/21(f).

Complainants allege that CLI's failure to obtain a RCRA permit violates or threatens to violate Sections 39(a), 39(c), 39(d), and 39.2 of the Act. Comp. at 47 (¶134), citing 415 ILCS 5/39(a), 39(c), 39(d), 39.2. Complainants contend that, by violating or threatening to violate Sections 39(a), 39(c), 39(d) and 39.2 of the Act and 35 Ill. Adm. Code 703.121(a) and (b), CLI violated and threatens to violate Section 21(f) of the Act. *Id.* at 47 (¶135), citing 415 ILCS 5/21(f).

Complainants request that the Board order the following relief: (1) find that CLI violated Sections 21(f), 39(a), 39(c), and 39.2 of the Act; (2) order CLI to cease and desist from the

identified violations of the Act, including closing the CWU at Clinton Landfill No. 3 in accordance with the Agency's closure plan and other immediate action to correct the violations; (3) submit to the Agency complainants' request for an informal Agency investigation pursuant to Section 103.208 of the Board's rules; and (4) assess a civil penalty of $25,000 per day of violation of Section 21(f) of the Act. Comp. at 48.

CLI MOTION TO DISMISS

CLI moves to dismiss the complaint on the following grounds: (1) the Board lacks jurisdiction to hear this case; (2) complainants lack standing to appeal a permit issued by the Agency; and (3) the case is frivolous because "it is both 'a request for relief that the Board does not have authority to grant' and 'fails to state a cause of action upon which the Board can grant relief.'" Mot. at 2, 12.

CLI characterizes the basic contention of the complaint to be that "CLI was required to seek local siting approval from the DeWitt County Board for the development and construction of a chemical waste landfill or unit in Clinton Landfill No. 3." Mot. at 2-3. Specifically, CLI "should have sought additional local siting approval before applying to the Agency for modifications to and renewal of the Permit, and that [CLI's] failure to do so was erroneous." *Id.* at 4, citing Comp. at 26-28 (¶¶92-100).

CLI quotes Section 39(c) of the Act and argues that "[n]owhere in the Act is the operator of a pollution control facility required to obtain local siting approval for development, construction, or operation of a facility, or for disposal at a facility." Mot. at 4 (emphasis omitted), citing 415 ILCS 5/39(c). Rather, "[o]btaining local siting approval is a condition to issuance of a permit by the [Agency]." *Id.* Accordingly, complainants' "true allegation of error is that pursuant to Section 39(c) of the Act, the Agency should have required new local siting approval before issuing Permit Modifications 9 and 29 and the Permit Renewal." *Id.* CLI concludes that the complaint is "an attack on the Permit." *Id.*

CLI argues that Count IV attacks the permit "from a slightly different angle." Mot. at 4. Count IV "allege[s] that the Agency should have required CLI to obtain a RCRA permit to dispose of [MGP] waste, which would have mandated another local siting approval." *Id.*, citing Comp. at 46 (¶127). CLI notes that Permit Modification No. 9 provides "[MGP] waste exceeding the regulatory levels specified in 35 Ill. Adm. Code 721.124(b) is among the waste that may be accepted at the CWU." *Id.* at 5, citing Comp. Exh. D. Thus, CLI contends that Count IV of the complaint is an attack on Permit Modification No. 9. *Id.* at 4-5.

CLI argues that under Illinois law, only the permit applicant may appeal the denial or issuance of a landfill permit by the Agency. Mot. at 5. CLI cites to Section 40(a)(1) of the Act, which provides that if the Agency refuses to grant or grants with conditions a permit, the applicant may petition for a hearing before the Board to contest the decision of the Agency. *Id.*, citing 415 ILCS 5/40(a)(1).

CLI cites various cases as holding that third parties, *i.e.* parties other than the applicant, may not appeal to the Board the Agency's issuance of a landfill permit. Mot. at 6, citing City of

Elgin v. County of Cook, 169 Ill. 2d 53, 61, 660 N.E.2d 875, 880 (1995); Landfill, Inc. v. PCB, 74 Ill. 2d 541, 559, 387 N.E.2d 258, 265 (1978); Williamson County v. Kibler Development Corp., PCB 08-93 (July 10, 2008).

CLI also discusses a previous Board decision in Anielle Lipe and Nykole Gillette v. IEPA, PCB 12-95 (May 3, 2012). Mot. at 6. CLI notes that complainants in that case filed an enforcement action against the Agency alleging that the Agency issued a permit without verifying that the siting requirements under Section 39.2 of the Act for pollution control facilities were met. *Id.* at 6-7. CLI notes complainants argued that the Board had authority to enforce the Act by ensuring that siting approval for a pollution control facility complied with the Act. *Id.* at 7. CLI quotes from the Board's opinion that "the Board finds that it does not have authority to hear this complaint alleging violations of the Act by the Agency in carrying out its permitting duties." *Id.*, citing Lipe, PCB 12-95, slip op. at 8.

CLI claims that the Board also previously concluded that third parties do not have standing to initiate an appeal of a permit that the Agency issued for a wastewater treatment facility. Mot. at 7, citing Mill Creek Water Reclamation Dist. v. IEPA, PCB 10-74, slip op. at 7 (Aug. 5, 2010). CLI adds that courts have ruled similarly regarding third-party appeals of Agency permits. *Id.* at 8. CLI cites to City of Waukegan v. IEPA, where the court stated,

> [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.' Mot. at 8, citing City of Waukegan v. IEPA, 339 Ill. App. 3d 963, 975, 791 N.E.2d 635, 645 (2nd Dist. 2003).

CLI concludes that "the Agency's decision not to require local siting approval prior to issuing a permit is not subject to review by the Board or the Courts." Mot. at 9.

CLI theorizes that complainants are aware of this precedent and styled the complaint as an enforcement action against CLI rather than a permit appeal naming the Agency. Mot. at 9. CLI argues that the only statutory or permit requirement that complainants seek to enforce against CLI is the requirement in Section 39(c) of the Act that an applicant for a permit obtain local siting approval. *Id.* CLI argues that complainants do not have standing to appeal the Agency's permitting decision and complainants are seeking to enforce the siting provisions of the Act in order to attack the permit issued by the Agency. *Id.* at 11.

CLI notes that Section 31 of the Act provides that any person may file with the Board a complaint alleging violations of the Act, regulation adopted under this Act, permit, or Board order. Mot. at 3, citing 415 ILCS 5/31(d)(2)[2]. CLI argues that complainants do not allege that CLI caused or threatened pollution in violation of the Act. *Id.* at 10. CLI further argues that complainants do not allege that "CLI's development, construction, or operation of the landfill" violates the Act or threatens the environment. *Id.* Further, CLI claims complainants concede

[2] The Board notes that, while CLI cites to 415 ILCS 5/31(d)(2), the cited language actually appears in 415 ILCS 5/31(d)(1).

that the Agency issued a permit for Clinton Landfill No. 3 on March 2, 2007 and the permit was later modified to develop the CWU at Clinton Landfill No. 3. *Id.*, citing Comp. at 11 (¶35), 14-15 (¶¶48-52), 16 (¶58). CLI asserts that complainants do not allege that CLI violated its permit. *Id.*

CLI concludes that the Board does not have jurisdiction to hear this case because complainants cannot appeal the Agency's issuance of the permit. Mot. at 11 (citations omitted).

