

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CLINTON LANDFILL, INC.,)	
)	
Petitioner,)	PCB _____
)	(Permit Appeal)
v.)	
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

NOTICE OF ELECTRONIC FILING

TO: All Parties of Record

PLEASE TAKE NOTICE that on August 28, 2014, I filed the following documents electronically with the Clerk of the Pollution Control Board of the State of Illinois:

1. Entries of Appearances
2. Petition for Review of Permit and Motion for Order Regarding Stay
3. Notice of Electronic Filing

Copies of the above-listed documents were served upon you via U.S. Mail, First Class Postage Prepaid, sent on August 28, 2014, as is stated in the Certificates of Service attached to each document.

Respectfully submitted,

CLINTON LANDFILL, INC.
Petitioner

By:  _____
One of its attorneys

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914-0887

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ENTRIES OF APPEARANCES

TO: Clerk of the Illinois Pollution Control Board and All Parties of Record

Please enter our appearances as counsel of record in this case for

CLINTON LANDFILL, INC

Respectfully submitted,

ELIAS, MEGINNES & SEGHETTI, P.C.

By:  _____
 Brian J. Meginnes, Esq.

ELIAS, MEGINNES & SEGHETTI, P.C.

By:  _____
 Janaki Nair, Esq.

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CERTIFICATE OF SERVICE

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(Per 35 Ill. Adm. Code §101.304(g)(1))



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**PETITION FOR REVIEW OF PERMIT MODIFICATION
AND MOTION FOR ORDER REGARDING STAY**

NOW COMES the Petitioner, CLINTON LANDFILL, INC. ("CLI"), by and through its undersigned attorneys, and as and for its Petition for Review of Modification No. 47 to Permit No. 2005-070-LF, issued by the Illinois Environmental Protection Agency (the "Agency") on July 31, 2014, pursuant to 415 ILCS §5/40 and 35 Ill. Adm. Code Parts 101 and 105, and its Motion for Order Regarding Stay, states as follows:

Introduction

CLI hereby respectfully requests that the Pollution Control Board (the "Board") review Modification No. 47 to Permit No. 2005-070-LF, which modification was issued by the Agency on July 31, 2014 ("Modification No. 47"). A copy of Modification No. 47, with the Agency's cover letter, is attached hereto as Exhibit A. The Board has jurisdiction to hear this matter pursuant to Section 40 of the Illinois Environmental Protection Act (415 ILCS §5/40) and pursuant to Parts 101 and 105 of Title 35 of the Illinois Administrative Code (35 Ill. Adm. Code Parts 101 and 105).

Brief Statement of Facts and Background

1. CLI owns and operates a landfill in DeWitt County, Illinois. CLI filed an Application for Local Siting Approval of a Pollution Control facility with the DeWitt County Clerk on April 11, 2002, requesting approval to expand its existing municipal solid waste and non-hazardous special waste landfill located within DeWitt County to create “Clinton Landfill No. 3.”

2. On September 12, 2002, the DeWitt County Board unanimously passed and approved the “Resolution Conditionally Approving the Application for Local Siting Approval of a Pollution Control Facility Filed by Clinton Landfill, Inc.,” along with the Findings of Fact and list of conditions appended thereto, granting siting authorization to CLI for Clinton Landfill No. 3 pursuant to Section 39.2 of the Act.

3. The DeWitt County Board certified its siting approval to the Agency on October 17, 2002. A copy of the Certification of Siting Approval (LPC-PA8), which includes the DeWitt County Board’s Resolution (collectively, the “Conditional Siting Resolution”) is attached hereto as Exhibit B.

4. The Agency issued Permit No. 2005-070-LF for the development of Clinton Landfill No. 3 on March 2, 2007.

5. On or about February 1, 2008, CLI filed an application with the Agency seeking a modification to the Permit, to allow CLI to develop a small portion of Clinton Landfill No. 3 (22.50 acres out of the 157.50 acre landfill, constituting less than 15% of the total landfill area) as a “Chemical Waste Unit” or “CWU.”

