

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

VILLAGE OF GLENVIEW, an Illinois,)	
a municipal corporation, and)	
SOLID WASTE AGENCY OF)	
NORTHERN COOK COUNTY, an)	
Illinois statutory solid waste agency)	PCB NO.: 2023-049
)	(Enforcement - Water)
Complainants,)	
)	
v.)	
)	
CATHOLIC BISHOP OF CHICAGO,)	
a corporation sole, and)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
an Agency of the State of Illinois,)	
)	
Respondents.)	

NOTICE OF FILING

TO: Attached Service List Via Email

PLEASE TAKE NOTICE THAT today I caused to be electronically filed with the Clerk of the Illinois Pollution Control Board, via the "COOL" System, the following Respondent, Illinois Environmental Protection Agency's, Motion For Permission to File Reply to Complainants' Response In Opposition to Illinois Environmental Protection Agency's Motion to Dismiss the Complaint of the Village of Glenview and The Solid Waste Agency of Northern Cook County and Respondent, Illinois Environmental Protection Agency's, Reply in Support of its Motion to Dismiss Village of Glenview and Solid Waste Agency of Northern Cook County's Complaint, true and correct copies of which are attached hereto and hereby served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY

by KWAME RAOUL, Attorney
General of the State of Illinois

By: /s/ Kevin Garstka
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December 27, 2022

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CERTIFICATE OF SERVICE

I, Kevin Garstka, an Assistant Attorney General, caused to be served on this 27th day of December, 2022, true and correct copies of the Notice of Filing and Respondent, Illinois Environmental Protection Agency's, Motion For Permission to File Reply to Complainants' Response In Opposition to Illinois Environmental Protection Agency's Motion to Dismiss the Complaint of the Village of Glenview and The Solid Waste Agency of Northern Cook County and Respondent, Illinois Environmental Protection Agency's, Reply in Support of its Motion to Dismiss Village of Glenview and Solid Waste Agency of Northern Cook County's Complaint, upon the persons listed on the Service List via electronic mail with return receipt.

/s/Kevin Garstka

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and SOLID WASTE AGENCY OF)	
NORTHERN COOK COUNTY,)	
an Illinois statutory solid waste agency;)	
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Complainants,)	
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v.)	PCB No. 23-49
)	
CATHOLIC BISHOP OF CHICAGO,)	
a corporation sole, and ILLINOIS)	
ENVIRONMENTAL PROTECTION)	
AGENCY, an agency of the State of Illinois;)	
)	
Respondents.)	

RESPONDENT, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY’S, MOTION FOR PERMISSION TO FILE REPLY TO COMPLAINANTS’ RESPONSE IN OPPOSITION TO ILLINOIS ENVIRONMENTAL PROTECTION AGENCY’S MOTION TO DISMISS THE COMPLAINT OF THE VILLAGE OF GLENVIEW AND THE SOLID WASTE AGENCY OF NORTHERN COOK COUNTY

NOW COMES Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“Respondent” or “Illinois EPA”), by and through the Attorney General of the State of Illinois, KWAME RAOUL, and pursuant to 35 Ill. Adm. Code 101.500(e), hereby moves for permission to file a reply to Complainants’ Response In Opposition To Illinois Environmental Protection Agency’s Motion to Dismiss The Complaint Of The Village of Glenview And The Solid Waste Agency Of Northern Cook County. In support of this motion, Illinois EPA states as follows:

1. On October 12, 2022, Complainants filed a two-count complaint with the Board. The Complaint was received by the Illinois EPA on October 17, 2022.
2. On November 16, 2022, Illinois EPA filed its Motion to Dismiss Village of Glenview and Solid Waste Agency of Northern Cook County’s Complaint (“Motion to Dismiss”).

3. On November 30, 2022, Complainants filed their Motion for Extension of Time to File a Response to Respondents' Motion to Dismiss the Complaint on Behalf of The Village of Glenview and The Solid Waste Agency Of Northern Cook County.

4. On December 13, 2022, Complainants filed their Response in Opposition to Illinois Environmental Protection Agency's Motion to Dismiss the Complaint of The Village of Glenview and the Solid Waste Agency of Northern Cook County.