COMPLAINANTS' RESPONSE TO MOTION TO DISMISS

Complainants contend that the complaint is a proper enforcement action under Section 31(d) of the Act brought against CLI for violations of the Act. Resp. at 14. Complainants assert that the Board has jurisdiction to hear the complaint. *Id.* at 2. Complainants make two arguments in support of their complaint: (1) CLI has an independent obligation to obtain local siting approval to develop the CWU at Clinton Landfill No. 3; and (2) the complaint sufficiently alleges an enforcement cause of action against CLI for violations of the Act.

CLI Obligation to Obtain Local Siting Approval

Complainants argue that CLI has an independent obligation to obtain local siting approval before undertaking the disposal of PCB and MGP wastes at Clinton Landfill No. 2. Resp. at 14. Complainants dispute CLI's claim that local siting is merely a pre-condition to the Agency issuing a landfill permit. *Id.* at 3, citing Mot. at 2. Rather, complainants contend that the DeWitt County Board has concurrent authority with the Agency over siting a landfill and that authority would be rendered meaningless if CLI is not required to obtain the county board's siting approval for these operations. *Id.* at 5-6, 14. According to complainants, CLI is required under Section 39.2 to obtain local siting approval from the county board and then provide proof of that approval to the Agency. *Id.* at 6.

Complainants argue that CLI mischaracterizes the complaint as an attack on the permit. Resp. at 3. Rather, complainants intend that their complaint is an action under Section 31(d) of the Act against CLI alleging that CLI's "contemplated activities cause or threaten pollution, and violate the Act." *Id.* at 4. Complainants cite to Landfill, Inc. as establishing that a citizen can bring an enforcement action against a permittee who is alleged to be in violation of the substantive provisions of the Act. *Id.* at 3, citing Landfill, Inc., 74 Ill. 2d at 556. Complainants argue that Landfill, Inc. distinguishes between a proper citizen enforcement action alleging violations of the Act and an improper third party action against the Agency. *Id.* at 4, citing Landfill, Inc., 74 Ill. 2d at 560-61. Complainants assert that the complaint is a proper enforcement action under Landfill, Inc. *Id.* Complainants distinguish the post-Landfill, Inc. cases cited by CLI as cases involving third party claims against the Agency challenging permits issued by the Agency and the Agency's performance of its duties. *Id.* at 9. None of the cases cited by CLI were brought against the permit holder. *Id.* In contrast, complainants allege violations against CLI and seek no relief from the Agency. *Id.*

Complainants assert that the complaint alleges that CLI violated Section 39.2 of the Act. Resp. at 6, citing 415 ILCS 5/39.2. By failing to obtain local siting approval pursuant to Section

39.2, CLI also violated Section 21(e). *Id.* Complainants cite Section 21(e) of the Act which prohibits disposal of waste "except at a site or facility which meets the requirements of this Act." *Id.*, citing 415 ILCS 5/21(e). Complainants argue that local siting approval under Section 39.2 of the Act is one of the requirements of the Act referenced in Section 21(e). *Id.* According to complainants, "landfill development and specific waste disposal activities, if conducted at a facility which fails to meet all requirements of the Act, violate the Act and are the proper subject of a citizen enforcement action." *Id.* at 7.

According to complainants, the complaint alleges that CLI has an independent obligation under the Act to obtain local siting approval before developing and operating the CWU. Resp. at 8. Further, complainants argue that an Agency-issued permit is not a defense to a claim of polluting without a permit unless the permit is valid. *Id.* at 9.

Alleged Violations of Environmental Protection Act

Complainants argue that the complaint sufficiently alleges that CLI violated the Act and threatened to cause or caused pollution associated with PCB and MGP waste streams. Resp. at 10, citing Comp. at 2-4 (¶1-6), 5-6 (¶10). Complainants further argue that the complaint alleges that CLI's PCB and MGP waste disposal operations at the CWU have commenced and CLI is violating or threatening to violate the Act and Board rules. *Id.* at 4-5, citing Comp. at 5-6 (¶10).

Complainants argue that CLI has the primary responsibility to determine whether a proposed facility is a "new pollution control facility" under Section 3.330 of the Act. Resp. at 10, citing 35 Ill. Adm. Code 812.105. Complainants note that the complaint alleges that CLI is responsible for "determining and complying" with Sections 3.330(b)(3), 39(c), and 39.2 of the Act. *Id.*, citing Comp. at 26 (¶90). Complainants further state that the complaint alleges "CLI represented and determined that local siting authority for the [CWU] was not needed." *Id.* at 11, citing Comp. at 27 (¶96). Complainants then restate specific paragraphs in each of the four counts alleging violations of the Act. *Id.* at 11-12, citing Comp. at 31 (¶112, ¶113), 37 (¶119, ¶120), 43 (¶119, ¶120), and 47 (¶134, ¶135).

CLI'S REPLY TO COMPLAINANTS

In support of its motion to dismiss, CLI replies to complainants' objection to dismissal that the Board does not have jurisdiction to hear third party appeals of landfill permits and complainants fail to state a cause of action against CLI.

Board Jurisdiction

In its reply, CLI continues its argument that the Board does not have jurisdiction over the complaint because "the Illinois General Assembly has limited administrative review of permits issued by the [Agency] to permit applicants, and has denied third parties any such right of review." Reply 1 at 2. Accordingly, CLI argues that the Board should dismiss the complaint.

CLI first argues that the Board lacks jurisdiction over counts I, II, and III because these counts are collateral attacks on the Agency's issuance of a permit. CLI contends that counts I, II,

and III are based on the allegation that CLI should have obtained additional approval from DeWitt County before developing the CWU. Reply 1 at 2. CLI points to City of Elgin where municipalities sued the local siting authority challenging the validity of siting approval and did not sue the Agency for improperly issuing the permit. *Id.* at 3, citing City of Elgin, 169 Ill. 2d at 65, 660 N.E.2d at 882. CLI quotes City of Elgin: "[t]hough the plaintiff municipalities contend that they are not attacking the Agency's decision to grant the permit but, rather, the Cook County board's zoning ordinance granting the permit, this distinction does not withstand scrutiny." *Id.*, citing City of Elgin, 169 Ill. 2d at 61-62, 660 N.E.2d at 880. Thus, in City of Elgin, the suit was barred as an "impermissible collateral attack on the Agency development permit approving the balefill." *Id.*, citing City of Elgin, 169 Ill. 2d at 65, 660 N.E.2d at 882. Accordingly, CLI concludes that counts I, II, and III are frivolous under 35 Ill. Admin. Code 101.202 because they are requests for relief that the Board does not have the authority to grant. *Id.* at 4-5, citing 35 Ill. Adm. Code 101.202.

