BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	
MAHOMET VALLEY WATER AUTHORITY, CITY OF CHAMPAIGN, ILLINOIS, a municipal corporation, DONALD R. GERARD, CITY OF URBANA, ILLINOIS, a municipal corporation, LAUREL LUNT PRUSSING, CITY OF BLOOMINGTON, ILLINOIS, a municipal corporation, COUNTY OF CHAMPAIGN, ILLINOIS, COUNTY OF PIATT, ILLINOIS, TOWN OF NORMAL, ILLINOIS, a municipal corporation, VILLAGE OF SAVOY, ILLINOIS, a municipal corporation, and CITY OF DECATUR, ILLINOIS, a municipal corporation,	)	
	)	
Complainants,	)	
	)	PCB 2013 - 22
	)	
PEOPLE OF THE STATE OF ILLINOIS,	)	(Enforcement – Land)
	)	
Intervenor,	)	
	)	
v.	)	
	)	
CLINTON LANDFILL, INC., an Illinois corporation,	)	
	)	
Respondent.	)	

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on October 25, 2013, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, c/o John T. Therriault, Assistant Clerk, James R. Thompson Center, 100 W. Randolph St., Ste. 11-500,

Chicago, IL 60601, a MOTION TO RECONSIDER, copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: s/Javonna L. Homan
Javonna L. Homan
Assistant Attorney General
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Springfield, Illinois 62706
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	)	PCB 2013 - 022)
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v.	)	
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CLINTON LANDFILL, INC., an Illinois corporation,	)	
	)	
Respondent.	)	

MOTION TO RECONSIDER

NOW COME the Complainants, MAHOMET VALLEY WATER AUTHORITY, CITY OF CHAMPAIGN, ILLINOIS, a municipal corporation, DONALD R. GERARD, CITY OF URBANA, ILLINOIS, a municipal corporation, LAUREL LUNT PRUSSING, CITY OF BLOOMINGTON, ILLINOIS, a municipal corporation, COUNTY OF CHAMPAIGN, ILLINOIS, COUNTY OF PIATT, ILLINOIS, TOWN OF NORMAL,

ILLINOIS, a municipal corporation, VILLAGE OF SAVOY, ILLINOIS, a municipal corporation, and CITY OF DECATUR, a municipal corporation, by and through their attorneys, Hasselberg Grebe Snodgrass Urban & Wentworth, and Albert Ettinger, and the Intervenor, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, and for their Motion to Reconsider portions of the September 19, 2013 Opinion and Order of the Board (hereinafter the "Board Order"), pursuant to 35 Ill. Adm. Code 101.520, 101.902 and 101.403, respectfully state as follows:

I. Introduction

1. In 2002, Clinton Landfill, Inc. (CLI) obtained local siting authority from the DeWitt County Board to develop a municipal solid waste disposal unit known as Clinton Landfill No. 3 after representing to the DeWitt County Board in its application and at hearing that high concentrations of PCBs, hazardous levels of MGP, and hazardous waste would be excluded from disposal in the proposed Clinton Landfill No. 3. In 2007, CLI obtained a permit from the Agency to develop Clinton Landfill No. 3, a RCRA Subtitle D municipal solid waste disposal facility, which permit specifically prohibited the disposal of TSCA regulated levels of PCBs and manufactured gas plant waste exceeding the regulatory levels provided in 35 Ill. Adm. Code 721.124(b). In 2008, CLI applied for a significant permit modification from the Agency to construct an entirely differently designed, and previously undisclosed, Chemical Waste Unit (CWU) within Clinton Landfill No. 3. The CWU was specifically designed to hazardous waste facility standards to accept PCBs at levels regulated by TSCA and manufactured gas

plant waste exceeding the regulatory levels provided in 35 Ill. Adm. Code 721.124(b), the very wastes CLI had previously committed not to accept. In violation of Section 39.2 of the Act, CLI took no steps to obtain approval of the suitability of the location or otherwise obtain local siting approval for the new CWU from the DeWitt County Board.

