ILLINOIS POLLUTION CONTROL BOARD
November 6, 2014

WILLIAM SPENCER,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 15-63
	)	(Citizens Enforcement - Land)
CLINTON LANDFILL, INC., and ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by J.D. O'Leary):

On September 3, 2014, William Spencer filed a complaint (Comp.) against Clinton Landfill, Inc. (CLI) and the Illinois Environmental Protection Agency (Agency or IEPA) regarding requirements under Section 39.2 of the Environmental Protection Act (Act) for approval of the site of a pollution control facility at Clinton Landfill No. 3. The complaint also requests third-party involvement in pending case PCB 15-60, Clinton Landfill, Inc. v. IEPA. On September 29, 2014, CLI filed a motion to dismiss the complaint as duplicative and frivolous (CLI Mot.). On October 3, 2014, the Agency filed a motion to dismiss the complaint as frivolous (Agency Mot.). Complainant responded to the motions (Resp.) on October 14, 2014.

Below, the Board first summarizes the complaint, CLI's motion to dismiss, the Agency's motion to dismiss, and complainant's response. After providing the legal background and the standard of review, the Board analyzes the issues presented before reaching its conclusion.

SUMMARY OF COMPLAINT

The complainant first requests to file a complaint regarding site approval requirements under Section 39.2 of the Act for 22.5 acres of Clinton Landfill No. 3 re-designated by Modification No. 9 to Permit No. 2005-070-LF. Comp. at 1.

The complainant also requests third-party involvement in pending case PCB 15-60, Clinton Landfill, Inc. v. IEPA. *Id*.

Allegations

The complaint alleges that CLI obtained Modification No. 9 of its Permit No. 2005-070-LF, which re-designated 22.5 acres of Clinton Landfill No.3 for the purpose of storing hazardous waste. Comp. at 1 (¶1). The complaint alleges that CLI "attempted to create a new regulatory term 'CHEMICAL WASTE UNIT' that does not exist." *Id*. at 1 (¶4).

The complaint states that CLI in good faith re-negotiated its original Host Agreement with the DeWitt County Board to reflect Modification No. 9. Comp. at 1 (¶2). The complaint alleges that CLI did not initiate a new proceeding for site approval to reflect this re-negotiated agreement. *Id*. The complaint alleges that, while CLI obtained site approval on September 12, 2002, that approval did not include storage of hazardous waste. *Id*. The complaint also alleges that the Agency required certification that Modification No. 9 meets the site approval requirements of Section 39.2 of the Act. *Id*. at 3 (¶5). The complaint alleges that CLI certified that site approval had been obtained for the re-designated 22.5 acres. *Id*.

The complaint alleges that, because CLI failed to obtain new site approval for Modification No. 9, it failed to follow the requirements of Section 39.2 of the Act. Comp at 1. (¶1); *see* 415 ILCS 5/39.2 (2012). The complaint claims that CLI obtained a permit modification for the disposal of hazardous wastes without the notification, participation, and independent review required by Section 39.2 of the Act. Comp. at 2 (¶8). The complaint states that the Agency issued Modification Nos. 46 and 47 to remove two waste streams, polychlorinated biphenyls (PCBs) and Manufactured Gas Plant (MGP) waste, from CLI's permit because CLI had not received site approval under Section 39.2 of the Act. Comp. at 2 (¶7).

The complaint alleges that complainant originally presented to the Agency the issue of site approval raised in pending case PCB 15-60, Clinton Landfill, Inc. v. IEPA. Comp. at 4 (¶11). The complaint characterizes site approval for Modification No. 9 as the major issue of this case. *Id*. The complaint states that complainant wishes to maintain and defend his position on the question of site approval and the other requirement of Section 39.2 of the Act. *Id*.

Requested Relief

The complaint first requests "to be allowed as a third party in case #PCB2015-060 as the original complainant." Comp. at 4.

Second, the complaint requests "that the Illinois Environmental Protection Agency decision to remove two listed waste PCBs and MGP streams from permit NO. 2005-070-LF due to false and misleading information supplied to the Agency by Clinton Landfill in application of modification NO. 9 that redesigned 22.5 acres of the municipal landfill #3 in Clinton Illinois be made permanent." Comp. at 4.

Third, the complaint requests "that all changes made to permit due to modification NO. 9 be removed permanently from permit NO. 2005-070-LF and that all waste be removed from the redesigned 22.5 acres of municipal landfill #3." Comp. at 4.

