ILLINOIS POLLUTION CONTROL BOARD
May 3, 2012

ANIELLE LIPE and NYKOLE GILLETTE,	)	
	)	
Complainants,	)	
	)	
v.	)	PCB 12-95
	)	(Enforcement - Air)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by T.A. Holbrook):

On December 22, 2011, Anielle Lipe and Nykole Gillette (complainants) filed a *pro se* complaint (Comp.) against the Illinois Environmental Protection Agency (Agency or Illinois EPA or IEPA). The complaint concerns the Agency's December 9, 2011 issuance of a construction permit to Tough Cut Concrete Service, Inc. (Tough Cut) for a proposed concrete and asphalt crushing operation. The operation is to be located on an 80-acre parcel owned by Sexton Properties R.P, LLC (Sexton) in the Village of Richton Park, Cook County, near the intersection of Sauk Trail and Central Avenue.[1]

Complainants allege that the Agency issued the construction permit to Tough Cut without verifying that Sexton had complied with the siting requirements applicable to pollution control facilities under Section 39.2 of the Environmental Protection Act (Act) (415 ILCS 5/39.2 (2010)). Comp. at 1. Complainants request that the Board revoke the construction permit issued to Tough Cut by the Agency. *Id*. at 1, 7.

For the reasons below, the Board grants the Agency's motion to dismiss the complaint. In this order, the Board first reviews the procedural history before addressing preliminary matters. The Board then summarizes the following: the complaint, the Agency's motion to dismiss, the complainants' response, the Agency's reply, and the complainant's sur-reply. Finally, the Board discusses the issues raised before reaching its conclusion.

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[1] The Board notes that, on September 1, 2011, these complainants filed a *pro se* complaint against the Village of Richton Park concerning a Village ordinance approving a special use permit for a proposed concrete crushing operation at this site. The previous complaint alleged improper notice of the ordinance and requested that the Board "appeal" it. Anielle Lipe and Nykole Gillette v. Village of Richton Park, PCB 12-44, slip op. at 2 (Nov. 17, 2011). In an order dated November 17, 2011, the Board granted the Village's motion to dismiss, finding that the complaint failed to state a cause of action upon which the Board can grant relief and that it requested relief that the Board does not have authority to grant. *Id*. at 7. In doing so, the Board stated that it need not render a legal opinion on whether the proposed operation is a "pollution control facility" or requires a permit under the Act. *Id*.; *see* 415 ICLS 5/3.330(a), 39 (2010).

PROCEDURAL HISTORY

On December 22, 2011, complainants filed a complaint, to which they attached a number of exhibits. On January 26, 2012, the Agency filed a motion to dismiss the complaint (Mot.). On February 15, 2012, complainants filed a response to the motion (Resp.). On February 22, 2012, the Agency filed a motion for leave to file a reply to complainants' response, and the reply (Reply). On March 12, 2012, complainants filed a motion for leave to file a reply to the Agency and their sur-reply (Sur-reply).

PRELIMINARY MATTERS

Under Section 100.500(e) of the Board's procedural rules, "[t]he moving person will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice. A motion for leave to file a reply must be filed with the Board within 14 days after service of the response." 35 Ill. Adm. Code 101.500(e).

On February 22, 2012, the Agency filed a motion for leave to file a reply (Agency Leave). The Agency claims that "[c]omplainants 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." Agency Leave at 2.

On March 12, 2012, complainants filed a motion for leave to file a sur-reply (Compl. Leave). Complainants state that they wish to resolve service issues, account for emissions data, address the Attorney General's representation of the Agency, and respond to the argument that their response raises arguments outside the four corners of the complaint. Compl. Leave at 1. For these reasons and to prevent material prejudice, complainants "respectfully request that they be granted leave to file their [sur-] Reply." *Id*. at 2.

Section 101.500(d) of the Board's procedural rules provides that, "[w]ithin 14 days after service of a motion, a party may file a response to the motion. If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board or the hearing officer in its disposition of the motion." 35 Ill. Adm. Code 101.500(d). In the absence of any response to either of the motions for leave to file, the Board grants the motions, accepts the Agency's reply and complainants' sur-reply, and summarizes them below.