CLI next argues that the Board lacks jurisdiction over count IV because it collaterally attacks the permit, or, alternatively, because 35 Ill. Adm. Code 813.107 bars count IV. Reply 1 at 5. CLI characterizes count IV as alleging that CLI is disposing waste without a permit. *Id.* CLI notes that permit modifications and renewal allow CLI to dispose MGP waste in the CWU without a RCRA permit. *Id.* CLI argues that CLI is not disposing of waste without a permit, as alleged in count IV; rather, complainants intend that CLI's permit should not allow CLI to dispose certain wastes. *Id.* Additionally, CLI cites to 35 Ill. Adm. Code 813.107 which provides that a permit shall not constitute a defense to a violation of the Act "except for the development and operation of a landfill without a permit." *Id*. at 6, citing 35 Ill. Adm. Code 813.107. CLI argues that 35 Ill. Adm. Code 813.107 bars count IV. *Id.*

Count IV Fails to State a Cause of Action

CLI argues that count IV fails to state a cause of action and must be dismissed as frivolous. Reply 1 at 6. CLI characterizes count IV as alleging that CLI is disposing hazardous waste in the CWU without a permit. *Id.* The alleged hazardous waste is MGP waste exceeding regulatory levels. *Id.*, citing Comp. at 45 (¶123). CLI states that the permit does not allow CLI to dispose hazardous waste at Clinton Landfill No. 3. *Id.* at 9. CLI disputes complainants' allegation that MGP waste is hazardous waste and that CLI is disposing hazardous waste at Clinton Landfill No. 3. *Id.* at 7-11. CLI discusses various federal cases and concludes that MGP waste is not hazardous "as a matter of law." *Id.* at 12. According to CLI, count IV should be dismissed as frivolous because it fails to state a cause of action. *Id.*, citing 35 Ill. Adm. Code 101.202.

PEOPLE'S RESPONSE TO MOTION TO DISMISS

The People ask the Board "to decide whether [CLI] properly followed all of the steps required by the legislature when applying for a landfill permit." People Resp. at 3. The People assert that it is CLI who has "the duty to properly submit a permit application." *Id.* The People add that "[a]s part of that duty, [CLI] was required to show that it acquired local siting for the new additions to its landfill." *Id.* The People conclude that CLI is the "only party which may remedy the insufficiency." *Id.* at 4.

The People argue that CLI's motion to dismiss misconstrues the complaint as a third party attack on CLI's landfill permit. People Resp. at 4. The People further argue that CLI misapplies two lines of cases: (1) cases establishing that a third party may not challenge a landfill permit issued by the Agency; and (2) cases establishing concurrent authority between the Agency and local governmental bodies. *Id.*

Third Party Appeals

As to the first line of cases, following Landfill, Inc., the People dispute CLI's argument that the Board lacks jurisdiction to hear the complaint as a collateral attack on the Agency's permitting authority. People Resp. at 4-5. The People acknowledge that "the Act does not provide a method for third parties to appeal a landfill permit after it has been issued." *Id.* at 5. The People, however, assert 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." *Id.* The People argue that, unlike various Board decisions, which held that a third party may not attack an Agency-issued permit before the Board, complainants here are not attacking the Agency's decision to issue a permit. *Id.* at 5-6, citing Lipe, PCB 12-95, Anielle Lipe and Nykole Gillette v. Village of Richton Park, PCB 12-44 (Nov. 17, 2011), Mill Creek Water Reclamation Dist., PCB 10-74, Terri D. Gregory v. Regional Ready Mix, LLC, PCB 10-106 (Aug. 19. 2010). Rather, complainants allege that CLI sought its permit without obtaining local siting approval. *Id.* at 6. Complainants, therefore, challenge CLI's "compliance with the statutory requirements established by the legislature"-- specifically CLI's failure "to obtain local siting from the DeWitt County Board prior to operating its landfill under its renewed permit." *Id.*

Local Siting Authority

The People contend that a permit applicant is required to "complete all statutory steps to vest the Agency with the jurisdiction to consider, create and issue a permit." People Resp. at 6. If the applicant fails to complete the statutory steps, the Agency would lack necessary information to issue the permit and such a permit is "tainted." *Id.* One of those statutory steps is the requirement in Section 39(c) of the Act to obtain local siting approval. *Id.* at 6-7. The People contend because Clinton Landfill No. 3 was originally permitted as a municipal solid waste landfill, the CWU "designed to accept a completely new waste stream" requires a new permit. *Id.* at 7. The CWU "so integrally changes the operations at the facility as to render it a 'new' facility." *Id.* Further, by changing waste streams accepted at the landfill, CLI undertook a "fundamental change" that was not considered during the local siting process for a municipal solid waste landfill. *Id.* at 8. CLI created a new pollution control facility and did not obtain local siting approval. *Id.* The Agency's issuance of a permit without proper siting is prohibited by the applicable statutes. *Id.*

The People state that the local government's role in approving siting is integral to permitting landfills. People Resp. at 9. The People continue that "the county board hearing, which presents the only opportunity for public comment on the proposed site, is the most critical stage of the landfill site approval process." *Id.* at 9-10, citing Kane County Defenders, Inc. v.

PCB, 139 Ill. App. 3d 588, 593 (2nd Dist. 1985); M.I.G. Investments, Inc., et al. v. EPA, et al., 122 Ill. 2d 392, 400-401 (1988) (legislature intended to invest local governments with the right to assess not merely the location of proposed landfills, but also the impact of alterations in the scope and nature of previously permitted landfill facilities).

The People contend that CLI's latest permit allows it to accept PCB and MGP waste which was not envisioned at the time that the DeWitt County Board last approved local siting for Clinton Landfill No. 3. People Resp. at 11. The People argue that the DeWitt County Board should have had an opportunity to determine if CLI's new operations were suitable for their location. *Id.* The People conclude that, due to CLI's failure to obtain local siting, CLI "failed to vest the Agency with the jurisdiction to review the permit application, create a permit, and issue a permit." *Id.*

CLI'S REPLY TO THE PEOPLE

CLI contends that it is "nonsensical" to argue that this case is not an attack on the Agency's permit when the relief sought would result in invalidating the permit. Reply 2 at 3. CLI argues that the Illinois Supreme Court has held that cases collaterally attacking permits issued by the Agency are impermissible even if the Agency is not a party and even if the permit in question is not directly challenged. *Id.*, citing City of Elgin. CLI argues that if the Board reviews the need for additional siting approval in this case and decides that such additional siting approval was required, then the Agency's permit would be invalidated. *Id.* at 5-6. CLI contends that this case is therefore an attack on the Agency's permit which is not allowed under Landfill, Inc..

CLI contends that the Agency is the appropriate authority to determine whether the CWU is a "new pollution control facility" and therefore requires siting approval under the Act. Reply 2 at 6. CLI argues that the People's position (that the Agency lacked jurisdiction to issue the permit because the CWU was a "new pollution control facility" requiring siting approval) has already been dismissed by the courts. *Id.* CLI notes that, in City of Waukegan, the court dismissed the case because the city could not collaterally attack the Agency's permitting decision. *Id.*, citing City of Waukegan, 339 Ill. App. 3d at 967, 791 N.E.2d at 639. CLI argues that Section 39(c) of the Act requires the Agency to decide, before issuing a permit, whether local siting approval is required and, if it is, to confirm that the applicant submitted proof of the approval. *Id.* at 9. CLI asserts that complainants do not allege that the Agency failed to make the necessary determination under section 39(c) of the Act. *Id.* Rather, complainants disagree with the Agency's determination. *Id.* at 8. CLI concludes that the Board lacks jurisdiction to review the alleged need for additional siting authority because this power is vested solely in the Agency. *Id.* at 9-10.

