

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	PCB No. 11-50
The CITY OF MORRIS, an Illinois	)	
municipal corporation, and	)	(Enforcement-Land)
COMMUNITY LANDFILL COMPANY, INC.,	)	
a dissolved Illinois corporation,	)	
	)	
	)	
Respondents.	)	

**NOTICE OF FILING**

PLEASE TAKE NOTICE that on August 30, 2021, Complainant filed its Motion for Leave to file Surreply and Proposed Surreply in Support of Complainant’s Motion to File First Amended Complaint, a copy of which is attached hereto and served upon you.

PEOPLE OF THE STATE OF ILLINOIS  
KWAME RAOUL  
Attorney General of the  
State of Illinois

MATTHEW J. DUNN, Chief  
Environmental Enforcement/Asbestos Litigation Division

STEPHEN SYLVESTER, Chief  
Environmental Bureau  
Assistant Attorney General

BY: */s/ Christopher Grant*  
CHRISTOPHER GRANT  
Senior Assistant Attorney General  
Environmental Bureau  
69 W. Washington St., 18th Floor  
Chicago, Illinois 60602  
(312) 814-5388  
Christopher.grant@ilag.gov

**CERTIFICATE OF SERVICE**

I, Christopher Grant, an attorney, certify that I caused to be served a copy of Complainant's Motion for Leave to file Surreply and Proposed Surreply in Support of Complainant's Motion to File First Amended Complaint, and Notice of Filing, upon those persons listed below by electronic mail on August 30, 2021

Service List:

For City of Morris

Mr. Richard Porter

[Rporter@hinshawlaw.com](mailto:Rporter@hinshawlaw.com)

Mr. Christopher Dearth

christopher.dearth@comcast.net

For the Illinois Pollution Control Board

[Brad.halloran@Illinois.gov](mailto:Brad.halloran@Illinois.gov)

BY: *s/ Christopher Grant*  
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**MOTION FOR LEAVE TO FILE SURREPLY**  
**AND PROPOSED SURREPLY IN SUPPORT OF COMPLAINANT'S**  
**MOTION TO FILE FIRST AMENDED COMPLAINT**

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS, by KWAME RAOUL, Attorney General of the State of Illinois, and seeks leave to file the attached Surreply in Support of Complainant's Motion to File First Amended Complaint. In support of its request, Complainant states as follows:

**I. MOTION FOR LEAVE TO FILE SURREPLY**

Although the Board procedural rules do not expressly provide for filing of a surreply, the Board considers requests for filing surreplies in accordance with 35 Ill. Adm. Code 101.500(e) and will grant leave for a surreply "to prevent material prejudice". *People v. Atkinson Landfill Co*, PCB 13-20 (January 9, 2014, *slip op.* at 4); (citing *City of Quincy v. Illinois EPA*, PCB 08-86 (June 17, 2010, *slip op.* at 3)); *Chicago Coke Company v. Illinois EPA* PCB 10-75 (July 15, 2010, *slip op.* at 1). The Board will also grant leave to file a surreply to correct misstatements in the record. *Illinois Ayers Oil Company v. Illinois EPA*, PCB 03-214 (August 5, 2004, *slip op.* at 2).

## Electronic Filing: Received, Clerk's Office 08/30/2021

On August 28, 2020, Complainant filed its Motion to File First Amended Complaint.<sup>1</sup> On September 11, 2020, Morris filed its Response to Complainant's Motion. In its Response, Morris claimed that the Board should not grant the State's Motion pursuant to 35 ILCS 5/6-619(a)(3), because of an "earlier filed case", which Morris filed on August 14, 2020, styled as *City of Morris v. People of the State of Illinois and Illinois Environmental Protection Agency*, 2020 CH 31 (Grundy County) ("Declaratory Judgment Case"). (*Response* at pp. 9-10) Morris filed the Declaratory Judgment Case to attempt to pre-empt the State's enforcement of violations noted in a 2013 Illinois EPA-issued violation notice ("2013 VN"). Some, but not all, of the violations noted in the 2013 VN were updated and included in the proposed Amended Complaint that is the subject of Complainant's Motion to File First Amended Complaint in this matter.

