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MAR 04 2004

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS
Pollution Control Board

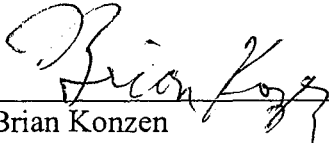
SALINE COUNTY LANDFILL, INC.,)
)
PETITIONER,)
)
v.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
RESPONDENT.)

No. PCB 04-117
(Permit Appeal)

NOTICE OF FILING

Notice is hereby given to you that on March 1, 2004, the Petitioner filed a response to Respondent's motion for protective order.

BY: _____


Brian Konzen
Lueders, Robertson, Konzen LLC
P. O. Box 735, Granite City, IL 62040
618-876-8500

MAR 04 2004

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS
Pollution Control Board

SALINE COUNTY LANDFILL, INC.,)
)
 PETITIONER,)
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 v.) No. PCB 04-117
) (PERMIT APPEAL)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 RESPONDENT.)

RESPONSE TO MOTION FOR ORDER OF PROTECTION

Comes now Petitioner, Saline County Landfill, Inc., and responds to the Motion for Order of Protection submitted by the Illinois Environmental Protection Agency (IEPA).

1. Assertions of privilege, whether attorney-client or work product, are to be narrowly construed, and the party asserting privilege against disclosure has the burden of proving it. Monier v. Chamberlain, 35 Ill.2d 351, 359, 221 N.E. 2d 410 (1966). Illinois adheres to a strong policy of encouraging disclosure. Waste Management v. International Surplus Lines, 144 Ill.2d 178, 579 N.E. 2d 322, 327 (1991).

2. Where the written opinions and communications of counsel are the basis of the lawsuit, an "at issue" exception to privilege applies, and the communications and opinions of counsel therefore must be disclosed. Waste Management v. International Surplus Lines, 144 Ill.2d 178, 579 N.E. 2d 322, 333 (1991).

3. Privileged documents inadvertently disclosed, whether subject to attorney-client or work product privilege, may be subject to discovery. Inadvertent disclosure may waive any privilege under a 5-factor test:

1. The reasonableness of the precautions taken to prevent disclosure;
2. The time taken to rectify the error;

3. The scope of the discovery;
4. The extent of the disclosure;
5. The overriding issue of fairness.

Dalen v. Ozite Corporation, 171 Ill. Dec. 845, 594 N.E. 2d 1365, 1371 (2d Dis. 1992). In the Ozite Opinion, cited in oral argument before the hearing officer by Movant, IEPA, the Court held the free disclosure of the confidential documents waived any privilege.

4. Petitioner notes below which documents are clearly in the administrative record previously tendered by the IEPA in the instant permit review appeal.

5. Under Ozite, all documents inadvertently included in the administrative record should be deemed fully disclosed, and any claim of privileged waived. This is because the party asserting the privilege, the IEPA, has made no attempt in the motion for order of protection, to satisfy any of the five balancing test criteria of Ozite.

6. The December 4, 2003 memorandum, page six of the administrative record, is exempt from any claim of privilege under the "at issue" exception, to the privilege claimed. This December 4, 2003 memorandum from the IEPA's Division of Legal Counsel essentially admits to a long standing interpretation by the IEPA, of Section 39.2(f) of the Environmental Protection Act. This change in long standing position and interpretation by the IEPA is pleaded by Petitioner in its petition for review, paragraph 5. It is precisely this sudden change of position by the IEPA, that justifies reversal of the IEPA's permit denial as arbitrary and capricious. Therefore, the December 4, 2003 memorandum is "at issue".

7. Any privilege asserted regarding the December 5, 2003 correspondence from Assistant Attorney General Tom Davis to John Kim, on page seven on the administrative record, is waived, because its contents were disclosed in nonprivileged communication. See the administrative record,

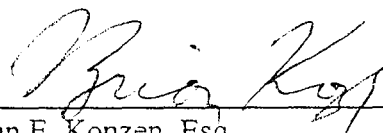
page five, dated December 5, 2003, signed by Joyce Munie, attached.

8. The November 26, 2003 memorandum from John Kim, to Joyce Munie, was disclosed beginning on page 21 of the Administrative Record. This document explains the 10-year history of the IEPA's interpretation of Section 39.2(f) of the Act, said interpretation consistent with granting the permit at issue. Therefore, this memorandum too must be disclosed pursuant to the "at issue" exception to the privilege rule.

9. The November 21, 2003 email from Dan Merriman to Joyce Munie is disclosed on page 8 of the administrative record. Further, this memorandum supports Petitioner's argument Petitioner would have received its permit, but for the reversal of the IEPA in its long-standing interpretation of Section 39.2 (f). In addition, this email is in no way marked as a legal, confidential, or privileged communication. Under the five-part Ozite test, this email is not entitled to protection as privileged.

10. The June 11, May 15, and March 10, 2003 letters from the Illinois Assistant Attorney General Tom Davis to the IEPA lack privilege. The record suggests their contents were repeatedly disclosed to third parties in the first several months of 2003, specifically, the Saline County's State's Attorney, and Steve Hedinger, Esq., neither of whom advise or represent the IEPA. See, for example, the attached November 20, 2003 correspondence of said State's Attorney, with its enclosures, including the September 24, 2003 correspondence to the IEPA from Tom Davis.

