BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KIBLER DEVELOPMENT CORPORATION and MARION RIDGE LANDFILL, INC.,,	)	
Petitioners,	)	PCB No. PCB 07-43
v.	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,,	)	
Respondents.	)	

NOTICE OF FILING

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on September 11, 2008, we electronically filed with the Clerk of the Illinois Pollution Control Board, Williamson County State's Attorney, Charles Garnati's Brief in Support of His Motion for Reconsideration, copies of which are attached hereto and hereby served upon you.

Dated: September 11, 2008

Respectfully submitted,

On behalf of Williamson County State's Attorney, Charles Garnati

/s/ Michael John Ruffley
One of Its Attorneys

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KIBLER DEVELOPMENT CORP. and MARION RIDGE LANDFILL, INC.,	)	
Petitioners,	)	PCB No. 07-043
v.	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

WILLIAMSON COUNTY STATE'S ATTORNEY, CHARLES GARNATI'S BRIEF IN SUPPORT OF HIS MOTION FOR RECONSIDERATION

NOW COMES WILLIAMSON COUNTY STATE'S ATTORNEY, CHARLES GARNATI *ex rel.*, People of Williamson County, pursuant to 35 Ill.Adm.Code 101.520, and for his Brief in Support of his Motion for Reconsideration, states as follows:

BACKGROUND

This action was initiated by the State's Attorney of Williamson County ("State's Attorney") to protect the health, safety and welfare of the people of Williamson County.

In 1995, the Petitioners, Kibler Development Corp. ("Kibler") and Marion Ridge Landfill, Inc., obtained local siting approval by default when the Williamson County Board failed to issue a decision on the Petitioner's application for landfill siting within 180 days of the filing of the application. Litigation followed, as citizens challenged the siting and sought to prevent development of the facility.

Ultimately, the citizen-initiated litigation ended, and Kibler sought a development permit. However, the development permit proposed construction of a facility in Williamson County that was different from the facility proposed in 1995, for which Kibler obtained siting approval and for which a Host Agreement had been executed. In 2004, IEPA issued a development permit to

Kibler, but imposed conditions designed to protect public safety. Kibler objected to the conditions and appealed to the Board, in PCB 05-035. During the pendency of that appeal, Kibler applied, on May 2, 2006, for a permit to modify the facility which had been approved in 1995. The proposed modifications included, *inter alia*, changing the type of waste to be accepted at the facility.

On October 18, 2006, IEPA denied the 2006 permit application. Kibler appealed to the Board, giving rise to the instant appeal. No discovery was conducted in this appeal, and no hearings were ever held. Instead, Kibler and IEPA engaged in back-room negotiations concerning the permitting of the proposed facility, without the benefit of public involvement or scrutiny.

When the State's Attorney learned that IEPA intended to strike a deal and accede to Kibler's demands, thereby compromising the safety and welfare of Williamson County's citizens, and that the Agency intended to authorize development of a facility that would violate State and Federal law, the State's Attorney sought to intervene.

IEPA formally agreed to Kibler's demands, and Kibler filed a voluntary motion to dismiss this action. On August 7, 2008, the Board entered an order dismissing this appeal based on Kibler's motion, and denied the State's Attorney's motion to intervene as moot.

SUMMARY OF THE ARGUMENT

By allowing Kibler to voluntarily dismiss this action, the Board has tacitly authorized IEPA to issue a development permit for a facility that never received siting approval, inasmuch as the permit issued by IEPA, pursuant to its closed-door negotiations with Kibler, authorizes development of a facility that is different from the proposed facility that was approved in 1995; because this authorization would allow development of a facility that never received local siting

approval, the "deal" upon which voluntary dismissal is based would violate 415 ILCS 5/39(c).

The Board's Order allowing voluntary dismissal also effectively authorizes IEPA to circumvent 415 ILCS 5/39(p), which requires notice, and public input and scrutiny, regarding the issuance of a permit to develop a landfill. In addition, the Order circumvents 35 Ill.Adm.Code 105.214 and 101.600 (which mandate a public hearing except under expressly enumerated situations, none of which apply here).

