

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF WILLIAMSON COUNTY *ex rel.*
STATE'S ATTORNEY CHARLES GARNATI, and
THE WILLIAMSON COUNTY BOARD,
Petitioners,

v.

KIBLER DEVELOPMENT CORPORATION,
MARION RIDGE LANDFILL, INC., and ILLINOIS
ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

No.

(Permit Appeal - Land)

NOTICE OF FILING

TO:

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PLEASE TAKE NOTICE that on July 7, 2008, I filed, electronically, with the Illinois Pollution Control Board, the following: Petitioners' Joint Response in Opposition to IEPA and Landfill's Motions to Dismiss, a copy of which are attached hereto and served upon you.

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PEOPLE OF WILLIAMSON COUNTY *ex rel.* STATE'S
ATTORNEY CHARLES GARNATI, and THE
WILLIAMSON COUNTY BOARD,

By: /s/ Jennifer J. Sackett Pohlenz

CERTIFICATE OF SERVICE

I, **Jennifer J. Sackett Pohlenz**, certify that served the foregoing Notice of Filing, along with copies of document(s) set forth in this Notice, on the above listed persons at the above listed e-mail addresses this 7th day of July 2008, *via* e- mail, and further will serve them *via* facsimile on July 8, 2008.

 /s/ Jennifer J. Sackett Pohlenz

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF WILLIAMSON COUNTY *ex rel.*
STATE'S ATTORNEY CHARLES GARNATI,
and THE WILLIAMSON COUNTY BOARD,
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KIBLER DEVELOPMENT CORPORATION,
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ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY,
Respondents.

No. 08-93

(Permit Appeal - Land)

**PETITIONERS' JOINT RESPONSE IN OPPOSITION TO
IEPA AND LANDFILL'S MOTIONS TO DISMISS**

NOW COME Petitioners PEOPLE OF WILLIAMSON COUNTY *ex rel.* STATE'S ATTORNEY CHARLES GARNATI and the WILLIAMSON COUNTY BOARD, by and through their attorneys, and file this Joint Response in Opposition to the Illinois Environmental Protection Agency's ("Illinois EPA") Motion to Dismiss and Kibler Development Corp./Marion Ridge Landfill, Inc.'s (jointly referenced as "Landfill") Motion to Strike and Dismiss. In support thereof, Petitioners state as follows:

1. Without any attempt to explain the near month-delay, both Illinois EPA, in a June 23rd filing, and Landfill, in a June 26th filing, contend that the Petition filed on May 29th in this matter should be dismissed. Their Motions are premised on two, faulty assertions: (A) Petitioners did not participate in the permitting process and (B) Petitioners otherwise lack standing.

A. Petitioners' Participation in the Permitting Process Is Not Mandatory, as like the Attorney General, the State's Attorney has Additional Obligations and Duties Outside Section 40(a)(1), that Require that He Is Allowed to Represent the People

2. Respondents' argument that the Petition should be dismissed since Petitioners did not participate in the permitting process is nothing more than a farce. First, the Petition asserts, on

information and belief, that Petitioners did *not* receive the required prerequisite notice of the permit application that was filed by Landfill. As such, Petitioners could hardly participate in a process of which they were not aware until after Illinois EPA's decision to issue the subject permit and mere days prior to the deadline for filing this Petition. Second, and more importantly, as a constitutional officer, the participation in the permitting process is not required for a State's Attorney.

3. On numerous occasions, Illinois Courts have made clear that due to the special powers and duties of State's Attorneys, they should not be restricted to a narrow interpretation of a single statutory provision, such as 415 ILCS 5/40(a)(1), without full consideration of their obligations outside such statutory provisions. *Pioneer Processing Inc. v. EPA*, 102 Ill.2d 119, 464 N.E.2d 238 (S.Ct. 1984); *AFSCME v. Ryan, et al.*, 347 Ill.App.3d 732, 807 N.E.2d 1235 (5th Dist. 2004); *Land and Lakes Co. v. PCB*, 245 Ill.App.3d 361, 616 N.E.2d 349, 354-355 (3rd Dist. 1993); *Saline County v. IEPA*, PCB 02-108 (April 18, 2002).

