



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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DEC 05 2007
STATE OF ILLINOIS
Pollution Control Board

Lisa Madigan
ATTORNEY GENERAL

December 3, 2007

John T. Therriault
Illinois Pollution Control Board
James R. Thompson Center, Ste. 11-500
100 West Randolph
Chicago, Illinois 60601

Re: ***People v. Isaacson Construction, Inc.***
PCB No. 07-25

Dear Mr. Therriault:

Enclosed for filing please find a Notice of File and Complainant's Response to Respondent's Motion to Compel Discovery Through In Camera Inspection in regard to the above-captioned matter. Please file the originals and return file-stamped copies to me in the enclosed, self-addressed envelope.

Thank you for your cooperation and consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kristen Laughridge Gale", is written over a faint, larger signature.

Kristen Laughridge Gale
Environmental Bureau
500 South Second Street
Springfield, Illinois 62706
(217) 782-9031

KLG/pjk
Enclosures

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
)
Complainant,)
)
vs.)
)
ISAACSON CONSTRUCTION, INC.,)
an Illinois corporation,)
)
Respondent.)

PCB No. 07-25
(Enforcement)

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STATE OF ILLINOIS
Pollution Control Board

NOTICE OF FILING

To: Fred C. Prillaman
Mohan, Allewelt, Prillaman & Adami
One North Old State Capital Plaza, Ste. 325
Springfield, IL 62701

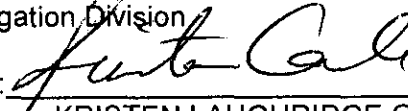
PLEASE TAKE NOTICE that on this date I mailed for filing with the Clerk of the Pollution Control Board of the State of Illinois, COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION TO COMPEL DISCOVERY THROUGH IN CAMERA INSPECTION, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: 
KRISTEN LAUGHRIDGE GALE
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: December 3, 2007

CERTIFICATE OF SERVICE

I hereby certify that I did on December 3, 2007, send by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the following instruments entitled NOTICE OF FILING and COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION TO COMPEL DISCOVERY THROUGH IN CAMERA INSPECTION

To: Fred C. Prillaman
Mohan, Allewelt, Prillaman & Adami
One North Old State Capital Plaza, Ste. 325
Springfield, IL 62701

and the original and ten copies by First Class Mail with postage thereon fully prepaid of the same foregoing instrument(s):

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

A copy was also sent by First Class Mail with postage thereon fully prepaid to:

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
Springfield, IL 62794



KRISTEN LAUGHRIDGE GALE
Assistant Attorney General

This filing is submitted on recycled paper.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF)
ILLINOIS,)
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 Complainant,)
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 vs.)
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 ISAACSON CONSTRUCTION, INC., an)
 Illinois corporation,)
)
 Respondent.)

No. PCB 07-25
(Enforcement)

**COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION TO COMPEL
DISCOVERY THROUGH IN CAMERA INSPECTION**

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS, objects to Respondent's motion to compel discovery through *in camera* inspection of documents withheld from production. The People respectfully request that the Hearing Officer deny this motion for the following reasons:

A. THE BOARD DOES NOT HAVE THE AUTHORITY TO DO AN *IN CAMERA* INSPECTION

The Board's Procedural Rules, 35 Ill. Adm. Code 100.100-100.908, do not provide for an *in camera* review. Section 101.616 of the Board's rules provides that, for purposes of discovery, "the Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance where the Board's rules are silent." However, neither the Supreme Court Rules nor Section 2-1003 of the Code of Civil Procedure require an *in camera* review; in fact, both are silent on *in camera* reviews. An administrative agency has no inherent or common-law powers. *McArdle v. Rodriguez*, 277 Ill. App. 3d 365, 373, 659 N.E.2d 1356, 1362 (1st Dist., 1995), *Illinois Dept. of*

Public Aid v. Brazziel, 61 Ill.App.3d 168, 171, 377 N.E.2d 1119, 1121-1122 (1st Dist., 1978).

Since neither the Board's procedural rules nor the Code of Civil Procedure and the Supreme Court Rules require, or even mention *in camera* reviews, and the Board as an administrative agency has not inherent or common-law powers, the Board is not authorized to do an *in camera* inspection.