5. Section 101.500(e) of the Illinois Pollution Control Board's ("Board") Procedural Rules states, "[t]he moving person will not have the right to reply, except as the Board or the hearing officer permits to prevent material prejudice. A motion for permission to file a reply must be filed with the Board within 14 days after service of the response." 35 Ill. Adm. Code 101.500(e). In this matter, Illinois EPA has timely filed this Motion for Permission, as the 14-day deadline ends on December 27, 2022.

6. In the absence of an opportunity to file a Reply to Complainants' Response, Illinois EPA will be materially prejudiced. Specifically, Illinois EPA must be permitted to reply to Complainants' egregious misstatements regarding the Landfill Inc. v. Pollution Control Board, 74 Ill. 2d 541, 556 (1978) case, impermissible request to the Board for a writ of mandamus, and a collateral attack on the Illinois EPA's permitting decision being framed as an enforcement action rather than an appeal. *See* Sierra Club v. City of Springfield, PCB No. 18-11 (December 21, 2017) (Board found that Respondent's motion for permission to reply in support of its motion to dismiss would be helpful and prevent material prejudice and granted the motion for leave to file a reply under 35 Ill. Adm. Code 101.500(e).)

7. Illinois EPA has prepared a Reply that responds to Petitioner's Response. A copy of such Reply is attached hereto as Exhibit A. By this motion, Illinois EPA seeks permission to file its Reply to avoid material prejudice.

WHEREFORE, Respondent, the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, respectfully requests that the Board or the hearing officer grant it permission to file its Reply to Complainants' Response and such other relief as the Board or the hearing officer deems appropriate.

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY

by KWAME RAOUL, Attorney
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EXHIBIT A

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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RESPONDENT, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY’S, REPLY IN SUPPORT OF ITS MOTION TO DISMISS VILLAGE OF GLENVIEW AND SOLID WASTE AGENCY OF NORTHERN COOK COUNTY’S COMPLAINT

Complainants’ Response to Respondent, Illinois Environmental Protection Agency’s (“Illinois EPA”) Motion to Dismiss fails to adequately address the deficiencies in the Complaint identified in the People’s Motion. First, Complainants egregiously misrepresent the holding of the Illinois Supreme Court’s landmark decision in Landfill, Inc., a case that supports the People’s Motion to dismiss. Second, rather than clarifying the Complainants’ relief, Complainants reframe their plea to impermissibly void the permit by seeking a Board order 1) mandating Illinois EPA to undertake particular enforcement activities and 2) requiring another form of relief (mandamus) that is beyond the Board’s statutory authority. Finally, Complainants’ framing its attack on the Illinois EPA’s permitting decision as an enforcement action rather than an appeal does not cure the deficiencies of the Complaint before the Board, because collateral attacks on Illinois EPA’s permitting decisions face the same jurisdictional limits as third-party appeals.

A. Complainants misrepresent the Illinois Supreme Court *Landfill, Inc.* case.

Complainants try to paint the Illinois EPA as a bad actor in this case. Complainants in some instances argue that the Illinois EPA must act and in other instances that Illinois EPA is an active violator of the provisions of the Illinois Environmental Protection Act. Response at p. 1, ¶1 and p. 3, ¶4. Complainants' argument is based solely on their egregious misrepresentation of Landfill Inc. v. Pollution Control Board, 74 Ill. 2d 541 (1978), as they cite no other authority. In their Response, Complainants state that, "the Illinois Supreme Court has previously held that the IEPA is a person violating the Act when it allows a permit without complying with the provisions of the Act or the applicable rules and regulations." Response at p. 5, ¶8. Complainants have selectively omitted the beginning of the sentence to the quote above and the next sentence of the Court's opinion which in full states:

It is the position of the Board and the intervenors that the Agency is a person violating the Act when it allows a permit without complying with the provisions of the Act or the applicable rules and regulations. This argument ignores the context in which section 31(b) is found. Sections 30 and 31(a) speak in terms of Agency investigation of violations. The focus must be upon polluters who are in violation of the substantive provisions of the Act, since it would be unreasonable to presume these provisions direct the Agency to investigate its own compliance with permit-granting procedures.