6. On November 3, 2009, the Agency held a public availability session in DeWitt County, Illinois, concerning CLI's application. The Agency received public comment on the application through December 3, 2009.

7. The Agency issued Modification No. 9 to Permit No. 2005-070-LF permitting the development of the Chemical Waste Unit on January 8, 2010.

8. The Agency issued Modification No. 18 to Permit No. 2005-070-LF permitting the operation of the Chemical Waste Unit on April 1, 2011.

9. In June, 2011, in response to inquiries by members of an opposition group, the Agency issued a letter explaining the Agency's determination that the Conditional Siting Resolution (Ex. B) constituted sufficient siting for the Chemical Waste Unit. The letter is attached hereto as Exhibit C.

10. On April 3, 2012, the Agency held a public information session in DeWitt County, Illinois, concerning the renewal of the Permit for Clinton Landfill No. 3, including the Chemical Waste Unit. The Agency received public comment on the renewal through April 17, 2012.

11. The Agency issued Modification No. 29 to Permit No. 2005-070-LF renewing the Permit in its entirety, including the provisions relating to the Chemical Waste Unit, on July 5, 2012.

12. The Agency issued Modification No. 46 to Permit No. 2005-070-LF on July 30, 2014, a copy of which is attached hereto, with the Agency's cover letter, as Exhibit C.

13. In accordance with its normal practice, Modification No. 46 to Permit No. 2005-070-LF includes the entire text of Permit No. 2005-070-LF, as amended and modified from time

to time, through Modification No. 46. Permit No. 2005-070-LF as modified through Modification No. 46 (Exhibit D), is referred to hereinafter as the "Permit."

14. The day after the Agency issued Modification No. 46, on July 31, 2014, the Agency issued Modification No. 47 (Ex. A).

15. CLI is appealing the changes to the Permit that were made in Modification No. 47. This Petition for Review is timely, as it is filed within thirty-five (35) days after issuance of the Modification No. 47 on July 31, 2014 (*i.e.*, on or before September 4, 2014).

16. CLI further notes that during the pendency of this case, it is very likely that the Permit will be further modified. These subsequent modifications will most likely include the entire text of Permit No. 2005-070-LF through all the amendments and modifications thereto, in accordance with the Agency's customary practice. If (when) this occurs, the modifications will presumably include the specific changes to the Permit that were made in Modification No. 47, that are the subject of this case. Therefore, CLI will most likely be filing additional Petitions for Review of these subsequent modifications to the Permit (at least as to the changes made in Modification No. 47), and will most likely seek leave to consolidate those subsequent cases with the instant case.¹

Grounds for Appeal

The following are the grounds of appeal, specified in accordance with 35 Ill. Adm. Code §105.210(c).

The Agency made three substantive changes to the Permit in Modification No. 47. First, the Agency modified Special Condition Section II.10.f, "to add obtaining local siting approval as

¹ In discussions between counsel for CLI and counsel for the Board leading up to the filing of this Petition for Review, no other procedure was discovered that would ensure that CLI does not inadvertently waive its objections to the changes made in Modification No. 47, by failing to seek review of the same changes appearing in subsequent versions of the permit.

a precondition to accepting PCB waste.” (Ex. A, pg. 2 of cover letter). In particular, as of July 30, 2014, Section II.10.f provided that there were three (3) conditions before the Chemical Waste Unit could accept certain types of polychlorinated biphenyl (PCB) wastes. (See Ex. D, pg. 18, §II.10.f). On July 31, 2014, the Agency added a fourth condition: “The local siting authority for Clinton Landfill 3 (currently the DeWitt County Board) grants local siting approval specifically allowing such waste to be disposed of in CWU.” (Ex. A, pg. 17, §II.10.f).