B. NONE OF THE CLAIMED PRIVILEGES WERE WAIVED, THEREFORE AN *IN CAMERA* INSPECTION IS NOT REQUIRED

The party who claims the privilege has the burden of showing the facts which give rise to the privilege. *Mlynarski v. Rush Presbyterian-St. Luke's Medical Center*, 213 Ill.App.3d 427, 527 N.E.2d 1025 (1st Dist., 1991). However, a request for an *in camera* inspection should not be used as a fishing expedition. *Radiac Abrasives, Inc. v. Diamond Technology, Inc.* 177 Ill.App.3d 628, 532 N.E.2d 428 (2nd Dist., 1988). Respondent makes the unsupported claim that additional information must be provided describing why each document is privileged. Rule 201(n) requires only that a claim of privilege "be supported by a description of the nature of the documents, communications or things not produced or disclosed and the exact privilege which is being claimed." The Privileged Document List describes each document's nature, all of which are communications, the date and the subject matter, and the authors and recipients. Furthermore, except for the typographical error for document number 20, the privilege claimed is identified. A corrected Privileged Document List is attached to this response. The only case Respondent cites to support his claim that additional information is required, *Ill. Educ. Ass'n v. Ill. State Bd. Of Educ.*, 204 Ill.2d 456 (2003), is regarding the interpretation of the privilege section under the Freedom for Information Act, 5 ILCS 140/7(1)(n). That section does not apply to this case. The

People have provided sufficient information under Supreme Court Rule 201(n) describing each privileged document.

Claims of privilege can be supported by either an *in camera* review or submitting affidavits setting forth facts sufficient to establish the applicability of the privilege to the withheld documents. *Ardisana v. Northwest Community Hospital, Inc.* 342 Ill.App.3d 741, 795 N.E.2d 964 (1st Dist., 2003), *Mlynarski*. Attached is an affidavit outlining all of the facts establishing the applicability of the privilege claimed signed by Kristen Laughridge Gale, Assistant Attorney General. Therefore, an *in camera* review by the Hearing Officer is not necessary.

Respondent makes another unsupported claim that the People have injected “at issue” material into the Privileged Document list. Respondent states that one of the issues in this case is that the waste buried on Respondent’s property was hazardous. Respondent then conjectures that the privileged documents contain information regarding this issue even though none of the documents mention hazardous wastes or materials. The cases that Respondent uses to bolster this conjecture are different. In *Waste Management Inc. v. International Surplus Lines, Ins. Co.*, 144 Ill.2d 178 (1991), the Defendants sought discovery of Plaintiff’s attorney’s files from a previously litigated case because Plaintiffs were making claims based upon the orders of the previous case. A similar situation is presented in *Lama v. Preskill*, 353 Ill.App.3d 300. In fact, *Lama*, presents a clear example of what an “at issue” waiver is: “For example, when clients sue their attorneys for malpractice, or when lawyers sue their clients for fees, a waiver applies to the earlier communications between the now-adversarial parties.” *Lama v. Preskill* 353 Ill.App.3d 300, 305, 818 N.E.2d 443, 448-449 (2 Dist., 2004). This case is concerning the burial of

hazardous waste on Respondent's property, not communications between parties. None of the descriptions of the documents refer to or mention hazardous wastes or hazardous materials. The "at issue" waiver exception to the attorney-client privilege and the work product privilege is not applicable to this case and the privileged documents.

Respondent also asserts that the People have waived both privileges for certain documents under the "same subject" waiver. However, Respondent stretches this waiver in application beyond its intention. Although voluntary disclosure of confidential information does not effectively waive an attorney-client privilege as to all other non-disclosed communications that may have taken place, where a client reveals portions of her conversation with her attorney, those revelations amount to a waiver of the attorney-client privilege as to the remainder of the conversation or communication about the same subject matter. *People v. O'Banner*, 215 Ill.App.3d 778, 793, 159 Ill.Dec. 201, 575 N.E.2d 1261 (1991). In both cases Respondent cites regarding the "same subject" waiver, the waivers found by the courts were limited to privileged information contained within the same conversations and letters. In other words, the privileged information was the "same" not "similar". Furthermore, the court in *Graco Children's Products v. Dressler*, 1995 WL 360590 (N.D.Ill.,1995), stated that in finding whether a subject matter waiver has occurred determining whether a party has gained a tactical advantage is an important consideration. The *Graco* Court found that a subject matter waiver did not occur because there was no indication that the parties withheld partially or selectively disclosed documents so as to gain a tactical advantage. *Id.* Finally, waiver may only be partial in that it does not waive the privilege as to all other non-disclosed communications that may have taken place. *In re Estate of Hoover*, 589 N.E.2d 899, 168 Ill.Dec. 499 (1st Dist., 1992). The Respondent claims that because