SUMMARY OF CLI'S MOTION TO DISMISS

Background

CLI states that on August 28, 2014, it filed a petition for review of Modification No. 47 issued by the Agency on July 31, 2014, to Permit No. 2005-070-LF. CLI Mot. at 2. CLIs' petition requested that the Board review Permit Modification No. 47 issued on July 31, 2014,

which made three substantive changes to CLI's permit. *Id*., *see* Clinton Landfill, Inc. v. IEPA, PCB 15-60 (Aug. 28, 2014). First, the Agency added obtaining local siting approval as a condition of accepting PCB waste. CLI Mot. at 2. Second, the Agency added a prohibition of the disposal of MGP waste exceeding specified regulatory levels. *Id*. Third, the Agency modified a condition addressing leachate management to reflect the need to obtain local siting approval before accepting PCB waste. *Id*. CLI's petition argues that these changes made through Modification No. 47 "were arbitrary, capricious, unreasonable, unlawful, and beyond the regulatory authority of the Agency." *Id*. at 3; *see* Clinton Landfill, Inc. v. IEPA, PCB 15-60.

CLI states that on September 3, 2014, complainant submitted to the Board a filing designated "Formal Complaint Third Party Petition to Participate Case # PCB 2015-060," which the Board has docketed as PCB 15-63. CLI Mot. at 3; *see* Comp. at 1.

Intervention in PCB 15-60

Citing the allegations and requested relief in the complaint, CLI surmises that complainant may seek to intervene in the pending PCB 15-60 instead of initiating an enforcement action against CLI and the Agency. CLI Mot. at 5, citing Comp. at 4. CLI states that its petition in PCB 15-60 "seeks review of a permit issued by the Agency." CLI Mot. at 5. CLI claims that it is well-settled law "that only the Agency and the permit applicant can properly seek review of a permit, and that intervention by non-parties in permit appeals is not allowed." *Id*. at 5-6, citing Sutter Sanitation, Inc. v. IEPA, PCB 04-187, slip op. at 3-4 (Sept. 16, 2004); Riverdale Recycling, Inc. *et al*. v. IEPA, PCB 00-228, slip op. at 2-3 (Aug. 10, 2000).

CLI cites Sutter Sanitation, which states that, under Section 40(a)(1) of the Act, "[o]nly the permit applicant may appeal." CLI Mot. at 6, citing Sutter Sanitation, slip op. at 4. Regarding intervention, CLI cites the Board's statement that, "[r]egardless of the claimed interests that the movants here seek to protect, *the Board lacks the authority to give party status through intervention to persons the General Assembly does not allow to become parties to this type of proceeding*." CLI Mot. at 6 (emphasis in original), citing Sutter Sanitation, slip op. at 4.

CLI cites the Board's position in Riverdale Recycling that granting a third party's motion to intervene "would essentially allow a third-party challenge to the Agency's permit denial," an action barred by Landfill, Inc. v. PCB, 74 Ill. 2d 541, 387 N.E.2d 258 (1978). CLI Mot. at 7, citing Riverdale Recycling, slip op. at 2-3. The Board added that this rationale applied even though the motion to intervene appeared to support the Agency's denial of a permit. CLI Mot. at 7, citing Riverdale Recycling, slip op. at 2-3. Although the Board noted that the General Assembly had adopted Sections 40(b) and (e) of the Act authorizing appeals of specific third-party permit appeals, the Board stressed that it had never granted general authority for third-party appeals or interventions. CLI Mot. at 7, citing Riverdale Recycling, slip op. at 2-3. CLI argues that, under the cited case law, "the Board cannot permit intervention by persons who are not allowed to become parties to the particular type of proceeding at issue pursuant to the Act. CLI Mot. at 8.

CLI states that, because PCB 15-60, Clinton Landfill, Inc. v. IEPA, is a permit appeal, the only proper parties are the permit applicant and the Agency. CLI Mot. at 8, citing Landfill, Inc.

v. PCB, 74 Ill. 2d. 541, 387 N.E.2d 258 (1978); People of Williamson Co. *ex rel*. Garnati, *et al*. v. Kibler Devel. Corp., *et al*., PCB 08-93 (July 10, 2008). CLI argues that complainant is not the permit applicant or the Agency and is therefore not a proper party in that appeal. *Id*. CLI claims that, to the extent the complaint in PCB 15-63 is a request to intervene in PCB 15-60, the Board does not have authority to grant that request. Because the complaint requests relief that the Board lacks authority to grant, CLI argues that the complaint is frivolous and should therefore be dismissed. *Id*., citing 35 Ill. Adm. Code 101.202.

