BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

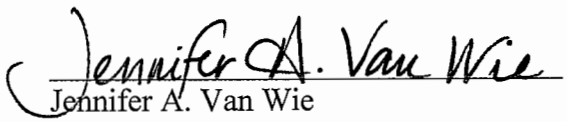
CLINTON LANDFILL, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 15-60
	)	PCB 15-76
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	(Permit Appeal - Land)
	)	
	)	
Respondent.	)	

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that on the 9th day of January 2015, I have filed with the Office of the Clerk of the Pollution Control Board the Respondent's Response in Opposition to Petitioner's Motion for Partial Summary Judgment. A copy of which is attached hereto and hereby served upon the persons listed in the attached Service List.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By LISA MADIGAN
Attorney General of the
State of Illinois



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Date: January 9, 2015

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RESPONDENT'S RESPONSE IN OPPOSITION TO PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Now comes Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("IEPA"), by LISA MADIGAN, Attorney General of the State of Illinois, and hereby provides its response in opposition to Petitioner's, CLINTON LANDFILL, INC. ("CLI"), Motion for Partial Summary Judgment regarding the changes to Special Condition Section III.A.2.f of the Permit (concerning MGP Waste). In support of this Response, the IEPA states as follows:

I. INTRODUCTION

On November 7, 2014, CLI filed with the Illinois Pollution Control Board ("Board") its Motion for Partial Summary Judgment regarding the changes to Special Condition Section III.A.2.f of the Permit (concerning MGP Waste) ("Motion"). In its Motion, CLI asks the Board to declare the IEPA's "action issuing changes in Modification No. 47 relating to MGP waste to be arbitrary, capricious, unreasonable, unlawful, and/or beyond the regulatory authority of the Agency" and to "vacate the Agency's action issuing changes relating to MGP waste in Modification No. 47 ("Mod 47")." Motion at 9.

The Board should deny CLI's Motion as a matter of law, because:

1. CLI did not have local siting approval for its chemical waste unit ("CWU") from

the DeWitt County Board as required by Section 39.2 of the Environmental Protection Act ("Act"), 415 ILCS 5/39.2, and therefore the requested permit (i.e. Modification No. 9) violates Section 39(c) of the Act, 415 ILCS 5/ 39(c).

2. Lacking local siting approval for Modification No. 9 ("Mod 9"), Special Condition III.A.2.f of Mod 9 to Permit No. 2005-070-LF, as it applied to the CWU, is void and inapplicable as a matter of law.

3. The CWU is a new pollution control facility because in its Mod 9 application CLI sought to dispose, for the first time, manufactured gas plan ("MGP") waste exceeding the regulatory levels set forth in 35 Ill. Adm. Code 721.124(b).

4. CLI should also be prohibited from accepting MGP wastes exceeding the regulatory limits found at 35 III. Adm. Code 721.124(b) in its **municipal solid waste landfill** ("MSWLF") portion of Clinton Landfill No. 3 ("CL3") because the disposal may create a water pollution hazard in violation of Section 12(d) of the Act.

A. Undisputed Facts

1. On April 12, 2002, CLI filed an Application for Local Siting Approval of a Pollution Control Facility with the DeWitt County Clerk to expand the then-existing municipal solid waste and non-hazardous special waste landfill already located within DeWitt County to create CL3. *See* Petition at 2, ¶ 1.

2. On July 11 and 15, 2002, the DeWitt County Board held public meetings to discuss CLI's proposal to expand its municipal solid waste and non-hazardous special waste landfill. R. at 7.[1]

3. On September 12, 2002, the DeWitt County Board conditionally approved CLI's

[1] References to page numbers in the administrative record in this case will be preceded with an "R" for the sake of clarity.

request for site approval of the proposed expansion of CL3 based on CLI's siting application, notifications, hearings, public comment and the record. R. at 7-8.

4. On October 17, 2002, the DeWitt County Board certified its siting approval for CL3, a municipal solid waste and non-hazardous special waste landfill. R. at 4.

5. On February 28, 2005, CLI submitted an application to the IEPA to develop CL3 as a new municipal solid waste landfill which would accept non-hazardous municipal solid wastes, non-hazardous wastes, and non-hazardous special wastes. R. at 1-2968.

6. On March 2, 2007, the IEPA issued Permit No. 2005-070-LF to CLI for the development of CL3. Petition at 2, ¶ 4.

7. On October 19, 2007, CLI applied to the United State Environmental Protection Agency ("USEPA") for approval to develop and operate a chemical waste landfill (i.e. CWU), which would allow it to accept polychlorinated bi-phenols ("PCBs") at CL3.[2]

8. On February 1, 2008, CLI filed a permit application with IEPA to modify its Permit to allow CLI to develop and operate the CWU at CL3. R. at 8696- 9960.

9. On September 30, 2008, the IEPA issued the initial operating permit for CL3, Permit No. 2005-070-LF.[3]

10. Special Condition III.A.2.f of Permit No. 2005-070-LF, provided as follows:

> CLARIFICATIONS:
>
> Notwithstanding the exception for manufactured gas plant waste contained in 35 Ill. Adm. Code 721.124(a), no manufactured gas plant waste shall be disposed in a non-hazardous waste landfill, unless: i) the waste has been tested in accordance with subsection (d) of this special condition, and ii) the analysis has demonstrated that the waste does not exceed the regulatory levels for any contaminant given in the table contained in 35 Ill. Adm. Code 721.124(b).

[2] USEPA application letter and Executive Summary are available at http://www.epa.gov/Region5/waste/clintonlandfill/cl-application.html (Record nos. 1 and 3 respectively).
[3] *See* IEPA's Solid Waste Database for Log No. 2008-063, available at: http://epadata.epa.state.il.us/land/solidwaste/byLogNumber.asp?pkLog_No=2008%2D063.

R. at 6988.

11. On January 8, 2010, the IEPA issued Mod 9 to CLI to allow it to develop and construct the CWU at CL3. Petition at 3, ¶ 7; R. at 7854-7919.

12. Special Condition III.A.2.f of Mod 9 to Permit No. 2005-070-LF, provided as follows:

> CLARIFICATIONS:
>
> Notwithstanding the exception for manufactured gas plant waste contained in 35 Ill. Adm. Code 721.124(a), **no manufactured gas plant waste shall be disposed in Clinton Landfill 3's MSW unit, unless: i) the waste has been tested in accordance with subsection (d) of this special condition, and ii) the analysis has demonstrated that the waste does not exceed the regulatory levels for any contaminant given in the table contained in 35 Ill. Adm. Code 721.124(b).**
>
> Manufactured gas plant waste exceeding regulatory levels specified in 35 Ill. Adm. Code 721.124(b) can be disposed in the CWU.

(Emphasis added.) R. at 7871.