one document, with a different subject heading and often between different parties, was produced, the privileges for the multiple documents listed in the Privileged Document List are waived under the subject matter waiver because they may be similar. Respondent appears to base this contention on the fact that the produced document is labeled as “Confidential”. Just because a document has a “Confidential” stamp, does not make it so. Those documents Respondent relies upon were produced because they did not meet the tests for either the attorney-client privilege, *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill.2d 111, 432 N.E.2d 253 (1982), or for the work-product privilege, *Mlynarski*. For subject matter waiver to apply, the produced documents must be privileged. Since those documents are not privileged, no waiver can have occurred, and the subject matter waiver of privilege does not apply. Furthermore, claiming that the subject matter waiver applies to privileged correspondences with tangentially similar subjects and often different authors and recipients as the produced documents stretches the “subject matter” waiver beyond any of the previously established parameters. The subject matter waiver is limited to conversations between the same parties, therefore, neither privilege was waived for any of the privileged documents between parties that were not part of the original conversation the Respondent claims to cause the waiver. Those are document numbers 17, 21, 23, 28, 32-34, 36-37, 38, 41-42. The remaining documents Respondent claims to have been waived have a different subject matter and date, and are not a part of the same conversation. Therefore the subject matter waiver does not apply to any of the documents.

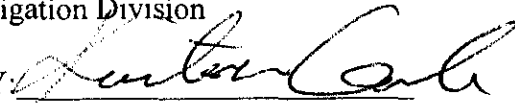
Even if the privileged documents contain a mixture of factual material and counsel’s work product, the privileged documents are not discoverable unless the party seeking disclosure “conclusively demonstrates the absolute impossibility of securing similar information from other

sources.” *Consolidation Coal Co.* This is because most of the time the material is so inextricably intertwined with the privileged material that it is virtually impossible to isolate. *Id.* Therefore, even if the privileged documents contain some factual material, the documents are still not discoverable unless the Respondent conclusively demonstrates that it is absolutely impossible to secure the information from another source.

WHEREFORE, the People respectfully requests that the Hearing Officer DENY Respondent’s request for an *in camera* review of all the privileged documents because the Board does not have the authority to perform an *in camera* inspection and the People did not waive the privilege of any of the documents under the “at issue” waiver nor the “same subject” waiver.

Respectfully submitted,
PEOPLE OF THE STATE OF ILLINOIS
ex rel. LISA MADIGAN,
Attorney General
of the State of Illinois,

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: 
KRISTEN LAUGHRIDGE GALE
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: December 3, 2007

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF)	
ILLINOIS,)	
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Complainant,)	
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vs.)	No. PCB 07-25
)	(Enforcement)
ISAACSON CONSTRUCTION, INC., an)	
Illinois corporation,)	
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Respondent.)	

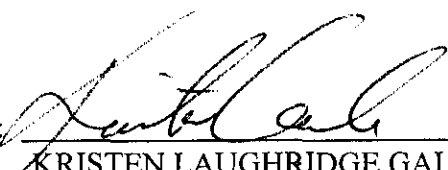
AFFIDAVIT

I, Kristen Laughridge Gale, am an Assistant Attorney General with the Illinois Attorney General's Office. I reviewed and prepared the privileged document list provided for the above matter. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, 735 ILCS 5/1-109, I hereby state the following:

- 1) Items #'s 1, 10, 17, 21, 23, 24, 32-34, 36-43, 45-47 are all correspondence between attorneys within the Illinois Attorney General's Office, including the Deputy Attorney General, the Environmental Bureau Chief, and Assistant Attorneys General. All of the correspondence are identified as privileged under the work product privilege.
- 2) Item #'s 2, 4-8, 16, 18-20, 22, 25-31, 35, 48-54 are all correspondence between the Illinois Attorney General's Office, specifically Thomas Davis, Environmental Bureau Chief and Kristen Gale, Assistant Attorney General, and attorneys within the Illinois EPA, specifically Wm. Ingersoll, Chief, Illinois EPA Department of Legal Counsel and Kyle Davis, Legal Counsel, Illinois EPA Department of Legal

Counsel. All of the correspondence are identified as privileged under the work product privilege.