Recently, on August 25, 2021, the Circuit Court granted the State's Motion to Dismiss the Declaratory Judgment Case. As the Board has not yet ruled on Complainant's Motion to File First Amended Complaint, Complainant will be prejudiced if it considers Morris's argument that 735 ILCS 5/2-619(a)(3) prevents it from granting the State's Motion to Amend (*Response* at pp. 9-10). Accordingly, Complainant's surreply advises the Board of this recent significant development. In addition, while Morris's claim of a pending case involving the "same cause pending in a different forum" was not a "misstatement" at the time it filed its Response on September 11, 2020, this representation now misstates a material fact.

To the extent that the Board found any merit with Morris's argument that 735 ILCS 5/2-619(a)(3) should preclude it from granting Complainant's Motion to File First Amended Complaint (i.e. because there was another cause of action pending in another venue), that issue no

<sup>1</sup> Also, at that time, Complainant filed its Motion for Voluntary Dismissal of Respondent Community Landfill Company, Inc.

longer exists. The Grundy County Circuit Court's dismissal of Morris's Declaratory Judgment Case is an important development that the Board should be aware of and take into consideration when it is ruling on Complainant's Motion to File First Amended Complaint. Accordingly, the Board should grant this Motion to file Complainant's Surreply in Support of its Motion to File First Amended Complaint.

## II. COMPLAINANT'S SURREPLY

In its Response to Complainant's Motion to File First Amended Complaint, Morris argued that the Board should deny the People's Motion pursuant to 735 ILCS 5/2-619(a)(3), because the "State's Proposed Violations Alleged in Counts I to III and Counts VIII to XIII are Barred Because a Cause of Action is Already Pending in Another Venue." (*Response* at pp. 9-10) The case that Morris was relying on to support this argument is its Declaratory Judgment Case. That argument is no longer available to Morris, because on August 25, 2021, the Court dismissed Morris's Declaratory Judgment Case. A true and correct copy of the Order and Transcript of the August 25, 2021 Ruling is attached hereto as Exhibit A. The Court dismissed the case finding a lack of justiciability and that the case was not ripe. (Ex. A, Order at p. 1, ¶2; Ruling Transcript at 2:16-17, 4:19-21)<sup>2</sup>

Accordingly, the Board should reject Morris's argument opposing the Complainant's Motion for Leave to File First Amended Complaint based on Morris's assertion that its Declaratory Judgment Case was pending in another venue. In addition, for all the reasons stated in Complainant's Motion for Leave to File First Amended Complaint, its Reply in Support, and this Surreply in Support, the Board should grant the Motion for Leave to File First Amended

<sup>2</sup> Judge Peterson states that Morris's Declaratory Judgment case is like *Alternate Fuels* (4:19-20), but later in the Ruling, he clarifies that Morris's case is more like *National Marine* (7:23-8:2).

Complaint, as expeditiously as possible.

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board grant Complainant's: 1) Motion for Leave to file its Surreply, 2) Motion to File Amended Complaint, and 3) grant such other relief as the Board deems appropriate.

RESPECTFULLY SUBMITTED

PEOPLE OF THE STATE OF ILLINOIS  
by KWAME RAOUL,  
Attorney General of the State of Illinois

MATTHEW J. DUNN, Chief  
Environmental Enforcement/Asbestos  
Litigation Division

STEPHEN SYLVESTER, Chief  
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**MOTION FOR LEAVE TO FILE SURREPLY**  
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Exhibit A

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT

GRUNDY COUNTY, ILLINOIS

NO. 2020 CH 31

CITY of Morris

PLAINTIFF

vs.

People of the State of Illinois

and Illinois Environmental Protection Agency

Defendants

ORDER

this matter having come before the court on Defendants' ~~motion~~ ~~to~~ joint motion to dismiss City of Morris' First Amended Complaint, the parties having appeared, IT IS HEREBY ORDERED:

① For the reasons stated on the record in open court, a court reporter being present, Defendants' joint motion is granted and the amended complaint is dismissed.