Duplicative of PCB 15-60

CLI argues that, to the extent that the complaint in PCB 15-63 seeks relief other than intervention in PCB 15-60, it is duplicative of PCB 15-60. CLI Mot. at 8. CLI claims that the issues raised in PCB 15-63 regarding "(1) CLI's compliance with siting requirements relative to the Chemical Waste Unit (or CWU) at Clinton Landfill No.3, (2) CLI's development of the Chemical Waste Unit pursuant to Modification No. 9 to CLI's Permit No. 2005-070-LF, and (3) the Agency's issuance of Modification No. 47 to CLI's Permit No. 2005-070-LF, are all topics that are before the Board in PCB 2015-060." CLI Mot. at 8-9. CLI concludes that the complaint in PCB 15-63 is duplicative of PCB 15-60 and should therefore be dismissed. *Id*. at 9.

Frivolous

CLI argues that, to the extent that the complaint in PCB 15-63 seeks relief other than intervention in PCB 15-60, it fails to state a claim on which relief could be based. CLI Mot. at 9. CLI claims that the complaint primarily alleges that CLI should have sought and obtained additional site approval before developing a CWU under Modification No. 9. *Id*. CLI argues that this complaint effectively alleges that CLI failed to meet the requirements of Section 39.2 of the Act. *Id*.

CLI cites Mahomet Valley Water Authority, *et al*. v. Clinton Landfill, Inc., PCB 13-22, which alleged that CLI violated authorities including Section 39.2 of the Act by transforming a municipal solid waste disposal unit into a CWU without obtaining site approval form the DeWitt County Board. CLI Mot. at 9. CLI argues that the Board held that as a matter of law none of those provisions, including Section 39.2, could be violated by CLI. CLI states that the Board dismissed the relevant counts of the complaint as frivolous. *Id*. at 10, citing Mahomet Valley Water Authority, *et al*. v. Clinton Landfill, Inc., PCB 13-22, slip op. at 27 (Sept. 9, 2013), *appeals pending as* Mahomet Valley Water Auth., *et al*. v. PCB and Clinton Landfill, Inc., No. 4-14-0002 (4th Dist.); People v. PCB and Clinton Landfill, Inc., No. 4-14-0020. CLI claims that "[t]he Board has already considered the specific points raised by Mr. Spencer regarding the CWU, and the general legal principles underlying Mr. Spencer's Complaint in regard to siting, and has found *none* that give rise to a cognizable enforcement case before the Board." CLI Mot. at 10 (emphasis in original). CLI concludes that the complaint fails as a matter of law for the reasons stated in the Board's decision in PCB 13-22. *Id*.

Specificity

CLI notes the reference in the complaint to "hazardous waste," and argues that it does not identify any such waste or indicate that any of it has been disposed of in the CWU. CLI Mot. at 10. CLI argues that this reference fails to comply with Section 31(c) of the Act, which requires the complaint must identify the "manner in and extent to which" CLI is alleged to have violated specified authorities. *Id*., citing 415 ILCS 5/31(c) (2012). Suggesting that the complaint does not provide this identification, CLI claims that "[t]he allegations clearly do not provide a basis for any relief from the Board." CLI Mot. at 10. CLI adds that, to the extent the complaint may refer to MGP wastes, the Board found in PCB 13-22 that allegations in Count IV regarding MGP were frivolous and dismissed them. *Id*., citing Mahomet Valley Water Authority, *et al*. v. Clinton Landfill, Inc., PCB 13-22, slip op. at 30-31 (Sept. 9, 2013).

Summary

CLI concludes that the complaint "is frivolous and duplicative and should be dismissed as a matter of law." CLI Mot. at 11; *see id*. at 1-2.

