

STATE OF ILLINOIS
POLLUTION CONTROL BOARD
JAMES R. THOMPSON CENTER
100 W. RANDOLPH STREET, SUITE 11-500
CHICAGO, ILLINOIS 60601

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CLERK'S OFFICE

MAR 12 2012

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

ORIGINAL

RETURN TO CLERK'S OFFICE

Anielle Lipe)
Nykole Gillette)
Complainants)
v.) PCB No. 12-95
) (CITIZENS ENFORCEMENT)
)
IEPA (Bureau of Air, Permit Section))
Respondent)

**COMPLAINANTS' MOTION TO FILE A REPLY TO THE IEPA'S
REPLIED MOTION TO DISMISS**

1. Your name, street address,
county, state: Anielle Lipe
22123 Meadow Lake Place
Richton Park, IL 60471
Cook County
Phone: 630-235-9821
- Nykole Gillette
22232 Scott Drive
Richton Park, IL 60471
2. Name and address of respondent Illinois Environmental Protection Agency
Bureau of Air, Permit Section
1021 North Grand Avenue East
Springfield, IL 62794-9506
3. Courtesy Copy Mailed to
Respondent's Attorney Lisa Madigan, Attorney General State of
Illinois/ Sr. Assistant Attorney General,
Gerald T. Karr
100 West Randolph Street
Chicago, IL 60601

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In reply to the Respondent's Motion to Dismiss, please note the following. On January 30, 2012, Anielle Lipe was served through the mail the "Illinois Environmental Protection Agency's Motion To Dismiss Petition For Review", and Nykole Gillette was served on February 1, 2012 by the IEPA's council, Senior Assistant Attorney General, Gerald T. Karr. Within 14 days of Anielle Lipe being served the Motion to Dismiss, on **February 13, 2012**, Anielle Lipe and Nykole Gillette served the IEPA their reply, "Response To Motion To Dismiss Complaint". Please refer to the proof of service sheet that accompanied the Complainants' reply, "Response To Motion To Dismiss Complaint". Based on our explanation of how the IEPA was served our reply, "Response To Motion To Dismiss Complaint", all issues surrounding proper service to the Respondent, IEPA should be resolved.

On 12/20/11, Anielle Lipe and Nykole Gillette filed a complaint with the Board citing that the IEPA **violated and did not enforce the local siting processes** located in the Illinois Compiled Statutes (ILCS) at 415 ILCS 5/1 et seq, in Sections 3.330, 39, 39.2, and 40.1 of the Illinois Environmental Protection Act. Therefore, the Board's requirement of the IEPA complying with the Act is within the four corners of our complaint. **The Board has jurisdiction to make sure that the IEPA does not violate the Act by the IEPA reviewing an application or granting a permit for the development or construction of a new pollution control facility, without the facility first obtaining local siting approval and providing proof to the IEPA pursuant to Section 39(c) of the Act.** Please

refer to our “Formal Complaint” and reply, “Response To Motion To Dismiss” where Sexton Properties R.P.,LLC and its proposed operation is defined as a new, developed and or expanded pollution control facility per the Act.

The Complainants and the citizens of Richton Park were unlawfully denied their rights under the siting approval process because the Village of Richton Park and the IEPA never properly classified Tough Cuts’ partnering company, Sexton Properties R.P., LLC and its proposed operation as a Pollution Control Facility. As a result, the Village of Richton Park failed to require that Sexton Properties R.P., LLC obtain a siting approval permit. The citizens of Richton Park were further deprived justice of the law when the IEPA reviewed Tough Cuts’ Lifetime Air Permit application without them submitting a siting approval permit from Sexton Properties R.P., LLC. The IEPA took this violation a step further and granted Tough Cuts a construction permit to crush concrete and **asphalt, a chemical waste**. As a side note, the Village of Richton Park only granted Sexton Properties R.P., LLC a permit to crush concrete **and not asphalt on their site**. Therefore, our allegation to the Board that the IEPA violated the Act is not a complaint of appeal within the siting approval process of the Act. Reason being is that the citizens of Richton Park were never given a chance to participate per Section 39.2 of the Act, Local Siting Review. Merely, our complaint is asking the Board to revoke the construction permit on the basis that the IEPA violated the Act when they reviewed Tough Cuts’ application without the submission of a siting approval permit.