Moreover, Supreme Court Rule 219(e) makes clear that the mechanism of voluntary dismissal is not available to "avoid compliance with discovery deadlines, orders or applicable rules." *Id.* Here, voluntary dismissal has been used to avoid the Board's Rules, and to evade public input and scrutiny in the permit process, thereby evading the transparency in permitting required by Illinois law.

Finally, this Board has held that even where, in the course of an appeal, a decisionmaker re-thinks its prior decision, that subsequent change of position in no way supersedes the earlier decision, and the Board, in deciding the appeal, must review the decision that was appealed. *Rochelle Waste Disposal v. City of Rochelle*, PCB 07-113 at 7 (April 3, 2008).[1]

ARGUMENT

The purpose of a motion for reconsideration is to, *inter alia*, bring to the court's attention "errors in the court's previous application of the existing law." *Citizens Against Regional Landfill v. County Board of Whiteside*, PCB 93-156 (Mar. 11, 1993) (citing *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992)).

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[1] Although Rochelle Waste Disposal was an appeal of a siting decision, not a permit appeal, the Board's fundamental principle – that a decision-maker cannot change its decision in the midst of a pending appeal – presumably applies whether decision is based upon a siting application, or upon a requested permit modification.

Here, the State's Attorney brings this Motion for Reconsideration based upon errors in application of existing law.

1. **The Board's Order Authorizes Issuance of a Development Permit in Violation of 415 ILC 5/39(c).**

The Illinois Environmental Protection Act vests in local governmental entities the authority to determine the question of siting for a proposed pollution control facility. 415 ILCS 5/39.2. That provision of the Act requires that an applicant "submit sufficient details describing the proposed facility to demonstrate compliance," and further provides that local siting approval shall be granted only if the site meets all of the criteria listed at Section 39.2. *Id.* The Act further provides that IEPA may not issue a permit for the development or construction of a new pollution control facility unless the applicant submits proof to the Agency that the applicant has obtained siting approval from the local siting authority in accordance with Section 39.2. 415 ILCS 5/39(c).

Here, the Applicant/Petitioner, Kibler, originally obtained siting approval in 1995 and entered into a Host Agreement with the Williamson County Board, the local siting authority. Thereafter, objectors challenged the siting approval. Over the years, conditions surrounding the proposed facility changed, as residential and commercial development occurred in the immediate vicinity of the siting area. Eventually, Kibler sought a permit to develop the proposed facility, and IEPA issued the requested development permit, but imposed conditions designed to protect public safety. Kibler appealed the conditions, thereby initiating PCB 05-035. As noted above in the introductory section, during the pendency of the appeal in PCB 05-035, Kibler requested a permit modifying the proposed facility. Among the modifications was a request to change the type of waste to be accepted at the site. IEPA denied the requested modification, and Kibler appealed, initiating this action.

During the years of negotiations between IEPA and Kibler, during the pendency of the appeals in PCB 05-035 and 07-043, which ultimately led to Kibler's decision to voluntarily dismiss, IEPA and Kibler decided between themselves to substantially alter the facility for which siting approval was obtained in 1995. The parties further agreed to change the permit conditions imposed by IEPA in 2004 (the subject of appeal in PCB 05-035). However, Williamson County, as well as the rest of the public, was completely shut out of the process by which those changes were made, and the County, as well as the public, was thereby prevented from providing any input into the permitting process.[2] Ultimately, IEPA agreed to the changes Kibler demanded, and Kibler filed a motion to voluntarily dismiss.

This "behind-closed-doors" approach to permitting, utilizing the instant appeal as a curtain to shield negotiations from view, not only shut the public out of the process, it also resulted in a deal that incorporated the issuance of a development permit for a MSWLF facility that is different from the facility for which siting approval was obtained. As a result, the permit issued as part of the "deal" struck in this appeal would violate 415 ILCS 5/39(c), inasmuch as it purports to authorize development of a facility that never received local siting approval under 415 ILCS 5/39.2.