② As further described on the record, the court's finding is based ~~partially~~ on lack of justiciability and Ripeness.

DATE 08-25-21



JUDGE



1 STATE OF ILLINOIS )  
 ) SS:  
 2 COUNTY OF GRUNDY )

3 IN THE CIRCUIT COURT OF THE 13TH JUDICIAL CIRCUIT  
 4 GRUNDY COUNTY - ILLINOIS

5 CITY OF MORRIS, an Illinois )  
 Municipal Corporation, )  
 6 )  
 Plaintiff, )  
 7 )  
 - vs - ) 2020 CH 31  
 8 )  
 PEOPLE OF THE STATE OF ILLINOIS )  
 9 and ILLINOIS ENVIRONMENTAL )  
 PROTECTION AGENCY, )  
 10 )  
 Defendants. )  
 11 )

12 REPORT OF PROCEEDINGS had in the above-entitled  
 13 cause before the HONORABLE LANCE R. PETERSON, Judge of  
 14 said Court, on the 25th day of August, 2021.

15 APPEARANCES:

16 MR. RICHARD PORTER  
 17 MR. CHRISTOPHER DEARTH  
 18 Attorneys at Law  
 19 Appeared on behalf of the Plaintiff;

21 MR. CHRISTOPHER GRANT  
 22 MR. KEVIN GARSTKA  
 23 Attorneys at Law  
 24 Appeared on behalf of the Defendants.

1 THE COURT: 20 CH 31, City of Morris versus People of  
2 the State of Illinois and the EPA. And, gentlemen, do you  
3 want to make your appearance of record?

4 MR. PORTER: Sure, your Honor. Rick Porter on behalf  
5 of the City of Morris.

6 MR. DEARTH: Chris Dearth on behalf of the City of  
7 Morris.

8 MR. GRANT: Christopher Grant on behalf of the State  
9 of Illinois.

10 MR. GARSTKA: Kevin Garstka on behalf of the State of  
11 Illinois.

12 THE COURT: All right. This cause comes before the  
13 Court for ruling on the State's motion to dismiss. It's a  
14 combined motion to dismiss 615 and 619. And I've read all  
15 the materials. And, again, today is for the parties to  
16 get an answer. All right. The Court is going to grant  
17 the motion, but based only on justiciability. My ruling  
18 is that there is not yet a justiciable issue in this case.  
19 There's just a notice. There has been no enforcement  
20 action initiated yet. I know that the State filed -- or  
21 I'm sorry -- cited the case I think Illini that explains  
22 that the whole thing is set up to try to get cases  
23 resolved without litigation. I think they quoted to  
24 respond now and litigate later.

1                   In this case the Section 31 notice, all it  
2                   does is put the City on notice that the State has  
3                   information that there may be a violation. And the  
4                   issues, I'm going to just summarize to keep it simple, the  
5                   issues are they may have to do something different with  
6                   their groundwater testing and they may have to close the  
7                   facility some day. If we file an enforcement action and  
8                   we were to win, those are the things that might happen in  
9                   the future, and there isn't an enforcement action yet, I  
10                  think this case is square with the National Marine case.  
11                  And I'm going to point out in the other two cases cited by  
12                  the parties, Illini Environmental and Alternate Fuels, the  
13                  difference, because I think the notice process can result  
14                  in a ripe issue. This is a ripeness decision issue. And  
15                  it can in certain circumstances. And those two cases are  
16                  good examples. In Alternate Fuels, the notice process,  
17                  the way it went along, resulted in the requiring of a  
18                  permit that halted the business's operations. So what  
19                  they do, how they make money had to stop. And then they  
20                  were at the will of the agency and its delays, and the  
21                  court noted in that case that they were really out of  
22                  administrative remedies. There was nothing left to do.  
23                  And then they had to just wait for the State to file an  
24                  enforcement action of some sort, and time is money. So