Also when the IEPA’s council stated in the “IEPA’s Motion to Dismiss Petition For Review” on page 4 that “only the applicant can appeal the issuance of a general permit issued with the conditions under Section 39”, this statement does not apply to our complaint. Reason being is that Tough Cuts’ partnering company, Sexton Properties R.P., LLC, a pollution control facility should have undergone the siting approval process per Section 39.2 of the Act and the IEPA should have adhered to Section 39(c) of the Act.

As a result of the siting approval process not being adhered to per Section 39.2, Tough Cuts’ partnering company, Sexton Properties R.P., LLC failed to convey to interested citizens the following rights under the Act:

- “The applicant must comply with notification requirements.
- The applicant must present a proposal that complies with the siting law.
- The public must be allowed an opportunity to comment on the proposal.
- The local officials must examine the application and evaluate public comments to determine whether the site meets the requirements of the siting law.
- Local officials are required to make public, orally or in writing, any host agreement between the local siting authority and the siting applicant, prior to the siting decision.
- The Illinois EPA will not review a permit application without documentation that the county or municipal government has approved the location of the facility.”

Instead disenfranchised citizens of Richton Park participated in a more lax process of a public hearing for a Petition of a Special Use Permit to crush concrete hosted by the Village of Richton Park Planning & Zoning Commission for Sexton Properties R.P., LLC on June 14, 2011. As well as the casual public meetings held by the Village of Richton Park's Trustees and Village President prior to them voting unanimously to permit Sexton Properties R.P., LLC to crush concrete. The IEPA had an opportunity to host a public hearing regarding the issuance of Tough Cuts' construction permit, however, the IEPA decided to host a casual public meeting instead stating that a public hearing was too costly.

The IEPA's council raises the argument in the "Illinois Environmental Protection Agency's Reply To Complainants' Response To Illinois EPA's Motion To Dismiss" on page 2 that the "Illinois EPA again asserts that it is the Agency that is charged with making the determination on whether local siting is required." The IEPA's council refers to the case, City of Waukegan v. Illinois Environmental Protection Agency. Our response to this argument is that "the Illinois EPA was created by the Illinois Environmental Protection Act ("Act") and charged with carrying out its purposes. 415 ILCS 5/4 (2010)." Therefore, we expect the IEPA to adhere and enforce Section 39(c) and Section 39.2 of the Act which we believe in our filed complaint, they have not done. Furthermore, the IEPA's decision should not be bias or subjective to one's opinion, but determined from the laws of the Act.

The IEPA's council states on page 3 of the "Illinois Environmental Protection Agency's Motion For Leave To File A Reply To Complainants' Response" that "the Office of the Attorney General is defending the Illinois EPA in its permitting decision, it is not permitting air emissions as Complainants assert". As a matter of fact, Anielle Lipe and Nykole Gillette obtained facts and figures from the emission statistics quoted from Tough Cuts' Environmental Consultants, Derenzo and Associates, Inc.'s report. Please refer to (Exhibit B), "Air Quality Impacts For ToughCuts Concrete Services, Inc., Nonmetallic Mineral Crushing and Processing Equipment At Sexton Development" pages 2 and 3 that were sent with our reply, "Response To Motion To Dismiss Complaint". Per page 3 of Derenzo and Associates, Inc. report states "the specified control measures are expected to reduce uncontrolled particulate and dust emissions at the planned waste concrete crushing and processing operations by at least 80%". Page 2 of Derenzo and Associates, Inc. report, indicates "a total of approximately 250,000 tons of waste concrete material will be processed at the site annually". **Based on Derenzo and Associates Inc.'s report that was derived from the USEPA emission statistics, Anielle Lipe and Nykole Gillette did simple math of determining that at most 20% of the projected 250,000 tons of crushed concrete equals a maximum of 50,000 tons of emissions in the air which is drastically higher than the .8 tons that the IEPA states.** As a result of the IEPA not explaining:

- the discrepancy in the USEPA's statistics vs. their .8 tons statistic,
- how much asphalt is projected to be crushed annually,
- the list of emissions that were left incomplete on question #6 of Tough Cuts' application leaves citizens in despair as to exactly what emissions and how much of those emissions will people be exposed to in the crushing operation.