13. At all times, subsection (d) of Special Condition III.A.2.f of Permit No. 2005-070-LF, provided as follows:

> Sec. (d) – The permittee shall obtain metals and organics analysis. Either procedure may be utilized (i.e., total or TCLP[4]), but any constituent whose total concentration exceeds the TCLP limit specified in 35 Ill. Adm. Code, Section 721.124 must be analyzed using the TCLP test and the results reported, unless an alternative test has been approved by the Illinois EPA. TCLP test methods must be in accordance with SW 846-1311.

R. at 6987 and 7870.

14. On July 22, 2014, the IEPA sent a letter to the DeWitt County Board seeking information regarding the September 12, 2002 local siting approval. R. at 15838.

15. On July 24, 2014, the DeWitt County Board responded to the July 22, 2014 IEPA

[4] TCLP is the Toxicity Characteristic Leaching Procedure, which is referenced in 35 Ill. Adm. Code §721.124 and is a procedure to test the toxicity of solid wastes.

letter seeking information regarding the September 12, 2002 local siting approval. R. at 15389-15864.

16. Specifically, the July 24, 2014 DeWitt County Board letter stated, in pertinent part, as follows:

> The Board also did *not* authorize the disposal of manufactured gas plant (MGP) waste which exceeds the regulatory levels contained in 35 Ill. Adm. Code 721.124(b) in its September 12, 2002 siting approval.
>
> * * *
>
> The Board issued no further siting decisions subsequent to its 2002 siting approval, nor was the Board ever asked by Clinton Landfill to provide a subsequent siting decision, either for TSCA-regulated PCB wastes, or for MGP wastes which exceed the regulatory levels contained in 35 III. Adm. Code 721.124(b).

R. at 15839.

17. On July 31, 2014, the IEPA issued Permit Modification No. 47 ("Mod 47") to CLI. Petition at 4, ¶ 14; R. at 15752-15755.

18. Special Condition III.A.2.f of Mod 47 to Permit No. 2005-070-LF, provided as follows:

> CLARIFICATIONS:
>
> Notwithstanding the exception for manufactured gas plant waste contained in 35 Ill. Adm. Code 721.124(a), no manufactured gas plant waste shall be disposed in Clinton Landfill 3's MSW unit or the CWU, unless: i) the waste has been tested in accordance with subsection (d) of this special condition, and ii) the analysis has demonstrated that the waste does not exceed the regulatory levels for any contaminant given in the table contained in 35 Ill. Adm. Code 721.124(b).

R. at 15779-15780.

II. ARGUMENT

A. Summary Judgment Standard

The purpose of the summary judgment procedure is to aid in the expeditious resolution of

a lawsuit. *Pyne v. Witmer*, 129 Ill.2d 351, 358 (1989). When ruling on a motion for summary judgment, pleadings, depositions, and affidavits must be considered strictly against the movant and in favor of the opposing party. *Illinois Envtl. Prot. Agency v. Illinois Pollution Control Bd.*, 386 Ill. App. 3d 375, 391 (3rd Dist., 2008). Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Board Of Trustees of Southern Illinois University Governing Southern Illinois University, Edwardsville, v. IEPA*, at 5, (Slip Op. August 4,, 2005) PCB 02-105. Summary judgment is a drastic means of disposing of litigation, and therefore should be granted only when the movant's right to the relief "is clear and free from doubt". *Id.*

B. Standard of Review for Permit Proceedings

To prevail on its claim, the petitioner must show the IEPA's imposed modifications were not necessary to accomplish the purposes of the Act, or, stated alternatively, the petitioner had to establish that its plan would not result in any future violation of the Act and the modifications, therefore, were arbitrary and unnecessary. *Illinois E.P.A. v. Jersey Sanitation Corp.*, 336 Ill. App. 3d 582, 593 (4th Dist., 2003); *see also Browning-Ferris Indus. of Illinois, Inc. v. Pollution Control Bd.*, 179 Ill. App. 3d 598, 603 (2nd Dist., 1989).

C. MGP Waste Disposal at the CWU Portion of CL3

1. In its Mod 9 application, CLI did not demonstrate to the IEPA that it had obtained local siting approval from the DeWitt County Board for the CWU.

CLI contends that Mod 47 should be vacated by the Board as it applies to MGP waste and essentially revert to Mod 46 (or Mod 9). Motion at p. 9. However, as discussed herein, CLI did not obtain local siting approval for its CWU from the DeWitt County Board as required by Section 39.2 of the Act. 415 ILCS 5/39.2. Therefore, the permit must revert back to the original

IEPA-issued Permit No. 2005-070-LF for CL3 (or Mod 8, as it was the last modification prior to inclusion of the development and operation of the CWU), including Special Condition III.A.2.f.

The purpose of IEPA's issuance of Mod 47 was to address CLI's failure to provide sufficient information in its Mod 9 application (i.e. local siting approval). Section 813.201(b)(1)(B) of the Board Regulations, 35 Ill. Adm. Code 813.201(b)(1)(B), allows the IEPA to modify a permit where it has discovered "that a determination or condition was based upon false or misleading information." The IEPA's independent authority to modify waste disposal permits under Section 813.201(b) has been reviewed and been held to be consistent with the Act and the Board's rulemaking authority. *See Waste Mgmt. of Illinois, Inc. v. Pollution Control Bd.*, 231 Ill. App. 3d 278 (1st Dist., 1992).

In its application for Mod 9, CLI failed to establish that the design, operation, and waste stream changes requested in Mod 9 had been approved by the DeWitt County Board through the local siting process. On July 22, 2014, the IEPA sought information from the DeWitt County Board regarding its 2002 local siting approval for CL3. R. at 15838. The DeWitt County Board provided its response to the IEPA's inquiry in a letter dated July 24, 2014, which included portions of CLI's Application for Siting Approval ("Siting Application") and portions of the hearing transcript during the local siting hearings. *See* R. at 15389-15864. The IEPA's questions and the DeWitt County Board's responses are provided below:

> *In its September 12, 2002 siting approval, did the Board authorize Peoria Disposal to accept PCB wastes in TSCA[5]-regulated concentrations at the Landfill?*
>
> > No. The Board did *not* authorize the disposal of TSCA-regulated PCBs in its September 12, 2002 siting approval. In fact, a Clinton Landfill representative testified at the siting hearing that no such PCB waste would be accepted by the Landfill. **The Board also did *not* authorize the disposal of manufactured gas plant (MGP)**

[5] Federal Toxic Substances Control Act ("TSCA"), 15 U.S.C.A. Ch. 53, Subch. I, *et seq.*

waste which exceeds the regulatory levels contained in 35 Ill. Adm. Code 721.124(b) in its September 12, 2002 siting approval.

At any time after September 12, 2002, did the Board issue any other siting decision to Peoria Disposal to authorize it to accept PCB wastes in TSCA-regulated concentrations at the Landfill?

No. The Board issued no further siting decisions subsequent to its 2002 siting approval, nor was the Board ever asked by Clinton Landfill to provide a subsequent siting decision, either for TSCA-regulated PCB wastes, or for MGP wastes which exceed the regulatory levels contained in 35 III. Adm. Code 721.124(b).