The Board's order dismissing this appeal, and denying the State's Attorney's motion to intervene, thereby facilitates a violation of the law. Accordingly, the Board should reconsider its August 7, 2008 order.

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[2] Notably, as discussed depth below, although construction of the proposed landfill would be in conflict with federal aviation law, the Federal Aviation Administration was not consulted during the negotiations either.

2. **The Board's Order Authorizes Issuance of a Permit in Violation of 415 ILCS 5/39(p).**

The Environmental Protection Act expressly provides for public input with respect to the issuance of a permit for development of a MSWLF unit. 415 ILCS 5/39(p). The Act requires that the Applicant publish notice of its application, stating, *inter alia*, the location, nature and size of the proposed unit, the nature of the proposed activity to be conducted at the unit, and the probable life of the unit. *Id.* The Agency must thereafter accept public comment regarding the proposed unit. *Id.* These statutory provisions clearly illustrate the legislature's intent that the permitting process be transparent, and that the public be allowed to participate.

Here, however, the public was prevented from participating, or even observing, the process as Kibler and the Agency negotiated changes to the proposed MSWLF unit, including its size, location, and the type of waste to be deposited at the facility. Moreover, the IEPA and Kibler agreed that Kibler's proposed facility could be developed across an existing township road, requiring that the road be vacated, despite the fact that the township has not given approval to vacate the road.

As noted above, the Board's order allows IEPA to utilize the smokescreen of an appeal before the PCB to shield from public view its negotiations with Kibler, which resulted in the decision to re-configure the original facility through a re-writing of the development permit and a revamping of the plans for the facility. The Board should, therefore, reconsider its August 7, 2008 Order which rewards Kibler's misuse of the appeal process by allowing Kibler to voluntarily dismiss the appeal after having extracted what it wanted from IEPA.

3. **The Board's Order Allows the Parties to Ignore the Board's Procedural Rules.**

The Board's Rules mandate a hearing in an appeal, unless: the Petition is found to be

duplicative or frivolous, the Petitioner would be unaffected by the facility, or the case is decided on summary judgment. 35 Ill.Adm.Code 105.214; *see also* 35 Ill.Adm.Code 101.600. None of the conditions that would preclude a hearing is present in this case. Nevertheless, the Petitioner has been allowed, by the Board's Order of August 7, 2008, to completely avoid a hearing on the challenged Agency decision by filing a motion to voluntarily dismiss. The use of voluntary dismissal to avoid compliance with the Board's Rules is improper.

As noted above, the parties have simply ignored the Board's procedural rules, and have misused the appeal process by using it to surreptitiously draw a curtain across their back-room dealings. The Board should reject this tactic, and refuse to allow the parties to evade a hearing on the challenged decision.

4. **Review of a Permit Appeal Should Consider the Decision Appealed From, Unaffected by the Decision-Maker's Subsequent "Change of Heart."**

The Board has previously held that where an appeal is taken, the Board must review the decision appealed from, notwithstanding any "second thoughts" the decision-maker might later have about its decision. *See Rochelle Waste Disposal v. City of Rochelle,* PCB 07-113 at 7 (April 3, 2008). As the Board reasoned in *Rochelle Waste Disposal,* it is the final decision appealed from which is the subject of review, and once an appeal has been filed with the Board, a decisionmaker's subsequent change of position becomes irrelevant. *Id.*

Here, Kibler appealed the Agency's October 18, 2006 decision denying the requested modification, and it would be improper to allow the Agency to reformulate its decision during the pendency of this action. The Board should, accordingly, reconsider its order and refuse to grant the Motion for Voluntary Dismissal.

5. **Public Policy Demands that the State's Attorney be Permitted to Intervene in This Action, Wherein an Applicant and the IEPA Seek to Reformulate and**

Reconfigure a Proposed MSWLF Unit.