Second, the Agency modified Special Condition Section III.A.2.f “to prohibit the disposal of Manufactured Gas Plant (MGP) waste exceeding the regulatory levels specified in 35 Ill. Adm. Code 721.124(b) in the CWU.” (Ex. A, pg. 2 of cover letter). In particular, as of July 30, 2014, Section III.A.2.f included the following exception to the Agency’s general policy prohibiting disposal of Manufactured Gas Plant (MGP) waste exceeding the regulatory levels specified in 35 Ill. Adm. Code 721.124(b) in landfills in Illinois: “Manufactured gas plant waste exceeding the regulatory levels specified in 35 Ill. Adm. Code 721.124(b) can be disposed in the CWU.” (Ex. D, pg. 25, §III.A.2.f). On July 31, 2014, the Agency deleted this exception. (See Ex. A, pg. 25, §III.A.2.f).

Finally, the Agency modified Special Condition Section VII.12 “to reflect the need to obtain local siting approval before accepting PCB waste....” (Ex. A, pg. 2 of cover letter). Section VII.12 of the Permit relates to management of leachate from the CWU. (See Ex. D, pg. 47, §VII.12). On July 31, 2014, the Agency added the following as a condition to triggering of the leachate management protocols in the section: “the local siting authority for Clinton Landfill 3 grants local siting approval specifically allowing PCB waste to be disposed of in the CWU....” (Ex. A, pg. 46, §VII.12).

These changes were arbitrary, capricious, unreasonable, unlawful, and beyond the regulatory authority of the Agency. No changes in the relevant law occurred from the time of the issuance of Modification No. 9 (first permitting the development of the CWU) and Modification No. 18 (first permitting the operation of the CWU), and the time of Modification No. 47. The Agency learned no new information relevant to the changes to the Permit in Modification No. 47. No substantive technological advances were made relevant to the changes to the Permit in Modification No. 47. The reason stated in the cover letter for the modifications is a sham, as the Agency previously, correctly, determined that no additional siting was required for the development of the CWU, and CLI provided no false or misleading information to the Agency. Rather, the changes to the Permit in Modification No. 47 were made for wholly political reasons, unrelated to and outside of the regulatory authority of the Agency.

Moreover, the changes to the Permit in Modification No. 47 were not required by, or even conducive, to the protection of the environment. The CWU as designed and permitted as of July 30, 2014, was fully protective of public health and safety, and of the environment. In fact, the changes to the Permit in Modification No. 47 would have the direct effect of preventing the remediation of existing contamination at sites throughout Illinois.

In addition, the second change to the Permit described above, in which the Agency purports to prohibit CLI from accepting for disposal at the CWU "Manufactured Gas Plant (MGP) waste exceeding the regulatory levels specified in 35 Ill. Adm. Code 721.124(b) in the CWU" (Ex. A, pg. 2 of cover letter), is clearly not permitted under the law. Under the law, MGP waste is non-hazardous special waste. The CWU is permitted (and sited) to accept non-hazardous special waste. Therefore, the Agency cannot, by bureaucratic fiat, prevent CLI from accepting MGP waste.

Illinois law (which is “identical in substance” to Federal law on this point) provides that certain solid wastes that are not specifically listed as hazardous wastes may be deemed “hazardous” if they exhibit one or more of four characteristics, namely, ignitability, corrosivity, reactivity, or toxicity. In order to determine whether a solid waste exhibits the characteristic of toxicity, the Board has adopted a test called the Toxicity Characteristic Leaching Procedure (“TCLP”). (See 35 Ill. Adm. Code 721.124(a); see also 40 C.F.R. §261.24). The Illinois regulations provide, in pertinent part, as follows:

A solid waste (*except manufactured gas plant waste*) exhibits the characteristic of toxicity if, using Method 1311 (Toxicity Characteristic Leaching Procedure (TCLP)) in ‘Test Methods for Evaluating Solid Waste, Physical/Chemical Methods,’ USEPA publication number EPA 530/SW-846, as incorporated by reference in 35 Ill. Adm. Code 720.111(a), the extract from a representative sample of the waste contains any of the contaminants listed in the table in subsection (b) of this Section at a concentration equal to or greater than the respective value given in that table.