If its September 12, 2002 siting approval did not authorize Peoria Disposal to accept PCB wastes in TSCA-regulated concentrations at the Landfill, does the Board believe that additional siting approval is necessary for Peoria Disposal to accept PCB wastes in TSCA-regulated concentrations at the Landfill?

Yes. On November 14, 2013, the DeWitt County Board passed a resolution stating, in part, that **the Board believes the Chemical Waste Unit of Clinton Landfill #3 (which has been permitted by Illinois EPA to accept both the PCB and MGP waste streams noted above) required local siting pursuant to the Illinois Environmental Protection Act (415 ILCS 5/39.2).**

(Emphasis added.) R. at 15839-15840.

In its 2002 siting application, CLI specifically stated that the "following wastes will not be accepted . . . [w]astes containing polychlorinated bi-phenyls (PCBs) at concentrations greater than that allowed by the Toxic Substances Control Act (TSCA)." (Emphasis in original.) R. at 15841A,[6] and 15849. In addition, on July 11, 2002, during the public hearing conducted on the Siting Application before the DeWitt County Board, Ronald L. Edwards, Vice President of Landfill Development and Operation for CLI, testified that "[h]azardous waste as defined by Illinois Administrative Code Title 35, Section 721, will not be accepted" and that "[w]aste

[6] This page was inadvertently left out of the record due to a copying error and on January 6, 2014, the Respondent filed an Unopposed Motion to Supplement the Record to designate this missing page as 15841A.

concerning PCB's regulated by the Toxic Substances Control Act will not be accepted" at CL3. R. at 15858-15859. Local siting for CL3 was premised, in part, on the foregoing information that was part of the record before the County Board. Specifically, the DeWitt County Board's 'Resolution Conditionally Approving the Application for Local Siting' stated that "recommendations for conditional siting approval . . . includes the determination that all applicable requirements of Section 39.2 have been met **based upon the siting application, notifications, hearings, public comment and the record.**" (Emphasis added.) R. at 7.

The County Board's Resolution further relied upon Mr. Edwards' testimony in consideration of local siting criteria (a)(ii) set forth in Section 39.2 of the Act. 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"). However, in its Mod 9 application to the IEPA, CLI provided none of the information upon which the DeWitt County Board based its approval and made no mention of it. Specifically, in its Mod 9 application, CLI stated as follows:

> Section 812.105 - Approval By Unit Of Local Government
>
> The DeWitt County Board granted local siting approval for Clinton Landfill No. 3 on September 12, 2002. Documentation of the local siting approval was provided to the IEPA with the initial application to develop Clinton Landfill No. 3 (Log No. 2005-070). **This application does not propose a new nor [*sic.*] an expansion to the currently permitted Clinton Landfill No. 3 and, therefore, local siting approval is not required for this permit modification.**

(Emphasis added.) R. at 8703.

2. CLI's Mod 9 application to the IEPA for the CWU was for a new pollution control facility requiring local siting approval from the DeWitt County Board.

The permitting process for landfills in Illinois is well-established and clearly laid out in the Act. For a landfill permit to be valid, both the IEPA and the applicant must comply with the provisions of the Act. The General Assembly has set out the steps which must be completed

before attempting to obtain a landfill permit from the IEPA. Some types of permitting decisions require that an applicant obtain local siting prior to the issuance of the permit. Specifically, Section 39(c) provides that local siting is a necessary prerequisite to obtaining a permit for a new pollution control facility. 415 ILCS 5/39(c).

The General Assembly has determined that local governing bodies have an integral role to play in permitting pollution control facilities. *See* 415 ILCS 5/39(c) and 39.2. The legislature amended the Act in 1981 to give local governmental authorities a voice in landfill decisions that affect them and "based on the definition for a new pollution control facility, it was clear that the 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**." (Emphasis added.) *M.I.G. Investments, Inc. v. IEPA*, 122 Ill. 2d 392, 400 (1988). Further, the General Assembly has charged the local siting authority with "resolving the technical issues such as the public health ramifications of a landfill's design." *Kane County Defenders, Inc. v. Pollution Control Bd.*, 139 Ill. App. 3d 588, 592 (2nd Dist., 1985). In addition, Section 39.2 of the Act "requires the local siting authority to hold a public hearing and issue a written decision," (415 ILCS 5/39.2(d), and (e)), and to determine if the proposed facility is "so designed, located and proposed to be operated that the public health, safety and welfare will be protected" (415 ILCS 5/39.2(a)(ii)). *Town & Country Utilities, Inc. v. Illinois Pollution Control Bd.*, 225 Ill. 2d 103, 108 (2007).

In the Board's decision in *M.I.G.*, which was affirmed by the Supreme Court, the Board noted that a vertical expansion of the M.I.G. landfill could impact the Section 39.2 local siting criteria. *M.I.G. Investments, Inc. v. IEPA*, at 8 (Slip Op. August 15, 1985) PCB 85-60, *affirmed at M.I.G. Investments, Inc. v. IEPA*, 122 Ill. 2d 392 (1988). In *M.I.G. Investments, Inc. v. IEPA*,

the Illinois Supreme Court found that the Act was amended "to place decisions regarding the sites for landfills with local authorities and to avoid having a regional authority (the Agency) in a position to impose its approval of a landfill site on an objecting local authority." 122 Ill. 2d at 398 (1988) citing *E & E Hauling, Inc. v. Pollution Control Board,* 107 Ill.2d 33, 42 (1985). The amendment provided that the local siting authority must determine whether a landfill applicant meets certain statutory criteria set out in Section 39.2 of the Act. *Id.* Section 39(c) of the Act prohibits the IEPA from granting a permit for the development or construction of a new pollution control facility, unless the applicant submits proof that the facility has been approved by the local government under section 39.2. 415 ILCS 5/39(c); *M.I.G. Investments, Inc.* at 399.

In sum, the Supreme Court has stated that "all units of local government, home rule and non-home-rule alike, have concurrent jurisdiction with the Agency in approving siting, because section 39(c) now requires local government approval of all proposed pollution control facilities." *City of Elgin v. Cnty. of Cook*, 169 Ill. 2d 53, 64 (1995); *see also Town & Country Utilities, Inc.*, 225 Ill. 2d at 108.

To vest the IEPA with the jurisdiction to consider, create, and issue a permit, an applicant must complete all of these steps. If either the IEPA or the applicant skips a step, whether intentionally or inadvertently, the IEPA lacks the information it needs to fully consider whether to issue a landfill permit. A review of the pertinent facts at issue here demonstrates that CLI did in fact skip a step, as it did not have the requisite local siting approval for the development of its CWU when it applied to the IEPA for Mod 9.