2. A local siting decision is not subject to review in an enforcement proceeding because Section 40.1 of the Act provides for appeals to the Board. 415 ILCS 5/40.1. Upon the issuance of a local siting decision under the Act, Section 39.2 cannot be violated and cannot be raised in a subsequent enforcement action (but may only be appealed pursuant to Section 40.1 of the Act). The Board Order applies this rule to the case at hand where there *never was a local siting application, filing, notice, hearing or decision for the Chemical Waste Unit*. The Board Order justifies extension of the "Section 39.2 not capable of being violated" rule to a situation *where no local siting hearing was held* by improperly ignoring the applicant's duties found in Section 39.2, focusing exclusively on the responsibilities of the local siting authority, overlooking factual allegations in the Citizens' Complaint, and improperly interpreting *Landfill, Inc*.

3. Complainants respectfully request reconsideration of those portions of the Board Order that found that Section 39.2 of the Act is not capable of being violated by CLI and that *Landfill, Inc*. bars the relief sought by Complainants. Specifically, Complainants draw the Board's attention to the following paragraph and provisions of the Board Order:

> 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**.
> Board Order, p. 26 (emphasis added to identify issues for reconsideration).
>
> * * * * *
>
> 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.
> Board Order, p. 27.

4. The foregoing portions of the Board Order and related discussion in other parts of the Board Order contain errors in the application of the existing law and indicate that allegations in the Citizens' Complaint were overlooked. Pursuant to Sections 101.520 and 101.902 of the Board's procedural rules, the Board should reconsider its decision and issue an order denying the motion to dismiss.

II. Standards for Reconsideration

5. Section 101.520 of the Board's procedural rules governing the timing of motions for reconsideration states:

> a) Any motion for reconsideration or modification of a final Board order must be filed within 35 days after the receipt of the order. (See Section 101.902 of this Part.)
>
> b) Any response to a motion for reconsideration or modification must be filed within 14 days after the filing of the motion.

> c) A timely-filed motion for reconsideration or modification stays the effect of the final order until final disposition of the motion in accordance with Section 101.300(d)(2) of this Part.
> 35 Ill. Adm. Code 101.520.

6. Section 101.902 of the Board's procedural rules establishes criteria for ruling on motions for reconsideration, and states:

> In ruling upon a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error. (See also Section 101.520 of this Part.)
> 35 Ill. Adm. Code 101.902.

7. In analyzing and ruling upon motions to reconsider, Board decisions frequently observe that the purpose of a motion for reconsideration is to bring "to the [Board's] attention newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the [Board's] previous application of existing law." See, e.g., *People v. Packaging Personified, Inc.*, PCB 04-16, slip op. at 8 (March 1, 2012), quoting *Citizens Against Regional Landfill v. County Board of Whiteside County*, PCB 92-156, slip op. at 2 (March 11, 1993), citing *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1991). Motions for reconsideration "may specify evidence in the record that was overlooked." *Packaging Personified*, PCB 04-16, slip op. at 8, citing *People v. Prior*, PCB 02-177, slip op. at 2 (July 8, 2004).

8. Each claimed error in the Board Order in the application of the existing law and each allegation in the Citizens' Complaint that was apparently overlooked in the Board Order will be addressed below.

III. Errors in Application of Existing Law and Allegations Overlooked by Board Order

A. "*Section 39.2 is directed at the responsibilities of the local siting authority"*

9. The Board Order states "Section 39.2 is directed at the responsibilities of the local siting authority." Board Order, p. 26. The language of the Board Order ignores the responsibilities of a siting applicant for a new pollution control facility found throughout Section 39.2 of the Act.

10. Section 39.2 of the Act is replete with duties and responsibilities of an *applicant* for siting a new pollution control facility, including the following:

- "An applicant for local siting approval *shall submit sufficient details describing the proposed facility* to demonstrate compliance . . . " Section 39.2(a)(emphasis added).
- "[T]he applicant shall cause written notice of such request to be served . . . " Section 39.2(b).
- "An applicant *shall file a copy of its request with the county board* . . . " Section 39.2(c)(emphasis added).
- "[T]he applicant may file not more than one amended application . . . " Section 39.2(e).
- A county board "host agreement with the local siting applicant . . . shall be disclosed. . . " Section 39.2(e).
- "Siting approval obtained pursuant to this Section is transferrable and may be transferred to a subsequent owner or operator." Section 39.2(e-5).

415 ILCS 5/39.2.

Indeed, an applicant's request must be submitted with sufficient details "to demonstrate compliance" with, among other provisions, Section 39.2(a)(ii)("the facility is so designed, *located* and proposed to be operated that the public health, safety and welfare will be protected")(emphasis added).