CLI argues that the Board should not review the scope of the siting approval granted by the DeWitt County Board because do so would "usurp" the DeWitt County Board's authority. Reply 2 at 10. CLI states that the DeWitt County Board's final decision regarding siting in this case is in the Conditional Siting Resolution. *Id.*, citing Comp. Exh. B. Any investigation or analysis by the Board of the siting approval would result in the Board "inserting itself into the siting process in place of the DeWitt County Board." *Id.*

***AMICUS CURIAE* BRIEFS**

National Solid Wastes Management Association

NSWMA requests that this case be dismissed. NSWMA Br. at 2. NSWMA contends that the complaint would undermine the Act by "opening up the Agency's permits to perpetual review based on purported deficiencies in siting approvals or on the Agency's decision not to require local siting approval." *Id.*

NSWMA states that a developer of a "new pollution control facility" must obtain local siting approval before petitioning the Agency for a permit. NSWMA Br. at 2. NSWMA further states that decisions by a local siting authority are subject to appeal by the applicant and by a third party who participated in the public hearing conducted by the county board or governing body of the municipality. *Id.* at 4. NSWMA contends that once a siting certificate has been issued and the time to appeal has passed, "the siting approval is unassailable." *Id.*

NSWMA states that it is the Agency who must determine whether an application is "for the development or construction of a new pollution control facility" such that siting is required pursuant to the Act. NSWMA Br. at 4-5, citing 415 ILCS 5/39(c). NSWMA argues that an Agency determination that siting approval is not required is not subject to review by the Board. *Id.* at 5. This is because "the right to appeal the issuance or denial of a permit by the Agency is narrowly restricted as a matter of law" and because any such review of an Agency determination "would constitute, in effect, a review of the permit itself." *Id.* at 5-6. NSWMA contends that, if the validity of an Agency-issued permit were open to attack, "no developer would dare to propose the construction of a new pollution control facility." *Id.* at 6.

NSWMA contends that, if the Board does not dismiss this case, "anyone could file a complaint with the Board claiming that any permit or permit modification issued to any new pollution control facility . . . is inconsistent with the siting for such facility, at any time." NSWMA Br. at 6. NSWMA also notes that events occurring during a siting hearing that are neither reflected in a siting certificate nor the subject of a siting appeal are not relevant to validity of permit issued by the Agency. *Id.* at 6-7. NSWMA contends that Illinois law and public policy "requires that this case be dismissed." *Id.* at 7.

Village of Summit

The Village of Summit (Summit) states the complaint should be dismissed because complainants lack standing to challenge the Agency's issuance of a permit to CLI. Summit Br. at 1. Summit states that the Board and Illinois courts

> 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." Summit Br. at 2 (citations omitted).

Summit further notes that the People have "consistently confirmed that third parties do not have standing to appeal an Agency permit." Summit Br. at 3. Summit contends that the People pay "lip service" to the assertion that complainants are not seeking to overturn or modify the Agency's permitting decision, while at the same time attacking the validity of the Agency permit. *Id.* at 5.

Summit contends that the People rejected the same type of challenge in City of Waukegan, where the People argued that the Agency "had jurisdiction to issue the permit to the NSSD; thus, the City of Waukegan's challenge to the permitting decision attacks the [Agency's] application of the [Act], not its authority to act." Summit Br. at 5 (citation omitted). Further, in Village of Frankfort v. IEPA, the People took a similar position, stating in part that "a third party has no authority to challenge the validity of a permit issued by the [Agency] or to claim it was improperly issued." *Id.*, citing Village of Frankfort v. IEPA, 339 Ill. App. 3d 963, 791 N.E.2d 635, 644-646 (2003). Summit claims that the People "[turn] a blind eye to every case that has ever addressed this issue," instead the People argue "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." *Id.* at 7.

DISCUSSION

In ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See, e.g.*, Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004); *see also In re* Chicago Flood Litigation, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997). "To determine whether a cause of action has been stated, the entire pleading must be considered." LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297, 1303 (2nd Dist. 1993), citing A, C & S, 131 Ill. 2d at 438 ("'the whole complaint must be considered, rather than taking a myopic view of a disconnected part'" A, C & S quoting People *ex rel.* William J. Scott v. College Hills Corp., 91 Ill. 2d 138, 145, 435 N.E.2d 463, 466-67 (1982)).

CLI moves to dismiss the complaint on various grounds: (1) the Board lacks jurisdiction to hear this case; (2) complainants lack standing to appeal a permit issued by the Agency; and (3) the case is frivolous because "it is both 'a request for relief that the Board does not have authority to grant' and 'fails to state a cause of action upon which the Board can grant relief.'" Mot. at 2, 12.

The Board finds that, although it has jurisdiction to hear an enforcement action for a violation of the Act and complainants have standing to bring such an enforcement action, the complaint does not plead any violation of the Act. The Board therefore grants CLI's motion to dismiss the complaint.

Board Jurisdiction

Under the Act, any person may bring an action before the Board to enforce Illinois' environmental requirements. *See* 415 ILCS 5/31(d)(1). Complainants bring this case as an enforcement action against CLI under Section 31(d) of the Act. Comp. at 5 (¶7). Complainants

allege that CLI violated the Act "when [CLI] transformed a municipal solid waste disposal unit into a [CWU] specifically designed for the disposal of at least [two] types of highly toxic environmental contaminants without obtaining prior siting authority from the DeWitt County Board." Comp. at 2 (¶1). Specifically, complainants allege CLI violated Sections 21(e), 21(f), 39(a), 39(c), 39(d), and 39.2 of the Act as well as 35 Ill. Adm. Code 703.121(a) and (b). Comp. at 31 (Count I ¶112, ¶113), 37 (Count II ¶119, ¶120), 43 (Count III ¶119, ¶120), 47 (Count IV ¶134, ¶135), citing 415 ILCS 5/21(e), 21(f), 39(a), 39(c), 39(d), 39.2; 35 Ill. Adm. Code 703.121(a), (b).

CLI argues that the Board does not have jurisdiction to hear this complaint alleging violations of the Act by the Agency in carrying out its permitting duties. Mot. at 7. CLI argues that only the permit applicant may appeal the denial or issuance of a landfill permit by the Agency. *Id.* at 5, citing 415 ILCS 5/40(a)(1). CLI cites various cases as holding that third parties, *i.e.* parties other than the applicant, may not appeal to the Board the Agency's issuance of a landfill permit. Mot. at 6-7, citing Landfill, Inc., 74 Ill. 2d at 559, 387 N.E.2d at 265; Lipe, PCB 12-95; Mill Creek Water Reclamation Dist., PCB 10-74, slip op. at 7; Williamson County, PCB 08-93.

As the various briefs have noted, it is well-established that the Board lacks jurisdiction to consider allegations that a landfill permit determination by the Agency violates the Act. The Supreme Court held in Landfill, Inc. that "focus must be upon polluters who are in violation of the substantive provisions of the Act," and not on the Agency in the performance of its duties. Landfill, Inc., 74 Ill. 2d at 556, 387 N.E.2d at 263. In Landfill, Inc.**,** complainants filed a complaint with the Board contesting the issuance of the permit and seeking to revoke the permit because the Agency issued the permit in violation of the Act. *Id.* at 548, 259. The Court held that the Board has authority to hear enforcement complaints alleging that an activity threatens or causes pollution but "not challenging the Agency's performance of its statutory duties in issuing a permit." *Id.* at 560, 265.