Also the IEPA's council **did not state or provide proof** that the emissions from the crushing operation would not negatively effect human health, cost to property, productivity, quality of life and the environment. Yet, "the Attorney General is the chief legal officer of the State of Illinois and the Attorney General has an obligation to represent the interests of the People so as to ensure a healthy environment for all the citizens of the State. Ill. Const. 1970, art. V, §15; People v. NL Industries, 152 Ill.2d 82, 103 (1992)." To prove that the emissions from this crushing operation is unsafe, we submitted with our "Formal Complaint", (Exhibit H1), the United States EPA Health Effect fact sheet. Per page 1 of the fact sheet, it states the "particle pollution-especially fine particles- contains microscopic solids or liquid droplets that are so small that they can get deep into the lungs and cause serious health problems". There is a concern that the particle pollution mentioned in the US EPA Health Effect fact sheet can be emitted from the crushing operation.

Issues of Disclosure

Based on the IEPA's council's comments, it is warranted that we reply to the IEPA's opposing argument of Assistant Attorney General, Stephen Sylvester not disclosing representation or potential representation of the IEPA when a complaint was alleged against the IEPA. We will affirm that the lack of disclosure of the IEPA's potential representation is considered a conflict of interest. Lastly, we will respond to the statements made by the IEPA's council regarding the topic of two different lawyers from the same Illinois Attorney General's Office having conflicting advocacies of the operation of the CCDD laws.

In summary, after the Village of Richton Park granted Sexton Properties R.P., LLC a Special Use Permit to crush, sell and bury concrete and the IEPA granted their partnering company, Tough Cuts a construction permit to crush, sell and bury **concrete and asphalt**, Anielle Lipe researched cases on CCDD laws that was located on the Board's website. Anielle located the public comments that the Assistant Attorney General, Stephen Sylvester made with the Board regarding advocating for more stringent rules in the CCDD laws to protect the public. Per the Electronic Filed Public Comments on page 2, Assistant Attorney General, Stephen Sylvester indicated that "CCDD includes asphalt, which is a source of polynuclear aromatic hydrocarbons ("PNAs"), which by operation of the Board Waste Disposal Regulations would classify CCDD as a "chemical waste." See 35 Ill. Adm. Code 810.103." On page 2 of the Electronic Filed Public Comments, Assistant Attorney General, Stephen Sylvester goes on to quote Section 22.51 (f)(1) which indicates measures to further protect the groundwater from the CCDD material. With Assistant Attorney General, Stephen Sylvester's strong advocacy for strengthening the CCDD laws and the subject related to Anielle Lipe and Nykole Gillette's case against the Village of Richton Park and the IEPA, naturally Anielle felt she could reach out in confidence to Assistant Attorney General, Stephen Sylvester for help. Anielle Lipe and Nykole Gillette are lay people that have not been to school to practice law nor have they obtained a law degree, and are unrepresented by council. Anielle Lipe and Nykole Gillette are attempting to protect themselves and the community from the emissions of

the crushing operations with their own resources. Therefore, as a lay person and not an attorney practicing law, Anielle Lipe at the time didn't know as common knowledge that the Attorney General's Office represents the IEPA in any or all cases against them.