SUMMARY OF AGENCY'S MOTION TO DISMISS

The Agency requests that the Board dismiss the complaint as it is directed to the Agency. Agency Mot. at 1, 4-5. The Agency states that complainant appears to be seeking to intervene in Clinton Landfill, Inc. v. IEPA, PCB 15-60. The Agency argues that any request of that nature should be made separately and specifically and not in this proceeding. Agency Mot. at 1. To the extent that complainant seeks other relief, the Agency argues that the complaint is frivolous for failing to state a cause of action on which the Board can grant relief. *Id*. at 2, 4. In the following subsections, the Board summarizes the Agency's arguments.

Background

The Agency cites Section 31(d)(1) of the Act, which authorizes citizen's enforcement proceedings. Agency Mot. at 2, citing 415 ILCS 5/31(d)(1) (2012). The Agency also cites Section 31(c), which provides in pertinent part that a complaint "shall specify the provision of the Act, rule, regulation, permit, or term or condition thereof under which such person is said to be in violation and a statement of the manner in and the extent to which such person is sad to violate the Act, rule, regulation, permit, or term or condition thereof. . . ." 415 ILCS 5/31(c)(1) (2012); *see* Agency Mot. at 2. The Agency also cites the Board's procedural rules, which list elements that a complaint must contain. 35 Ill. Adm. Code 103.204(c); *see* Agency Mot. at 3. The Agency states that, under Section 31(d), the Board must schedule a hearing unless it finds that the complaint is duplicative or frivolous. Agency Mot. at 2, citing 415 ILCS 5/31(d)(1) (2012); *see* 35 Ill. Adm. Code 101.202 (definitions).

Frivolous

The Agency states that "Mr. Spencer appears to allege that CLI failed to comply with the local siting requirements of Section 39.2 of the Act when it sought Permit Modification No. 9 to

Permit No. 2005-07-LF." Agency Mot. at 4, citing Comp. at 2. The Agency claims that complainant failed to allege that the Agency violated any provision of the Act or regulations. Agency Mot. at 4. The Agency argues that the complaint fails to meet the requirements of Section 31(c) of the Act. *Id*., citing 415 ILCS 5/31(c) (2012). The Agency concludes that the complaint is therefore frivolous because it "fails to state a cause of action upon which the Board can grant relief" and should be dismissed. Agency Mot. at 4 (citations omitted).

The Agency states that "the Illinois Supreme Court has held that enforcement actions under Section 31 of the Act do not apply to the IEPA, but only to polluters. Agency Mot. at 4, citing Landfill, Inc. v. PCB, 74 Ill. 2d 541, 556 (1978). The Agency adds that, even if complainant alleged that the Agency had violated the Act or regulations, the complaint should be dismissed with prejudice. Agency Mot. at 4.

SUMMARY OF COMPLAINANT'S RESPONSE

The response first states that, although it addresses both motions to dismiss, "[n]o complaint has been made against the Agency." Resp. at 1. The response states that its "[o]nly Complaint was made against CLI" for failure to comply with Section 39.2 of the Act by failing to obtain site approval for a new waste stream. *Id*.

The response states that the Complaint seeks third-party participation in PCB 15-60, Clinton Landfill, Inc. v. IEPA, only as to the issue of site approval and not with regard to "changes made to the permit by the Agency." Resp. at 1. The response adds that the "[m]otion to participate in PCB 2015-060 was not to intervene in the permit appeal case filed by CLI against the Agency but was a Formal Complaint against CLI's failure to comply with [Section] 39.2 of the Act. . . ." *Id*. (¶1).

The response addresses CLI's argument that "[t]he only proper parties in a permit appeal are the permit applicant and the Agency" (CLI Mot. at 8) by acknowledging that, "[a]s a complainant I clearly only have the authority granted under the Act" as a citizen unable to participate in site approval of activities pursuant to Modification No. 9. Resp. at 2 (¶2).

The response acknowledges that modifications to CLI's permit are "strictly under Agency authority." Resp. at 2 (¶3). The response argues that the Agency' authority under Section 39.2 of the Act is limited to "the requirement that the permit applicant certify that siting requirements under [Section] 39.2 have been met as part of the application process." *Id*. The response suggests that the pending permit appeal stems from CLI's failure to obtain site approval and failure to inform the public of its intent to operate a hazardous waste unit. *Id*. (¶4). The response further suggests that CLI's failure to meet Section 39.2 of the Act caused "Agency actions resulting in permit changes for CLI's facility." *Id*. (¶5).