SUMMARY OF THE COMPLAINT

Complainants allege that the Agency granted Tough Cut a construction permit to crush concrete and asphalt at Sexton "without verifying that [Sexton] complied with local siting processes" for a pollution control facility under the Act. Comp. at 1, citing 415 ILCS 5/3.330, 39, 39.2, 40.1 (2010). Additionally, the complaint alleges the Agency and the Village ignored evidence of potentially harmful health and environmental effects of the crushing operations. *Id.* at 5-6. Accordingly, complainants seek to have the Board "revoke" the permit. *Id.* at 1, 7.

Complainants claim that Sexton's proposed crushing operation constitutes a pollution control facility, but that Sexton has not been properly sited as such by the Village under Section 39.2 of the Act. Comp. at 1. Complainants allege that the information Tough Cut presented at public meetings and hearings did not fully disclose the nature and scope of the proposed operation. *Id*. at 2. Specifically, complainants allege that Tough Cut's plan to crush asphalt in addition to concrete was not disclosed at hearings before the Village. *Id.* Furthermore, complainants claim that Tough Cut omitted this information from its permit application. *Id*. Additionally, complainants assert that Tough Cut intends to continue the crushing operation for three to ten years, although it provided the Village an operation timeline of approximately three years. *Id*. Complainants contend that these factors led to a misinformed position on Sexton's status as a pollution control facility on the part of the Village and a misinformed Agency decision to grant Tough Cut a construction permit. *Id.*

In support of their claim that Sexton is a pollution control facility, complainants point to Section 3.330(a) of the Act which defines a pollution control facility as "any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility, or waste incinerator" including "sewers, sewage treatment plants, and any other facilities owned or operated by sanitary districts organized under the Metropolitan Water Reclamation District Act." Comp. at 2, citing 415 ILCS 5/3.330(a) (2010). Complainants allege that Tough Cut's concrete crushing operation constitutes waste treatment. Comp. at 4. Complainants cite the Agency's website for a definition of waste treatment as "any activity that changes the waste," including grinding or separating waste. Comp. at 4, citing Exhibit A1 (Agency Web page entitled "Does My Business Need a Land Pollution Control Permit?"). Complainants contend that Tough Cut's concrete crushing operation constitutes grinding under the definition of waste treatment, and that Sexton is therefore a pollution control facility requiring site approval. Comp. at 4.

Complainants also allege that Sexton is engaged in waste disposal under the definition of a pollution control facility. Comp. at 4-5. Complainants cite Section 3.185 of the Act, under which disposal means "discharge, deposit, injection, dumping, spilling, leaking or placing of any waste or hazardous waste into or on any land or water or into any well so that such waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air. . . ." Comp. at 4, citing 415 ILCS 5/3.185 (2010). Complainants contend that, under this definition, the crushing operation results in a fine dust of crushed concrete and asphalt – a waste – being emitted into the air, thus constituting disposal. Comp. at 4.

Complainants further allege that Sexton is a sanitary landfill within the definition of pollution control facility. Comp. at 4. In support, complainants state that the Agency provided notice of a public meeting in which the Agency stated that "Tough Cut Concrete Services, Inc. has applied to the Illinois EPA's Bureau of Air for a joint construction and operating permit to construct and operate a crushing facility on the site of the current Sexton clean construction and demolition debris landfill at I-57 & Sauk Trail in Richton Park." *Id*. Complainants also cite Section 3.445 of the Act, which defines a sanitary landfill as "a facility permitted by the Agency for the disposal of waste on land . . . without creating nuisances or hazards to public health or safety, by confining the refuse to the smallest practical volume and covering it with a layer of earth at the conclusion of each day's operation. . . ." *Id.*, citing 415 ILCS 5/3.445 (2010).

Finally, complainants allege that the Agency's investigation of the health and environmental effects of the crushing operation was inadequate. Comp. at 5-6. Specifically, they contend that the Agency's estimates that the risk of potential exposure to particulate dust from the operation os extremely low and that the operation will only emit 0.8 tons per year of particulate matter into the air are unfounded. *Id.* For example, complainants calculate that, with pollution control equipment that is expected to reduce 80% of the uncontrolled particulate and dust emissions from the operation, this actually means that 50,000 tons of particulate matter will be emitted into the air per year based on expected operational capacity of 250,000 tons per year. *Id.*

AGENCY'S MOTION TO DISMISS

The Agency makes several arguments for dismissal of complainants' complaint. The Agency first argues that the Board lacks jurisdiction to hear the appeal or to grant the relief requested. Mot. at 2-3. The Agency next argues that the complainants lack standing to bring the claim. *Id*. at 3-5. Finally, the Agency argues that the complaint should be dismissed because the issued permit complies with the law. *Id*. at 5-6. For these reasons, the Agency believes the Board should dismiss the complaint. Each of those arguments is described in more detail below.

