

Electronic Filing - Received, Clerk's Office, 02/22/2012
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ANIELLE LIPE and NYKOLE GILLETTE)	
)	
)	
Complainants,)	
)	
v.)	PCB No. 12-95
)	(Third-Party Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY)	
)	
Respondent.)	

NOTICE OF FILING

TO: Attached Service List

PLEASE TAKE NOTICE that on February 22, 2012, I filed with the Clerk of the Illinois Pollution Control Board, Respondent's, Illinois Environmental Protection Agency, Motion for Leave to File a Reply, a copy of which is attached and served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: Gerald T. Karr

Gerald T. Karr
Senior Assistant Attorney General
Environmental Bureau
69 West Washington Street
Suite 1800
Chicago, Illinois 60602
(312) 814-3369

DATED: February 22, 2012

THIS FILING IS SUBMITTED ON RECYCLED PAPER

SERVICE LIST

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 West Randolph Street
Chicago, Illinois 60601

Anielle Lipe
22123 Meadow Lake Place
Richton Park, Illinois 60471

Nykole Gillette
22232 Scott Drive
Richton Park, Illinois 60471

CERTIFICATE OF SERVICE

I, GERALD T. KARR, an Assistant Attorney General in this case, do certify that on this 22nd day of February, 2012, I caused to be served by First Class Mail the foregoing Notice of Filing and Respondent's Motion For Leave to File a Reply upon the individuals listed on the attached service list, by depositing the same in the U.S. Mail depository located at 100 West Randolph Street, Chicago, Illinois in an envelope with sufficient postage prepaid.


GERALD T. KARR

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY)	
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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S MOTION FOR LEAVE TO FILE A REPLY TO COMPLAINANTS' RESPONSE

NOW COMES Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by its attorney, LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Illinois Pollution Control Board ("Board") Procedural Rule 101.500(e), 35 Ill. Adm. Code 101.500(e), and hereby moves the Board for leave to file a reply to Complainants' response to Respondent's Motion to Dismiss, as Complainants' response raise issues outside the four corners of its complaint. A copy of Respondent's proposed reply is attached hereto. In support of its Motion to for Leave to File a Reply, Illinois EPA states as follows:

On or about December 22, 2011, Lipe/Gillette filed a Complaint ("Complaint") challenging the decision by Illinois EPA to issue the construction permit to Tough Cuts and have requested that the permit issued by the Illinois EPA to Tough Cuts be set aside. The Complaint was received by the Illinois EPA on December 27, 2011. On January 20, 2012, the Office of the Attorney General received a copy of the Complaint along with a request from the Illinois EPA for representation in this matter.

In response to the Complaint the Illinois EPA filed a Motion to Dismiss the Complaint on the grounds that it amounted to a Third-Party challenge to the grant of a permit by the Illinois EPA. The Motion sets out that the Complainants lack standing to assert such a challenge to the permit.

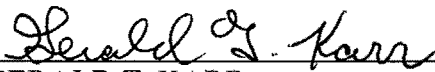
It appears that Complainants filed a response to the Motion to Dismiss on or about February 15, 2012. Complainants did not serve a copy of this response upon counsel for the Illinois EPA. Counsel was alerted to this filing on February 17, 2012.

Complainants in their response raise issues outside the four corners of their Complaint and assert a conflict within the Office of the Attorney General in representing the Illinois EPA. For this reason and to avoid prejudice of this unrebutted argument, Respondent seeks leave to file a reply to these new allegations.

WHEREFORE, Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, respectfully requests that the Board issue an order granting the Respondent Leave to File a Reply to Complainant's Response to its Motion to Dismiss.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY
ex rel. LISA MADIGAN,
Attorney General of the State of Illinois

BY: 
GERALD T. KARR
Senior Assistant Attorney General
Environmental Bureau

69 W. Washington St.
Chicago, Illinois 60602
(312) 814-3369

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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S REPLY TO COMPLAINANTS' RESPONSE TO ILLINOIS EPA'S MOTION TO DISMISS

NOW COMES Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by its attorney, LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Illinois Pollution Control Board ("Board") Procedural Rule 101.500(e), 35 Ill. Adm. Code 101.500(e), and for its Reply to Complainants' Response to its Motion to Dismiss, Illinois EPA states as follows:

I

INTRODUCTION

On or about December 22, 2011, Lipe/Gillette filed a Complaint ("Complaint") challenging the decision by Illinois EPA to issue the construction permit to Tough Cuts for a concrete crushing operation. Complainants have requested that the permit issued by the Illinois EPA to Tough Cuts be set aside. The Complaint was received by the Illinois EPA on December 27, 2011. On January 20, 2012, the Office of the Attorney General received a copy of the Complaint along with a request from the Illinois EPA for representation in this matter.