Per Lisa Madigan, Attorney General's website, it states "The Illinois Constitution guarantees the right of the people of the state to a healthy environment. Attorney General, Lisa Madigan is committed to protecting this right as well as the rights of those who farm our lands." Anielle Lipe and Nykole Gillette are citizens of the State of Illinois, and are advocating for a healthy environment of preventing a facility from polluting the land, air and water. Therefore, it is not unreasonable to believe that the Attorney General's Office would not come to their aid. More importantly, Anielle Lipe and Nykole Gillette expected the Attorney General's Office to advocate on their behalf per the statute. Some of their expectations were based on reading or hearing on the news the high profiled cases of:

- **the Attorney General Lisa Madigan's Office enforced the Clean Water Act against the Village of Crestwood that purposely used a contaminated well to provide water for the local residents.**
- **the Attorney General Lisa Madigan's Office along with other Attorney General Offices assisted in fighting the predatory lending and mortgage fraud. The Attorney General's Offices sued some of the nation's largest mortgage lenders: Ameriquest, Countrywide and Wells Fargo, and assisted in recouping over 9 billion dollars in damages and restitution for borrowers.**

Although the Attorney General's Office is representing the IEPA, a sector of Illinois government, it was shocking to the complainants because the Attorney General's Office is council for the IEPA that is permitting a company through its crushing operation to pollute the environment which can have negative consequences. It is the opinion of the complainants that Assistant Attorney General, Stephen Sylvester should have disclosed that the Attorney General's Office would represent the IEPA when Anielle first mentioned a complaint against them. Instead the Assistant Attorney General allowed Anielle to go into details of the case to cause a conflict of interest based on an attorney-client relationship being created with her and Assistant Attorney General, Stephen Sylvester. Anielle advised Assistant Attorney General Stephen Sylvester:

- she was a citizen in Richton Park, IL,
- she had a complaint against the Village of Richton Park and the IEPA that dealt with the CCDD laws and their noncompliance of the Act,
- she was looking for some advice regarding the complaint and if the Attorney General's Office could investigate the matter and let her know the outcome, and
- she divulged confidential information that she did not want the opposing side to know. Therefore, the Attorney General's Office should have declined representation of the IEPA when they made their request.

Anielle spoke with Assistant Attorney General, Stephen Sylvester the third week of December and had an extensive conversation regarding her complaints of the IEPA and the Village of Richton Park. Anielle felt Assistant Attorney General, Stephen Sylvester was being helpful in his advice of stating that one of her defenses was the health concerns from the crushing operation. When Anielle mentioned the issue of noncompliance of the Act by the Village of Richton Park and the IEPA, Assistant Attorney General, Stephen Sylvester mentioned that the crushing operation might be delayed based on our claims. He also stated that he could check to see if the "attorney of the month" would investigate our complaint. Anielle mentioned specifically the request of investigating the Village of Richton Park's process of granting the Special Use permit and the non-compliance of the Act by both the local government and the IEPA. After Anielle Lipe spoke to Assistant Attorney General, Stephen Sylvester, she felt somewhat assured that she and Nykole may finally get some assistance in this matter. Because Anielle did not receive a call back from Assistant Attorney General, Stephen Sylvester after a few weeks, she called to request the outcome of the Attorney General Office's investigation regarding her verbal complaint against the Village of Richton Park and the IEPA. The call to the Assistant Attorney General, Stephen Sylvester went straight to voice mail. Therefore, Anielle left a message on his voice mail, and he did not return her phone call. After Anielle Lipe was served in the mail by Senior Assistant Attorney General, Gerald T. Karr, she called the Assistant Attorney General, Stephen Sylvester and left additional messages to inquire why the Attorney General's Office was representing the IEPA after she confided in the Assistant Attorney General, Stephen Sylvester about her case. Since Anielle could not reach Assistant Attorney General, Stephen Sylvester, she called Senior Assistant Attorney General, Gerald T. Karr, to advise of the disclosure issue and conflict of interest. Senior Assistant Attorney General, Gerald T. Karr said that he would consult a supervisor from the Attorney General's Office about this matter and someone would get back to her. To Anielle's dismay, she has not received a call back from Assistant Attorney General, Stephen Sylvester or any other representatives from the Attorney General's Office regarding this matter.