4. Indeed, in *Pioneer Processing Inc.*, the Illinois Supreme Court explained that the Attorney General should not have been dismissed for lack of standing by an appellate court for its appeal of the Board's decision related to an Illinois EPA permit, as the Attorney General has "the duty and au-thority to represent the interests of the People of the State to insure a healthful environment". *Pioneer Processing Inc.*, 102 Ill.2d at 138-139, 464 N.E.2d at 247. The Supreme Court further stated that "[i]f, in fact, the Agency failed to afford the citizens of this State the proper procedures relating to the issuance of Pio-neer's permit, then we believe it is only proper for the Attorney General to be the People's representative in the courts on this matter." *Id.*

5. Like the Attorney General, the State's Attorney is a constitutional officer and the State's Attorney has duties and powers that largely parallel those of the Attorney General. *People*

ex rel. Kunstman v. Nagano, 389 Ill. 231, 249, 59 N.E.2d 96, 104 (1945). One important duty of the State's Attorney is to "commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for his county, in which the people of the State or county may be concerned." 55 ILCS 5/3-9005(a)(1). Clearly, if the Attorney General has the authority, contrary to a specific statute identifying who has standing, to commence an action to determine whether the Illinois EPA failed to follow the proper procedures in issuing a permit, then the State's Attorney of Williamson County has the same authority on behalf of the people and the County Board. In particular, contrary to Illinois EPA's contention Petitioners' lack a "nexus" to this matter, Petitioners' direct interest in this matter is clear when, among other things, Petitioners assert Landfill's failure to notify them of the permit application and Illinois EPA's failure to consider the substance and scope of the County's site location approval. (Illinois EPA Motion ¶3; Petition ¶¶6, 8).

6. Further, the Supreme Court in *Pioneer Processing Inc.* expressly disavowed any precedential value of *Lake County Contractors Assoc. v. Pollution Control Board*, 54 Ill.2d 16, 294 N.E.2d 259 (1973), which has been incorrectly cited by and relied on by Landfill for the proposition that participation in the permitting process is mandatory in this circumstance. *Pioneer Processing Inc.* 102 Ill.2d at 136, 464 N.E.2d at 246. In doing so, the Supreme Court analogized its decision to a similar decision in *People ex rel. Scott v. Illinois Racing Board*, 54 Ill. 2d 569 (1973), warned that standing should not be read narrowly for a constitutional officer, and distinguished as non-precedent *Lake County Contractors Assoc.* as it concerned the appeal of contractors associations rather than the Attorney General. *Pioneer Processing Inc.* 102 Ill.2d at 136-138, 464 N.E.2d at 246-247.

7. Thus, Respondents not only have Respondents failed to address the authority of Petitioners outside Section 40(a)(1) of the Act (which was specifically plead by Petitioners in their Petition), Respondents assertion that to have standing, Petitioners must have participated in the permitting process is incorrect and must fail.

B. Petitioners have Standing to File this Petition

8. As previously referenced, despite being explicitly plead in the Petition, both Illinois EPA and Landfill fail to distinguish the Petitioners' authority as a constitutional officer to bring actions such as the subject Petition. Instead, Illinois EPA argues, citing inapplicable and distinguishable authority, that the Board is not authorized to hear such a Petition unless brought by a permit applicant, such as Landfill. (Illinois EPA Motion ¶4). *Waukegan et al. v. Illinois EPA, et al.*, PCB 02-174 (May 2, 2002), *Kibler Development Corp. et al. v. Illinois EPA*, PCB 05-35, and *Landfill, Inc. v. Illinois Pollution Control Board*, 74 Ill. 2d 541, 387 N.E.2d 258 (S.Ct. 1978), relied on by Illinois EPA for its argument, are all distinguishable.

9. In *Waukegan et al.*, the City of Waukegan, not the State's Attorney, filed a petition for the review of land and air permits issued by Illinois EPA. In the cover letter that accompanied that petition, Waukegan stated that although it did not believe that the Board had jurisdiction to hear its petition, it needed to file it as a result of one of the Respondent's allegation that it was a prerequisite to the Circuit Court action already filed by Waukegan. *Waukegan*, PCB 02-174, p. 1. Relying on *Landfill, Inc.* the Board dismissed the petition for lack of standing. *Waukegan*, however, is not precedent for determining standing in this case, as it does *not* involve a State's Attorney with specific obligations and duties that override a narrow, Section 40-limited reading of standing. For the same reasons that *Lake County Contractors Assoc.* was disavowed by the Illinois Supreme Court as precedent for determining the Attorney General's standing in *Pioneer*

Processing, the Board should not accept *Waukegan* as authority for the State's Attorney's standing in this matter.

