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

PEOPLE OF WILLIAMSON COUNTY ex rel.	)	
STATE'S ATTORNEY CHARLES GARNATI,	)	
And THE WILLIAMSON COUNTY BOARD,	)	
Petitioners,	)	
v.	)	PCB No. 08-93
KIBLER DEVELOPMENT CORPORATION,	)	(Permit Appeal - Land)
MARION RIDGE LANDFILL, INC., and	)	
ILLINOIS ENVIRONMENTAL PROTECTION	)	
AGENCY,	)	
Respondents.	)	

#### **NOTICE**

John Therriault, Acting Clerk Illinois Pollution Control Board James R. Thompson Center 100 West Randolph Street, Suite 11-500 Chicago, IL 60601

Stephen F. Hedinger Hedinger Law Officer 2601 South Fifth Street Springfield, IL 62703

Jennifer Sackett Pohlenz Querrey & Harrow 75 West Jackson Boulevard Suite 1600 Chicago, IL 60604-2827 Carol Webb, Hearing Officer Illinois Pollution Control Board 1021 North Grand Avenue East P.O. Box 19274 Springfield, IL 62794-9274

Michael John Ruffley Assistant State's Attorney 200 Jefferson, Williamson County Courthouse Marion, IL 62959

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a REPLY TO PETITIONERS' JOINT RESPONSE IN OPPOSITION TO IEPA AND LANDFILL'S RESPECTIVE MOTIONS TO STAY AND EXTEND DISCOVERY, 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: July 8, 2008

# Electronic Filing - Received, Clerk's Office, July 8, 2008 CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on July 8, 2008, I served true and correct copies of a **REPLY TO PETITIONERS' JOINT RESPONSE IN OPPOSITION TO IEPA AND LANDFILL'S RESPECTIVE MOTIONS TO STAY AND EXTEND DISCOVERY** via the Board's COOL System and by placing true and correct copies thereof 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 postage affixed thereto, upon the following named persons:

John Therriault, Acting Clerk Illinois Pollution Control Board James R. Thompson Center 100 West Randolph Street, Suite 11-500 Chicago, IL 60601

Stephen F. Hedinger Hedinger Law Officer 2601 South Fifth Street Springfield, IL 62703

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# REPLY TO PETITIONERS' JOINT RESPONSE IN OPPOSITION TO IEPA AND LANDFILL'S RESPECTIVE MOTIONS TO STAY AND EXTEND DISCOVERY

NOW COMES Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, who is appearing limitedly for the purpose of attacking the sufficiency of the Petition filed in this case, and who, pursuant to 35 Ill. Adm. Code 101.500 and 101.514, hereby respectfully replies to the Petitioners' Joint Response In Opposition To IEPA And Landfill's Respective Motions To Stay And Extend Discovery and in support of said motion, the Illinois EPA states as follows:

The Petitioners have painted their alleged prejudice with such a broad brush, that the Illinois EPA feels that it is forced to reply to this parade of horribles. In its motion, Illinois EPA argued that the stay should be granted or denied based upon the procedural arguments presented, however, if the Board entertains the Petitioners' argument on whether or not they will be prejudiced by a short delay in discovery, the Illinois EPA points out that this area of the law is well decided by the Board. In <u>Des Plaines River Watershed</u>, et. al. v. IEPA and the Village of New Lenox, (PCB 04-88), the Board stated in a NPDES third party appeal, an appeal I might add that is statutorily permitted under the Act, "[t]he

Board has consistently held that, in permit appeals, its review is limited to the record that was before IEPA at the time the permitting decision was made." Prairie Rivers Network v. IEPA and Black Beauty Coal Company, PCB 01-112, slip op. at 10 (Aug. 9, 2001), citing Alton Packaging Corp. v. IPCB, 516 N.E.2d 275, 280 (5th Dist. 1987) (disallowing introduction of new evidence not presented to the Agency in the permit proceeding); Community Landfill Co. v. IEPA, PCB 01-48, 01-49 (Apr. 5, 2001); Panhandle Eastern Pipeline Co. v. IEPA, PCB 98-102 (Jan. 21, 1999); West Suburban Recycling and Energy Center, L.P. v. IEPA, PCB 95-125, 95-199 (Oct. 17, 1996). Furthermore, the Board's decision "is not based on information developed by the permit applicant, or the Agency, after the Agency's decision." Community Landfill Co. and City of Morris v. IEPA, PCB 01-48. Consequently, "evidence that was not before the Agency at the time of its decision is not admitted at hearing or considered by the Board." Community Landfill Co. and City of Morris v. IEPA, PCB 01-48, 01-49, slip op. at 3 (Apr. 5, 2001), citing Alton Packaging, 516 N.E.2d at 280; Panhandle Eastern Pipeline Co. v. IEPA, PCB 98-102 (Jan. 21, 1999); West Suburban Recycling and Energy Center, L.P. v. IEPA, PCB 95-125, 95-199 (Oct. 17, 1996)."

The Board went on to say that "[i]n a permit appeal such as this, respondents do not have the same opportunity to engage in discovery as they would in an enforcement case. Consequently, the Board directs the hearing officer to proceed to hearing on terms consistent with this order."

Based on the foregoing, it is apparent that the Petitioners will not be prejudiced by a stay in discovery because it is clear from this ruling that the Petitioners are not even entitled to discovery in this case.

**CONCLUSION** 

For the reasons stated herein, the Illinois EPA respectfully requests that the Board grant the

Illinois EPA's Motion to Stay Discovery and the Filing of the Administrative Record until such time as

the Board rules on the Illinois EPA's Motion to Dismiss based on the Board's lack of jurisdiction and

Petitioners lack standing to bring this matter before the Board or in the alternative rule that the

Petitioners have no right to discovery in a third party permit appeal.

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: July 8, 2008

This filing submitted on recycled paper.