Based on our current research and understanding, Attorneys have an obligation of candor which means they must be open and forthright. The representation of a client is not privileged information and should be disclosed. Especially since this information is sometimes essential to making sure that the proper procedural steps are met when moving a case through the legal system. The Assistant Attorney General, Stephen Sylvester is held to a higher level of standard based on his knowledge of the law and experience. Therefore, Assistant Attorney General, Stephen Sylvester should have quoted to Anielle over the phone the "Illinois Supreme Court case law, *Environmental Protection Agency v Pollution Control Board*, 69 Ill. 2d. 394, 372 N.E. 2d. 50, (Ill. Sup. Ct. 1977)" that Senior Assistant Attorney General, Gerald T. Karr quoted in his response, "Illinois Environmental Protection Agency's Reply To Complainants' Response To Illinois EPA's Motion To Dismiss" on page 3 to prevent Anielle from divulging details of her complaint. Or the Attorney General's Office should have declined representation of the IEPA because of a conflict of interest.

Overview for Determining Conflict of Interest

In review of the Cornell University Law School internet website discussing Illinois Legal Ethics in the subheading, "1.7:230 Perspective for Determining Conflict of Interest" it states the following: "whether a current attorney-client relationship exists between the attorney and the adverse party is a threshold question for determining whether or not a conflict of interest exists under Rule 1.7. The attorney-client relationship typically arises in the context of agency, but the existence of the relationship is not dependent on the payment of fees or the execution of a formal contract. In fact, the attorney-client relationship can result in the absence of mutual assent. See *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1317 (7th Cir. 1978). Rather, a fiduciary relationship may result because of the nature of the work performed and the circumstances under which confidential information is divulged. *Id.* at 1320.

The Seventh Circuit Court of Appeals has established a two-part inquiry to determine whether an attorney-client relationship has been established. The party seeking to establish the relationship must show (1) he "submitted confidential information to a lawyer; and (2) that he did so "with the reasonable belief that the lawyer was acting as the party's attorney." See *Bridge Prod., Inc. v. Quantum Chem. Corp.*, 1990 WL 70857, *3 (N.D. Ill. 1990). In *Quantum*, the plaintiff, Bridge Products, sought to hire a new attorney at the beginning of its suit against Quantum. Bridge met with Chicago-based law firm, Sidley & Austin to discuss the possibility of Sidley taking over Bridge's representation. See *id.* at *1. At the meeting with Sidley, Bridge discussed the status of the litigation, their view of trial strategy, their discussions with their previous counsel about settlements and other privileged information. See *id.* Bridge did not ultimately hire Sidley & Austin, but several months later Quantum sought to replace their attorney and decided to hire Sidley & Austin. See *id.* at *2. The court granted Bridge's motion to disqualify Sidley & Austin from representing Quantum under the two-part analysis set forth above. The court found that confidential information was conveyed to Sidley at the initial meeting between Bridge and Sidley and Bridge reasonably believed that an attorney-client relationship was formed. See *id.* at *3-*4. Thus, the predicate requirement of demonstrating an attorney-client relationship to establish a conflict of interest was fulfilled even though the relationship was not a fiduciary one. Disqualification was therefore appropriate. See *id.* at *7.

Another crucial factor in determining whether there is an impermissible conflict of interest under rule 1.7 is whether the attorney-client relationship is current, or has been terminated. As articulated by the court in *SWS Fin. Fund A., et al v. Salomon Bros., Inc.*, 790 F. Supp. 1392, 1398 (N.D. Ill. 1992), an established lawyer-client relationship does not terminate easily. The court identified several circumstances that would indicate that an attorney-client relationship had dissolved. First, the relationship may terminate by the express statement of either the attorney or the client. Second, behavior inconsistent with the continuation of the representation may indicate that the relationship has terminated, such as the client filing a grievance against the lawyer with the local bar association."

Based on the above, Anielle believed an attorney client relationship was created between she and Assistant Attorney General, Stephen Sylvester because of their conversation that consisted of the following: her indicating confidential details of her case, the Assistant Attorney General, Stephen Sylvester's conduct of advising that our health concerns were a defense for our complaint, and he would check to see if "the attorney of the month" would investigate our complaint. Once the Attorney General's Office represented the IEPA, this posed a conflict of interest with Anielle.