Landfill Inc. v. Pollution Control Board, 74 Ill. 2d 541, 556 (1978) (emphasis added). Complainants appear to be positing that the argument of certain parties in Landfill, Inc., which the Court rejected, allows for the position they are taking in this matter. The Court ultimately found that "the judgment of the circuit court of Cook County is reversed, and the cause is remanded with directions to enter judgment for plaintiff, Landfill, Inc." Id. The losing party's arguments is not binding authority. The Board, however, should consider the Court's accurate holding and analysis in Landfill Inc., which states that there is no cause of action under the Act against Illinois EPA for granting a permit. Id. ("Prosecution under the Act . . . is against polluters, not the Agency."). Thus,

this case demonstrates not only that there is no legal remedy available to Complainants against Illinois EPA for what they believe is a “wrongfully” issued permit, but that prosecution under the Act is against the polluters, not the Illinois EPA. Id.

B. The Board does not have the authority to order the mandamus relief that Complainants seek.

Complainants also ask that the Board “enter an order...2) requiring IEPA to fulfill its regulatory mission to actually enforce the Act against CBOC-...”. Response at p. 1, ¶1. In other words, Complainants appear to request a writ of mandamus from the Board. Mandamus means a court command to a governmental office to correctly perform a mandatory function. Black’s Law Dictionary (7th ed. 1999) 973.

However, “the Board, as an administrative body, cannot decide issues for which the remedy is a writ of mandamus. This is reserved for the judiciary.” Illinois EPA v. Granite City Steel Division of National Steel Corporation PCB No. 78-233 (September 2, 1982). Further as held in Citizens for a Better Environment v. Briceland, et al. PCB No. 74-103 (May 23, 1974),

We are not a court of general jurisdiction. We have only the powers conferred upon us by statute, but the statute does indicate that we have some authority over public officials. Section 33(b)(4) states that our cease and desist orders may be enforced by injunction or mandamus in a court of law. However that does not answer the ultimate question here: Do we have authority to order the EPA and its Director to file prosecution cases before us or to coerce the Agency and Director into doing so by issuing an “advisory” opinion? We hold that we lack such authority.”

Thus, the Board cannot issue a writ of mandamus directing the Illinois EPA to undertake the type of action as requested by the Complainants.

C. Complainants impermissibly attempt to collaterally attack Illinois EPA-issued permits.

Throughout their Response, Complainants attempt to argue that they have a cause of action against Illinois EPA. This in essence is a collateral attack on the Illinois EPA’s permitting

decisions; however, Complainants fail to cite to any authority in support of this argument. Illinois Courts and the Board have consistently dismissed third-party challenges to non-hazardous waste and non-NPDES permit appeals. The right to appeal under Section 40(a) of the Act is expressly and exclusively directed to “*the applicant*” for a permit. 415 ILCS 5/40(a) (2020) (emphasis added); *see also* Section 105.204 of the Board’s Procedural Regulations, 35 Ill. Adm. Code 105.204 (“If the Agency refuses to grant or grants with conditions a permit under Section 39 of the Act, *the applicant* may petition for a hearing before the Board to contest the decision of the Agency”) (emphasis added). In that circumstance, the applicant must file a petition or request an extension within 35 days of Agency’s final decision. 35 Ill. Adm. Code 105.206(a). “Under the maxim of *expressio unius est exclusio alterius*, the enumeration of an exception in a statute is considered to be an exclusion of all other exceptions.” Schultz v. Performance Lighting, Inc., 2013 IL 115738, ¶ 17. This inference is even stronger in contrast to other specific provisions of Section 40, where the General Assembly expressly provided a third-party right to appeal certain permits.¹ Similarly, Section 40.2(a) of the Act clearly provides for third party appeals of Illinois EPA-issued Clean Air Act Permit Program (“CAAPP”) permits. As the present case does not involve a hazardous waste disposal permit, an NPDES permit, or CAAPP permit, the right to seek review of the Landfill Permit and Compost Permit is limited by statute to only the applicant(s), which the Village of Glenview and Solid Waste Agency Of Northern Cook County (“SWANCC”) are not. In fact, Complainant SWANCC was a party to the case City of Elgin, et al. v. County of Cook, et al., in which the Illinois Supreme Court held, “An Agency decision granting a permit cannot be

