

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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STATE OF ILLINOIS
Pollution Control Board

MATHER INVESTMENT PROPERTIES)
L.L.C.)

Complainant,)

v.)

Case No. 05-29

ILLINOIS STATE TRAPSHOOTERS)
ASSOCIATION, INC.,)

Respondent.)

PETITIONER'S RESPONSE TO MOTION FOR STAY

NOW COMES Petitioner, Mather Investment Properties, by and through its attorneys, Sorling, Northrup, Hanna, Cullen & Cochran, Ltd., Charles J. Northrup of counsel, and hereby respond to Respondent's Motion for Stay. In Response, Petitioner states:

1. On or about August 16, 2004, Petitioner filed this action with the Illinois Pollution Control Board ("Board"). A series of extensions of time by which Respondent was required to Answer were filed by Respondent and not objected to by the Petitioner. During this time, the Parties engaged in good faith negotiations to resolve this matter. Although these negotiations have not conclusively terminated, they have not resulted in any settlement of the case.

2. On or about May 17, 2005, Respondent filed its Answer in this case and its Motion for Stay.

3. Petitioner objects to Respondent's Motion for Stay.

4. Section 101.514 of the Board's procedural rules provide for a stay of Board proceedings where the movant provides "sufficient information detailing why a stay is needed." 35

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Ill. Adm. Code 101.514. See Nielsen & Brainbridge v. Illinois EPA, PCB No. 03-98 (February 6, 2003)(2003 Ill. Env. Lexis 63). In addition, the Board's rule clearly envisions a "stay" in the context of staying enforcement of an order, and the Board's analysis of this issue is not easily applicable to this matter. In Nielsen & Brainbridge, the Board referenced an analysis of such factors as (1) a certain and clearly ascertainable right [that] needs protection; (2) irreparable injury will occur without the injunction [in this case, the Stay]; (3) no adequate remedy at law exists; and (4) there is a probability of success on the merits." In this case, Respondent does not identify a clearly ascertainable right in avoiding the imposition of a potential Board order compelling a clean-up or imposing a civil penalty. Indeed, such an argument cannot be made in good faith because to do so would be to sanction the allowance of contamination. Second, no irreparable injury will occur if this matter proceeds. Third, an adequate remedy at law for this Complaint does exist -- namely a hearing on the merits in this case to identify whether movant has violated the Illinois Environmental Protection Act. Fourth, there is no probability that movant will succeed in the underlying matter. Accordingly, under the applicable standards outlined by the Board, no "stay" of this proceeding is warranted.

5. In contravention of the applicable Rule, no "sufficient information detailing why a stay is needed" has been identified. Respondents are simply advocating a procedural device by which they do not have to face the consequences of its own actions in contaminating the property at issue. The contaminated property at issue in this case remains contaminated as a result of the activities conducted at the property by Respondent. While the property is located in a commercially desirable, and quickly developing, area of Springfield, Illinois, the contamination presents an impediment to the development of the property by Petitioner. Any stay of this action will prejudice

Petitioner and the residents of the area by delaying the prompt clean-up of the property. Indeed, a stay in this case only serves to benefit Respondent by delaying the potential that it may be forced, by Board Order, to clean-up its former property. Petitioner loses by not being able to commercially develop the property. The City of Springfield loses by not reaping the tax benefits of commercial development at this property. The residents of the City of Springfield lose by not having the additional services or merchants that might be located on the property. Lastly, the environment loses in that contamination is allowed to remain in place.

6. The crux of Respondent's Motion For Stay is that another case has been filed between these same Parties (and others) addressing the same property and the same contamination. This case has been filed and is pending in the Circuit Court of Sangamon County. See Mather Investment Properties v. Illinois State Trapshooters Association and Hanson Professional Services, Inc., No. 03-L-144. However, Respondent's remedy in such a situation was to file a motion suggesting that the Board case was duplicitous. Respondent did not do this, and the time for such a motion is long past. 35 Ill.Adm.Code 103.212(b). Even if such an argument was not untimely, this case should clearly proceed because the two pending cases are not "identical or substantially similar." Union Oil Co. v. Barge-Way Oil Co., PCB No. 98-169 (January 7, 1999)(1999 Ill.Env.Lexis 9). The Board has frequently held that even though two cases may involve the same parties, the same time frame, and the same actions, if the cases are based on different statutes and legal theories they are not duplicitous. Id.; Lake County Forest Preserve District v. Ostro, PCB No. 92-80 (July 30, 1992). The statutes and legal theories presented in this case are distinct and separate than the theories presented in the Circuit Court action. This action before the Board is seeking civil penalties under the Act as well as an order compelling the clean-up of the property. The Circuit Court action is based upon a

contract dispute between the Parties, as well as theories of negligent misrepresentation against a third party. That action seeks civil damages, which the Board cannot award. Accordingly, nothing about the pending Sangamon County Circuit Court action prevents the Board from proceeding in this matter.

7. Respondent presents another set of factors for consideration by the Board in determining the appropriateness of the Motion For Stay. Respondent cites Environmental Site Developers, Inc. v. White and Brewer Trucking, Inc., PCB No. 96-180 (July 10, 1997) for consideration of these factors: (1) comity; (2) prevention of multiplicity, vexation and harassment; (3) likelihood of obtaining complete relief in the foreign jurisdiction; and, (4) the res judicata effect of a foreign judgment in the local forum. However, none of these factors favor staying this matter before the Board.

With respect to "comity," Respondent references the central issue of adjudicating the "contractual transaction" between the parties. The "contractual transaction" between the parties, however, has nothing to do with the alleged violation of the Act by Respondent, which is the sole issue before the Board. Concepts of "comity" are not at issue in this case.

Similarly, with respect to the second factor, Respondent notes "In this case, a stay would avoid the multiplicity of proof and argument concerning the proper interpretation of the contract" (Mot. at 6). Again, the terms of the contract between the Parties is not at issue before the Board. What is at issue before the Board is whether the Respondent has abandoned waste (or any other violation of the Act) at this site such that it should be compelled to clean it up. There is no multiplicity of suits here.

With respect to obtaining "complete relief", the pending Circuit Court action will not adjudicate violations of the Act, which are at issue in the Board case. Here too, this is an insufficient rationale for staying this Board proceeding.

Finally, res judicata is also not at issue. Again, the causes of action in the Circuit Court and Board proceedings are different. A judgment in either forum will not conclude or decide issues the other.

Accordingly, for these reasons, Respondent's arguments are without merit.

WHEREFORE, Petitioner, Mather Investment Properties, L.L.C., respectfully requests that this Board deny Respondent's Motion for Stay.

Respectfully submitted,

Mather Investment Properties, L.L.C.

By: 

One Of Its Attorneys

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PROOF OF SERVICE

The undersigned hereby certifies that one original and 10 copies of the foregoing document was served by placing same in a sealed envelope addressed:

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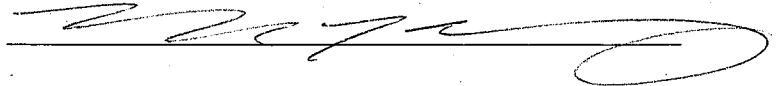
and one copy to:

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and by depositing same in the United States mail in Springfield, Illinois, on the 31st day of May, 2005, with postage fully prepaid.

A handwritten signature in black ink, appearing to be "M. J. Prillaman", written over a horizontal line.