The Agency first argues that the Board lacks jurisdiction to reverse issuance of the permit granted by the Agency to Tough Cut. Mot. at 2. According to the Agency, determining whether applicants should receive permits is the role of the Agency. If the Board reviewed those Agency determinations, it would become the permit granting authority, a function not delegated to the Board. *Id.*, citing Landfill, Inc. v. Pollution Control Bd., 74 Ill. 2d 541, 557, 387 N.E.2d 258 (1978). The Agency adds that, although the Board may review a permit denial, the Board has no statutory authority to review the Agency's grant of a permit. Mot. at 3. Furthermore, the Agency asserts that the Board does not have authority to grant the requested relief and revoke the permits granted by the Agency. *Id.*

Additionally, the Agency argues that the complainants lack standing to challenge the granting of the permit as third parties. Mot. at 3, citing Koers v. Illinois EPA, PCB 88-163 (Oct. 20, 1988). In addition to citing case law in support of this argument, the Agency cites Section 40(a)(1) of the Act, which establishes those entities entitled to appeal issuance of a permit. Mot. at 4; citing 415 ILCS 5/40(a)(1) (2010). This section provides that "[i]f the Agency refuses to grant or grants with conditions a permit . . . the applicant may, within 35 days after the date on which the Agency served its decision on the applicant, petition before the Board to contest the decision of the Agency." Mot. at 4. Given the statutory provision, the Agency argues that only the applicant may challenge the Agency's issuance of a permit. *Id.* Furthermore, the permit does not fall within any of the categories of Section 40 of the Act authorizing a third-party appeal. *Id*.

Finally, the Agency argues that, even if the Board finds that complainants have standing to challenge the Agency's grant of a permit to Tough Cut, complainants' arguments will fail because Tough Cut's permit complies with the law. Mot. at 5. Complainants argue that the permit must be revoked because prior to permitting, the Village Board failed to comply with local siting requirements applicable to a "pollution control facility" under Section 39.2 of the Act

Comp. at 7; *see* 415 ILCS 5/39.2 (2010). However, the Agency argues that Tough Cut is not a "pollution control facility" because its concrete and asphalt crushing operation is not any type of waste management facility and is not a sewer works. Mot. at 5. The Agency argues that the operation is, instead, a clean construction and demolition debris processing facility, and the Agency claims that it is properly permitted as such. *Id.*

The Agency argues that it is the appropriate entity to determine whether a proposed facility is a pollution control facility and must comply with local siting requirements. *Id.* at 6, citing City of Waukegan v. Illinois Environmental Protection Agency, 339 Ill. App. 3d 963 (2nd Dist. 2003). The Agency further argues that it "has correctly determined that no such local siting approval process was necessary or proper under the Act. Mot. at 6.

COMPLAINANTS' RESPONSE TO THE MOTION TO DISMISS

In their response to the Agency's motion to dismiss, complainants contend that the Agency improperly granted Tough Cut's construction permit because the proposed operation should be sited as a pollution control facility. Resp. at 1-2. Complainants state that the Agency overlooked potential harm to human health and the environment when issuing the permit and offer additional data and facts about the hazardous contents of asphalt. *Id.* at 3-4. As a remedy, complainants ask the Board "to verify Sexton Properties R.P., LLC as a pollution control facility and revoke the Construction Permit granted to Tough Cut on the basis of the IEPA not complying with the siting approval process of the 'Act.'" *Id.* at 9. Complainants also newly allege that the Attorney General's office failed to disclose its representation of the Agency before speaking with complainants about the case. The Complainants assert that "the Attorney General, Lisa Madigan's office should be removed from representing the IEPA if the 'Board' has authority to request reassignment in the IEPA's representation." *Id.* Each of these arguments is addressed below in more detail.

First, complainants allege that Tough Cut's proposed operation is a "pollution control facility" because Tough Cut's activities involve waste storage, waste disposal, and waste treatment, and because Sexton is a sanitary landfill. Resp. at 2. Based on this argument, complainants allege "[t]he IEPA failed to comply [with] and enforce the 'Act'" by granting the permit despite the fact that Sexton had not obtained local siting approval as a pollution control facility. *Id.* at 5.

