ILLINOIS POLLUTION CONTROL BOARD
December 5, 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.	)	

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

In a September 19, 2013 opinion and order responsive to the parties' pleadings, the Board dismissed this citizens' enforcement complaint on the grounds that it failed to plead violations against respondent for which the Board could grant relief. On October 25, 2013, 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; Town of Normal; Village of Savoy; and City of Decatur (collectively, complainants) together with intervenor People of the State of Illinois, represented by the Attorney General (collectively, movants), filed a motion for reconsideration (Mot.) of that opinion and order.

Clinton Landfill, Inc. (CLI), the Village of Summit (Summit), and the National Solid Wastes Management Association (NSWMA) filed responses opposing the motion to reconsider. On November 15, 2013, the Board received a public comment (PC1) from Bill Spencer, President of WATCH. Complainants filed a reply to CLI's response and the supplemental *amicus* briefs on November 21, 2013. For the reasons given below, the Board denies the motion.

PRELIMINARY PROCEDURAL MATTERS

Motions for Leave to File *Amicus Curiae* Briefs

The Board received two motions by *amici curiae* for leave to file briefs responding to the motion to reconsider. *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.*

On November 13, 2013, Summit filed its motion for leave to file a supplemental brief accompanied by its supplemental brief (Summit Supp. Br.). On November 15, 2013, NSWMA filed its motion for leave to file a supplemental brief accompanied by its supplemental brief (NSWMA Supp. Br.). The Board previously allowed each entity to file *amicus curiae* briefs relating to CLI's motion to dismiss. *See* Mahomet Valley Water Authority, et al. v. Clinton Landfill, Inc., PCB 13-22, slip op. at 4 (Sept. 19, 2013). Summit and NSWMA filed their motions prior to the Board ruling on the motion to reconsider and did not delay the Board's decision. The Board grants Summit's and NSWMA's motions for leave to file *amicus curiae* briefs and considers their respective briefs below.

Complainants' Motion for Leave to File Reply to CLI's Response and *Amicus* Briefs

On November 21, 2013, fourteen days after CLI filed its response, complainants sought leave of the Board to file a reply to CLI's response to the motion to reconsider the Board's September 19, 2013 order. Complainants also sought leave to respond to CLI's request that the Board reconsider other portions of its order and to respond to the briefs filed by *amici curiae*. Complainants assert that the filing of their reply will prevent material prejudice and injustice. The Board may permit a reply to prevent material prejudice, 35 Ill. Adm. Code 101.500(e). The Board finds it appropriate to allow complainants to reply and will consider their reply brief (Reply).

SEPTEMBER 19, 2013 BOARD ORDER

In its September 19, 2013 order, the Board dismissed this enforcement action alleging that CLI violated various provisions of the Illinois 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." Mahomet, PCB 13-22, slip op. at 1, citing Complaint (Comp.) at 2. The Board found that, although it had jurisdiction to hear an enforcement action for a violation of the Act and complainants had standing to bring such an enforcement action, the complaint did not plead any violation of the Act by CLI. *Id.* at 31-32. The Board therefore granted CLI's motion to dismiss the complaint.

Among the alleged statutory violations, complainants alleged that CLI's failure to obtain local siting authority violated Section 39.2 of the Act. Comp. at 31 (Count I ¶112), 37 (Count II ¶119), 43 (Count III ¶119). 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 (2012). 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) (2012).

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) (2012).

The Board found that CLI was not capable of violating Section 39.2 of the Act. Mahomet, PCB 13-22, slip op. at 26. The Board reasoned that 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 (2012). Section 39.2 requires the local siting authority to grant approval only if listed criteria are met. *Id.* The Board noted that it previously held that Section 39.2 is not "properly the subject of an enforcement action." Mahomet, PCB 13-22, slip op. at 26, citing Anielle Lipe and Nykole Gillette v. IEPA, PCB 12-44, slip op. at 5-6 (Nov. 17, 2011); Terri D. Gregory v. Regional Ready Mix, LLC, PCB 10-106, slip op. at 2 (Aug. 19, 2010); Nelson v. Kane County Board, PCB 95-56, slip op. at 2 (May 18, 1995).