¹ *See e.g.* 415 ILCS 5/40(b) (“If the Agency grants a [Resource Conservation Recovery Act] permit for a hazardous waste disposal site, a third party, other than the permit applicant or Agency, may . . . petition the Board for a hearing to contest the issuance of the permit.”); 415 ILCS 5/40(c) (“[a]ny party to an Agency proceeding conducted pursuant to Section 39.3” governing hazardous waste facilities may petition the Board for review.); or 415 ILCS 5/40(d) (a third party, other than the permit applicant or Agency” may petition the Board for review of a National Pollutant Discharge Elimination System (“NPDES”) permit.).

appealed to the Pollution Control Board, which is only authorized to hear appeals where the Agency denies a permit or grants only a conditional permit. 169 Ill. 2d 53 (1995) (citing 415 ILCS 5/40(a)(1)). Further, the Act only authorizes judicial review of Pollution Control Board permitting decisions, and not Agency permitting decisions. Id. at 61. Consequently, judicial review of Agency decisions granting development permits for solid waste disposal sites is precluded and the instant plaintiffs cannot challenge the Agency's decision to grant the balefill development permit.” Id. at 61. Complainants should be fully aware that the action that they have initiated before the Board is not permissible under the Act.

The jurisdictional limitations under the Act apply not only to direct petitions for review, but also to any action that collaterally attacks a permit, because that also involves a decision concerning whether to grant a permit. In Inland Steel Mortg. Acceptance Corp. v. Carlson, 154 Ill. App. 3d 890, 895 (2d Dist. 1987), the Second District held that the circuit court did not have jurisdiction over the plaintiff's declaratory judgment actions, because the declarations at issue required the Circuit Court to review the IEPA's permitting decision. Id. Similarly, in City of Waukegan v. IEPA, the City of Waukegan filed a complaint against IEPA and the North Shore Sanitary District which included counts seeking declaratory judgments that the biosolids reuse project at issue was a “new pollution control facility”, for which, pursuant to Section 39(c) of the Act, proof of local siting approval is required, and that the IEPA permits for the project were void for failure to obtain such local siting approval. 339 Ill. App. 3d 963, 967 (2d Dist. 2003). The circuit court's dismissal was affirmed, because it was “clear that the City is really challenging the merits of the Agency's decision to issue permits to the District and, in particular that the project does not constitute a pollution control facility,” and therefore impermissibly petitions for review of an Illinois EPA permit. Id. at 974-75, citing City of Elgin v. County of Cook, 169 Ill. 2d 53

(1995) (“In *City of Elgin*, the supreme court held that the plaintiff municipalities were statutorily precluded from seeking judicial review of the Agency’s decision to issue a development permit for a pollution control facility.”). The Complaint in this matter undeniably bases its claims of liability on Illinois EPA’s exercise of its statutory permitting duties. For example, it alleges “The Respondent and IEPA have, inexplicably, now continued this malfeasance by approving a permit application ...”. Complaint at ¶5. The Complaint also alleges “IEPA should never have issued a permit for the Compost Facility and doing so is a direct violation of the Act and therefore beyond IEPA’s powers.” Complaint at ¶48 As these allegations are effectively collateral attacks on the Illinois EPA’s permitting decision, the Complaint should be dismissed for lack of jurisdiction.

Therefore, as a matter of law, Illinois EPA respectfully requests that the Board issue an order dismissing the Complaint against Illinois EPA with prejudice, pursuant to Sections 2-615 and 2-619 of the Code of Civil Procedure, 735 ILCS 5/2-615 and 2-619 (2020), and Sections 101.506 and 103.212(b) of the Board Procedural Rules, 35 Ill. Adm. Code 101.506 and 103.212(b).

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