Additionally, complainants contend that the Agency must provide "proof that a permitted operation isn't harmful to human health and the environment," but that "they failed to do so." Resp. at 5. In support of their public health and environmental concerns, complainants cite data on asphalt production and the existence of toxic chemicals in asphalt and assert that crushing asphalt will emit these toxins with cement dust from the crushing operation. *Id.* at 3-4, 6-7. Complainants also refer to Assistant Attorney General Stephen Sylvester's public comments before the Board with regard to the proposed amendments to rules for clean construction and

demolition debris (CCDD).[2] *Id.* In those comments, Sylvester stated that asphalt contains polynuclear aromatic hydrocarbons (PNAs) which would fall under the definition of chemical waste under 35 Ill. Adm. Code 810.103, and therefore CCDD would be classified as a chemical waste. *Id.* at 3.

In response to the Agency's argument that the Board lacks jurisdiction, complainants assert that the Board "has the authority to revoke the construction permit that the IEPA granted to Tough Cuts." *Id.* at 1, citing 415 ILCS 5/3.330, 39, 39.2, 40.1 (2010).

Complainants counter the Agency's lack of standing argument by stating that "the Illinois Pollution Control Board does have authority to enforce the 'Act' by ensuring that the siting approval requirements of a pollution control facility and its operations are in compliance." Resp. at 5. They also state that the Board must verify that "the crushing/fill operation does not pose a threat to public health, safety and welfare." *Id.*

Finally, complainants state that Ms. Lipe contacted Assistant Attorney General Stephen Sylvester in December 2011 to discuss his comments addressing proposed regulation of CCDD and the proposed Tough Cut operations with him. Resp. at 8. Complainants believe that this discussion formed an attorney-client relationship between Ms. Lipe and Mr. Sylvester. *Id.* Complainants contend that the Attorney General's office should have disclosed their actual or potential representation of the Agency in this case before Ms. Lipe discussed the case with Mr. Sylvester. *Id.* Complainants request that the Attorney General's Office "should be removed from representing the IEPA if the 'Board' has authority to request reassignment in the IEPA's representation." *Id.* at 9.

AGENCY'S REPLY TO COMPLAINANTS' RESPONSE

In its reply to complainants' response, the Agency responds to those new issues raised "outside the four corners of their Complaint." Reply at 2. The Agency first addresses complainants' argument "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." *Id*. at 2-3. The Agency argues that complainants do not cite any legal authority for this position. *Id.* Also, the Agency states that the Illinois Attorney General was not aware of complainants' complaint until January 20, 2012, so Assistant Attorney General Stephen Sylvester would have been unaware of even the potential for a conflict of interest when he spoke with Ms. Lipe in December 2011. Furthermore, the Agency claims that"[t]he authority of the Illinois Attorney General to represent Illinois State Agencies in legal matters is well established." *Id.* at 3, citing Environmental Protection Agency v. Pollution Control Board, 69 Ill. 2d 394, 372 N.E. 2d 50, 51 (1977). The Attorney General is "fulfilling its constitutional duty by representing

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[2] This refers to the ongoing rulemaking In the Matter of: Proposed Amendments to Clean Construction or Demolition Debris (CCDD) Fill Operations: Proposed Amendments to 35 Ill. Adm. Code 1100, R12-9 (Feb. 2, 2012) (first-notice opinion and order).

the Illinois EPA in this matter." *Id.* The Agency concludes by asserting that "[t]here exists no legal authority for the Board to sever this representational relationship." *Id*. at 4.

Additionally, the Agency asserts that complainants are third parties and therefore lack standing in a permit challenge. *Id.* at 2. They also maintain that "it is the Agency that is charged with making the determination on whether local siting is required" and therefore the Board lacks jurisdiction to hear the matter. *Id.*

<u>COMPLAINANTS' SUR-REPLY TO AGENCY'S REPLY</u>

Complainants maintain that "[t]he Board has jurisdiction to make sure that the IEPA does not violate the Act" by failing to require Tough Cut to obtain pollution control facility siting. Sur-reply at 1, citing 415 ILCS 5/39(c) (2010). Complainants assert that the Agency's determination that Tough Cut is not a pollution control facility is incorrect. Sur-reply at 1-2. Because Tough Cut is a "pollution control facility," they maintain that third parties, such as themselves, may appeal Tough Cut's air construction permit. *Id.* at 2.