CLI's CWU, although located within the MSWLF at CL3, was designed to accept a completely new waste stream made up of different constituents with potential hazards and impacts separate from those found in typical municipal solid waste (e.g. household waste). CLI

sought to be permitted to accept these new wastes via a mere permit modification (i.e. Mod 9). However, the proposed disposal activity for the CWU so integrally changes the operations at the facility as to render it a new "pollution control facility" under Section 3.330 of the Act, 415 ILCS 5/3.330, requiring CLI to obtain local siting for it under Section 39.2 of the Act, 415 ILCS 5/39.2.

The IEPA's ability to determine if local siting is required has been found to be part of its role in issuing permits, *City of Waukegan v. Illinois E.P.A.,* 339 Ill. App. 3d 963, 975-76, (2nd Dist., 2003), and as mentioned above, local governing bodies, like the DeWitt County Board, have concurrent jurisdiction in siting new pollution control facilities. *See e.g. City of Elgin v. County of Cook,* 169 Ill.2d 53, 64 (1996). In this case, the IEPA and the DeWitt County Board have worked concurrently to determine that local siting for the CWU has not been obtained, as required by Sections 39.2 and 39(c) of the Act. On July 22, 2014, for the first time, IEPA sought information directly from the DeWitt County Board as to whether it thought additional siting was required for the CWU. R. at 15838. The DeWitt County Board stated that the "Board believes the Chemical Waste Unit of Clinton Landfill #3 (which has been permitted by Illinois EPA to accept both the PCB and MGP waste streams noted above) required local siting pursuant to the Illinois Environmental Protection Act (415 ILCS 5/39.2)." R. at 15840.

On July 31, 2014, after reviewing the information provided by the DeWitt County Board (*See* R. at 15839-64), the IEPA unequivocally stated in its cover letter issuing Mod 47 that CLI did not have the requisite local siting approval for Mod 9.

> On February 5, 2008, the Agency received from Clinton Landfill, Inc. a permit application to modify Permit No. 2005-070-LF to create an area designated as a "chemical waste unit" that would accept wastes Clinton Landfill No. 3 was already permitted to accept as well as wastes it was not yet permitted to accept. **The application did not contain a Certification of Siting Approval.** Instead, Section 812.105 of the application stated that "[t]his application does not propose a new nor expansion to the

> currently permitted Clinton Landfill No. 3 and, therefore, local siting approval is not required for this permit modification." On January 8, 2010, the Agency issued Permit Modification No. 9, which incorporated the information contained in the February 5, 2008 application. **Since issuing Permit Modification No. 9, the Agency has received information indicating that the necessary local siting approval has not been granted for the modifications in Permit Modification No. 9.**

(Emphasis added.) R. at 15752.

3. The Board has consistently held that new local siting approval is needed when a permit application makes substantial changes to the facility's previously approved nature, scope, or design.

In *Saline County Landfill,* the Board stated that the issue to be determined was whether the petitioner had "demonstrated that there is no reasonable likelihood that eliminating the interior separation berm would **substantially alter the nature and scope of the expansion approved by the County Board in 1996"**. (Emphasis added.) *Saline County Landfill v. IEPA, and County of Saline Intervenor*, at 9 (Slip Op., May 16, 2002) PCB 02-108. The Board further stated that if there is **a reasonable likelihood** that the change would so alter the project, then the change is outside of the siting approval and the requested permit would therefore violate Section 39(c). (Emphasis added.) *Id.* citing *M.I.G. Investments, Inc. at* 400 (1988). In *Saline County Landfill,* there was a contention that "any design change that does not exceed the waste boundaries of the facility, as sited, would not require additional proof of local siting approval." *Saline County Landfill* at 16. In rejecting this argument, the Board explained:

> The applicable case law, however, discussed above, holds that **the local siting authority considers not only the location of a proposed landfill expansion, but also its design.** *See M.I.G.*; *see also City of East Peoria v. PCB*, 117 Ill. App. 3d 673, 679 (3d Dist. 1983) (the Act "unambiguously requires the county board to consider the public health ramifications of the sanitary landfill's design at a given site"); *Kane County Defenders, Inc. v. PCB*, 139 Ill. App. 3d 588 (2d Dist. 1985). **An expansion's design, proposed in a development permit application, that substantially differs from the design proposed at siting could happen to fall within the waste boundaries approved by the local government.** As the Board stated in it April 18, 2002 order, however, **"[i]f an applicant were allowed to substantially change its landfill design between siting approval and permitting, without reapplying for siting approval, the Section 39.2 design criterion**

could be rendered meaningless." *Saline County Landfill*, PCB 02-108, slip op. at 16. (Emphasis added.) *Saline County Landfill* at 16.

In United Disposal of Bradley v. IEPA, the Board held that even a requested expansion of the service area limits of Petitioner's existing waste transfer facility "may impact the criteria a local siting authority considers in determining whether to site, or re-site, a pollution control facility." *See* (Slip Op. June 17, 2004) PCB 03-235 at 19, *affirmed* in *United Disposal of Bradley, Inc. v. Pollution Control Bd.*, 363 Ill. App. 3d 243 (3d Dist., 2006). The Board concluded by stating that it would "not deprive the local siting authority of its **statutory right and obligation** to review the service area expansion under the procedures of Section 39.2 of the Act." (Emphasis added.) *Id.* In *Village of Robbins and Allied Waste Transportation, Inc. v. IEPA*, the Board found that the ordinance granted "siting approval for a waste-to-energy facility, not a waste transfer station." *See* (Slip Op. September 16, 2004) PCB 04-48 at 9. Further, the Board stated "the change sought by the petitioners is not a mere change in condition; **but a wholesale change in the very type of facility contemplated.**" (Emphasis added.) *Id.* The Board found that the facts in *Village of Robbins* were similar to those in *United Disposal*. *Village of Robbins* at 9. The Board found that in both *Village of Robbins* and *United Disposal*, "the nature of the change that the petitioners were seeking may impact the criteria considered in determining whether to site or re-site a pollution control facility." *Id.* Significantly, the Board held that **"to allow the use of Section 39.2(e-5)[7] in this context would deprive members of the public an opportunity to participate in the local siting process."** (Emphasis added.) *Id.*

This broad delegation of adjudicative power to a county board clearly reflects a legislative understanding that the county board hearing, which presents the only opportunity for

[7] Section 39.2(e-5) of the Act provides for the transfer of local siting approval obtained under Section 39.2 to a subsequent owner or operator. 415 ILCS 39.2.

public comment on the proposed site, is the most critical stage of the landfill site approval process. *Kane County Defenders* at 593.