10. Likewise, *Kibler Development Corp. et al. v. Illinois EPA*, PCB 05-35 and *Landfill, Inc.* involved private parties, subject to statutory standing restrictions for petitions to the Board for review of permits. Additionally, *Landfill, Inc.* was decided by the Illinois Supreme Court prior to its decision in *Pioneer Processing Inc.* and concerned the issue of whether a private enforcement action against the Illinois EPA could be maintained by the Board, when its sole claim was that the Illinois EPA violated the Illinois Environmental Protection Act by issuing a permit. Unlike in *Landfill, Inc.*, in this case, the question is whether a constitutional officer, such as the State's Attorney, has standing to bring a petition asserting both *Landfill* and Illinois EPA failed in their permitting process obligations such as to, among other things, supersede the County's authority over site location criteria. *See*, 415 ILCS 5/39.2. Thus, neither *Kibler* nor *Landfill, Inc.* is precedent for dismissal in this case.

11. Further, *Landfill's* attempt to distinguish the legal authority for Petitioners' standing cited in the Petition must fail as it is, at best, incomplete and inaccurate. *Landfill* argues that the cases cited by Petitioners in support of standing are limited to the circumstance where a State's Attorney *intervenes* in an existing permit petition, rather than initiates that petition. However, in doing so, *Landfill* fails to address *AFSCME v. Ryan, et al.*, 347 Ill.App.3d 732, 807 N.E.2d 1235 (5th Dist. 2004) and *People ex rel. Scott v. Illinois Racing Board*, 54 Ill. 2d 569, which involved a State's Attorney and Attorney General, respectively.

12. Further, inapposite to *Landfill's* assertion, the line of authority granting intervention to State's Attorneys is, in fact, precedent for a State's Attorney initiating a petition for review. *See, e.g., Land and Lakes Co. v. PCB*, 245 Ill.App.3d 361, 616 N.E.2d 349, 354-355 (3rd Dist.

1993)(State's Attorney allowed to intervene in permit appeal); *Saline County v. IEPA*, PCB 02-108 (April 18, 2002)(State's Attorney intervened in permit appeal).

13. Per both Code of Civil Procedure Rule 403 and the Board's procedural rules 101.402, an intervener has all the rights of an original party to the proceeding. While the Board's procedural rules limit an intervener's rights, such that it cannot contest decisions made in the case prior to the intervener becoming a party, that limitation is not relevant (nor has either Respondent asserted it to be relevant) to this proceeding. Further, there is no limitation, for example, on basic party rights, such as appeal of a decision. In other words, even if the original party to the proceeding did not want to appeal a decision by the Board, if that decision was adverse to the intervener, the intervener could appeal that decision as if it were the original party. *See, e.g., Chicago Area Recycling Group v. Illinois Commerce Commission*, 58 Ill. App. 3d 769, 374 N.E.2d 1008 (1st Dist. 1978)(citation omitted)("to allow an intervenor the status of party and to accord it all the panoplies of the adversary process but to deny it the statutory right of appeal requires a great leap of the imagination to satisfy the fundamentals of simple fairness.").

14. Thus, Respondents assertions that Petitioners have no standing must fail, as Section 40(a)(1) of the Act does not exclude the authority of a constitutional officer, such as a State's Attorney, to initiate the review of a permit issued by Illinois EPA and the already established intervener precedent allowing State's Attorneys to intervene in an applicant's petition for review of a permit is likewise authority supporting a State's Attorney's rights as an original party in such proceedings.

15. Finally, it must be noted that the Petition in this case expressly identified the line of cases restricting the Board to permit reviews brought solely by the applicant. Yet, Respondents waited nearly the full 30-day allotment under Board Rule 101.506, prejudicially wasting nearly

one-quarter of the statutory review time and even agreeing to a discovery schedule prior to asserting the Board has no jurisdiction. Respondents actions have prejudiced Petitioners, as it has forced Petitioners to proceed with this matter as if it the Petition was accepted, preparing and filing discovery requests and preparing for an already scheduled July 28th hearing.

WHEREFORE, Petitioners, People of Williamson County *ex rel.* Charles Garnarti and the Williamson County Board respectful request the Board enter an order allowing its Petition and reversing Illinois EPA's approval with conditions of the subject permit modification and denying that permit modification. If this Board finds that the Petitioners herein do not have standing based on the precedent referenced in this Response, the Petitioners respectfully request that the Board clearly and specifically acknowledge the jurisdictional ground of standing being the sole reason for the denial, as was done, for example, in *City of Waukegan, et al. v. IEPA, et al.*, PCB 02-173 (May 2, 2002), and allowing for the future enforcement or other action by the State's Attorney on behalf of the people and the County Board.

Dated: July 7, 2008

Respectfully submitted,

PEOPLE OF WILLIAMSON COUNTY *ex rel.*
STATE'S ATTORNEY CHARLES GARNATI, and
THE WILLIAMSON COUNTY BOARD,

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