In response to the Complaint the Illinois EPA filed a Motion to Dismiss the Complaint on the grounds that it amounted to a Third-Party challenge to the grant of a permit by the Illinois EPA. The Motion sets out that the Board lacks jurisdiction to hear such a matter and the Complainants lack standing to assert such a challenge to the permit.

It appears that Complainants filed a Response to the Motion to Dismiss on or about February 15, 2012. Complainants did not serve a copy of this Response upon counsel for the Illinois EPA. Counsel was alerted to this filing on February 17, 2012.

Complainants in their Response raise issues outside the four corners of their Complaint and assert a conflict within the Office of the Attorney General in representing the Illinois EPA. For this reason a Reply is necessary.

II

ARGUMENT

Complainants' raise the same issues in their Response to IEPA's Motion to Dismiss that they raise in their Complaint, i.e. that the Illinois EPA did not require local siting prior to issuing Tough Cuts construction permit. Illinois EPA again asserts that it is the Agency that is charged with making the determination on whether local siting is required. *See City of Waukegan v. Illinois Environmental Protection Agency*, 339 Ill.App.3d 963, 976 (2nd Dist 2003) as well as Illinois EPA's full argument set out in its Motion to Dismiss. In addition to the allegations contained in their Complaint, Complainants in their Response also assert that a conflict exists within the Office of the Attorney General in its representation of the Illinois EPA in this matter. Specifically, Complainants argue that because Assistant Attorney General Stephen Sylvester filed comments in a Board Rulemaking regarding Clean Construction Debris and

Complainants initiated a phone conversation with Mr. Sylvester regarding their particular matter, that the Office of the Illinois Attorney General has a conflict and is barred from representing the Illinois EPA in this matter. (See Complainants' Response, pgs. 8 & 9).

The authority of the Illinois Attorney General to represent Illinois State Agencies in legal matters is well established. The Illinois Supreme Court has definitively spoken on this issue in the case *Environmental Protection Agency v. Pollution Control Board*, 69 Ill. 2d. 394, 372 N.E. 2d. 50, (Ill. Sup. Ct. 1977). In this case the Court stated that:

It is sufficient to observe that this court has consistently held, under both the 1870 and 1970 constitutions that the Attorney General is the chief legal officer of the State; ... As chief legal officer of the State, the Attorney General has the constitutional duty of acting as legal adviser to and legal representative of State agencies.

Environmental Protection Agency v. Pollution Control Board, 372 N.E.2d. 50, 51 (Ill. Sup. Ct. 1977). Therefore, it is entirely proper and in fact it is required that the Office of the Attorney General act as counsel for the Illinois EPA in this matter. The Office of the Illinois Attorney General is fulfilling its constitutional duty by representing the Illinois EPA in this matter. The Office of the Attorney General is defending the Illinois EPA in its permitting decision, it is not permitting air emissions as Complainants assert. (See Complainants' Response, pg. 8).

Complainants argue that Mr. Sylvester had an obligation to disclose the fact that the Illinois Attorney General represents the Illinois EPA. (See Complainants' Response, pg. 8). First, Complainants do not point to any legal authority for this assertion and second, Complainants had not even served their Complaint upon the Illinois EPA at the time they initiated their conversation with Mr. Sylvester. Further, the Illinois Attorney General was not made aware of Complainants' Complaint until January 20, 2012, at least

five weeks after the conversation with Mr. Sylvester. Thus Mr. Sylvester would not even have been aware of any perceived conflict on the part of the Complainants.

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. The Attorney General is not an actual party in this case; it is instead carrying out its constitutionally authorized duty of representing a State Agency. In fact, as set out above, the courts recognize that it is sometimes permissible for the Attorney General to be on both sides of a proceeding. Both the Illinois Constitution and the case law recognize the position of the Illinois Attorney General to represent the Illinois EPA in this matter. There exists no legal authority for the Board to sever this representational relationship.


III CONCLUSION

WHEREFORE, Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, respectfully requests that the Board dismiss Complainants', ANIELLE LIPE and NYKOLE GILLETTE, Complaint challenging the Illinois EPA's Permit Decision

with prejudice, and for such other relief as the Board deems appropriate.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY
ex rel. LISA MADIGAN,
Attorney General of the State of Illinois

BY: 
GERALD T. KARR
Senior Assistant Attorney General
Environmental Bureau

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