11. Applicant duties under Section 39.2 must be placed in context with the permit decisions of the Agency. The Board Order speaks to the latter, but ignored the former. Specifically, in ruling that Sections 39(a) and 39(c) of the Act regarding the issuance of permits are "not capable" of being violated such that an enforcement action under those sections is barred by *Landfill, Inc. v. Pollution Control Board*, 74 Ill. 2d 541 (1978), the Board reasons that each section requires an ***Agency*** decision. See Board Order, at p. 23 ("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"); and Board Order at p. 25 ("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").

12. In contrast, when addressing Section 39.2 of the Act, the Board tacitly acknowledges that the Agency does not have anything to do with the section, and does not expressly cite *Landfill, Inc*. Rather, the Board Order states that the Section 39.2 decision rests with the ***local siting authority*** and therefore cannot be violated by a siting applicant. Board Order, at p. 26 ("Section 39.2 is directed at the responsibilities of the local siting authority . . . "). The Board Order is silent on the responsibilities of the siting applicant. Contrary to the Board's reasoning, as described above, Section 39.2 imposes multiple and significant responsibilities on the applicant, *including the initial filing of a siting application with a county board to commence Section 39.2 proceedings*, and are not solely "directed at the responsibilities of the local siting authority." Board Order, p. 26; 415 ILCS 5/39.2(c).

13. Pursuant to Section 39.2 of the Act, a county board[1] has *concurrent* jurisdiction with the Agency to determine whether a waste facility should be located at a proposed site. *City of Elgin v. County of Cook*, 169 Ill. 2d 53, 64 (1995)(SB 172 "made clear all units of local government . . . have concurrent jurisdiction with the Agency in approving siting, because section 39(c) now requires local government approval of all proposed pollution control facilities [in accordance with Section 39.2 of this Act]."); see also *Town & Country Utilities, Inc. v. Pollution Control Board*, 225 Ill. 2d 103, 108, 866 N.E.2d 227, 230 (2007)("all units of local government . . . have 'concurrent jurisdiction' with the Agency in approving siting, subject to the criteria in section 39.2.")(citing City *of Elgin*). The Board Order improperly discounts the applicability of these decisions in its discussion.

14. In addition to having concurrent jurisdiction with the Agency, a county board has *independence* as the decision maker to make a local siting decision. 415 ILCS 5/39.2(g)("siting approval procedures, criteria and appeal procedures *provided for in this Act* for new pollution control facilities shall be the *exclusive* siting procedures and rules and appeal procedures for facilities subject to such procedures.")(emphasis added). Section 39.2(g) applies equally to *applicants* and local siting authorities; and it does not apply to the Agency. Furthermore, the exclusive "siting approval procedures" are not limited to Section 39.2 itself; rather, Section 39.2(g) speaks to the entire Act ("*provided for in this Act*"), including the definition of a "new pollution control facility" which is central to the Citizens' Complaint.

[1] An elected county board is a separate and distinct entity empowered under Article VII of the Illinois Constitution. Ill. Const. 1970, art. VII, §3(a)(providing for an elected "county board" in each county).

15. The Board Order errs and improperly applies existing law by effectively negating the concurrent jurisdiction of a county board as established by the Act and the Illinois Supreme Court, and by overlooking the duties and responsibilities of an *applicant* to a county board and the public, for the local siting of a new pollution control facility.

B. "Section 39.2 is not 'properly the subject of an enforcement action.'"

16. Complainants have brought an enforcement action under the Act against a permit applicant for a *new* pollution control facility where no local siting hearing was ever *submitted*, *filed* or requested by the applicant or held under Section 39.2 of the Act. See 415 ILCS 5/39.2(a)(applicant for local siting approval *shall submit sufficient details describing the proposed facility*), and 39.2(c)("applicant *shall file a copy of its request with the county board* . . . "). The action is not directed against the Agency.

