

BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

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CLERK'S OFFICE

MAR 05 2004

STATE OF ILLINOIS  
Pollution Control Board

SALINE COUNTY LANDFILL, )  
Petitioner, )  
v. )  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
Respondent. )

PCB No. 04-117  
(Permit Appeal)

**NOTICE**

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph Street  
Suite 11-500  
Chicago, IL 60601

Brian E. Konzen  
Lueders, Robertson & Konzen, LLC  
1939 Delmar Avenue  
P.O. Box 732  
Granite City, IL 62040-0735

Carol Sudman, Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue, East  
P.O. Box 19274  
Springfield, IL 62797-9274

Rod Wolfe, State's Attorney  
Saline County State's Attorney Office  
Saline County Courthouse  
10 East Poplar Street  
Harrisburg, IL 62946

Stephen F. Hedinger  
Hedinger Law Office  
2601 South Fifth Street  
Springfield, IL 62703

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a MOTION FOR LEAVE TO FILE REPLY and REPLY TO RESPONSE TO MOTION FOR ORDER OF PROTECTION, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,  
Respondent



John J. Kim  
Assistant Counsel  
Special Assistant Attorney General  
Division of Legal Counsel  
1021 North Grand Avenue, East  
P.O. Box 19276  
Springfield, Illinois 62794-9276  
217/782-5544  
217/782-9143 (TDD)  
Dated: March 3, 2004

**BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS**

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ILLINOIS ENVIRONMENTAL	)	(Permit Appeal)
PROTECTION AGENCY,	)	
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STATE OF ILLINOIS  
Pollution Control Board

**MOTION FOR LEAVE TO FILE REPLY TO RESPONSE TO  
MOTION FOR ORDER OF PROTECTION AND PRIVILEGE LOG**

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to Section 101.500(e) of the Illinois Pollution Control Board's ("Board") procedural rules (35 Ill. Adm. Code 101.500(e)), hereby files a motion for leave to file a reply to the response to the motion for order of protection and privilege log. In support of this motion for leave, the Illinois EPA provides as follows.

1. The motion for order of protection and privilege log ("Illinois EPA's motion") sought an order from the Hearing Officer that the documents identified in the privilege log would not be subject to disclosure.

2. At the time the Illinois EPA's motion was filed, counsel for the Illinois EPA was not aware that the documents listed on the privilege log had been inadvertently included in the Administrative Record ("record") filed previously in this case.

3. Counsel for the Petitioner, Respondent and Intervenor (Saline County State's Attorney) brought this situation to the Hearing Officer's attention just prior to the taking of a deposition of Joyce Munie, and Illinois EPA employee. At that time, counsel for the Illinois EPA provided the parties and the Hearing Officer with citations to two cases believed to be

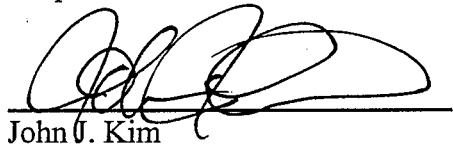
relevant and applicable. The Illinois EPA's position was and is that the inadvertent disclosure of the documents should not act to waive the privilege status sought for the documents.

4. Since that time, Ms. Munie's deposition transcript has been made available to the parties. Also, the Petitioner has filed a response to the Illinois EPA's motion ("Petitioner's response"), along with a letter supplementing the response.

5. Based upon the information and arguments contained within the Petitioner's response, including portions of Ms. Munie's deposition transcript, a material prejudice would result if the Illinois EPA were not allowed to file a reply.

6. For the reasons stated herein, the Illinois EPA hereby respectfully requests that the Hearing Officer allow the Illinois EPA to file a reply to the Petitioner's response to prevent material prejudice.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,  
Respondent



John U. Kim  
Assistant Counsel  
Special Assistant Attorney General  
Division of Legal Counsel  
1021 North Grand Avenue, East  
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Springfield, Illinois 62794-9276  
217/782-5544  
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This filing submitted on recycled paper.

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**STATE OF ILLINOIS**  
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**BEFORE THE POLLUTION CONTROL BOARD  
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SALINE COUNTY LANDFILL, INC.,	)	
Petitioner,	)	
v.	)	PCB No. 04-117
ILLINOIS ENVIRONMENTAL	)	(Permit Appeal)
PROTECTION AGENCY,	)	
Respondent.	)	

**REPLY TO RESPONSE TO MOTION FOR ORDER OF PROTECTION  
AND PRIVILEGE LOG**

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to Section 101.500(e) of the Illinois Pollution Control Board's ("Board") procedural rules (35 Ill. Adm. Code 101.500(e)), hereby files a reply to the response to the motion for order of protection and privilege log. In support of this reply, the Illinois EPA provides as follows.