Viewing the complaint as pled and in the light most favorable to complainants, the complaint alleges violations of the Act by CLI. As complainants and the People note, the complaint is a direct action against CLI alleging that CLI had "an independent obligation under the Act to obtain local siting authority." Resp. at 8; *see also* People Resp. at 6 ("Complainants are therefore challenging [CLI's] compliance with the statutory requirements established by the legislature"). Accordingly, under Section 31(d)(1) of the Act, the Board has jurisdiction over the violations of the Act alleged in the complaint. Landfill, Inc. and its progeny do not apply to divest the Board of jurisdiction to hear a complaint against CLI alleging violations of the Act.

Complainants' Standing

CLI argues that, under Illinois law, only the permit applicant may appeal the denial or issuance of a landfill permit by the Agency. Mot. at 5, citing 415 ILCS 5/40(a)(1). CLI also cites various Board and court decisions in support of its position that third parties may not appeal the Agency's issuance of a landfill permit. *Id.* at 6-7.

Section 40(a)(1) of the Act authorizes only permit applicants to appeal either the issuance of a permit with conditions or the denial of a permit. *See* 415 ILCS 5/40(a)(1). It is well-settled that, if the Act does not expressly provide a third-party right to appeal a final permit determination, the right does not exist. *See* Landfill, Inc., 74 Ill. 2d at 557-58, 387 N.E.2d at 264; Citizens Utilities Co. of Ill. v. PCB, 265 Ill. App. 3d 773, 782 (3rd Dist. 1994); United City of Yorkville v. IEPA and Hamman Farms, PCB 08-95, slip op. at 6 (Aug. 7, 2008); City of Waukegan v. IEPA and North Shore Sanitary Dist., PCB 02-173, slip op. at 1 (May 2, 2002). Where final determinations are appealable by third parties under the Act, the General Assembly expressly provided the right and articulated standing requirements. *See, e.g.*, 415 ILCS 5/40(b) (grant of RCRA permit for hazardous waste disposal site); 415 ILCS 5/40(e) (National Pollutant Discharge Elimination System (NPDES) permit determination); 415 ILCS 5/40.1(b) (pollution control facility siting approval). As the briefs in this matter note, only CLI as the permit applicant could appeal its permit – complainants have no standing to appeal the permit that the Agency issued to CLI.

However, as explained above, Section 31(d)(1) of the Act allows any person to bring a complaint before the Board to enforce Illinois environmental requirements. *See* 415 ILCS 5/31(d)(1). Complainants allege violations of the Act by CLI, and do not appeal the issuance of the permit. Further, complainants are individual residents of Illinois, Illinois municipalities, Illinois counties, and an Illinois regional water authority. These entities are persons within the meaning of Section 31(d)(1) of the Act. *See* 415 ILCS 5/3.315; 415 ILCS 5/31(d)(1). Accordingly, under Section 31(d)(1) of the Act, the Board finds that complainants have standing to bring this enforcement action.

Frivolous Determination for Counts I, II, III

Section 31(d)(1) of the Act provides "[u]nless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d)(1); *see also* 35 Ill. Adm. Code 103.212(a). Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is duplicative or frivolous. See 35 Ill. Adm. Code 103.212(b). CLI did so here, alleging that the complaint is frivolous because it is both "a request for relief that the Board does not have the authority to grant" and "fails to state a cause of action upon which the Board can grant relief." Mot. at 12, citing 35 Ill. Adm. Code 101.202.

For the reasons set forth below, the Board finds that counts I, II, and III are frivolous within the meaning of the Act and the Board's procedural rules. Counts I, II, and III both "fail[] to state a cause of action upon which the Board can grant relief" and ask for "relief that the Board does not have the authority to grant." 35 Ill. Adm. Code 101.202 (definition of "frivolous"). Complainants allege that CLI violated Sections 21(e), 39(a), 39(c), and 39.2 of the Act by changing a municipal solid waste disposal unit into a CWU without obtaining prior siting approval from the DeWitt County Board. None of these statutory provisions is capable of being violated by CLI.

Section 39(a) of the Act

In counts I, II, and III, complainants allege that CLI failed to obtain local siting authority from the DeWitt County Board for the CWU at Clinton Landfill No. 3 and this failure violates Section 39(a) of the Act. Comp. at 31 (Count I ¶112), 37 (Count II ¶119), 43 (Count III ¶119). Complainants ask the Board to find that CLI violated Section 39(a) of the Act and order CLI to cease violating Section 39(a) and correct any violation of Section 39(a). *Id.* at 32, 38, 44.

Counts I, II, and III each turn on the allegation that CLI was required to submit proof to the Agency that the DeWitt County Board approved the site of the CWU prior to the Agency issuing a permit modification or renewal. According to complainants, local siting approval was required: to develop the CWU (Count I); to dispose TSCA-regulated PCB waste (Count II); and to dispose MGP waste (Count III). Complainants allege that CLI's failure to obtain siting approval for the CWU violates Section 39(a) of the Act.

Complainants describe Section 39(a) of the Act as "vest[ing] the Agency with the duty to issue permits for the construction, installation, and operation of facilities regulated by the [Board] upon proof by the applicant that the facility will not cause a violation of the Act or of the regulations thereunder." Comp. at 20 (¶71), citing 415 ILCS 5/39(a). Specifically, Section 39(a) provides:

> When the Board has by regulation required a permit for the construction, installation, or operation of any type of facility, equipment, vehicle, vessel, or aircraft, the applicant shall apply to the Agency for such permit and it shall be the duty of the Agency to issue such a permit upon proof by the applicant that the facility, equipment, vehicle, vessel, or aircraft will not cause a violation of this Act or of regulations hereunder. 415 ILCS 5/39(a).

Section 39(a) further requires the Agency to adopt procedures necessary to carry out its permitting duties and elaborates on the Agency's permitting authority. *Id.*

Complainants argue that CLI has an independent obligation to obtain local siting approval. Resp. at 7-8. Complainants note that the complaint is a direct action against CLI and not the Agency. *Id.* at 8. The People agree with complainants and argue that the complaint is based on CLI's failure to obtain siting approval. People Resp. at 2. The People emphasize that it is CLI who must comply with statutory requirements established by the legislature to operate a landfill and CLI is "required by statute to obtain local siting approval." *Id.* at 2-3.

The Board disagrees with complainants and the People and finds that CLI is not capable of violating Section 39(a) of the Act. Section 39(a) directs the Agency to issue permits, when required by Board regulation for construction or operation of a facility, if the applicant has proven that the facility will not cause a violation of the Act or Board regulations. *See* 415 ILCS 5/39(a). Thus, Section 39(a) requires the Agency to decide, before issuing a permit, whether the applicant has proven that the facility will not cause a violation of the Act or Board regulations. Section 39(a) does not impose an obligation on CLI to obtain local siting authority; rather it

imposes on the Agency the obligation to determine whether issuing a permit to CLI will violate the Act.

Complainants make no allegation that the Agency failed to make this determination under Section 39(a) of the Act. Indeed, the Agency is not named as a respondent and the Board could not entertain any such allegation against the Agency. *See* Landfill, Inc., 74 Ill. 2d 541 at 559, 387 N.E.2d 258 at 265. Section 39(a) addresses Agency determinations on permit applicants and, therefore, is not capable of being violated by CLI as a permit applicant.