The Board further noted that "[i]f 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 [Illinois Environmental Protection Agency (Agency)]." Mahomet, PCB 13-22, slip op. at 27. 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. v. PCB, 74 Ill. 2d 541, 560, 387 N.E.2d 258, 265 (1978). The Board concluded that complainants sought 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. Mahomet, PCB 13-22, slip op. at 27. Accordingly, the Board found that it did not have the authority to grant the relief requested. *Id.*

MOTION TO RECONSIDER

Movants ask the Board to reconsider "portions" of the September 19, 2013 order. Mot. at 4. Specifically, movants contend that the Board erred in finding (1) that CLI is not capable of violating Section 39.2 of the Act and (2) that Landfill, Inc. bars the relief sought by complainants. *Id*. at 5-6.

Movants note that Section 39.2 contains various provisions concerning information that an applicant must submit to a local siting authority and other procedural steps involving the applicant. Mot. at 8, citing 415 ILCS 5/39.2 (2012). Based on these provisions, movants argue "[s]ection 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." Mot. at 9 (emphasis omitted). Movants contend that Section 39.2 is "not solely 'directed at the responsibilities of the local siting authority.'" *Id*. at 9, citing Mahomet, PCB 13-22, slip op. at

26. Movants further argue that the cases the Board relied on are distinguishable from the instant case because here, movants contend, "there never was a local siting application, filing, notice, hearing or decision for the Chemical Waste Unit." Mot. at 5, *see also id*. at 11-13.

Movants further argue that the Board's interpretation of Landfill, Inc. conflicts with "a plain reading of Section 39.2 of the Act" and caselaw. Mot. at 18. Movants disagree with the Board's statement that "determination of whether additional local siting approval is required is a permitting decision for the Agency." *Id.* at 16. Movants claim that the Board "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." *Id.* at 18. Rather, movants contend that the Agency could "modify a permit in consideration of a Board order" or otherwise "decide what credence to give to a Board order." *Id*. at 19-20. Accordingly, "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." *Id.* at 20.

CLI'S RESPONSE TO MOTION TO RECONSIDER

On November 7, 2013**,** CLI filed a response opposing movants' motion to reconsider (Resp.). CLI argues that the Board's finding that the complaint was frivolous and dismissal of the complaint were correct. Resp. at 7, 9. CLI asserts that there is no basis for the Board to reconsider its order because movants have not pointed to any new evidence or any change in law. Resp. at 10. Further, CLI claims complainants reargue the case and present the same arguments and authority already considered by the Board. *Id.* As to the interpretation of Section 39.2 of the Act, CLI notes the prior caselaw finding that Section 39.2 is not properly the subject of an enforcement action and discusses the role of the DeWitt County Board and allegations relating to it. *Id.* at 11-13. In addressing movants' arguments as to Landfill, Inc. and the respective roles of the Agency and the Board, CLI contends that in essence the complaint is an impermissible appeal of the Agency's issuance of a permit to CLI. *Id.* at 14.

However, if the Board reconsiders its order, CLI asks that the Board reconsider its holding that the Board has jurisdiction over the complaint and that complainants have standing. Resp. at 2. CLI contends that these conclusions "allow the Complainants and Intervenor to elevate form over substance." *Id.* at 16. Specifically, "the Complaint is a not-very-thinly-veiled attempt to obtain an illegal review of the Agency's Permit." *Id.*

COMPLAINANTS' REPLY

In their reply, complainants address (1) CLI's response to the motion to reconsider; (2) CLI's request that the Board reconsider the portions of its September 19, 2013 order relating to jurisdiction and standing; and (3) the *amici curiae* briefs.

Complainants argue that Section 39.2 places duties and responsibilities on CLI as the siting applicant to apply to the DeWitt County Board for siting approval of the CWU at Clinton Landfill No. 3. Reply at 3. CLI was not able to discharge this obligation through a host agreement with the DeWitt County Board. *Id.* at 2-3. Complainants assert that the CWU is a

new pollution control facility not covered by the prior application to the DeWitt County Board in 2002. *Id.* at 4. As such, CLI was required to make a separate application to the county board for siting the CWU. *Id.* CLI did not do so and, according to complainants, violated Section 39.2. *Id.*

Complainants object to CLI's request that the Board reconsider its findings that the Board has jurisdiction to hear the complaint and complainants have standing to bring the complaint. Specifically, complainants argue that CLI's request is late because any motion to reconsider was required to be filed within 35 days after receipt of the order. Reply at 7, citing 35 Ill. Adm. Code 101.520(a). Complainants calculate that this deadline was October 28, 2013 and CLI's request was filed on November 7, 2013 as part of its response to complainants' motion. *Id.*

As to the briefs by *amici curiae*, complainants dispute contentions that the complaint is an improper attack on a permit issued by the Agency. Reply at 8. Complainants argue that the DeWitt County Board did not approve siting for the CWU and the Agency is not a named respondent. *Id.* Further, complainants argue that CLI is requesting approval from another regulator, the United States Environmental Protection Agency, to dispose of regulated wastes that would cause the CWU to be a new pollution control facility. *Id.* at 8-9.