The IEPA's council raised the argument on page 4 of the "Illinois Environmental Protection Agency's Reply To Complainants' Response To Illinois EPA's Motion To Dismiss" that states "The Illinois Supreme Court further states that when the Attorney General is not an actual party in a dispute, "the Attorney General may represent opposing State agencies in a dispute." "372 N.E. 2d at 53". Yet we assert that the rationale of the Illinois Attorney General's Office advocating for the permission of lax CCDD laws to pollute the air and simultaneously advocating for more stringent CCDD laws to protect the ground water doesn't make common sense. Reason being is that the objective of the Attorney General's Office is to advocate for the protection of the environment that includes air, land and water for all Illinois citizens.

Anielle Lipe and Nykole Gillette respectfully request that the Board:

- reassign the IEPA's representation to further prevent an unfair trial of our case,
- verify that Tough Cuts' partnering company is a new pollution control facility where asphalt, a chemical hazardous waste is proposed to be crushed and the site is to be expanded beyond the boundaries of its current pollution facility by filling in an existing pond,
- verify the harmful pollutants from the crushing operation, and how it has negative effects on humans and the environment.

In light of the IEPA's violation of Section 39 (c) because the joint ventured company, Sexton Properties, R.P., LLC didn't obtain siting approval, it is requested that the Board revoke the Construction permit granted to Tough Cuts by the IEPA and provide for such other relief as the Board deems appropriate.

Complainant Anielle Lipe Complainant Nykole Gillette

Date 3/9/12 Date 3/9/12

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**COMPLAINANTS' MOTION TO FILE A REPLY TO THE IEPA'S
REPLIED MOTION TO DISMISS**

(PROOF OF SERVICE)

The undersigned hereby files a response.

Anielle Lipe
Anielle Lipe

Nykole Gillette
Nykole Gillette

Under penalties of perjury, we the undersigned certify as true that we served the foregoing upon:

Illinois Environmental Protection Agency
Bureau of Air, Permit Section
1021 North Grand Avenue East
Springfield, IL 62794-9506

by placing a true and correct copy of same into a properly addressed, Priority Mail envelope with sufficient postage, and mailing it at the cashier window at the at the Matteson Post Office, 20650 South Cicero Avenue, Matteson, IL on or before 6:00 P.M. on March 9,2012.

Complainant (s) Anielle Lipe Date 3/9/12

Complainant (s) Nykole Gillette Date 3/9/12

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**COMPLAINANTS' MOTION FOR LEAVE TO FILE A REPLY TO
THE IEPA'S REPLIED MOTION TO DISMISS**

On February 24, 2012, Anielle Lipe and Nykole Gillette were served the Motions from the IEPA's council. Anielle Lipe and Nykole Gillette request the Board for leave to file a reply to the IEPA's council's response, "Motion For Leave To File A Reply To Complainants' Response" per the Illinois Pollution Control Board Procedural Rules Section 101.500 (e).

In support of Anielle Lipe and Nykole Gillette's Motion to Leave to File a Reply, we want to:

1. Resolve any issues of whether the IEPA was properly served our reply, "Response To Motion To Dismiss Complaint" despite the ambiguity inferred by the IEPA's council.
2. Give clarity to our argument that we are not raising issues outside the four corners of our complaint that Senior Assistant Attorney General, Gerald T. Karr alleges.
3. Set the record straight that the emissions from the crushing operation was obtained from the report, "**Air Quality Impacts for ToughCuts Concrete Services, Inc. Nonmetallic Mineral Crushing and Processing Equipment at Sexton Development**" that was prepared by Tough Cuts' Environmental Consultants, Derenzo and Associates, Inc. that researched the projected emissions which was derived from the USEPA emission statistics.
4. Respond to comments the IEPA's council made in his Motion regarding the obligations of Assistant Attorney General, Stephen Sylvester disclosing

representation of the IEPA and conflict of interests within the Attorney General's Office.

For the reasons mentioned above, and to prevent material prejudice, Anielle Lipe and Nykole Gillette respectfully request that they be granted leave to file their Reply.

Complainant Anielle Lipe Complainant Nykole Gillette

Date 3/9/12 Date 3/9/12