The Illinois Supreme Court observed in *Pioneer Processing, Inc. v. E.P.A.*, 102 Ill.2d 119, 464 N.E.2d 238, 79 Ill.Dec. 640 (1984), under the State constitution, that the Attorney General acts as "the law officer of the people," observing that:

> as chief legal officer of this State, [the Attorney General] has the duty and authority to represent the interests of the People of the State to insure a healthful environment. In recognition of the Attorney General's role to insure a healthful environment, he has been given the power and authority 'to prevent air, land or water pollution within this State by commencing an action or proceeding in the circuit court of any county in which pollution has been, or is about to be, caused or has occurred, in order to have such pollution stopped or prevented either by mandamus or injunction.' (citation omitted). If, in fact, the Agency failed to afford the citizens of this State the proper procedures relating to the issuance of Pioneer's permit, then we believe it is only proper for the Attorney General to be the People's representative...

102 Ill.2d at 138, 464 N.E.2d at 247 (emphasis added).

The Court further observed that "there is a strong public interest in a healthful environment," and an Attorney General's responsibilities "embrac[e] serving or representing broader interests of the State." *Id.* (emphasis added).

Thereafter, in *Land and Lakes v. P.C.B.*, 245 Ill.App.3d 631, 640, 616 N.E.2d 349, 355 (3rd Dist. 1993), the Illinois Appellate Court held that because a State's Attorney, like an Attorney General, is a constitutional office-holder, he has "the duty and authority to represent the interests of the People of the State to insure a healthful environment." *Id.* (quoting *Pioneer Processing*) (emphasis added). More recently, in *Saline Co. Landfill v. IEPA*, PCB 02-108 (April 18, 2002), this Board acknowledged the Appellate Court's holding in *Land and Lakes* that the rights of State's Attorneys and Attorneys General are analogous. *Id.* at 3. The Board

therefore held that the County should participate in the appeal because the facts suggested its citizens "may be materially prejudiced absent the County's intervention." *Id.*

The State's Attorney here seeks to intervene here to protect the interests of the public with respect to a strategic decision by the Agency to strike a deal with a landfill operator concerning a proposed MSWLF unit to be built in Willliamson County. In the course of its deal-making, the Agency changed the permit without affording any opportunity whatsoever for public input. The public deserves representation and input in such decision-making, and the State's Attorney is prepared to provide that representation.

a. The Deal Between IEPA and Kibler Violates Federal Law

The deal struck between IEPA and Kibler, on which the voluntary dismissal of this action is predicated, would authorize construction of a MSWLF within two miles of a public airport, in violation of FAA-mandated setbacks and contrary to the limitations of 49 U.S.C. § 44718(d), as amended by section 503 of the Wendell H. Ford Aviation Investment and Reform Act, which prohibits siting a MSWLF within six miles of a public airport[3] because of the serious dangers associated with the wildlife that is almost invariably attracted to MSWLF's. Notably, the Federal Aviation Administration (FAA) was never consulted or provided with the opportunity to give input into the negotiations that resulted in a permit authorizing development of a landfill facility that would violate federal aviation law.

Pursuant to 49 U.S.C. §44718(d), it is unlawful to construct or establish a MSWLF within six miles of certain smaller public airports (a category that includes the Williamson County Regional Airport). This prohibition was enacted because of the high incidence of collisions

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[3] (without obtaining an exemption waiver)

between aircraft and birds, including gulls, waterfowl, and raptors, which are attracted to MSWLF facilities. Here, the bird-strike situation is even more critical because of the site's close proximity to a wildlife sanctuary. As noted above, the FAA was not consulted or allowed to provide input in the negotiations that resulted in the decision to authorize development of the landfill in conflict with 49 U.S.C. §44718(d).

In light of these circumstances, the interests of the public require representation by the State's Attorney.

b. The Deal Between IEPA and Kibler Violates State Law.