1. The motion for order of protection and privilege log ("Illinois EPA's motion") sought an order from the Hearing Officer that the documents identified in the privilege log would not be subject to disclosure.

2. At the time the Illinois EPA's motion was filed, counsel for the Illinois EPA was not aware that the documents listed on the privilege log had been inadvertently included in the Administrative Record ("record") filed previously in this case.

3. Counsel for the Petitioner, Respondent and Intervenor (Saline County State's Attorney) brought this situation to the Hearing Officer's attention just prior to the taking of a deposition of Joyce Munie, and Illinois EPA employee. At that time, counsel for the Illinois EPA provided the parties and the Hearing Officer with citations to two cases believed to be

relevant and applicable. The Illinois EPA's position was and is that the inadvertent disclosure of the documents should not act to waive the privilege status sought for the documents.

4. Since that time, Ms. Munie's deposition transcript has been made available to the parties. Also, the Petitioner has filed a response to the Illinois EPA's motion ("Petitioner's response"), along with a letter supplementing the response.

5. In the Petitioner's response, the Petitioner argues that the documents in question should be disclosed consistent with Illinois' policy of encouraging disclosure. Further, the Petitioner argues that the attorney work product privilege does not act to shield the documents in question from disclosure.

6. The Petitioner cites to the balancing test employed by the court in the case of Dalen v. Ozite Corporation, 230 Ill. App. 3d 18, 594 N.E.2d 1365 (2<sup>nd</sup> Dist. 1992). Based on an application of that test, the Petitioner argues that the documents in question should be disclosed.

7. In a letter supplementing the Petitioner's response, the Petitioner further cites to portions of the deposition transcript of Ms. Munie in support of the contention that the balancing test utilized by the Ozite court should weigh in favor of disclosing the subject documents.

8. The Illinois EPA respectfully disagrees with the Petitioner's arguments and conclusions thereto. Also, it is necessary to clarify the arguments of the Illinois EPA on this convoluted topic.

9. The Illinois EPA's motion to the Hearing Officer seeks protection for documents listed on the privilege log (and provided as an attachment to the Hearing Officer). A review of the Illinois EPA's motion clearly indicates that counsel for the Illinois EPA was not aware at the time of filing the motion that the documents listed in the privilege log had been inadvertently disclosed through the record.

10. It is unclear what transpired internally within the Illinois EPA that resulted in the subject documents being included in the record, but a review of those documents and the documents presented to the Hearing Officer indicates that the documents presented to the Hearing Officer include an "Exempt" stamp. This indicates that the documents have been screened pursuant to an internal Illinois EPA review process. That the documents made their way into the record is clear proof that the review process took place some time after the documents were provided for copying and filing with the Board, and that for some reason the review process broke down in this limited instance.

11. However, there is clearly a process that is employed by the Illinois EPA to screen privileged documents, as evidenced by the "Exempt" stamp on the copies provided to the Hearing Officer. Counsel for the Illinois EPA admits that a review of the documents provided for copying and filing was not undertaken, in this case due to an excessive work load and the sheer volume of the record (approximately 3,500 pages).

12. After counsel for the Illinois EPA was informed of the inadvertent disclosure, the Ozite case and the case of Joliet Sand and Gravel Company v. Illinois Pollution Control Board, 163 Ill. App. 3d 830, 516 N.E.2d 955 (3<sup>rd</sup> Dist. 1987) were offered to the Board as persuasive case law in support of the contention that the documents should nonetheless be protected, or at the very least that the inadvertent disclosure should not in and of itself result in a waiver of any otherwise applicable privilege.

13. The Joliet Sand and Gravel case involved a situation in which a permit analyst mistakenly provided certain documents to be included in the Illinois EPA's record on appeal. When the Illinois EPA's attorney discovered the inadvertent disclosure, he withdrew the documents. The Board and the appellate court decided that the documents were not related to

the case at hand and therefore were properly excluded from evidence. Joliet Sand and Gravel, 163 Ill. App. 3d at 836, 516 N.E.2d at 960.

14. While the Joliet Sand and Gravel case is not directly on point from a factual standpoint, it is persuasive for the proposition that it is appropriate to exclude documents inadvertently disclosed in an administrative record where there was a reasonable basis for the exclusion. In that case, the basis was that the documents were not relevant to the case under review. In the present case, the basis is that the documents protected by both the attorney-client and attorney work product privileges. If those privileges are found to exist, as they should, then the mere inadvertent disclosure in the record should not act to allow disclosure.