The response lists arguments that the complainant could submit to the Board in PCB 15-60 "[i]f allowed as a third party." Resp. at 2-3 (¶8). The response concludes that CLI "failed to follow all of section 39.2 of the Illinois Environmental Protection Act when it failed to acquire a new siting for its modifications to Permit NO. 2005-070-LF to accept a 'new waste stream.'" *Id*. at 3 (¶9). The response requests that both motions to dismiss be denied. *Id*. at 3.

DISCUSSION

Statutory and Regulatory Background

Section 31(d)(1) of the Act provides in pertinent part that "[a]ny person may file with the Board a complaint, meeting the requirements of subsection (c) of this Section, against any person allegedly violating this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order. 415 ILCS 5/31(d)(1) (2012). Section 31(c)(1) of the Act provides in pertinent part that a complaint shall "specify the provision of the Act, rule, regulation, permit, or term or condition thereof under which such person is said to be in violation and a statement of the manner in and the extent to which such person is said to violate the Act, rule, regulation, permit, or term or condition thereof. . . ." 415 ILCS 5/31(c)(1) (2012). Section 31(d)(1) of the Act provides that "[u]nless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d)(1) (2012); *see also* 35 Ill. Adm. Code 103.212(a).

Section 101.202 of the Board's procedural rules provides that "'[d]uplicative' means the matter is identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. The same section provides that "'[f]rivolous' means a request for relief that the Board does not have the authority to grant, or a complaint that fails to state a cause of action upon which the Board can grant relief." *Id*.

Section 103.212(b) of the Board's procedural rules provides in pertinent part that "[m]otions made by respondents alleging that a citizen's complaint is duplicative or frivolous must be filed no later than 30 days following the date of service of the complaint upon the respondent. Motions under this subsection may be made only with respect to citizen's enforcement proceedings." 35 Ill. Adm. Code 103.212(b).

Standard of Review

In ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See, e.g.*, Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004). "[I]t is well-established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." Smith v. Central Ill. Reg'l. Airport, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003).

Board Analysis

Agency

The Board first addresses the Agency as a co-respondent and the Agency's motion to dismiss. That motion states that the complaint fails to allege that the Agency has violated any provision of the Act or Board regulations. Agency Mot. at 4. The Board has carefully reviewed the complaint and finds no statement or claim that can be construed as an allegation that the

Agency committed a violation of those authorities. The Board finds support for this conclusion in the response, which clarifies that "[n]o complaint has been made against the Agency. Only complaint was made against CLI for failure to comply with the ACT specifically [Section] 39.2 by failing to acquire a siting for a new waste stream at its facility in Clinton Illinois. CLI should either deny or admit to this complaint." Resp. at 1. Accordingly, the Board finds that the complaint fails to state a cause of action against the Agency upon which the Board can grant relief. The Board finds that the complaint as to the Agency is frivolous and grants the Agency's motion to dismiss the complaint as it is directed against the Agency.

CLI

The Board next addresses the complaint's allegations against CLI and CLI's motion to dismiss. The Board notes that the complaint and response request that the Board allow third-party involvement by the complainant in the pending permit appeal PCB 15-60, Clinton Landfill, Inc. v. IEPA. Comp. at 1, 4; Resp. at 1. Complainant states that he wishes to maintain and defend his position regarding the applicability of site approval under Section 39.2 of the Act to CLI's operation. Comp. at 4 (¶11). To decide CLI's motion to dismiss, the Board first construes the complaint as a motion to intervene in PCB 15-60 before construing it as a citizen's enforcement action.

Intervention. In PCB 15-60, CLI appeals the Agency's issuance of Modification No. 47 to its landfill development permit. Section 40(a)(1) of the Act provides in part that, "[i]f the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, *the applicant* may, within 35 days after the date on which the Agency served its decision on the applicant, petition for a hearing before the Board to contest the decision of the Agency." 415 ILCS 5/40(a)(1) (2012) (emphasis added).