17. Many reported decision under Sections 39 and 39.2 of the Act regarding whether "Section 39.2 of the Act is . . . properly the subject of an enforcement action" involve either an actual Section 39.2 local siting authority approval decision, or a local governmental zoning decision. *Nelson v. Kane County Board*, PCB 95-56, slip op. at 2 (May 18, 1995)(Kane County Board made Section 39.2 siting decision; purported enforcement action was impermissible attempt to challenge siting decision)[2]; *City of Elgin*, 169 Ill. 2d at 65 (Cook County Board made Section 39(c) zoning and siting location determination where Section 39.2(h) exempts Cook County from siting provisions of Section 39.2); and *Lipe*, PCB 12-44, slip op. at 6 (Nov. 17, 2011)(Village

[2] The Board Order cites *Nelson*. No other party cited *Nelson* in their respective briefs. *Nelson* also held that the action was barred by *res judicata* since the complainant had already filed and lost a Section 40.1 local siting appeal.

adopted special use ordinance with nothing in the record that the ordinance was a grant of Section 39.2 local siting approval).

18. Apparently, the Board bases its conclusion that "Section 39.2 of the Act is not properly the subject of an enforcement action" on its' reading of *Nelson v. Kane County Board*. In *Nelson*, before filing the enforcement complaint under Section 39.2 of the Act to challenge siting conditions, the complainant had filed an appeal of the local siting decision under Section 40.1. That appeal had been dismissed since Nelson did not participate in the underlying public hearing process. In his enforcement action, Nelson did not allege any pollution violations, and answered the pollution questions on the citizen complaint package "not applicable." The Board's order states: "The Board therefore finds that, *when viewed as an enforcement action*, the complaint fails to state a claim upon which relief can be granted, and that this action is therefore frivolous." *Nelson*, PCB 95-56, slip op. at 2 (emphasis added). The Board also ruled that the exclusive mechanism to challenge the Section 39.2 siting approval and conditions was Section 40.1 of the Act, and his Section 39.2 action was subject to the limitations period set forth therein. In *Nelson* the applicant had applied for and obtained siting approval and Nelson had failed to participate in the siting proceedings or attempt to utilize statutory means to review the decision. In *Nelson*, the Board determined that the complaint failed to state a cause of action, not that Section 39.2 was incapable of being violated but an applicant that did not comply with it.

19. Section 40.1 of the Act allows for appeals to the Board of local siting authority *decisions*. 415 ILCS 5/40.1. Section 101.202 of the Board's procedural rules makes clear that such an appeal first requires "a *decision* made by a unit of local

government." 35 Ill. Adm. Code 101.202 ("Pollution control facility siting appeal' means an appeal of a decision made by a unit of local government filed with the Board pursuant to Section 40.1 of the Act.")

20. In the instant case, there was no decision by a unit of local government under Section 39.2 of the Act for the CWU at issue in the Citizens' Complaint. Further, there was no zoning decision or special use ordinance. Even should the rule purportedly derived from *Nelson* be given credence, the Board Order improperly extends the "Section 39.2 not capable of being violated" rule to a situation *where no local siting hearing was held*, and as a direct result, impermissibly limits the concurrent jurisdiction of a county board. It denies relief to parties that never had an opportunity to participate in a siting proceeding or appeal from an improper siting decision because the necessary siting proceeding was never held as a result of the applicant's violation of law.

C. "[N]o allegation that the DeWitt County Board failed to make this determination under Section 39.2"

21. The Board Order states that Section 39.2 of the Act cannot be violated by CLI. The Board Order attempts to justify this holding by stating that Section 39.2 of the Act is directed solely at the local siting authority. As set forth above, Complainants respectfully assert that the Board Order is in error in these regards.

22. In its' reasoning, the Board Order also states "complainants make no allegation that the DeWitt County Board failed to make this determination under Section 39.2 . . .." Board Order, p. 26. To the contrary, Complainants allege just that - and the fact that the DeWitt County Board has never given its siting authority pursuant to Section 39.2 of the Act for the Chemical Waste Unit at the Clinton Landfill No. 3 is the gravamen of the Citizens' Complaint. Indeed, it is alleged that due to the applicant's violations of

Section 39.2, DeWitt County was never even asked to make the appropriate determination. Accordingly, it is apparent that there are facts in the record that were overlooked.