Complainants also argue that, because the decision not to require pollution control facility siting was incorrect, "the citizens of Richton Park were unlawfully denied their rights under the siting approval process." Sur-reply at 2; *see id*. at 3. Complainants claim errors in the permitting process in that the construction permit allows Tough Cut to crush asphalt in addition to concrete, while the Village only gave permission to crush concrete. *Id.* Complainants claim that asphalt is a chemical waste and that crushing it will create health problems. *Id.* at 3-4.

Complainants question the amount of air emissions Tough Cut will produce as calculated by the Agency. Sur-reply at 3. They claim that the Agency's prediction is far too low, and that based on complainants' own calculations, Tough Cut will emit 50,000 tons of dust annually, rather than 0.8 tons. *Id.*

Finally, complainants expand their argument that the Attorney General's failure to disclose its representation of the Agency in this matter represents a conflict of interest. Sur-reply at 4. Complainants cite news coverage of various cases as the basis for their expectation that the Attorney General's Office would "advocate on their behalf." *Id*. at 5. Complainants state that Ms. Lipe disclosed details about the enforcement action against the Agency without being aware that the Attorney General would or could represent the Agency in that action. Complainants argue that Ms. Lipe's conversation generated an attorney-client relationship and a conflict of interest. *Id.* at 5-6.

Complainants therefore reiterate their request to remove the Attorney General from representation of the Agency. *Id.* at 8.

<u>DISCUSSION</u>

In ruling on a motion to dismiss, the Board takes all well-pleaded allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See*, *e.g.*, <u>Beers v. Calhoun</u>, PCB 04-204, slip op. at 2 (July 22, 2004). "[I]t is well established that a cause of

action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003).

Complainants' claim contains three arguments: 1) that the Agency's permitting determination failed to categorize Sexton and Tough Cut as a pollution control facility; 2) that the construction permit granted to Tough Cut was therefore invalid and should be revoked by the Board; and 3) that the Agency did not accurately assess the potential health and environmental effects of Tough Cut's crushing operation. Additionally, in their response to the Agency's motion to dismiss, complainants claim the Attorney General's potential or actual representation of the Agency in this matter constitutes a conflict of interest and that the Board should therefore remove the Attorney General from this case. Resp. at 9.

Having reviewed the parties' pleadings and applicable authorities and for the reasons described below, the Board finds that it lacks jurisdiction to hear an enforcement action against the Agency under these circumstances and that the complainants lack standing to bring this third party challenge to the Agency's permit determination. The Board therefore grants the Agency's motion to dismiss the complaint.

In Landfill, Inc., the Illinois Supreme Court addressed a sanitary landfill development permit issued by the Agency. Landfill, Inc., 74 Ill. 2d at 548, 387 N.E.2d at 259. Individuals and groups who had objected during the permitting process filed a complaint with the Board contesting the issuance of the permit and seeking "to revoke the permit on the ground it was issued by the Agency in violation of the Act." *Id*. In concluding that the Board procedural rules under which the complaint had been filed were invalid, the Court stated that the Board has authority to hear enforcement complaints alleging that an activity threatens or causes pollution but "not challenging the Agency's performance of its duties." Landfill, Inc., 74 Ill. 2d at 560, 387 N.E.2d at 265.

Complainants claim that the Agency's decision to grant the Tough Cut permit violates the Act and request that the Board enforce the Act by revoking the permit. Comp. at 7. Complainants allege that the Sexton site falls under the definition of "pollution control facility" in Section 3.330 of the Act (415 ILCS 5/3.330 (2010)). Complainants also allege that the Agency's assessment that the Tough Cut operation poses no health risk is unsupported and that the Agency did not properly account for potential negative health and environmental effects of the operation.

The Agency argues that it properly issued the permit to Tough Cut, properly determined that the facility is not a "pollution control facility," and properly determined that local siting approval as a pollution control facility was not required to obtain the permit. The Agency argues that case law establishes that the Agency and not the Board is the appropriate entity to determine whether a facility qualifies as a pollution control facility. *See* City of Waukegan, 339 Ill. App. 3d at 975.