In Landfill, Inc. v. PCB, 74 Ill. 2d 541, 387 N.E.2d 258 (1978), the Supreme Court voided Board procedural rules authorizing third-party permit appeals. The Court characterized the challenged rules as "unauthorized administrative extensions of the Board's authority." Landfill, Inc., 74 Ill. 2d at 560, 387 N.E.2d at 165. Citizens Util. Co. of Ill. v. PCB, 265 Ill. App. 3d 773, 639 N.E.2d 1306 (3rd Dist. 1994), affirmed that, in the absence of specific statutory authority, the Board lacks general authority to hear third-party permit appeals. Citizens Util. Co., 365 Ill. App. 3d at 781-82, 639 N.E.2d at 1312. Citing a Board procedural rule authorizing specified third-party permit appeals, the court stated that, "as in Landfill, the Board has attempted to improperly expand its powers beyond those authorized by statute." *Id*.; *see* United City of Yorkville v. IEPA and Hamman Farms, PCB 08-95, slip op. at 6 (Aug. 7, 2008); City of Waukegan, *et al.* v. IEPA & North Shore Sanitary District, PCB 02-173, slip op. at 1 (May 2, 2002). The Board has found that this analysis extends to requests for intervention. Regardless of the interests cited in seeking to intervene, "the Board lacks the authority to give party status through intervention to persons the General Assembly does not allow to become parties to this type of proceeding." Sutter Sanitation v. IEPA, PCB 04-187, slip op. at 4 (Sept. 15, 2004). This rationale applies even though Mr. Spencer's complaint appears to support the Agency's position. Riverdale Recycling, Inc. and Tri-State Disposal, Inc. v. IEPA, PCB 00-228, slip op. at 1-2 (Aug. 10, 2000).

Although the complaint does not cite the Board's rules providing for intervention, those rules provide no support for Mr. Spencer's request to intervene. In adopting those rules, "the Board never purported to overturn existing case law interpreting permissible intervention under the Act. Indeed, the Board cannot, through rulemaking or otherwise, expand intervention rights beyond that which the Act can bear." Sutter Sanitation, slip op. at 4; *see* 35 Ill. Adm. Code 101.402. Finally, the Board recognizes that the General Assembly has authorized third-party appeals of permits under the Resource Conservation and Recovery Act (RCRA) and the National Pollutant Discharge Elimination System (NPDES) permit programs. *See* 415 ILCS 5/40(b) (RCRA), 40(e) (NPDES) (2012). The pending case PCB 15-60, Clinton Landfill, Inc. v. IEPA, does not arise under either of those programs, and these authorizations do not provide the Board with general authority to hear third-party appeals or grant intervention to a third party.

The Act grants the Board no authority to accept a third-party permit appeal or to grant intervention in a permit appeal to a third party. The Board finds that the complaint, construed as a motion to intervene in the pending permit appeal PCB 15-60, Clinton Landfill, Inc. v. IEPA, requests relief that the Board does not have the authority to grant. The Board finds that the complaint as to CLI, when so construed, is frivolous.

Enforcement. To complete consideration of CLI's motion to dismiss, the Board next construes the complaint as alleging that CLI has violated the Act. *See* Comp. at 1, 2; Resp. at 1. Specifically, the complaint alleges that "Clinton Landfill Failed to follow all of section 39.2 of the Illinois Environmental Protection Act when it failed to acquire a new siting for its modifications to Permit NO. 2005-070-LF, starting with modification NO. 9 that redesigned 22.5 acres of its municipal landfill #3 in Clinton Illinois. . . ." Comp. at 1.

The Board has previously addressed an allegation the CLI violated Section 39.2 of the Act by transforming Clinton Landfill #3, "a municipal solid waste disposal unit into a Chemical Waste Unit (CWU) specifically designed for the disposal of at least two (2) types of highly toxic environmental contaminants without obtaining prior siting authority from the DeWitt County Board." Mahomet Valley Water Auth., *et al.* v. Clinton Landfill, Inc.; People of the State of Illinois as Intervenor, PCB 13-22, slip op. at 2 (¶1) (Nov. 9, 2012) (Citizens' Complaint); *appeals pending as* Mahomet Valley Water Auth., *et al*. v. PCB and Clinton Landfill, Inc., No. 4-14-0002 (4th Dist.); People v. PCB and Clinton Landfill, Inc., No. 4-14-0020 (4th Dist.).