In this case, CLI had a permit to operate a municipal solid waste and non-hazardous special waste landfill (i.e. CL3). However, CLI decided to change the waste streams accepted at CL3, including PCBs and MGP waste above regulatory limits, and applied for a TSCA permit from the USEPA to accept PCBs. This was a fundamental change to the nature of the waste to be disposed that was not considered during the local siting process for the CL3. In fact, in both its siting application and during the public siting hearings, CLI had specifically represented that the CL3 would only take municipal solid wastes and non-hazardous special wastes, and not hazardous wastes or wastes containing PCBs regulated by TSCA. R. at 15841A, 15858-59. At the time CLI's local siting application was pending with the DeWitt County Board, MGP wastes were required to undergo TCLP testing to determine if the MGP waste was hazardous. The DeWitt County Board, in response to the IEPA's inquiry regarding local siting for the CWU, stated that it "did *not* authorize the disposal of manufactured gas plant (MGP) waste which exceeds the regulatory levels contained in 35 Ill. Adm. Code 721.124(b) in its September 12, 2002 siting approval." (Emphasis added in original.) R. at 15839-15840.

An applicant seeking siting approval must submit sufficient details of the proposed facility demonstrating that it meets each of the nine criteria set forth in section 39.2(a) of the Act. 415 ILCS 5/39.2(a); *Fox Moraine, LLC v. United City of Yorkville*, 2011 IL App (2d) 100017, ¶13. In granting siting approval for CL3, the DeWitt County Board painstakingly addressed each of the nine local siting criteria set forth in Section 39.2(a) of the Act. Notably, the DeWitt County Board stated that, based on the testimony of Mr. Edwards, criteria number 7 concerning the disposal of hazardous waste did not apply. R. at 14. Allowing CLI to modify its permit to add

the CWU would prevent the DeWitt County Board from fulfilling its statutory obligation to consider the location, design, and public health impacts, among other criteria, of the CWU and thereby render Section 39.2 meaningless. *See Saline County Landfill v. IEPA,* at 18 (Slip Op., May 16, 2002) PCB 02-108; *see also United Disposal of Bradley v. IEPA,* at 19 (Slip Op., June 17, 2004) PCB 03-235.

Based on the Illinois Supreme Court's decision in *M.I.G. Investments*, and the Board's decisions in *Saline County Landfill* and *Village of Robbins*, it is clear that a facility like CLI's CWU, which went well beyond the scope and nature of the original local siting approval for a municipal solid waste and non-hazardous special waste landfill, becomes a new pollution control facility and requires local siting review and approval before issuance of a permit. Further, granting this permit, notwithstanding CLI's failure to acquire or even seek local siting approval, would violate Section 39(c) of the Act. *See United Disposal of Bradley, Inc. v. Pollution Control Bd.*, 363 Ill. App. 3d 243, 251 (3rd Dist. 2006).

4. The facts in this case demonstrate that CLI changed its landfill design between siting approval and permitting, without reapplying for siting approval, and thereby rendering the Section 39.2 design criterion meaningless.

The pertinent undisputed facts and admissions herein demonstrate that the proposed disposal activity at the CWU so fundamentally changed the operations at the originally permitted CL3 as to make it a new pollution control facility under Section 3.330 of the Act, 415 ILCS 5/3.330, and thereby triggering the requirement to obtain local siting under Section 39(c) of the Act, 415 ILCS 5/39(c). Both Illinois courts and the Board have established the central part of the review of whether the IEPA can issue a permit under Section 39(c) of the Act is whether or not the County Board's consideration of the Section 39.2 local siting criteria substantially changed from the local siting approval to the permit application. CLI did not have independent local siting

approval for the CWU when it applied to the IEPA for Mod 9, and accordingly, the IEPA did not have the authority to issue Mod 9. In short, CLI created a new unit - the CWU - which included new designs and new waste streams that were not presented to the DeWitt County Board as part of the local siting approval in 2002.

a. CLI's Mod 9 Application

A review of CLI's 2008 Mod 9 application to the IEPA amply demonstrates that CLI substantially changed the nature and character of CL3 that the DeWitt County Board approved in 2002, including, among other things, a redesigned liner and leachate drainage collection system that meets the requirements of a hazardous waste landfill.

> On behalf of Clinton Landfill, Inc. (CLI), PDC Technical Services, Inc. (PDC) is **submitting this application to modify the design and operation of a portion of Clinton Landfill No. 3 (Facility I.D. 0390055036).** The design modifications include reconfiguring the southwest approximately 22.5 acres of Clinton Landfill No. 3. **The reconfiguration includes adding liner components and a redundant leachate drainage and collection system that comply with the technical requirements of 35 Ill. Adm. Code Part 724.401**. The reconfigured area is referred to herein as the Chemical Waste Unit, or CWU. CLI intends to utilize the CWU for disposal of non-hazardous Special Waste and certified non-Special Waste. Additionally, CLI has submitted an application to the United States Environmental Protection Agency (USEPA) to permit the CWU as a Chemical Waste Landfill, as defined at 40 CFR Part 761.3. Upon the USEPA's granting of that permit, CLI intends to accept polychlorinated biphenyl compound (PCB) wastes that are allowed by the USEPA to be disposed in a Chemical Waste Landfill, provided such wastes contain no more than 500 parts per millions (ppm) PCBs.

(Emphasis added.) R. at 8703.

The CWU and MSWLF are clearly intended to handle different waste streams and have different design criteria as well.

> 812.108.1 Type of Waste Disposal Unit and Types of Waste Accepted
>
> Chemical Waste Unit
>
> **The CWU is considered to be a Chemical Waste Landfill** and will accept only

non-hazardous chemical waste, as defined by 35 III. Adm. Code Part 810.103. Upon approval of the USEPA, the CWU will be regulated by the USEPA as a Chemical Waste Landfill as defined by 40 CFR 761.3, at which time any PCB Waste (defined at 40 CFR Part 761.3) that is allowed for disposal at a Chemical Waste Landfill will be accepted at the CWU, except that waste containing PCBs at a concentration greater than 500 parts per million (ppm) will not be accepted.

Certified non-Special Waste and non-hazardous Special Waste, including **manufactured gas plant (MGP) wastes which exhibit constituent concentrations greater than those listed at 35 III. Adm. Code Part 721.124(b) will be accepted at the CWU.** Liquids will not be disposed in the CWU.

(Emphasis added.) R. at 8705.

Municipal Solid Waste Unit

The Municipal Solid Waste (MSW) Unit comprises the remainder of Clinton Landfill No. 3. As illustrated on the drawings enclosed separately, a portion of the MSW Unit overlies (or piggybacks) a portion of the CWU. The MSW Unit is considered to be a Municipal Solid Waste Landfill Unit, as defined by 35 Ill. Adm. Code Part 810.103.

Municipal solid waste (household and commercial refuse), construction demolition and debris waste, certified non-Special Waste, non-hazardous Special Waste, and ACWM will be accepted at the MSW Unit. . . .

R. at 8706.

SECTION 812.306 — DESIGN OF THE LINER SYSTEM

The approved permit application previously submitted under Log No. 2005-070 provided documentation that the MSW Unit liner system meets the requirements provided at 35 Ill. Adm. Code Part 811.306. . . .