The dispositive issue here, however, is whether the Act allows third parties to prosecute the Agency's alleged permitting violations before the Board. It has long been established that

the Board lacks jurisdiction to entertain allegations that a permit determination by the Agency violated the Act. In 1978, the Supreme Court held in Landfill, Inc. that "[t]he focus must be upon polluters who are in violation of the substantive provisions of the Act," and not on the Agency in the performance of its duties. Landfill, Inc., 74 Ill. 2d at 556, 387 N.E.2d at 263. Accordingly, the Board finds that it does not have authority to hear this complaint alleging violations of the Act by the Agency in carrying out its permitting duties.

As to complainants' standing to appeal an air construction permit, Section 40(a)(1) of the Act (415 ILCS 5/40(a)(1) (2010)) authorizes only permit applicants to appeal either the issuance of a permit with conditions or the denial of a permit. The Act includes no general authorization for third parties to appeal the issuance of a permit such as the construction permit issued in this case. *See* Landfill, Inc., 74 Ill. 2d at 557-58, 387 N.E.2d at 264. It is well-settled that, if the Act does not expressly provide a third-party right to appeal a final permit determination, the right does not exist. *See* Landfill, Inc., 74 Ill. 2d at 557-58, 387 N.E.2d at 264; Citizens Utilities Co. of Ill. v. PCB, 265 Ill. App. 3d 773, 782 (3rd Dist. 1994); *see also*, *e.g.*, United City of Yorkville v. IEPA and Hamman Farms, PCB 08-95, slip op. at 6 (Aug. 7, 2008); City of Waukegan v. IEPA and North Shore Sanitary District, PCB 02-173, slip op. at 1 (May 2, 2002). Where final determinations are appealable by third parties under the Act, the General Assembly has provided the right explicitly and has articulated standing requirements. *See, e.g.*, 415 ILCS 5/40(b) (2010) (grant of Resource Conservation and Recovery (RCRA) permit for hazardous waste disposal site); 415 ILCS 5/40(e) (2010) (National Pollutant Discharge Elimination System (NPDES) permit determination); 415 ILCS 5/40.1(b) (2010) (pollution control facility siting approval). The Board finds that the Act does not authorize complainants here to bring a third-party appeal of the Agency's construction permit determination. *See* Landfill, Inc. 74 Ill. 2d at 557-58, 387 N.E.2d at 264, citing City Savings Assoc. v. International Guaranty & Insurance Co., 17 Ill. 2d 609, 612, 162 N.E.2d 345, 346 (1959) (holding that expression of one thing in a statue excludes any other even in the absence of an explicit prohibition).

Complainants argue that this case should proceed because the Board has authority to enforce the Act "by ensuring that the siting approval requirements of a pollution control facility and its operations are in compliance." Resp. at 5. In Landfill, Inc., the Illinois Supreme Court found that the Act does not allow third parties to prosecute the Agency's alleged permitting violations before the Board. Specifically, the Court stated that a citizen's statutory remedy is "not an action before the Board challenging the Agency's performance of its statutory duties in issuing a permit." Landfill, Inc., 74 Ill. 2d at 559-60, 387 N.E.2d at 265.

Complainants allege that the Agency's assessment that the Tough Cut operation poses no health concerns is unfounded and that the Agency did not properly account for potential negative health and environmental effects of the operation. Comp. at 6. Because complainants do not allege any specific violation of the air pollution provisions of the Act or other air emission rules or regulations, no relief can be granted.

Finally, the Board also finds no basis for complainants' claim that a conflict of interest exists in the Attorney General's representation of the Agency in this matter. Complainants' statements do not support a claim that an attorney-client privilege was created between the complainants and the Office of the Attorney General. Moreover, to grant complainants relief by

removing the Attorney General from representing the Agency, even if the Board had authority to do so, would be to deny the Attorney General's Office its ability to fulfill its constitutional duty as "chief legal officer of the State." Environmental Protection Agency, 372 N.E.2d at 51; *see also* People *ex. rel.* Scott v. Briceland, 65 Ill. 2d 485, 359 N.E.2d 149.

CONCLUSION

For the reasons stated above, the Board finds that it lacks jurisdiction to hear the complaint alleging permitting violations by the Agency and that complainants lack standing to bring a third-party challenge to the Agency's issuance of the construction permit to Tough Cut. Taking all well-pled allegations as true and drawing all reasonable inferences from them in favor of complainants, it is clear that no set of facts could be proven that would entitle complainants to relief against the Agency. Accordingly, the Board grants the Agency's motion to dismiss and dismisses the complaint.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2010); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 3, 2012, by a vote of 5-0.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board