Section 39(c) of the Act

Counts I, II, and III, as noted above, allege that CLI failed to obtain local siting authority from the DeWitt County Board for the CWU. This failure allegedly violates Section 39(c) of the Act. Comp. at 31 (Count I ¶112), 37 (Count II ¶119), 43 (Count III ¶119). Complainants also allege that CLI is responsible for "determining and complying" with Sections 3.330(b)(3) and 39(c). Comp. at 26 (¶90). Complainants ask the Board to find that CLI violated Section 39(c) of the Act and order CLI to cease violating Section 39(c) and correct any violation of Section 39(c). Comp. at 32, 38, 44.

Section 39(c) provides:

> [N]o permit for the development or construction of a new pollution control facility may be granted by the Agency unless the applicant submits proof to the Agency that the location of the facility has been approved by the County Board of the county if in an unincorporated area . . . in which the facility is to be located in accordance with Section 39.2 of this Act. 415 ILCS 5/39(c).

"New pollution control facility" is defined by the Act to include "a permitted pollution control facility requesting approval to store, dispose of, transfer or incinerate, for the first time, any special or hazardous waste." 415 ILCS 5/330(b)(3).

Complainants argue that CLI is responsible for determining whether its proposed CWU is a "new pollution control facility" under Section 3.330 of the Act. Resp. at 10. Complainants further state that "CLI represented and determined that local siting authority for the [CWU] was not needed." *Id.* at 11, citing Comp. at 27 (¶96). The People agree with complainants, arguing "[i]f [CLI's] current additions and modifications to its landfill do create a new pollution control facility, [CLI] was required by [statute] to obtain local siting approval from the DeWitt County Board." People Resp. at 2.

CLI argues that "[n]owhere in the Act is the operator of a pollution control facility required to obtain local siting approval for development, construction, or operation of a facility, or for disposal at a facility." Mot. at 4, citing 415 ILCS 5/39(c). Rather, CLI posits that proof of local siting approval is a condition to the Agency issuing a permit. *Id.* CLI further argues that it is the Agency's responsibility under Section 39(c) of the Act to determine whether the CWU constitutes a "new pollution control facility" such that local siting is required. Reply 1 at 3-4, citing 415 ILCS 5/39(c).

The Board finds that CLI is not capable of violating Section 39(c) of the Act. Section 39(c) directs the Agency not to issue a permit for developing a new pollution control facility unless the applicant submits proof of local siting approval. *See* 415 ILCS 5/39(c). Thus, Section 39(c) requires the Agency to decide, before issuing a permit, whether the facility is a "new pollution control facility" so as to require proof of local siting from the applicant. *See* City of Waukegan, 339 Ill.App.3d at 645. Complainants make no allegation that the Agency failed to make this determination under Section 39(c) and the Board could not entertain any such allegation. *See* Landfill, Inc., 74 Ill. 2d at 559, 387 N.E.2d at 265.

In City of Waukegan, the court addressed the Agency's responsibilities under Section 39(c) of the Act. *See* City of Waukegan. There, the City of Waukegan brought suit against the Agency and the permittee arguing that the Agency improperly determined that the project was not a "new pollution control facility" and did not require local siting approval. City of Waukegan, 339 Ill. App. 3d at 967, 791 N.E.2d at 638. In that context, the court explained:

> 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 [cases] 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.' *Id.* at 976, 645.

Thus, Section 39(c) of the Act addresses Agency determinations on permit applicants. Accordingly, the Board finds that CLI as a permit applicant is not capable of violating Section 39(c) of the Act.

Section 39.2 of the Act

Similar to the discussion above, complainants also allege that CLI's failure to obtain local siting authority violates Section 39.2 of the Act. Comp. at 31 (Count I ¶112), 37 (Count II ¶119), 43 (Count III ¶119). Complainants also allege that CLI is responsible for "determining and complying" with Section 39.2 of the Act. Comp. at 26 (¶90). Complainants ask the Board to find that CLI violated Section 39.2 of the Act and order CLI to cease violating Section 39.2 and correct any violation of Section 39.2. Comp. at 32, 38, 44.

Section 39.2 of the Act sets forth local siting review procedures and criteria for proposed pollution control facilities. *See* 415 ILCS 5/39.2. Section 39.2(a) provides:

> The county board of the county or the governing body of the municipality, as determined by paragraph (c) of Section 39 of this Act, shall approve or disapprove the request for local siting approval for each pollution control facility which is subject to such review. 415 ILCS 5/39.2(a).

Section 39.2 further requires an applicant for local siting approval to "submit sufficient details describing the proposed facility to demonstrate compliance" and lists nine siting criteria. *Id.* Section 39.2 also provides for filing, notice, public comment, and hearing procedures. *See* 415 ILCS 5/39.2 (b) – (o).

The Board finds that CLI is not capable of violating Section 39.2 of the Act. Section 39.2 provides that the local siting authority will approve or disapprove applicant requests to locate a facility. *See* 415 ILCS 5/39.2. Section 39.2 requires the local siting authority to grant approval only if listed criteria are met. *Id.* Because Section 39.2 is directed at the responsibilities of the local siting authority, the Board has previously held that Section 39.2 is not "properly the subject of an enforcement action." Lipe, PCB 12-44, slip op. at 5-6; Gregory, PCB 10-106, slip op. at 2; Nelson v. Kane County Board, PCB 95-56, slip op. at 2 (May 18, 1995). Further, complainants make no allegation that the DeWitt County Board failed to make this determination under Section 39.2 and the county board is not named as a respondent.

Section 21(e) of the Act

Section 21(e) of the Act provides that no person shall:

> Dispose, treat, store or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder. 415 ILCS 5/21(e).

In counts I, II, and III, complainants allege that, by violating or threatening to violate Sections 39(a), 39(c), and 39.2 of the Act, CLI also violates or threatens to violate Section 21(e) of the Act. Comp. at 31 (Count I ¶113), 37 (Count II ¶120), 43 (Count III ¶120). Complainants argue that local siting approval under Section 39.2 of the Act is one of the requirements of the Act referenced in the phrase "except at a site or facility which meets the requirements of this Act" in Section 21(e). Resp. at 6. Based on the allegations in counts I, II, and III, complainants also appear to assert that the requirements of Section 39(a) and 39(c) are also covered by this language in Section 21(e). Complainants ask the Board to find that CLI violated Section 21(e) of the Act and order CLI to cease violating Section 21(e) and correct any violation of Section 21(e). Comp. at 32, 38, 44.

As explained, the Board finds that Sections 39(a), 39(c), and 39.2 of the Act cannot be violated by CLI. Because complainants allege that violations of Sections 39(a), 39(c), and 39.2 of the Act cause CLI to also violate Section 21(e), complainants have not pled a cause of action under Section 21(e).

Board Finding on Counts I, II, and III

For the reasons stated above, the Board finds that CLI is not capable of violating Sections 39(a), 39(c), and 39.2 of the Act. Accordingly, complainants have not pled a violation of Sections 39(a), 39(c), and 39.2 of the Act. Further, complainants have not pled a violation of

Section 21(e) of the Act because a Section 21(e) violation cannot be based on CLI's alleged violations of Sections 39(a), 39(c), and 39.2 of the Act. The Board, therefore, dismisses Counts I, II, and III of the complaint as frivolous because complainants fail to state a cause of action upon which the Board can grant relief.