1 the issue did become ripe because of how the notice  
2 process went in Alternate Fuels. Same thing in Illini.  
3 In Illini Environmental, the issue, an issue, an issue  
4 became ripe and justiciable again because of the process.  
5 The notice process that was dealt with in Illini there's  
6 notice of violation and then the process was the facility  
7 can submit a proposal for remediation, a plan, and there  
8 were timelines set forth, and then if the EPA fails to  
9 reject that proposal, it becomes binding. And in that  
10 case the facility's position was the EPA failed to  
11 correctly reject their proposal and that it became binding  
12 and it was based on a misnomer. The State had a -- they  
13 named the wrong person, the wrong entity in their  
14 rejection letter. But the bottom line is if at that point  
15 Illini took the position, well, they didn't reject it  
16 correctly so it's under the statute and under the  
17 procedure it's now binding, you got a ripe issue now.  
18 That's how the process gets you to a ripe issue and it did  
19 in two cases. But this is more like the Alternate Fuels  
20 case. There is no ripe issue. In fact, delay in this  
21 case can only benefit the City of Morris. There's two  
22 results here. Either the City of Morris is never ordered  
23 to do any remediation work or it is. Their hand is not  
24 being forced. In fact, really procedurally the City took

1 action only when they learned that the State was finally  
2 going to take action. That's what happened here. So  
3 there's not a justiciable issue at this point. I think  
4 there will be very soon because I think once this ruling  
5 gets down to Springfield the motion to amend the complaint  
6 is pending before the PVC, I would expect it granted. If  
7 not, then we will back here. But in light of this, I  
8 would expect that it would be granted. They're already  
9 hearing substantial and similar issues, which gets me to  
10 the second just commentary. There are -- and this is on  
11 the State's argument that the same matter is being handled  
12 by another court. There are additional violations with a  
13 '13 notice versus the '11 and there are some additional  
14 defenses that deal with the '13 notice. There will be a  
15 few different legal arguments, but I agree with this: The  
16 elephant in the room, whether they are in fact an owner  
17 and operator is the same, and so when you go through that  
18 it relates to the policies that also support this Court's  
19 ruling on the justiciability issue, which is, one, the act  
20 is set up to avoid litigation, and this process does the  
21 opposite. We think they may file so we'll file first and  
22 also try to pick the venue. That's the second. If I were  
23 to rule the other way, I think it promotes venue shopping,  
24 which is bad policy. And then the last two that are

1 inner-related, which is there's another court, another  
2 judicial body that would be deciding that same very  
3 significant issue. If I kept this case, if this case were  
4 to continue, you would have two different courts, in  
5 essence, two different judicial bodies of equal authority  
6 in this situation deciding the same major issue that is  
7 probably going to be the issue that drives everything in  
8 this case, which is bad policy, bad -- and then judicial  
9 economy. We already got an entity that's up to their  
10 elbows in this already that's handling this, and to have  
11 two courts doing it is not what we call judicial economy.  
12 And also, I don't know, put this under miscellaneous,  
13 there's something about the fact that they said -- through  
14 the negotiations when the State finally says do you know  
15 what, I don't think we're going to get anywhere, we're  
16 probably just going to have to amend our complaint and  
17 then the City runs off to a court and files something when  
18 they already know there's a PVC action, next time, you  
19 know, counsel is probably not going to be forthright with  
20 dealing with the next lawyer that's handling a matter like  
21 this because I can't tell them because then they might  
22 pull something on us and we end up having to go through  
23 all this. There's numerous policy reasons that I think  
24 also are supported by the fact that this should be before

1 one body. And there's no issue yet here. It's just sort  
2 of a sidenote as to why it really belongs all in one place  
3 in Springfield. And the fact that this is not justiciable  
4 yet and how this proceeded is exemplified, it hit me as I  
5 read through all the substance of all the allegations  
6 because the whole thing is bad news. This whole motion  
7 process is bad news. The City's entire pleading is a  
8 defense, all defenses. It's just putting on every defense  
9 they're going to have if there is an enforcement action.  
10 And then the irony that the State is now filing a motion  
11 to dismiss, what in essence are defenses, the whole thing  
12 is just bad news. It's like one giant Michael Jackson  
13 moonwalk procedurally. It's just bizarre. As I read it,  
14 I'm like this is so backwards and I kept thinking this is  
15 so backwards. And then it just all -- you know, the  
16 further I got along I realized I know why. It's because  
17 the State should get to choose. If they decide to  
18 enforce, they should get to take the first step unless you  
19 come under certain circumstances like in Illini and  
20 Alternate Fuels where the agency acts in a way or the  
21 process, the notice process guides things a way where you  
22 come to a halt and something has to happen, you can get a  
23 ripe issue. That's not in this case. And I may have  
24 misspoken. National Marine is the case that I believe is

1 closest to this case and applies.