- 3) Item #'s 3, 9, 11-15, are all correspondence between the Illinois Attorney General's Office, specifically either Kristen Laughridge Gale, Assistant Attorney General, and Thomas Davis, Environmental Bureau Chief, and Illinois EPA Legal Investigator, Michael McCabe, Wm. Ingersoll, Chief, Illinois EPA Department of Legal Counsel and Kyle Davis, Legal Counsel, Illinois EPA Department of Legal Counsel. The FOIA DLC is the alternative email used by Michael McCabe. The correspondence are regarding exempt records and are identified as privileged under the Attorney-Client Privilege.
- 4) Item # 44 is an email between attorneys and representatives within the Illinois Attorney General's Office regarding a press release. The email is identified as privileged under the Work Product Privilege.

By: 
KRISTEN LAUGHRIDGE GALE
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: December 3, 2007

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
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Complainant,)	
)	
vs.)	No. PCB 07-25
)	(Enforcement)
ISAACSON CONSTRUCTION, INC., an)	
Illinois corporation,)	
)	
Respondent.)	

PRIVILEGED DOCUMENT LIST

1. Email to Roger Flahaven from Tom Davis dated March 15, 2007 regarding privileged documents and reply. Privilege: Work Product
2. Email to Tom Davis from Wm. Ingersoll dated March 14, 2007 regarding exempt records. Privilege: Attorney-Client
3. Email to Mike McCabe from Kristen Gale dated March 12, 2007 regarding exempt records. Privilege: Attorney-Client
4. Email to Kristen Gale from Wm. Ingersoll dated March 13, 2007 regarding exempt records. Privilege: Attorney-Client
5. Email to Kyle Davis from Kristen Gale dated March 13, 2007 regarding exempt records. Privilege: Attorney-Client
6. Email to Kristen Gale from Kyle Davis dated March 13, 2007 regarding exempt records. Privilege: Attorney-Client
7. Email to Kristen Gale from Kyle Davis dated March 13, 2007 regarding exempt records. Privilege: Attorney-Client
8. Email to Kyle Davis from Kristen Gale dated March 13, 2007 regarding exempt records. Privilege: Attorney-Client
9. Email to Wm. Ingersoll, Kristen Gale & Mike McCabe from Tom Davis dated March 14, 2007 regarding exempt records. Privilege: Attorney-Client
10. Email to Kristen Gale from Tom Davis dated March 14, 2007 regarding exempt records. Privilege: Work Product
11. Email to Kristen Gale from FOIA DLC dated March 12, 2007 regarding exempt records. Privilege: Attorney-Client

12. Email to FOIA DLC from Kristen Gale dated March 12, 2007 regarding exempt records. Privilege: Attorney-Client
13. Email to Kristen Gale from Mike McCabe dated March 12, 2007 regarding exempt records. Privilege: Attorney-Client
14. Email to Mike McCabe from Kristen Gale dated March 12, 2007 regarding exempt records. Privilege: Attorney-Client
15. Email to Kristen Gale from Mike McCabe dated March 12, 2007 regarding exempt records. Privilege: Attorney-Client
16. Email to Kyle Davis from Kristen Gale dated March 12, 2007 regarding Isaacson document production request. Privilege: Attorney-Client
17. Email to Kristen Gale from Colette Melhuish dated March 1, 2007 regarding Isaacson proceeding with discovery. Privilege: Work Product
18. Email to Kyle Davis from Kristen Gale dated March 1, 2007 regarding Isaacson depositions. Privilege: Attorney-Client
19. Email to Kristen Gale from Kyle Davis dated March 1, 2007 regarding Isaacson depositions. Privilege: Attorney-Client
20. Email to Kyle Davis from Kristen Gale dated March 1, 2007 regarding Isaacson depositions. Privilege: Attorney-Client
21. Email to Colette Melhuish & Mitch Cohen from Kristen Gale dated March 1, 2007 regarding Isaacson discovery. Privilege: Work Product
22. Email to Kyle Davis from Kristen Gale dated March 1, 2007 regarding Isaacson discovery schedule. Privilege: Attorney-Client
23. Email to Kristen Gale from Tom Davis dated March 1, 2007 regarding deposition advice. Privilege: Work Product
24. Email to Colette Melhuish from Kristen Gale dated November 16, 2006 regarding Isaacson status conference. Privilege: Work Product
25. Email to Wm. Ingersoll from Tom Davis dated August 18, 2006 regarding Isaacson file request. Privilege: Attorney-Client
26. Email to Kyle Davis from Kristen Gale dated June 6, 2007 regarding Isaacson first answer to interrogatories. Privilege: Attorney-Client
27. Email to Kyle Davis from Kristen Gale dated March 29, 2007 regarding Isaacson first answer to interrogatories. Privilege: Attorney-Client