23. Paragraph 104 of each of the four (4) counts of the Citizens' Complaint alleges that the "*DeWitt County Board* has never been asked to give, and *has never given, its siting authority pursuant to Sections 39(c) and 39.2 of the Act* to CLI or any other person" to develop a chemical waste landfill within or to dispose of certain wastes in Clinton Landfill No. 3 (emphasis added). The Board Order actually summarizes and cites Paragraph 104 within its initial discussion of the counts of the Citizens' Complaint. Board Order, pp. 8 (Count I), 9 (Count II), and 10 (Count III). Yet, the paragraph of the Order holding that Section 39.2 of the Act "is not properly the subject of an enforcement action," states there is "no allegation that the DeWitt County Board failed to make this determination under Section 39.2."

IV. County Board Not Named as a Respondent

24. The Board Order is correct in that the County of DeWitt is not named as a respondent to the action. To the extent the Board Order indicates that Section 39.2 of the Act is capable of being violated by a county board which does not take action to compel a local siting approval hearing under Section 39.2 of the Act, Section 101.403(b) of the Board's procedural rules states that the "Board will not dismiss an adjudicatory proceeding for nonjoinder of persons who must be added to allow the Board to decide an action on the merits without first providing a reasonable opportunity to add the persons as parties." 35 Ill. Adm. Code 101.403(b). If the Board indeed believes that DeWitt County

is a necessary party, complainants request a reasonable opportunity to add a new party, the DeWitt County Board.

V. New Pollution Control Facility

25. By holding that Section 39.2 is not capable of being violated, the Board Order also sidesteps a determination as to whether the Chemical Waste Unit of Clinton Landfill No. 3 constitutes a "new pollution control facility." 415 ILCS 5/3.330(b)(3). The Citizens' Complaint contains well-pled allegations squarely placing the Chemical Waste Unit within the "new pollution control facility" definition. See e.g. Citizens' Complaint, para. 109. The Board Order acknowledges that these allegations must be taken as true for purposes of the motion to dismiss,[3] but then does not include them in the analysis of the enforceability of Section 39.2 of the Act - the very section implicated by the new pollution control facility determination.

26. Instead, citing *Landfill, Inc*., the Board Order holds that 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." Board Order, p. 27. The Board Order reasons that if it "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." *Id.* However, it is precisely the logic of *Landfill, Inc*. that an action of a private entity may be challenged in an enforcement action against that

[3] The Board Order states: "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)." Board Order, p. 20.

private entity even though the private entity has been granted a permit through an Agency decision that may not be appealed to the Board. 74 Ill. 2d at 559-60. Interpreting *Landfill, Inc.* to bar enforcement actions against entities holding permits that could not be reviewed violates the reasoning of *Landfill, Inc*. and violates the Due Process, Property, and Right to a Healthy Environment constitutional rights of parties who are thereby denied any ability to challenge action taken in violation of law. See *Landfill, Inc*. 74 Ill. 2d at 559-60.

27. The Board Order holding that the "determination of whether additional local siting approval is required is a permitting decision for the Agency" is in error to the extent the holding is meant to apply to Section 39.2 of the Act. Board Order, p. 27. Although there is no citation to authority, it appears the Board is referencing Section 39(c) of the Act and the discussion thereunder, including *City of Waukegan v. IEPA*, 339 Ill. App. 3d 963 (2d Dist. 2003), and then extending the holding of *City of Waukegan* under Section 39(c) to cover Section 39.2. See Board Order, pp. 24-25. *City of Waukegan* involved a declaratory judgment complaint against the Agency (as a named respondent to the complaint) seeking a declaration under Section 39(c) of the Act that a proposed facility was a new pollution control facility for purposes of Agency permit issuance, and a declaration that permits issued by the Agency were void. The action clearly implicated the Agency's "performance of its duties" under Section 39(c) of the Act in permit issuance, and was barred. *Waukegan*, 339 Ill. App. 3d at 965. In particular, the court stated that the City of Waukegan was "really challenging . . . the *Agency's determination* that the project does not constitute a 'pollution control facility.'" *Waukegan*, 339 Ill. App. 3d at 975 (emphasis added). In the instant case, however,

Section 39.2 is at issue, and as set forth above, the Board tacitly acknowledges that the Agency does not have anything to do with the Section 39.2 of the Act. See Board Order, p. 26. Furthermore, the express language of Section 39.2 clearly establishes the exclusive role of the county board in local siting matters. See 415 ILCS 5/39.2(a)(applicant for local siting approval *shall submit sufficient details describing the proposed facility*); 39.2(c)("applicant *shall file a copy of its request with the county board* . . . "); and 39.2(g)("siting approval procedures, criteria and appeal procedures *provided for in this Act* for new pollution control facilities shall be the *exclusive* siting procedures and rules and appeal procedures for facilities subject to such procedures.")(emphasis added). Finally, *City of Elgin* and *Town & Country* establish that there is concurrent jurisdiction in Section 39.2 under all provisions of the Act.