The Board further finds that counts I, II, and III of the complaint are frivolous because they ask for relief that the Board does not have the authority to grant. The complaint alleges that CLI violated the Act by failing to obtain additional siting approval for the CWU from the DeWitt County Board. Comp. at 2 (¶1). This failure allegedly resulted in violations of Sections 21(e), 39(a), 39(c), and 39.2 of the Act. If the Board were to find that CLI is required to obtain local siting authority for the CWU, that finding would invalidate the permit issued by the Agency. The determination of whether additional local siting approval is required is a permitting decision for the Agency, and the Board making this determination would have the same effect as the Board undertaking the role of permitting authority, a duty expressly assigned to the Agency. *See* Landfill, Inc., 74 Ill. 2d at 560, 387 N.E.2d at 265. Complainants seek relief that would impact the Agency's authority to issue a permit - an action that complainants do not have the right to bring before the Board. Accordingly, the Board does not have the authority to grant the relief complainants request in counts I, II, and III.

The Board agrees with the People's position that "a permit is no shield allowing wanton violations of the Act." People Resp. at 5; *see* Landfill, Inc., 74 Ill. 2d at 559-60, 387 N.E.2d at 265 ("grant of a permit does not insulate violators of the Act or give them a license to pollute"). The Board notes that, as the Board held above, Section 31(d) authorizes enforcement actions against parties who violate Illinois environmental requirements. *See* 415 ILCS 5/31(d). Therefore, if the landfill causes any violation of the Act or regulations, there are safeguards in place to address that activity. Here, complainants failed to allege such a violation but if a violation occurs in the future, complainants are entitled to pursue any enforcement action authorized by Section 31(d). *See* City of Elgin (Court rejected collateral attack on Agency-issued permit but noted "it is clear that if at any point the [landfill] or its development actually threatens the environment . . . adequate safeguards exist to at that point stop any further development and/or operation").

Frivolous Determination for Count IV

For the reasons set forth below, the Board finds that count IV is frivolous. Count IV both "fails to state a cause of action upon which the Board can grant relief" and asks for "relief that the Board does not have the authority to grant." 35 Ill. Adm. Code 101.202 (definition of "frivolous"). Complainants allege that CLI violated Sections 21(f), 39(a), 39(c), 39(d), and 39.2 of the Act and 35 Ill. Adm. Code Sections 703.121(a) and (b) by disposing hazardous waste, namely MGP waste, without a RCRA permit. Comp. at 47 (¶134, ¶135).

Section 39(a), 39(c), and 39.2 of the Act

In count IV, complainants allege that CLI failed to obtain a RCRA permit to dispose hazardous waste in the form of MGP waste exceeding regulatory levels in 35 Ill. Adm. Code 721.124(b). Comp. at 47 (¶134). CLI's alleged failure violates or threatens to violate Sections

39(a), 39(c), and 39.2 of the Act. *Id.* Complainants ask the Board to find that CLI violated Sections 39(a), 39(c), and 39.2 of the Act and order CLI to cease violating and correct any violations of these sections of the Act. Comp. at 48.

For the reasons stated above, CLI is not capable of violating Sections 39(a), 39(c), or 39.2 of the Act. Accordingly, to the extent count IV is based on violations of Sections 39(a), 39(c), or 39.2 of the Act, it is frivolous.

Section 39(d) of the Act

Count IV of the complaint alleges that the Agency has not issued a RCRA permit under Section 39(d) of the Act to dispose hazardous MGP waste at Clinton Landfill No. 3. Comp. at 46 (¶128), 47 (¶134), citing 415 ILCS 5/39(d). Complainants allege that CLI's failure to obtain a RCRA permit violates or threatens to violate Section 39(d) of the Act. Comp. at 47 (¶134), citing 415 ILCS 5/39(d). Complainants do not request a finding that CLI violated Section 39(d) of the Act or otherwise address Section 39(d) in their prayer for relief. Comp. at 48.

Section 39(d) provides Agency authority to issue RCRA permits:

> The Agency may issue RCRA permits exclusively under this subsection to persons owning or operating a facility for the treatment, storage, or disposal of hazardous waste as defined under this Act. 415 ILCS 5/39(d).

Section 39(d) further provides procedures and requirements for the Agency to follow in issuing RCRA permits. *Id.*

The Board finds that CLI is not capable of violating Section 39(d) of the Act. Section 39(d) provides that the Agency may issue RCRA permits in accordance with identified procedures and criteria. *See* 415 ILCS 5/39(d). Complainants allege that the Agency did not issue a RCRA permit under Section 39(d) but allege no wrongdoing by the Agency. Similar to the above analysis for Sections 39(a) and 39(c), Section 39(d) provides procedures and criteria for the Agency to issue RCRA permits and is not capable of being violated by CLI. To the extent complainants assert a claim against CLI for violating Section 39(d), complainants have failed to state a cause of action against CLI for violating Section 39(d).

Section 21(f) of the Act

In count IV, complainants allege that disposal of MGP waste exceeding levels specified in 35 Ill. Adm. Code 721.124(b) violates Section 21(f) of the Act because CLI does not have an Agency-issued RCRA permit for Clinton Landfill No. 3. Comp. at 46 (¶129), citing 415 ILCS 5/21(f). Complainants ask the Board to find that CLI violated Section 21(f) of the Act and order CLI to cease violating Section 21(f) and correct any violation of Section 21(f). Comp. at 48.

Section 21(f) provides that no person shall:

> Conduct any hazardous waste-storage, hazardous waste-treatment or hazardous waste-disposal operation:
>
> (1) without a RCRA permit for the site issued by the Agency under subsection (d) of Section 39 of this Act . . . . 415 ILCS 5/21(f).

Complainants base their allegation that CLI violated Section 21(f) on allegations that CLI designed the CWU for hazardous waste disposal and applied for permit modifications and renewal based on such design elements. Throughout the complaint, complainants allege that CLI designed the CWU as a hazardous waste disposal facility. *See* Comp. at 4 (¶6) ("CLI created a [CWU], a new disposal unit specifically and specially designed to exceed hazardous waste disposal standards"); (Comp. at 15 (¶53) ("CLI designed the [CWU] to exceed the design and operating requirements for hazardous waste disposal facilities"); Comp. at 15 (¶¶54-57) (allegations concerning design elements in permit modifications); Comp. at 45 (¶124, ¶125) (CLI's permit renewal and modification applications "proposed acceptance" and "sought to dispose" of hazardous waste). However, that a landfill has design features consistent with hazardous waste disposal requirements does not mean that the operator is conducting a hazardous waste operation. Furthermore, the allegation that the Agency issued a permit allowing certain waste disposal operations (Comp. at 5 (¶10)) does not mean that the permitted operations have actually commenced.