CLI is proposing modifications to the portion of the liner system which will be constructed within the CWU. These modifications are described in Shaw's Design Report, provided as Attachment 2 to this application. Shaw's Design Report includes plan views of the revised liner system, a plan showing the proposed layout of individual geomembrane panels, cross-sections and details of the CWU liner system, and the remaining documentation required by 35 Ill. Adm. Code Part 811.306. The cross-sections and details of the MSW Unit liner system remain unchanged from those provided in the approved permit application submitted under Log No. 2005-070.

Revisions to the geomembrane and composite drainage layer specifications are proposed to reflect the use of textured geomembrane throughout the

> **floor of the CWU and the use of a composite drainage layer as the CWU redundant leachate drainage layer.** . . .

R. at 8725-26.

In sum, the facts amply demonstrate that CLI's CWU went well beyond the scope of the local siting approval granted by the DeWitt County Board for CLI's CL3. The DeWitt County Board approved a municipal solid waste and non-hazardous special waste landfill, not a chemical waste landfill that included adding liner components and a redundant leachate drainage and collection system consistent with the technical requirements of 35 Ill. Adm. Code Part 724.401 (i.e. hazardous waste landfill specifications). The only remaining question is what the legal effect CLI's unlawful modification has. Based on CLI's failure to comply with the local siting requirements in Section 39.2 for new pollution control facilities, the IEPA did not have jurisdiction under Section 39(c), 415 ILCS 5/39(c), to issue Mod 9 and therefore Mod 9 is void. *See e.g. Pioneer Processing, Inc. v. E.P.A.,* 102 Ill. 2d 119, 143 (1984) (Supreme Court found IEPA-issued permit void).

5. The CWU is a new pollution control facility because in its Mod 9 application CLI sought to dispose, for the first time, MGP waste exceeding the regulatory levels set forth in 35 Ill. Adm. Code 721.124(b).

As discussed above, Section 39(c) of the Act prohibits the IEPA from issuing a development or construction permit for a new pollution control facility "unless the applicant submits proof to the IEPA that the location of the facility has been approved" by the relevant local government authority. 415 ILCS 5/39(c). A new pollution control facility is, among other things, "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 5/3.330(b)(3).

The CWU is a new pollution control facility. In its application for Mod 9, CLI sought to dispose of MGP waste exceeding the regulatory levels set forth in 35 Ill. Adm. Code 721.124(b)

– a new waste stream for which local siting approval had not been granted. MGP waste is a special waste. *See* 415 ILCS 5/3.475. Accordingly, Section 39(c) of the Act required CLI to obtain authorization from the DeWitt County Board prior to accepting this new special waste. The record does not contain any supporting evidence that CLI ever obtained authorization from the DeWitt County Board to dispose of MGP waste in excess of regulatory levels in the CWU. *See* 35 Ill. Adm. Code 721.124(b). In fact, the record amply demonstrates the opposite. Specifically, in its July 24, 2014 letter to the IEPA, the DeWitt County Board stated that its September 12, 2002 siting approval did **not** authorize disposal of MGP waste exceeding the regulatory levels in 35 Ill. Adm. Code 721.124(b). R. at 15839. (Emphasis added.) As a result, CLI lacked the necessary local siting approval to obtain a development or construction permit for the CWU as required by Section 39(c) of the Act. Therefore, the IEPA properly issued Mod 47, including Special Condition III.A.2.f, to ensure that CLI's permit did not violate Section 39(c) of the Act. By modifying CLI's permit to exclude MGP wastes, which includes constituents exceeding the regulatory levels specified in 35 Ill. Adm. Code 721.124(b), from disposal at the CWU. Consequently, IEPA's issuance of Mod 47 was appropriate and CLI's Motion should be denied.

6. An agency decision made without jurisdiction is void and can be attacked at any time.

In *Bus. & Prof'l People for Pub. Interest v. Illinois Commerce Comm'n*, 136 Ill. 2d 192, 243 (1989), the Illinois Supreme Court did a comprehensive analysis of government agency jurisdiction stating that an agency only has the authorization given to it by the legislature through the statutes. Consequently, to the extent an agency acts outside its statutory authority, it acts without jurisdiction. *Id.* The term "jurisdiction," while not strictly applicable to an administrative body, may be employed to designate the authority of the administrative body to act. *Id.* Thus, in

administrative law, the term "jurisdiction" has three aspects: (1) personal jurisdiction - the agency's authority over the parties and intervenors involved in the proceedings, (2) subject matter jurisdiction - the agency's power to hear and determine causes of the general class of cases to which the particular case belongs and (3) an agency's scope of authority under the statutes. *Id.*

Further, a decision by an agency which lacks the statutory power to enter the decision is treated the same as a decision by an agency which lacks personal or subject matter jurisdiction - **the decisions are void**. (Emphasis added.) *Bus. & Prof'l People for Pub. Interest* at 243. Moreover, "jurisdiction" and "authority" have been used interchangeably in certain administrative law contexts and the term "jurisdiction" may be employed to designate the authority of the administrative body to act. *Id.* at 244. The Illinois Supreme Court acknowledged that, theoretically, anytime an agency makes an erroneous decision, it acts without statutory authority because the legislature and the statutes do not give an agency the power to make erroneous decisions. *Id.* citing *Newkirk v. Bigard,* 109 Ill.2d 28, 39 ("A party could merely point to any provision of a statute which was not complied with and claim that the agency did not have authority to act unless the provision was complied with"). However, the Court indicated that it was confident that a reviewing court can make the appropriate distinction between an erroneous decision and one which lacks statutory authority. *Bus. & Prof'l People for Pub. Interest* at 245.

Significantly, a decision rendered by an administrative agency which lacks jurisdiction over the parties or the subject matter, or which lacks the inherent power to make or enter the decision involved, is void and may be attacked at any time or in any court, either directly or collaterally. *Bd. of Educ. of City of Chicago v. Bd. of Trustees of Pub. Sch. Teachers' Pension & Ret. Fund of Chicago*, 395 Ill. App. 3d 735, 739 (1st Dist., 2009) citing *City of Chicago v. Fair Employment Practices Comm'n,* 65 Ill.2d 108, 112–13 (1976).

A review of the applicable law and pertinent facts at issue here demonstrates that CLI did not have the requisite local siting approval for the CWU when it applied to the IEPA for Mod 9. Therefore, Mod 9 and any other permits including the CWU are void and CLI's Motion, which is based on Mod 9 and its successors, should be denied.

7. Since CLI did not establish local siting approval for the CWU in its Mod 9 application, the IEPA's issuance of Mod 47 was appropriate.