15. Further, in the Ozite case, a balancing test was employed to determine whether the documents in question should be disclosed despite an attorney-client privilege. Those factors were: 1) the reasonableness of the precautions taken to prevent the disclosure; 2) the time taken to rectify the error; 3) the scope of the discovery; 4) the extent of the discovery; and 5) the overriding issue of fairness.

16. In this case, all factors should weigh in favor of protecting the documents. The Illinois EPA has an internal process by which documents are to be screened from disclosure, as evidenced by the "Exempt" stamp found on the documents proffered to the Hearing Officer. Admittedly, that system was somehow bypassed since the documents in the record had not yet undergone the screening, but nonetheless a system is in place that would normally prevent the inadvertent disclosure.

17. As soon as counsel for the Illinois EPA was made aware of the error, it was brought to the attention of the Hearing Officer. From a time standpoint, it is noteworthy that this was discovered prior to the deposition of the only employee of the Illinois EPA identified as a

potential witness by all parties. And, obviously, the hearing in this case has yet to be held, and the parties have yet to elicit any testimony at hearing or submit post-hearing briefs.

18. The scope of the discovery in this case is governed by the rules that would otherwise apply to the production of the Illinois EPA's administrative record. There is nothing in the Board's rules on that subject that would require the Illinois EPA to disclose documents that are otherwise protected by attorney-client or attorney work product privileges.

19. The extent of the disclosure is effectively total, since the Petitioner and the Board (and the Intervenor) have all been provided with copies of the record. However, again since none of the parties have made any dispositive arguments to the Board based on the record, and since no testimony has been elicited at hearing, the extent of disclosure should not be considered as adverse to the Illinois EPA's request to protect the documents.

20. Finally, there is the matter of the overriding issue of fairness. There would be no prejudice to the Petitioner in this case if the documents in question are withdrawn from the record and no reference to them is made henceforth. The material contained within the documents is clearly that subject to a privilege of either or both attorney-client and attorney work product, and therefore a greater unfairness would befall the Illinois EPA if the documents were not excluded. The Petitioner can obtain (and in deposition questioning has elicited) testimony from the Illinois EPA's witness that will allow them to present their complete arguments to the Board, and the content of the documents in question is not necessary for making those arguments.

21. The Illinois EPA respectfully requests that the Hearing Officer consider this issue on a two-step basis. First, the Hearing Officer should determine whether the documents in question are properly subject to a claim of privilege. Based on the content of the documents,



there is little if any question that the documents represent either communications solely between the Illinois EPA and its technical staff (i.e., the client) and the Illinois EPA's internal counsel and the Illinois Attorney General's Office (i.e., the attorneys). Further, the documents clearly reveal the internal thoughts, opinions and strategies of the attorneys that would defend the Illinois EPA in the (likely and now certain) event that litigation would result.

22. Second, once the Hearing Officer has determined that a privilege does apply, the Illinois EPA believes a decision should be made as to whether the privileges attached to the documents have been waived, either through the inadvertent disclosure or testimony by Ms. Munie in her deposition.

23. As argued above, the Ozite balancing test should swing in the favor of the Illinois EPA and the position that the inadvertent disclosure does not prevent exclusion of the documents. And a review of the testimony given by Ms. Munie in her deposition, as provided by the Petitioner, indicates that there was never any testimony by Ms. Munie regarding waiver of the privilege of the documents or as to the content of the documents. All Ms. Munie testified to was the existence of the documents, and the resulting decision she made based on her review of the documents. At no time does she disclose the content of any of the documents in question.

For the reasons stated herein, the Illinois EPA hereby respectfully requests that the Hearing Officer protect the documents in the privilege log from disclosure, and order the parties to withdraw them from the record and further to not make any reference to them in any arguments presented to the Board.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,  
Respondent

A handwritten signature in dark ink, appearing to read 'John J. Kim', is written over a horizontal line.

John J. Kim

Assistant Counsel

Special Assistant Attorney General

Division of Legal Counsel

1021 North Grand Avenue, East

P.O. Box 19276

Springfield, Illinois 62794-9276

217/782-5544

217/782-9143 (TDD)

Dated: March 3, 2004

## CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on March 3, 2004, I served true and correct copies of a MOTION FOR LEAVE TO FILE REPLY and REPLY TO RESPONSE TO MOTION FOR ORDER OF PROTECTION, by placing true and correct copies in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. mail drop box located within Springfield, Illinois, with sufficient First Class Mail postage affixed thereto, upon the following named persons:

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph Street  
Suite 11-500  
Chicago, IL 60601

Brian E. Konzen (Hand Delivery)  
Lueders, Robertson & Konzen, LLC  
1939 Delmar Avenue  
P.O. Box 732  
Granite City, IL 62040-0735

Carol Sudman, Hearing Officer (Hand Delivery)  
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