The deal struck between IEPA and Kibler, on which the voluntary dismissal of this action is predicated, also authorizes construction of a MSWLF facility across a public township road (Crenshaw Road), despite the fact that a petition to vacate Crenshaw Road has been rejected by the County Superintendent of Highways. Even if Williamson County wished to vacate Crenshaw Road, it is not lawfully able to decide to close a township road, because such closure is subject to State law procedures. *See* 605 ILCS 5/6-303, 6-305, and 6-306. In addition, there is no evidence that IEPA ever analyzed the public health, safety, welfare, or other impacts that would result from the closure of Crenshaw Road, or, the changes that would have to be made to the landfill if Crenshaw Road could not be closed and the proposed landfill was to be constructed without closure. Again, the interests of the people must be represented where such action is contemplated.

c. This Case Raises Issues Similar to Those Raised in *Pioneer Processing*.

In *Pioneer Processing*, the Supreme Court criticized the Agency's decision to issue a permit predicated, at least in part, on evidence not adduced during public hearings. 102 Ill.2d at 140-41, 464 N.E.2d at 248. The Court explained that where Agency decision-making occurs

without the benefit of public scrutiny, it seemingly moots the purpose behind public hearings. *Id.* The Court further observed that the legislature did not impose the public hearing requirement in order to create only the *illusion* that public scrutiny is vital to the decision-making process. *Id.*

Here, in order to dispose of troublesome litigation, the Agency made a tactical decision to unilaterally alter the permit for development of Marion Ridge Landfill. In so doing, the Agency made changes that violate State and Federal law. As noted above, the resulting permit authorized the permittee to begin construction of a MSWLF within two miles of the Williamson County Regional Airport, notwithstanding the fact that FAA setbacks and the Ford Act expressly prohibit such construction. The permit also changed the type of waste to be disposed of at the site, in contrast with the type of waste approved by the local siting authority, thereby effectively depriving the local siting authority of its statutory right under 415 ILCS 5/39.2 to approve or deny siting based on the statutory criteria.

Finally, the altered permit is predicated on the vacation of Crenshaw Road, despite the fact that the County Superintendent of Highways previously determined that Crenshaw Road could not be vacated, despite the fact that IEPA has conducted no inquiry into the health or safety impacts of closing the road, and in disregard of the statutory procedures that govern the closure of township roads.

The decision to effectuate these unilateral permit alterations without allowing any input whatsoever from the public, in violation of State and Federal law, and in derogation of the local siting approval under Section 39.2, not only violates the law, it places the safety and welfare of the people of Williamson County at risk.

For these reasons, the State's Attorney has a duty to represent the interests of the people, and has sought to exercise that duty by intervening to represent those interest in what has

purported to be an appeal requesting Board review of the Agency's decision. The Board should review the challenged permit decision, notwithstanding the Agency's subsequent "change of heart," in conformance with the reasoning articulated just this year in *Rochelle Waste Disposal*. Because the Board's order granting voluntary dismissal without a review of the challenged decision is at odds with the law as articulated by the Board in *Rochelle Waste Disposal*, the Board should reconsider its Order entered August 7, 2008.

Conclusion

For the foregoing reasons, the Petitioner respectfully suggests that the Board's Order granting Kibler's Motion for Voluntary Dismissal and denying the State's Attorney's Motion to Intervene as moot reflect an error in the application of existing law, and the Board is accordingly urged to reconsider its August 7, 2008 Order, and to enter an Order denying the Motion for Voluntary Dismissal, granting the State's Attorney's Motion to Intervene, and ordering that discovery be conducted, and that the matter be set for hearing.

WHEREFORE, WILLIAMSON COUNTY STATE'S ATTORNEY, CHARLES GARNATI *ex rel*, People of Williamson County, respectfully requests, pursuant to 35 Ill.Adm.Code 101.520, that this Honorable Board reconsider its order of August 7, 2008, and enter an order:

1. Denying the motion for voluntary dismissal;
2. Granting the State's Attorney's motion to intervene; and
3. Directing the Hearing Officer to enter a discovery schedule and set the matter for hearing.

Dated: September 11, 2008

Respectfully submitted,

/s/
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AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on September 11, 2008, she caused to be served a copy of the foregoing upon:

Mr. John T. Therriault, Assistant Clerk
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A copy of the same was enclosed in an envelope in the United States mail at Rockford, Illinois, proper postage prepaid, before the hour of 5:00 p.m., addressed as above.

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