The IEPA initiated Mod 47 pursuant to Section 813.201(b)(1) stating, "[s]ince issuing Permit Modification No. 9, the Agency has received information indicating that the necessary local siting approval has not been granted for the modifications in Permit Modification No. 9." R. at 15752. As stated above, the information referenced in Mod 47 was obtained from the DeWitt County Board on July 24, 2014. *See* R. at 15839-40. Based on the Board's longstanding approach discussed above, CLI was required to obtain local siting approval for the landfill changes included in Mod 9. New local siting approval was required because: 1) the CWU substantially differed from the proposed design for the CL3 development conditionally approved by the DeWitt County Board in 2002; and 2) CLI sought to accept new waste streams other than those conditionally approved by the DeWitt County Board in 2002. Therefore, lacking local siting approval for Mod 9, CLI cannot dispose of MGP wastes, which exhibit constituent concentrations greater than those listed at 35 III. Adm. Code 721.124(b), or PCBs at concentrations greater than that allowed by TSCA at the CWU. As a result, IEPA's issuance of Mod 47 was appropriate and CLI's Motion should be denied.

D. MGP Disposal at the MSWLF Portion of CL3

1. Disposal of MGP wastes exceeding the limits listed at 35 III. Adm. Code 721.124(b) at the MSWLF portion of CL3 should be prohibited.

It is unclear in CLI's Motion whether it is challenging the requirement to test MGP waste

using TCLP prior to disposal in the CWU **only**, or if it is also challenging the use of TCLP testing for the disposal of MGP waste in the MSWLF portion of CL3. (Emphasis added.) In its Motion, CLI contends that "the Agency has no legal basis for excluding one type of non-hazardous special waste, *i.e.,* those MGP wastes that include constituents exceeding the regulatory levels specified in 35 Ill. Adm. Code §721.124(b) **from disposal at the CWU**." (Emphasis added.) Motion at 9. Regardless, not only should CLI be precluded from accepting MGP wastes above regulatory levels at the CWU portion of CL3 because it doesn't have local siting approval, but CLI should also be precluded from accepting MGP wastes in the MSWLF portion of CL3 without first conducting TCLP testing because it is likely to create a water pollution hazard. *See* R. at 8705-6 (describing CWU and MSWLF portions of CL3).

For the first time in its application for Mod 9, CLI clearly declared its intention to accept MGP wastes that exceeded concentrations listed in Section 721.124(b) at the CWU. *See* R. at 8705. Of note, Special Condition III.A.2.f has **always** prohibited CLI from disposing of MGP waste which exceeds the concentrations listed in 35 Ill. Adm. Code §721.124(b) in the MSWLF portion of CL3. (Emphasis added.) R. at 6988, 7871, and 15779-15780. CLI has never sought review of Special Condition III.A.2.f as it applies to the MSWLF portion of CL3.

a. The purpose of using TCLP is to determine whether a solid waste is a hazardous waste based on toxicity

A solid waste not specifically listed as "hazardous" by the USEPA is nonetheless deemed "hazardous" if it exhibits one or more of four characteristics: ignitability, corrosivity, reactivity, or toxicity. *Ass'n of Battery Recyclers, Inc. v. U.S. E.P.A.*, 208 F.3d 1047, 1060 (D.C. Cir. 2000) citing 40 C.F.R. §§ 261.20, 261.21, 261.22, 261.23 & 261.24. The USEPA created the TCLP test as part of its response to the command of Congress to "promulgate regulations identifying the characteristics of hazardous waste." *Id.* citing 42 U.S.C. §6921(b)(1); *see also* 51 Fed. Reg.

21,653 (describing evolution of TCLP). Because Congress has defined hazardous waste to include any solid waste that may "pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed," (*See* 42 U.S.C. §6903(5)(B)), the USEPA designed a test that would determine whether a solid waste would pose a risk to human health or the environment if it was mismanaged. *Id.*; *See also* 55 Fed. Reg. 11,806/1. The USEPA adopted the TCLP test to simulate the disposal practice that is the most dangerous to human health and the environment, while still being a plausible scenario. *Id.*

In promulgating regulations for the treatment, storage, transportation, and disposal of hazardous waste, the USEPA stated the following:

> The improper management of hazardous waste is probably the most serious environmental problem in the United States today. EPA estimates that in 1979 the United States generated almost 60 million metric tons of hazardous waste, but that only 10 percent of this was managed in an environmentally sound manner. The remainder—over 50 million tons—was transported, treated, stored or disposed of in a manner which potentially threatens human health and the environment.
>
> This mismanagement has tragic consequences. EPA has on file hundreds of cases of damage to human health or the environment resulting from the indiscriminate dumping or other improper management of hazardous waste. The vast majority of these cases involve the pollution of groundwater—the source of drinking water for about half the nation's population—from the open dumping of wastes or from improperly operated landfills and surface impoundments. In many of these cases, groundwater supplies were so badly contaminated with toxic or cancer causing chemicals and heavy metals that residents in the area had to obtain drinking water from other sources. In other more tragic cases, residents were not aware of the contamination, continued to drink the water, and suffered serious health effects.

45 Fed. Reg. 33084-85 (May 19, 1980). With these concerns in mind, the USEPA designed and created TCLP testing to facilitate appropriate disposal of hazardous waste. The USEPA's worst-case mismanagement scenario assumed, among other things, the "co-disposal of toxic wastes in an actively decomposing municipal landfill which overlies a groundwater aquifer." *Ass'n of*

Battery Recyclers, Inc., 208 F.3d at 1060 citing 40 C.F.R. §§ 261.20, 261.21, 261.22, 261.23 & 261.24; *See also* 45 Fed. Reg. 33,110/3. CLI's CL3 overlies groundwater and the Mahomet Aquifer.

b. Regulation of MGP waste in Illinois

At the time of the initiation of a Board identical in substance rulemaking on June 18, 2001, the Board regulations did not exclude MGP waste from TCLP testing to determine if it was hazardous. *See* 35 Ill. Adm. Code 721.124(a); *See RCRA Subtitle C Update, USEPA Amendments (January 1, 2001 through June 30, 2001)*, (Slip Op. April 18, 2002), R 02-01. In its final opinion adopting the amendments, the Board pointed out that "[o]n March 13, 2002, USEPA amended its rules in response to the federal court's decision in *Association of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000). *Id.* at 27. The Board also noted that the USEPA amended the Phase IV land disposal restrictions rule "to reflect the fact that use of the [TCLP] test is not allowed to determine whether [MGP] waste is hazardous" in conformance with the decision in *Association of Battery Recyclers, Inc.*. *Id.* at 28. This amendment to the Board's regulations became effective on April 22, 2002. Amended in R02-1/R02-12/R02-17 at 26 Ill. Reg. 6584, effective April 22, 2002.

The Board's identical in substance rulemaking (R02-01), which excluded MGP waste from TCLP testing, became effective after CLI filed its local siting application on April 12, 2002 (*See* Petition at 2, ¶ 1). There is nothing in the record to suggest that CLI informed the DeWitt County Board that it intended to accept MGP waste for disposal. At the time CLI's local siting application was pending with the DeWitt County Board, MGP waste in Illinois were required to undergo TCLP testing to determine if the MGP waste was hazardous and therefore would require disposal at a hazardous waste landfill (pre-*Association of Battery Recyclers, Inc.*). In fact, in its

response to the IEPA's inquiry into the scope of local siting, the DeWitt County Board plainly stated that it "did *not* authorize the disposal of manufactured gas plant (MGP) waste which exceeds the regulatory levels contained in 35 Ill. Adm. Code 721.124(b) in its September 12, 2002 siting approval." (Emphasis added in original.) R. at 15839-15840.