2 All right. So the question is do you want  
3 to draft an order? I had thought I might have time to  
4 write a decision, but I have not had the time. This  
5 summer has been a crazy one. So if you want to draft an  
6 order.

7 MR. PORTER: Your Honor, I would suggest yes, there  
8 should be a written order. And obviously the State won so  
9 they should probably take the first half and circulate it.

10 THE COURT: Just say for reasons stated on the  
11 record. I think that covers it.

12 MR. GRANT: I think that's fine, your Honor. That  
13 would be the easiest. I'm going to order a copy of the  
14 transcript for today so we will have what it is for  
15 reasons stated on the record. My understanding is you're  
16 not making any findings about ownership or --

17 THE COURT: Oh, no, no, no. Exactly. There was no  
18 need. Once that issue of justiciability, once I concluded  
19 that that was going to be my ruling, then there's no need  
20 for me to even comment on all the substantive stuff that's  
21 coming down the line.

22 MR. PORTER: Judge, not to -- the justiciability  
23 issue was not a basis of their original motion to dismiss.  
24 It was brought up in the reply brief.



1           MR. GRANT: We cited those cases in our initial brief  
2 and in their response they raised the issue of  
3 justiciability which gave us I think a reason to respond  
4 to their argument and our reply with those two cases. But  
5 we have cited Alternate Fuels and I think National Marine  
6 in our original brief. I don't know if we had it as  
7 justiciability. We did raise that in our initial brief.

8           MR. PORTER: So, Judge, so we understand what's  
9 happening, counsel is going to circulate a potential  
10 ruling to me and then send it to the Court. That will  
11 then be entered and that will be the final ruling, if you  
12 will, once you --

13          THE COURT: Sure. Once I sign that, then that gives  
14 you your 30 days.

15          MR. GRANT: I would suggest and see if we just do the  
16 motion is granted for reasons stated on the record in open  
17 court. Plaintiff's motion dismissed -- or the State's  
18 motion to dismiss is granted, period. That we can do  
19 today rather than -- and then I'm not taking into any  
20 justiciability or the, you know, the other filing in the  
21 other court or anything like that. That's going to be  
22 contained in the transcript. So what do you think about  
23 that?

24          MR. PORTER: As long as we have transcripts, I guess

1 I can't fathom a basis to object to that.

2 THE COURT: Sure. If you want, I have to -- I'm  
3 filling in, so I got to hear an order of protection here.  
4 It will probably take me 15 minutes if you want to draft  
5 that now.

6 MR. GRANT: Sure.

7 THE COURT: That's fine. I think a written order  
8 citing the reasons stated on the record. If you want to  
9 put in there that it was granted on  
10 ripeness/justiciability issue, that's fine. All right.

11 MR. GRANT: All right.

12 THE COURT: All right. Thank you.

13 MR. GRANT: Thank you, your Honor.

14 (Proceeding concluded.)

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1 STATE OF ILLINOIS )  
2 ) SS:  
3 COUNTY OF GRUNDY )

4  
5 I, SARA E. OLSON, hereby certify that I  
6 reported stenographically the proceedings had at the  
7 hearing in the above-entitled cause, and that the above  
8 and foregoing is a true, correct, and complete transcript  
9 of my stenographic notes so taken at the time and place  
10 hereinbefore set forth.

11

12

13 Date: 8-26-21

A handwritten signature in cursive script that reads "Sara E. Olson". The signature is written in black ink and is positioned above a solid horizontal line.

14

SARA E. OLSON, CSR

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