35 Ill. Adm. Code 721.124(a) (emphasis added). The regulations include no test or criteria pursuant to which manufactured gas plant waste may be determined to exhibit the characteristic of toxicity. Therefore, manufactured gas plant waste cannot exhibit the characteristic of toxicity, as a matter of law. Rather, only if the waste exhibits the characteristics of ignitability, corrosivity, or reactivity will the waste be deemed characteristically hazardous. Because the MGP waste that CLI disposes of in the CWU does not exhibit the characteristics of ignitability, corrosivity, or reactivity, the waste is non-hazardous special waste, which CLI is permitted (and sited) to accept.

By purporting to prohibit the disposal of MGP waste in a special waste landfill, ignoring 35 Ill. Adm. Code 721.124(a), the Agency is usurping the Board’s authority to enact regulations. This action by the Agency violates the Legislature’s allocation of separate and distinct powers to

the Agency and to the Board. The law is clear that “[w]ithin the [Illinois Environmental Protection] Act, the legislature created the Board and granted it, *inter alia*, rulemaking authority. [Citation omitted.] The legislature also created the Illinois Environmental [Protection] Agency (Agency) and granted it authority to, *inter alia*, enforce Board regulations and administer permit systems established by the Act or Board regulations. [Citation omitted.]” Granite City Div. of Nat. Steel Co. v. Illinois Pollution Control Bd., 155 Ill. 2d 149, 155, 613 N.E.2d 719, 721 (1993). In regard to MGP waste, the Agency has apparently decided to ignore the Board’s regulation, and impose the Agency’s own standard in its place. This is not allowed under the law.

Motion for Order Regarding Stay

Pursuant to the Illinois Administrative Procedure Act, the effectiveness of Modification No. 47 is stayed as a matter of law, in its entirety, while this proceeding is pending before the Board. *See* 5 ILCS §100/10-65(b). The APA provides that “[w]hen a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license shall continue in full force and effect until the final agency decision on the application has been made unless a later date is fixed by order of a reviewing court.” 5 ILCS §100/10-65(b). The Courts and the Board have interpreted the phrase “final agency decision” to be the decision of the Board: “[a] final decision, in the sense of a final and binding decision coming out of the administrative process before the administrative agencies with decision making power, will not be forthcoming in the instant case until the PCB rules on the permit application, after [the petitioner] has been given its adjudicatory hearing before the PCB.” Borg-Warner Corp. v. Mauzy, 100 Ill. App. 3d 862, 870-71, 427 N.E.2d 415, 421 (3rd Dist. 1981). Therefore, until the Board rules on a petitioner’s request for review, the relevant license is automatically stayed. *See id.*; *see also* the Board’s Orders on the petitioners’ motion for

stay in Amerenenergy Generating Company v. Illinois Environmental Protection Agency, PCB 06-67 (February 16, 2006), and in Peoria Disposal Company v. Illinois Environmental Protection Agency, PCB 14-28 (November 21, 2013).

CLI requests that the Board enter an Order expressly finding that Modification No. 47 is stayed in its entirety by operation of law, and that CLI may continue operations under the Permit as it existed prior to issuance of Modification No. 47 throughout this proceeding. CLI requests this Order for purposes of clarity and to assure that CLI is operating in compliance with the law during the pendency of this appeal.

WHEREFORE, CLI respectfully requests that the Board (A) declare the Agency's action issuing Modification No. 47 to be arbitrary, capricious, unreasonable, unlawful, and/or beyond the regulatory authority of the Agency; (b) vacate the Agency's action issuing Modification No. 47; and (c) grant CLI such other and further relief as is deemed appropriate under the circumstances. CLI further respectfully requests that the Board enter an Order providing that Modification No. 47 is stayed in its entirety as a matter of law, and that CLI may continue operations under the Permit as it existed prior to issuance of Modification No. 47 throughout this proceeding.

Respectfully submitted,

CLINTON LANDFILL, INC.,
Petitioner

By: _____


One of its attorneys

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(Per 35 Ill. Adm. Code §101.304(g)(1))

By: _____



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