In *Ass'n of Battery Recyclers, Inc.*, the court considered, among other things, whether TCLP should be used to determine if MGP waste should be considered hazardous and specifically stated:

> **Here, the EPA has demonstrated the possibility that MGP waste from remediation sites could be disposed of in a municipal landfill, but has not produced a shred of evidence indicating that has happened or is likely to happen. Upon the current record**, therefore, we must conclude that the EPA has not justified its application of the TCLP to MGP waste.

208 F.3d at 1064. The court further explained its holding as follows:

> The Associations have pointed out that MGP waste differs in one very real respect from other mineral processing wastes: **MGP waste is no longer produced and therefore will not be disposed of in municipal landfills unless that happens in the course of a remediation effort.** Evidence that mineral processing wastes that are still being produced have been disposed of in municipal landfills offers no support for the different proposition that MGP waste from a remediation effort has been or will be so disposed.

(Emphasis added.) *Id.* Although MGP waste has been excluded in a Board rulemaking (R 02-01) from the TCLP analysis to determine if it is a hazardous waste, that does not the end the inquiry in determining if the waste is being properly disposed. *See* 35 Ill. Adm. Code 721.124(a).

2. Disposal of MGP waste exceeding the limits listed at 35 Ill. Adm. Code 721.124(b) at the MSWLF portion of CL3 may create a water pollution hazard in violation of the Environmental Protection Act.

From its Motion, it is unclear if CLI wants to dispose of MGP waste in the MSWLF portion of CL3 without the use of TCLP testing to determine if the MGP waste contains hazardous levels of toxic contaminants. *See generally* Motion at 9. If that is CLI's intention, then that intent runs counter to the USEPA rationale for designing and creating TCLP testing for use

in disposal determinations of whether certain solid wastes are hazardous or non-hazardous. *See generally Ass'n of Battery Recyclers, Inc. v. U.S. E.P.A.*, 208 F.3d 1047, 1060 (D.C. Cir. 2000), citing 40 C.F.R. §§ 261.20, 261.21, 261.22, 261.23 & 261.24; s*ee also* 55 Fed. Reg. 11,806/1. In fact, if CLI is allowed to dispose of MGP waste exceeding the regulatory limits found in 35 Ill. Adm. Code 721.124(a) at the MSWLF portion of CL3, the case at hand would become strikingly similar to the USEPA's worst-case mismanagement disposal scenario discussed above in Section II.D.1.a. Therefore, based on USEPA's rationale for creating the TCLP testing process for hazardous waste, CLI should not be allowed to dispose of MGP waste at the MSWLF portion of CL3 without making the threshold determination of whether those wastes exceed the regulatory limits listed in 35 Ill. Adm. Code 721.124(a).

Disposing of MGP waste containing hazardous levels of constituents into the MSWLF portion of CL3, which is not designed for the disposal of such wastes (i.e. wastes with hazardous concentrations of chemicals), can create a "water pollution hazard" to the groundwater underlying the CL3. Creating a water pollution hazard is prohibited by Section 12(d) of the Act. The Appellate Court has found that a Section 12(d) "water pollution hazard can be found although the actor does not yet threaten to cause pollution." 415 ILCS 5/12(d); *Tri-County Landfill Co. v. Illinois Pollution Control Bd.*, 41 Ill. App. 3d 249, 258 (2nd Dist. 1976). Landfill permits are granted by the IEPA pursuant to Section 39 of the Act, which provides, in pertinent part:

> "When the Board has by regulation required a permit for the [operation of a landfill facility], the applicant shall apply to the [IEPA] for such permit and it shall be the duty of the [IEPA] to issue such a permit upon proof by the applicant that the facility * * * will not cause a violation of this Act or of regulations hereunder." 415 ILCS 5/39(a).

Illinois E.P.A. v. Jersey Sanitation Corp., 336 Ill. App. 3d 582, 593 (4th Dist., 2003) citing 415 ILCS 5/39(a). To allow CLI to dispose of MGP waste that exceeds the regulatory limits set forth

in 35 Ill. Adm. Code 721.124(b) at the MSWLF portion of CL3 would, in effect, cause a violation of the Act in violation of Section 39(a).

The decision to exempt MGP waste from TCLP testing to determine if it constitutes a hazardous waste was based on the premise that no MGP waste would be disposed of in a municipal landfill; however this case demonstrates that that underlying premise was incorrect. Therefore, TCLP must be used to ensure that no waste exhibiting toxic characteristics at hazardous levels is disposed in a municipal landfill (i.e. MSWLF portion of CL3). At a minimum, such disposal may create a water pollution hazard in violation of Section 12(d) of the Act. Section 39(a) of the Act is clear; no permit shall issue that will cause a violation of the Act. *See Illinois E.P.A. v. Jersey Sanitation Corp.*, 336 Ill. App. 3d 582, 593 (4th Dist., 2003). Therefore, to avoid issuing a permit that would violate Section 39 of the Act, Special Condition III.A.2.f of Mod 47 was warranted. Consequently, IEPA's issuance of Mod 47 was appropriate and CLI's Motion should be denied.

III. CONCLUSION

The Board should deny CLI's Motion as a matter of law, because:

1. CLI did not have local siting approval for its CWU from the DeWitt County Board as required by Section 39.2 of the Act, 415 ILCS 5/ 39.2, and therefore the requested permit (i.e. Mod 9) violates Section 39(c) of the Act, 415 ILCS 5/ 39(c).

2. Lacking local siting approval for Mod 9, Special Condition III.A.2.f of Mod 9 to Permit No. 2005-070-LF, as it applied to the CWU, is void and inapplicable as a matter of law.

3. The CWU is a new pollution control facility because in its Mod 9 application CLI sought to dispose, for the first time, MGP waste exceeding the regulatory levels set forth in 35 Ill. Adm. Code 721.124(b).

4. CLI should also be prohibited from accepting MGP wastes exceeding the regulatory limits found at 35 III. Adm. Code 721.124(b) in the **MSWLF** portion of CL3 because the disposal may create a water pollution hazard in violation of Section 12(d) of the Act.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
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DATE: January 9, 2015

CERTIFICATE OF SERVICE

I, JENNIFER A. VAN WIE, an Assistant Attorney General, do certify that I caused the Respondent's Response in Opposition to Petitioner's Motion for Partial Summary Judgment in this matter to be served upon the persons listed in the Service List by electronic mail at the listed electronic mail addresses.

Jennifer A. Van Wie
JENNIFER A. VAN WIE

Date: January 9, 2015