ADDITIONAL FILINGS

Following the filing of the movants' motion, the Board received two supplemental *amicus curiae* briefs and one public comment, summarized below.

Village of Summit Supplemental *Amicus Curiae* Brief

Summit argues that movants do not meet the requirements of 35 Ill. Adm. Code 101.902 for reconsideration of a Board order. Summit Supp. Br. at 2. Summit contends that there is no new evidence and the law has not changed. *Id.* Summit asserts that "the law has *always* been that third parties 'are statutorily precluded from legally challenging the Agency's decision to grant a development permit for a pollution control facility.'" *Id.* (emphasis in original), citing City of Elgin v. County of Cook, 169 Ill.2d 53, 61 (1996). Summit concludes that movants "again ask this Board to ignore, and effectively overturn, the issuance by the [Agency] of a permit, permit renewal, and permit modifications." *Id.* Summit argues that the Act provides only limited siting and permit appeal procedures so that these approvals "become, at a definable and reliable point, final and non-appealable." *Id.* at 3.

National Solid Wastes Management Association Supplemental *Amicus Curiae* Brief

NSWMA argues that the motion to reconsider should be denied. NSWMA Supp. Br. at 2. NSWMA asserts that complainants continue to argue that "local siting decisions and permits issued by the [Agency] should be subject to review at *any time* in enforcement cases brought before the Board by *any person* under 415 ILCS 5/31." *Id.* (emphasis in original). NSWMA argues that the Act limits siting appeals and permit appeals in order "to ensure that local siting approvals and Agency permits become, at some point, final and unappealable." *Id.* NSWMA

concludes that "without this certainty, the development of pollution control facilities would grind to a halt." *Id.*

Public Comment of Bill Spencer, President, WATCH

Mr. Spencer submitted a document titled "Resolution No. 2013," which provides in part

> A resolution requesting and directing Dewitt County States Attorney to prepare and file, correspondence on behalf of the Dewitt County Board, to the Illinois Pollution Control Board (IPCB) declaring that the Dewitt County Board has an interest in the outcome of IPCB case no. 2013-022; and Requesting that 39.2 of the [Act] be fully enforced by the IPCB according to its terms; and declaring to the IPCB that the Dewitt County Board believes the new [CWU] at issue requires siting authority from the Dewitt County Board, pursuant to 415 ILCS 5/39.2 [(2012)]. PC1 at 2.

The document appears to be signed by the Dewitt County Board Chairperson and attested to by the County Clerk for a vote that occurred on November 14, 2013. *Id.* at 3.

DISCUSSION

In ruling on a motion for reconsideration, the Board will consider factors including new evidence or a change in the law, to determine whether the Board's decision was in error. 35 Ill. Adm. Code 101.902. A motion to reconsider may be brought "to bring to the [Board's] attention newly discovered evidence that was not available at the time of hearing, changes in the law or errors in the [Board's] previous application of existing law." Citizens Against Regional Landfill v. County Board of Whiteside, PCB 92-156, slip op. at 2 (Mar. 11, 1993), citing Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992). The Board may also reconsider evidence in the record that was overlooked. *See* People v. Packaging Personified, Inc., PCB 04-16, slip op. at 16 (March 1, 2012).

The Board has reviewed all of the filings by the parties, *amici curiae*, and public commenter. The Board is not persuaded to reconsider its September 19, 2013 order. Movants' joint motion does not cite new evidence or a change in the law showing that the Board's dismissal of this case was erroneous. Rather, movants assert that the Board erred in its application of existing law and overlooked allegations in the complaint. Movants argue for a different interpretation of Section 39.2 of the Act and existing caselaw including Landfill, Inc. After reviewing movants' re-argument of these issues, the Board is not persuaded to change its analysis of Section 39.2 or prior caselaw. Further, movants argue that the Board overlooked allegations in the complaint relating to the DeWitt County Board found at paragraph 104 in counts I, II, and III of the complaint. Complainants acknowledge that the Board noted this allegation in its opinion. Mot. at 14. Accordingly, the Board did not overlook this allegation. The Board, therefore, finds that the motion presents no basis to conclude that the Board's decision was in error and movants' motion to reconsider is denied.

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 order on December 5, 2013, by a vote of 4-0.

John T. Therriault, Clerk
Illinois Pollution Control Board