28. The concurrent jurisdiction and authority vested in a county board under the Act to approve the siting *location* of a new pollution control facility is separate and distinct from the permitting role of the Agency. See *City of Elgin* and *Town & Country*. The court in *Kane County Defenders, Inc. v. Pollution Control Board*, 139 Ill. App. 3d 588, 593 (2d Dist. 1985) described this concurrent jurisdiction and authority as follows: "This broad delegation of adjudicative power to the county board clearly reflects a legislative understanding 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." A county board's decision on the suitability of the location of a new pollution control facility is separate and distinct from Agency considerations. See 415 ILCS 5/39.2(a)(ii)("the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected").

The clearly established precedent of *City of Elgin*, *Town & Country*, and *Kane County*, and a plain reading of Section 39.2 of the Act have been placed in conflict with the Board's interpretation of *Landfill, Inc*. The Board Order impermissibly serves to make the latter nullify the former when the decisions actually are not in conflict.

VI. Board Enforcement Determination Independent of Agency

29. Referencing *Landfill, Inc*., the "Board Finding on Counts I, II, and III" section of the Board Order states, in part: "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." Board Order, p. 27 (without regulatory citation). In this regard, the Board Order errs in the application of the existing law, and improperly conflates the potential practical *effect* of a Board enforcement determination on the ability of an applicant to use an Agency permit with the Board's express charge to enforce the Act pursuant to Article VIII. That enforcement actions should be allowed where they might have this practical effect was stated by the Supreme Court in *Landfill Inc.* to be implied by the relevant statutes. 74 Ill. 2d at 548.

30. Moreover, existing Board regulations allow for modification of a permit without finding that the permit was invalid. Section 813.201 of the regulations, applicable to Clinton Landfill No. 3,[4] states:

b) Agency Initiated Modification[5]

[4] See 35 Ill. Adm. Code 810.101 and 813.101 for Subtitle D facilities; see also 35 Ill. Adm. Code 702.110, Definitions, "RCRA" (defining scope of Subtitle C, and excluding municipal solid waste landfill regulations for Subtitle D facilities).

> 1) The Agency may modify a permit under the following conditions:
>
> A) Discovery of a typographical or calculation error;
>
> **B) Discovery that a determination or condition was based upon false or misleading information;**
>
> **C) An order of the Board issued in an action brought pursuant to Title VIII**, IX or X of the Act; or
>
> D) Promulgation of new statutes or regulations affecting the permit.
>
> 35 Ill. Adm. Code 813.201(b)(1)(emphasis added).

31. The Board's own regulations expressly allow and provide for the Agency to modify a permit in consideration of an "order of the Board issued in an action brought pursuant to Title VIII . . . . 35 Ill. Adm. Code 813.201(b)(1)(C).[6] The Board here is NOT required to hold that the permit is void or invalid (and no such relief was requested in the Citizens' Complaint). The regulation allows for the Agency to decide what steps it will take, if any, after the conclusion of this enforcement case. 35 Ill. Adm. Code 813.201(b)(1)(C). The regulation preserves to the Agency the permit decision-making authority under the Act, but also notes that enforcement decisions are the province of the Board and that the Agency MAY modify a permit in consideration of a Board order.

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[5] CLI utilized Section 813.201(a), Operator Initiated Modification, in its Permit Modifications Nos. 9 and 29 as referenced in the Citizens' Complaint. It would be bitterly ironic, and abusive, for CLI to use Section 813.201 to circumvent Section 39.2 of the Act, and not allow Complainants, whom the Board Order found had jurisdiction and standing, to trigger the same section in an Article VIII enforcement action, especially where the entire dispute was caused by CLI's statement to the Agency pursuant to Section 812.105 that the CWU was not a new pollution control facility.

