

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

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STATE OF ILLINOIS
Pollution Control Board

KIBLER DEVELOPMENT CORPORATION)
and MARION RIDGE LANDFILL, INC.,)
 Petitioners,)
 v.)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
 Respondent.)

PCB No. 05-35
(Permit Appeal – Land)

NOTICE

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

Carol Sudman, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue, East
P.O. Box 19274
Springfield, IL 62794-9274

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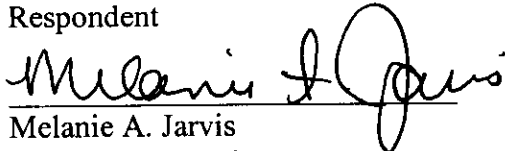
Stephen F. Hedinger
Hedinger Law Office
2601 South Fifth Street
Springfield, IL 62703

Francis X. Lyons
Bell, Boyd & Lloyd LLC
70 West Madison Street, #3100
Chicago, IL 60602

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a RESPONSE TO MOTION TO INTERVENE, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



Melanie A. Jarvis
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: April 6, 2006

This filing submitted on recycled paper.

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**RESPONSE TO MOTION OF CITIES OF MARION AND HERRIN AND THE
WILLIAMSON COUNTY AIRPORT AUTHORITY TO INTERVENE**

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500 and 101.504, hereby respectfully responds to the Motion to Intervene ("Motion") filed by the Cities of Marion and Herrin and the Williamson County Airport Authority ("Movant"). Movant filed the Motion on March 27, 2006, and the Motion was served on Respondent no sooner than March 27, 2006. In response to the Motion, the Illinois EPA states as follows:

I. **Third-Party Intervention in Agency Permit Appeals**

1. The Illinois Environmental Protection Act, 415 ILCS 5/1 et seq. (2004) ("Act"), does not expressly grant authority to the Illinois Pollution Control Board ("Board") to accept third-party permit appeals. Section 40(a)(1) of the Act states, "If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the *applicant* may...petition for a hearing before the Board to contest the decision of the Agency." (Emphasis Added.) Furthermore, it has been well established by Board order and court opinion that the Board is not authorized to hear an appeal for this type of permit from a person other than the permit applicant. See e.g. City of Waukegan et al. v. Illinois EPA and North Shore Sanitary District, PCB 02-173 (May 2, 2002)(citing Landfill, Inc. v. PCB, 74 Ill. 2d 541, 387 N.E. 2d 258 (1978)).

2. Motions to intervene are governed by Board procedural rule 101.402 (35 Ill. Admin. Code 101.402.) Pursuant to Section 101.402(e), a successful intervenor may be granted all of the rights of an original party to the adjudicatory proceeding. If the Board grants a third-party's petition to intervene, that third-party will essentially be given the right to challenge an Illinois EPA permit decision, which is a right that the Act only affords to an applicant. In Sutter Sanitation, Inc. et al., v. Illinois EPA, PCB 04-187 (September 16, 2004), the Board made it clear that in adopting procedural rule 101.402, it never intended to overturn existing case law interpreting intervention under the Act. In that case, the Board reasoned that it could not expand the right to intervene "beyond that which the Act can bear." Here, as in Sutter, regardless of the claimed interests they seek to protect, the Movant cannot seek party status through intervention because they are legislatively precluded from becoming parties in this type of proceeding.

II. Party Intervention in Permit Appeals

3. While no express authority exists to allow third-party interventions in permit appeals, the Board, in its discretion has allowed intervention in certain limited circumstances. Movant cites the Third District Appellate Court's decision in Land of Lakes Co. v. Pollution Control Board, 245 Ill. App. 3d 631, 616 N.E. 2d 349 (3d Dist. 1993), as precedent for allowing officials who represent the public interest to intervene in appeal proceedings before for the Board. (Motion p. 2). Movant fails to note that in the cited case the official allowed to intervene in the permit decision was the County state's attorney, who had standing to intervene based on his status as a *State* official representing the public interest. (Emphasis added). In Land of Lakes the court allowed intervention based on Pioneer Processing Inc. v. Illinois EPA, 102 Ill. 2d 119, 464 N.E. 2d 238 (1984), an Illinois Supreme Court Case holding that the Attorney General, as representative of the interest of the people of the State, had the authority to seek review of a decision of the Board even as a non-party, and upon a determination that a State's Attorney has

rights and duties analogous to those of the Illinois Attorney General. Accordingly, the Board has allowed only the State's Attorney or the Attorney General's Office to intervene in a permit appeals "in light of its unique constitutional role as a representative of the citizenry." See Sutter Sanitation; see also Saline County Landfill, Inc. v. Illinois EPA, PCB 02-108 (April 18, 2002) and Lowe Transfer, Inc. et al. v. Mc Henry County Board, PCB 03-221 (July 10, 2003).

Neither the Cities of Marion or Herrin nor the Williamson County Airport Authority possess the authority to represent the citizenry of the State. As such, Movant should not be permitted to intervene in this matter.

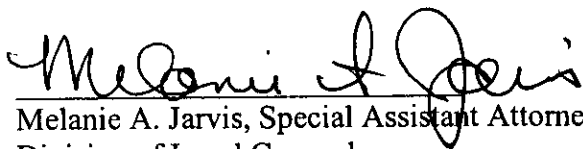
III. Conclusion

4. Finally, by asking for a seat at the bargaining table (Motion p. 8), Movant seems to suggest that a vigorous defense of the terms, conditions, and language of the permit could only occur if Movant were allowed to intervene. In response the Illinois EPA, who carefully crafted and issued the permit pursuant to their authority under the Act, contends that it will defend its own decisions in the pending appeal with competence and zeal.

WHEREFORE, for the reasons stated above, the Illinois EPA hereby respectfully requests that the Board deny the Movant's motion to intervene.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



Melanie A. Jarvis, Special Assistant Attorney General
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1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
Dated: April 6, 2004

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on April 6, 2006, I served true and correct copies of a RESPONSE TO MOTION TO INTERVENE, 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

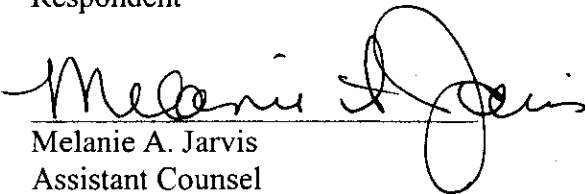
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