Addressing CLI's motion to dismiss in Mahomet Valley Water Auth., *et al*. v. PCB and Clinton Landfill, Inc., the Board stated 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. Section 39.2 requires the local siting authority to grant approval only if listed criteria are met. *Id*. Because Section 39.2 is directed at the responsibilities of the local siting authority, the Board has previously held that Section 39.2 'is not properly the subject of an enforcement action.' Mahomet Valley Water Auth., *et al.* v. Clinton Landfill, Inc.; People of the State of Illinois as Intervenor, PCB 13-22, slip op. at 26 (Sept. 19, 2013), citing Anielle Lipe and Nykole Gillette v. Village of Richton Park, 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 found "that CLI is not capable of violating Section 39.2 of the Act" and that the complaint had not pled a violation of Section 39.2. Mahomet Valley Water Auth., *et al.* v. Clinton Landfill, Inc.; People of the State of Illinois as Intervenor, PCB 13-22, slip op. at 26 (Sept. 19, 2013). The Board dismissed the four counts of the complaint as frivolous because the complaint failed to state a cause of action on which the Board can grant relief. *Id*. at 27 (Counts I, II, III), 28 (Count IV).

The Board also noted that the complaint alleged that CLI violated Section 39.2 by failing to obtain additional site approval. Mahomet Valley Water Auth., *et al.* v. Clinton Landfill, Inc.; People of the State of Illinois as Intervenor, PCB 13-22, slip op. at 27 (Sept. 19, 2013).

> If the Board were to find that CLI is required to obtain local siting authority for the CWU, that finding would invalidate the permit issued by the Agency. The determination of whether additional local siting approval is required is a permitting decision for the Agency, and the Board making this determination would have the same effect as the Board undertaking the role of permitting authority, a duty expressly assigned to the Agency. *Id*., citing Landfill, Inc., 74 Ill. 2d at 560, 387 N.E.2d at 265.

The Board stated that the complaint sought relief that would affect the Agency's permitting authority, action that the complainants did not have the right to bring before the Board. The Board dismissed the counts as frivolous because they "ask for relief that the Board does not have authority to grant." *Id*. at 27.

Faced again with an allegation that CLI violated Section 39.2 of the Act by failing to obtain additional siting approval, the Board finds that CLI is not capable of violating Section 39.2 of the Act. Construing the complaint as a citizen's enforcement action, that complaint must be dismissed as frivolous under Mahomet Valley, *et al.*, PCB 13-22, for failing to state a cause of action under which the Board can grant relief and also for requesting relief that the Board does not have the authority to grant. Accordingly, the Board grants CLI's motion to dismiss the complaint as it is directed against CLI.

Participation. Although the Board finds that it lacks authority to grant party status to the complainant through intervention or to accept the complaint as an alleged violation of Section 39.2, the Board recognizes complainant's clear wish to state and defend his position regarding site approval for CLI's operation. The Board notes that its procedural rules provide complainant with the opportunity to participate in the pending permit appeal PCB 15-60, Clinton Landfill, Inc. v. IEPA. The complainant may offer statements about that pending case by filing a public comment by the applicable deadline and according to other requirements. *See* 35 Ill. Adm. Code 101.110, 101.628(c). The procedural rules also allow non-party participants with the Board's permission to file *amicus curiae* briefs. *See* 35 Ill. Adm. Code 101.110(c).

CONCLUSION

For the reasons stated above, the Board first finds that the complaint as to the Agency is frivolous because it fails to state a cause of action against the Agency upon which the Board can grant relief. The Board grants the Agency's motion to dismiss the complaint as it is directed against the Agency.

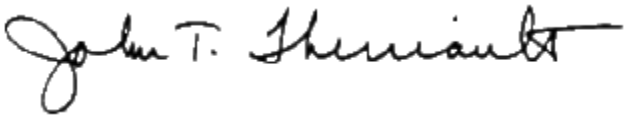
The Board next addresses CLI's motion to dismiss by construing the complaint as a motion to intervene in the pending permit appeal PCB 15-60, Clinton Landfill, Inc. v. IEPA. The Board determines that the complaint, when so construed, requests relief that the Board does not have the authority to grant and finds that it is frivolous. The Board then addresses CLI' motion to dismiss by construing the complaint as an allegation that CLI has violated Section 39.2 of the Act. The Board finds that, when so construed, the complaint must be dismissed as frivolous under Mahomet Valley, *et al.*, PCB 13-22, for failing to state a cause of action under which the Board can grant relief and for requesting relief that the Board does not have the authority to grant. The Board grants CLI's motion to dismiss the complaint as it is directed against CLI.

Having granted the motion to dismiss filed by each of the respondents, the Board dismisses the complaint and closes the docket.

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 November 6, 2014, by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board