[6] Notwithstanding the Board's interpretation of *Landfill, Inc*., if the CWU was permitted under Subtitle C as a hazardous waste facility, the *Board* would have the express power to "revoke a permit during its term in accordance with Article VIII of the [] Act" for "permittee's violation of the [] Act or regulations." 35 Ill. Adm. Code 702.186(a); See Board Order, p. 31.

Only the Agency can decide what credence to give to a Board order; but any uncertainty about what the Agency will do does not eliminate the Board's duty and authority to hear a valid Complaint, statutorily authorized, which alleges a valid violation of the Act.

32. The Board's own regulations expressly allow and provide that the Agency may modify a permit if it is discovered that a determination was based on false or misleading information. 35 Ill. Adm. Code 813.201(b)(1)(B). Complainants allege that CLI provided the Agency with erroneous information regarding the need for Section 39.2 local siting approval. See Citizens' Complaint, para. 96; see also para. 97-100. The factual basis for a violation of the Act found by the Board in an enforcement action may in the future serve as Agency grounds to modify a permit. But no such relief is sought against the Agency in the instant case.

33. Modified permits are still in existence and otherwise valid. Pursuant to 35 Ill. Adm. Code 813.201(b)(1)(C), *the Agency*, in consideration of an enforcement order of the Board, could modify an issued permit to add a condition, for example, that only municipal solid waste (and no MGP waste or PCB waste at concentrations regulated by TSCA) could be disposed of within the CWU unless and until DeWitt County Board approval for the CWU is obtained by CLI pursuant to Section 39.2 of the Act. *The Board* is statutorily authorized pursuant to Section 30 of the Act to issue an enforcement order to stop the conduct and comply with the Act. 415 ILCS 5/30. In essence, this is the relief requested from the Board by Complainants ("cease and desist from identified violations of the Act . . . and taking of such other immediate action to correct the violation of Section[] . . . 39.2 of the Act."). Citizens' Complaint, Prayer for Relief No. 3 to all

Counts. No relief is sought against the Agency in the Citizens' Complaint, nor could any relief against the Agency be ordered by the Board.

34. Local siting approval is a separate and independent action of the DeWitt County Board in the exercise of its concurrent jurisdiction over the location of new pollution control facilities. See *City of Elgin* and *Town & Country*. Section 813.201(b)(1)(C) of the regulations expressly provides for and allows Board enforcement actions and orders to enforce the Act, even if the Board order may trigger or impact Agency initiated modifications of Agency issued permits, and clearly establishes that the Board's interpretation of *Landfill, Inc*. to the contrary is in error.

35. Again, the Board's own regulations allow the relief sought in the Citizens' Complaint. Consistent with *Landfill, Inc*. and the intent of the drafters of the Act, Section 813.107 of the Board's rules states: "The issuance and possession of a permit shall not constitute a defense to a violation of the Act or any Board regulations set forth in 35 Ill. Adm. Code: Chapter I except for the development and operation of a landfill without a permit." 35 Ill. Adm. Code 813.107; *Landfill, Inc*., 74 Ill. 2d at 559-60 (quoting the principal drafter of the Act).

WHEREFORE, the Complainants respectfully request that the Board reconsider its September 19, 2013 Opinion and Order, deny CLI's Motion to Dismiss, accept the case and authorize a hearing in this matter at which time Respondent will be required to

answer the allegations contained in the Citizens' Complaint, and for such other and further relief as the Board may deem just and proper and in the public interest.

Respectfully submitted,

MAHOMET VALLEY WATER AUTHORITY, CITY OF CHAMPAIGN, ILLINOIS, a municipal corporation, DONALD R. GERARD, CITY OF URBANA, ILLINOIS, a municipal corporation, LAUREL LUNT PRUSSING, CITY OF BLOOMINGTON, ILLINOIS, a municipal corporation, COUNTY OF CHAMPAIGN, ILLINOIS, COUNTY OF PIATT, ILLINOIS, TOWN OF NORMAL, ILLINOIS, a municipal corporation, VILLAGE OF SAVOY, ILLINOIS, a municipal corporation, and CITY OF DECATUR, ILLINOIS, a municipal corporation,

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CERTIFICATE OF SERVICE

I hereby certify that I did on October 25, 2013, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the MOTION TO RECONSIDER, upon the persons listed on the Service List.

s/Javonna L. Homan
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