28. Letter and Referral to Attorney General Lisa Madigan from Renee Cipriano dated December 3, 2004 regarding Isaacson referral. Privilege: Attorney-Client
29. Email to Kyle Davis from Kristen Gale dated June 6, 2007 regarding Isaacson interrogatories with draft answers. Privilege: Attorney-Client
30. Email to Kristen Gale from Kyle Davis dated October 4, 2006 regarding Isaacson compliance. Privilege: Attorney-Client
31. Email to Kyle Davis from Kristen Gale dated October 4, 2006 regarding Isaacson compliance. Privilege: Attorney-Client
32. Email to Tom Davis from Jack Bailey dated January 11, 2005 regarding Isaacson referral. Privilege: Work Product
33. Email to Jack Bailey and Tom Davis from Kristen Laughridge dated January 11, 2005 regarding Isaacson draft complaint. Privilege: Work Product
34. Email to Jack Bailey from Tom Davis dated January 11, 2005 regarding Isaacson referral. Privilege: Work Product
35. Email to Kristen Laughridge from Kyle Davis dated January 11, 2005 regarding Isaacson draft complaint. Privilege: Attorney-Client
36. Email to Tom Davis from Jack Bailey dated January 11, 2005 regarding Isaacson referral. Privilege: Work Product
37. Email to Tom Davis from Jack Bailey dated January 11, 2005 regarding Isaacson referral. Privilege: Work Product
38. Email to Mitch Cohen from Tom Davis dated November 30, 2005 regarding Isaacson referral. Privilege: Work Product
39. Email to Kristen Laughridge from Tom Davis dated December 1, 2005 regarding Isaacson pending criminal investigation. Privilege: Work Product
40. Email to Jim Morgan, Mike Mankowski, Kristen Gale, Del Haschemeyer from Tom Davis dated June 16, 2006 regarding criminal investigations. Privilege: Work Product
41. Email to Kristen Gale from Tom Davis dated July 20, 2006 regarding Isaacson referral. Privilege: Work Product
42. Email to Tom Davis from Kristen Gale dated July 20, 2006 regarding Isaacson referral. Privilege: Work Product
43. Email to Mitch Cohen from Tom Davis dated August 24, 2006 regarding Isaacson civil case. Privilege: Work Product

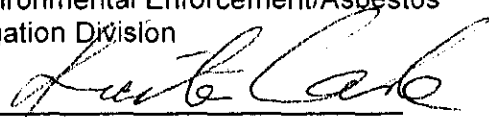
44. Email to Matt Dunn, Scott Mulford, Lisa Ranson, & Cara Smith from Tom Davis dated October 6, 2006 regarding press release. Privilege: Work Product
45. Email to Kristen Gale from Colette Melhuish dated October 12, 2006 regarding Isaacson IDNR reports. Privilege: Work Product
46. Email to Kristen Gale from Tom Davis dated October 12, 2006 regarding Isaacson press release. Privilege: Work Product
47. Email to Kristen Gale from Tom Davis dated October 12, 2006 regarding Isaacson press release. Privilege: Work Product
48. Letter to Wm. Ingersoll from Thomas Davis dated July 18, 2007 regarding Isaacson Construction. Privilege: Attorney-Client
49. Letter to Thomas Davis from Wm. Ingersoll dated July 19, 2007 regarding Isaacson Construction. Privilege: Attorney-Client
50. Letter to Kristen Gale from Kyle Davis dated May 11, 2007 regarding Isaacson Construction-interrogatories. Privilege: Attorney-Client
51. Letter to Kristen Gale from Kyle Davis dated July 12, 2007 regarding Isaacson Construction-interrogatories. Privilege: Attorney-Client
52. Letter to Kristen Gale from Kyle Davis dated July 19, 2007 regarding Isaacson Construction-interrogatories. Privilege: Attorney-Client
53. Letter to Kristen Gale from Kyle Davis dated May 2, 2007 regarding Isaacson Construction-interrogatories. Privilege: Attorney-Client
54. Letter to Kristen Gale from Kyle Davis dated August 13, 2007 regarding Isaacson Construction-Attestation. Privilege: Attorney-Client

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JAMES E. RYAN,
Attorney General
of the State of Illinois,

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY:


KRISTEN LAUGHRIDGE GALE
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
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Dated: 12/12/07