However, even if complainants adequately allege that CLI is conducting a waste disposal operation, complainants do not sufficiently allege that any waste being disposed of is hazardous. Complainants specifically allege throughout the complaint that the hazardous waste is MGP waste exceeding regulatory levels in 35 Ill. Adm. Code 721.124(b). Comp. at 46 (¶122, ¶123). Hazardous waste is defined as solid waste that exhibits certain characteristics such as ignitability, corrosivity, reactivity, or toxicity. 35 Ill. Adm. Code 720.103. At issue in this complaint, a solid waste exhibits the characteristic of toxicity if, using the toxicity characteristic leaching procedure (TCLP), the extract from a representative sample contains any contaminant listed in 35 Ill. Adm. Code 721.124(b) at a concentration equal to or greater than the value in the table. 35 Ill. Adm. Code 721.124(a). However, by its express terms, Section 721.124(a) does not apply to MGP waste. *See* 35 Ill. Adm. Code 721.124(a). Accordingly, Section 721.124(b) cannot be used to establish that MGP waste is hazardous. *See* 35 Ill. Adm. Code 721.124(b).

Complainants have not sufficiently pled that CLI violated Section 21(f) of the Act. Receiving a permit and designing the landfill in a certain way are not sufficient to plead that CLI is conducting certain waste disposal operations. Furthermore, complainants have not adequately pled that a hazardous waste is being disposed at the landfill. Complainants also allege that by violating or threatening to violate Sections 39(a), 39(c), 39(d), and 39.2 of the Act, CLI also violates or threatens to violate Section 21(f) of the Act. Comp. at 47 (¶135), citing 415 ILCS 5/21(f). Because the Board finds that Sections 39(a), 39(c), 39(d), and 39.2 of the Act cannot be violated by CLI, these alleged violations cannot form the basis of a violation of Section 21(f) of the Act.

35 Ill. Adm. Code 703.121(a) and (b)

In count IV, complainants allege that CLI conducted a hazardous waste operation without a RCRA permit "as a result of CLI's operation of the [CWU]." Comp. at 47 (¶133). Complainants further allege that CLI failed to obtain a RCRA permit pursuant to Sections 703.121(a) and (b) of the Board's regulations. *Id.* (¶134). According to complainants, by violating Sections 703.121(a) and (b), CLI violated Section 21(f) of the Act. *Id.* (¶135). Complainants do not request a finding that CLI violated 35 Ill. Adm. Code 703.121(a) and (b) or otherwise address these regulations in their prayer for relief. *Id.* at 48.

Section 703.121 of the Board's regulations provides in part:

> (a) No person may conduct any hazardous waste storage, hazardous waste treatment, or hazardous waste disposal operation as follows:
>
> (1) without a RCRA permit for the HWM (hazardous waste management) facility;
>
> ***
>
> (b) An owner or operator of a HWM unit must have permits during the active life (including closure period) of the unit . . . . 35 Ill. Adm. Code 703.121.

For the same reasons as above, complainants have not sufficiently pled that CLI violated Sections 703.121(a) and (b) of the Board's regulations. To the extent count IV is based on violations of 35 Ill. Adm. Code 703.121(a) and (b), it is frivolous.

Board Finding on Count IV

For the reasons stated above, the Board finds that complainants have not pled in count IV a cognizable violation of the Act related to the disposal of MGP waste. CLI is not capable of violating Sections 39(a), 39(c), 39(d), and 39.2 of the Act. Further, complainants have not pled a violation of Section 21(f) of the Act or 35 Ill. Adm. Code 703.121(a) and (b). The Board, therefore, dismisses count IV of the complaint as frivolous because complainants fail to state a cause of action upon which the Board can grant relief.

The Board further finds that count IV of the complaint is frivolous because complainants ask for relief that the Board does not have the authority to grant. Count IV alleges that CLI violated the Act by disposing "hazardous" MGP waste without obtaining a RCRA Subtitle C permit. Comp. at 46 (¶127, ¶128, ¶120). Specifically, complainants state

> [a]s a result of CLI's operation of the [CWU], CLI was and is a "person" conducting, owning and operating a "hazardous waste disposal operation" without a "RCRA permit" at a "hazardous waste management facility" as those terms are defined in Section 702.110 of the Board's Waste Disposal Regulations. *Id.* at 47 (¶133), citing 35 Ill. Adm. Code 702.110.

Complainants allege that CLI initiated Permit Modification No. 9 to seek approval from the Agency to dispose, for the first time, "[MGP] waste exceeding the regulatory levels specified in 35 Ill. Adm. Code 721.124(b)." Comp. at14 (¶51). Complainants state that the Agency issued Permit Modification No. 9 on or about January 8, 2010. *Id.* (¶48); *see also* Comp. Exh. D. CLI notes that Permit Modification No. 9 provides "[MGP] waste exceeding the regulatory levels specified in 35 Ill. Adm. Code 721.124(b) is among the waste that may be accepted at the CWU." Mot. at 5, citing Comp. Exh. D.

If the Board were to find that MGP waste exceeding the regulatory levels specified in 35 Ill. Adm. Code 721.124(b) is a hazardous waste requiring a RCRA Subtitle C permit to conduct disposal operations, that finding would invalidate the permit issued by the Agency to CLI. The determination of whether to issue a permit to CLI to accept MGP waste exceeding the regulatory levels specified in 35 Ill. Adm. Code 721.124(b) is a permitting decision for the Agency, and the Board making this determination would usurp the Agency's role of permitting authority. *See* Landfill, Inc., 74 Ill. 2d at 560, 387 N.E.2d at 265. Accordingly, the Board does not have the authority to grant the relief complainants request in count IV. *See* Landfill, Inc., 74 Ill. 2d at 560, 387 N.E.2d at 265.

Informal Investigation by Agency

Complainants ask the Board to submit to the Agency complainants' request for an informal Agency investigation pursuant to Section 103.208 of the Board's rules. Comp. at 32 (Count I ¶4), 38 (Count II ¶4), 44 (Count III ¶4), 48 (Count IV ¶4). Under Section 103.208 of the Board's rules, any person may request an informal Agency investigation by submitting the request to the Board, and the Board will forward that request to the Agency, as well as a copy to the person requesting the investigation. 35 Ill. Adm. Code 103.208(a), (d). The Board does not take any further action. 35 Ill. Adm. Code 103.208(c).

Pursuant to complainants' request, the Board will forward the complaint to the Agency for informal investigation.

CONCLUSION

For the reasons discussed above, the Board grants CLI's motion to dismiss and dismisses the complaint. The Board will forward the complaint to the Agency for informal investigation.

ORDER

The Board finds that, under Section 31(d)(1) of the Act, the Board has jurisdiction over the violations of the Act alleged in the complaint. Also under Section 31(d)(1) of the Act, the Board finds that complainants have standing to bring this enforcement action.

However, the Board finds that counts I, II, III and IV are frivolous because each count both "fails to state a cause of action upon which the Board can grant relief" and asks for "relief

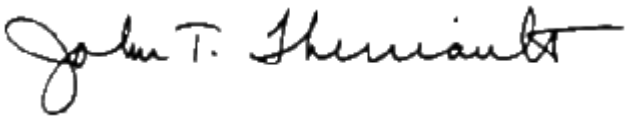
that the Board does not have the authority to grant." Accordingly, the Board grants Clinton Landfill, Inc.'s motion to dismiss, dismisses the complaint, and closes this docket.

Pursuant to complainants' request, the Board will forward the complaint to the Agency for informal investigation.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2012); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on September 19, 2013, by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board