The Petitioner respectfully submits the Motion for Order of Protection should be denied.



Brian E. Konzen, Esq.
Lueders, Robertson & Konzen LLC
1939 Delmar, P.O. Box 735
Granite City, Illinois 62040
Phone: (618) 876-8500
ARDC No.: 06187626

1658080001 - Saline County
Saline County Landfill
Log No. 2003-113

The application for the above referenced log number does not comply with the requirement to submit proof of local siting approval in accordance with Section 39(c) of the Act because, according to letter of December 4, 2003 from Tom Davis of the Illinois Attorney General's Office, the siting has expired. Therefore, solely for this reason, the permit will be denied.

Joyce Munn
12/5/03

ROD WOLF
STATE'S ATTORNEY
SALINE COUNTY STATE'S ATTORNEY'S OFFICE
SALINE COUNTY COURTHOUSE
10 EAST POPLAR STREET
HARRISBURG IL 62946
618-253-7169

November 20, 2003

VIA HAND DELIVERY

Joyce Munie
Christine Roque
Permit Section, Bureau of Land #33
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

Re: 1658080001-Saline County
Saline County Landfill, Inc.
Log No. 2003-113
Permit File

Dear Ms. Munie and Ms. Roque:

Following a Freedom of Information Act (FOIA) review, this office obtained a copy of a letter drafted by Brian Konzen, dated October 27, 2003, which responded to previous correspondence of this office dated September 22, 2003. Notably, neither your office nor Mr. Konzen informed this office of the filing of his materials. Further, Ms. Munie's September 25, 2003 letter, referenced in Mr. Konzen's letter, was not made available during the FOIA review. Nevertheless, we now submit this reply to Mr. Konzen's correspondence.

First, to reiterate my correspondence of October 28, 2003, all statements of Mr. Hedinger are completely adopted by me personally as State's Attorney for Saline County. Mr. Konzen's claim that Mr. Hedinger is not acting with authority, and that his position is entitled to no "deference," is therefore categorically false. To any extent such deference exists due to the office involved, that deference should be shown this office. Mr. Hedinger's September 22, 2003 letter and all other correspondence and written materials, fully speak for this office.

Significantly, Mr. Konzen's letter does not even reference the fact that the Office of the Attorney General of the State of Illinois has also agreed with this office's position, as conveyed by Mr. Hedinger. I refer you to correspondence by Thomas Davis, Chief of the Environmental Bureau of the Office of the Attorney General, dated September 24, 2003, which unequivocally adopts this position, and further finds that the earlier permit proceedings engaged in by Saline County Landfill, Inc. (hereinafter "SCLI") are dispositive of the expiration of the siting approval.



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

September 24, 2003

Mr. Daniel Merriman
Illinois EPA/Division of Legal Counsel
1021 North Grand Avenue East
Post Office Box 19276
Springfield, Illinois 62794-9276

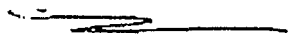
Re: *Saline County Landfill, Inc.*

Dear Dan:

The concerns of Saline County have again been conveyed to you by Special Assistant State's Attorney Stephen Hedinger. Steve's letter of September 22, 2003, was also directed to me because I have previously opened an investigation into this matter. As you know, I have sent inquiries to yourself and Joyce Munie; when I did not receive any reply, I wrote to Scott Phillips on June 11, 2003. Scott responded on June 24th and advised that the Bureau of Land had determined "the proposed waste footprint [is] consistent with the 1996 siting approval." Scott also indicated that "the Illinois EPA is obligated to approve any permit application that meets all of the regulatory requirements."

Please be advised that the Attorney General's Office shares the concerns articulated in Steve's most recent letter. Any technical determination by the Bureau that "the proposed waste footprint [is] consistent with the 1996 siting approval" is simply not relevant to a legal assessment whether such siting approval has expired pursuant to Section 39.2(f). Moreover, the Pollution Control Board's decision in the previous permit appeal that SCLI lacked the proof of local siting approval required by Section 39(c) of the Act is legally dispositive. I respectfully suggest that a legal assessment on this issue be provided to the Bureau by the Division of Legal Counsel before final action on or before October 4, 2003. Thank you for your assistance.

Sincerely,


Thomas Davis, Chief
Environmental Bureau
500 South Second Street
Springfield, Illinois 62706
217/782-7968

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PROOF OF SERVICE

I, the undersigned, verify copies of the forgoing Response to Motion for Protective Order were served by overnight mail upon the following persons by 5:00 p.m., on this first day of March, 2004:

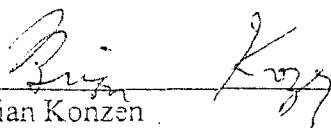
John Kim, Esq.
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

Carol Sudman, Esq.
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Ave. East
PO Box 19274
Springfield, Illinois 62794-9274

Rod Wolf
Saline County State's Attorney
10 E. Poplar
Harrisburg, Illinois 62946

Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 W. Randolph, Suite 11-500
Chicago, Illinois 60601

45093



Brian Konzen