

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MAHOMET VALLEY WATER AUTHORITY,)
CITY OF CHAMPAIGN, ILLINOIS, a municipal)
corporation, DONALD R. GERARD, CITY OF)
URBANA, ILLINOIS, a municipal corporation,)
LAUREL LUNT PRUSSING, CITY OF)
BLOOMINGTON, ILLINOIS, a municipal)
corporation, COUNTY OF CHAMPAIGN,)
ILLINOIS, COUNTY OF PIATT, ILLINOIS,)
TOWN OF NORMAL, ILLINOIS, a municipal)
corporation, VILLAGE OF SAVOY, ILLINOIS,)
a municipal corporation, and CITY OF)
DECATUR, ILLINOIS, a municipal corporation,)

Complainants,)

PEOPLE OF THE STATE OF ILLINOIS,)

Intervenor,)

v.)

CLINTON LANDFILL, INC., an Illinois)
corporation,)

Respondent.)

PCB No. 2013-022
(Enforcement - Land)

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on March 9, 2013, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, c/o John T. Therriault, Assistant Clerk, James R. Thompson Center, 100 W. Randolph St., Ste. 11-500, Chicago, IL 60601, PEOPLE'S OBJECTION TO MOTION FOR LEAVE TO FILE REPLY, 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

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BY: _____
THOMAS DAVIS, Chief
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I did on March 8, 2013, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled NOTICE OF ELECTRONIC FILING and PEOPLE'S OBJECTION TO MOTION FOR LEAVE TO FILE REPLY upon the persons listed on the Service List.



THOMAS DAVIS, Chief
Assistant Attorney General

This filing is submitted on recycled paper.

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:)
 MAHOMET VALLEY WATER AUTHORITY,)
 CITY OF CHAMPAIGN, ILLINOIS, a)
 municipal corporation, DONALD R. GERARD,)
 CITY OF URBANA, ILLINOIS, a municipal)
 corporation, LAUREL LUNT PRUSSING,)
 CITY OF BLOOMINGTON, ILLINOIS, a)
 municipal corporation, COUNTY OF)
 CHAMPAIGN, ILLINOIS, COUNTY OF)
 PIATT, ILLINOIS, TOWN OF NORMAL,)
 ILLINOIS, a municipal corporation,)
 VILLAGE OF SAVOY, ILLINOIS, a municipal)
 corporation, and CITY OF DECATUR,)
 ILLINOIS, a municipal corporation,)

Complainants,

PEOPLE OF THE STATE OF ILLINOIS,

Intervenor,

v.

CLINTON LANDFILL, INC.,)
an Illinois corporation,)

Respondent.

PCB 2013-022

(Citizens Enforcement - Land)

PEOPLE'S OBJECTION TO MOTION FOR LEAVE TO FILE REPLY

NOW COMES the Intervenor, PEOPLE OF THE STATE OF ILLINOIS, by LISA
 MADIGAN, Attorney General of the State of Illinois, and hereby objects to the Motion for Leave
 to File Reply to the People's Response to the Motion to Dismiss, and states as follows:

1. The Board's procedural rules for adjudicatory proceedings are intended to govern motion practice. Section 101.500(e) provides that the movant will not have the right to reply to a

response to its motion “except as permitted by the Board or hearing officer to prevent material prejudice.” On March 6, 2013 the Respondent filed a motion under this procedural rule seeking leave to file a reply to the People’s response to the motion to dismiss (filed on February 21, 2013 pursuant to leave granted by the Board). Without waiting for leave to be granted (and without regard to any objections to its motion for leave) the Respondent has also filed its reply. The People object to the motion for leave to file and to the filing of the reply without leave having been granted.

2. Clinton Landfill, Inc. alleges [motion at ¶ 4] that the filing of its reply “will prevent material prejudice and injustice.” The Respondent does not explain how, in the absence of its reply, it would be prejudiced and does not elaborate as to how such prejudice might be material. The Board has no basis to determine whether granting leave would prevent material prejudice. Hence, the request for leave fails to provide sufficient grounds.

3. As purported justification for its reply, Clinton Landfill, Inc. does contend [motion at ¶ 2] that the People’s response reverses the position taken by the Attorney General concerning the Board’s power “to review the need for local siting prior to permitting” by the Illinois EPA and “introduces new documents for consideration by the Board, which CLI has not had an opportunity to address.” These contentions do not, however, suggest that any material prejudice has resulted already or, absent the filing of a reply, might result. The motion for leave must stand or fail on its own merits without regard to the substance of the proffered reply, and the People will not refer to any matters raised in the prematurely filed reply.¹

¹ The relative merits of the Respondent’s arguments in such reply cannot be a basis for justification as to leave under the Board’s rule. Therefore, it is unnecessary and perhaps even improper to address any *prospective* arguments even though the reply has already been tendered.

4. The Board has previously considered whether material prejudice might occur in numerous cases without articulating any bright line test. Section 101.500(d) also employs a “material prejudice” standard regarding untimely responses to motions. Where the request for leave is itself untimely, the Board has denied the request. See, e.g., *Kyle Nash v. Luis Jimenez*, PCB 07-97 (August 19, 2010). Where the requests for leave fail to include any allegation of material prejudice, the Board has denied such requests. See, e.g., *People v. Tradition Investments, LLC*, PCB 11-68 (October 6, 2011). In the latter case, the Board denied the People’s request to file a reply under Section 101.500(e): “The People’s motion does not assert that material prejudice will occur if the People are not allowed to file a reply, but rather argues that a reply will help to narrow issues and allow for a response to Tradition Investments’ interpretation of the law. The Board finds that these are *insufficient grounds* to allow a reply when an objection has been raised.” PCB 11-68 (October 6, 2011), slip op. at 2; emphasis added. Unfortunately, the Board has not yet explained what sufficient grounds might entail.

5. In addition to the lateness of a request for leave or the omission of any claim of material prejudice, the Board has occasionally looked to the nature of the issues for which leave is sought. In *Kyle Nash v. Luis Jimenez*, for instance, the Board noted that the response to which a reply was intended contained “novel allegations” that were “irrelevant” to the underlying claims and denied leave to reply after somehow finding that “the likelihood of material prejudice resulting from a denial of leave to be low.” PCB 07-97 (August 19, 2010), slip op. at 3.

6. An exhaustive review of the orders in which the Board granted or denied leave to reply under Section 101.500(e) is unnecessary to make the simple point that *allegations* of material prejudice must be pleaded in any such request. The actual showing of any such prejudice

that may be required and the standard of review to consider whether the allegations are sufficiently supported are not readily apparent from the Board's rulings. Does a *reasonable* likelihood of material prejudice suffice or must a party requesting leave show a *substantial* likelihood? Moreover, once the likelihood of *any* prejudice may be established, how does the Board consider the *materiality* of potential prejudice? In other words, the impact on the party being denied the opportunity to reply (in support of the party's own motion) would have to be *tangible* and *direct* somehow. The Board's previous rulings have considered the effects upon the requesting party of not permitting a reply; the potential effects upon the adjudication of the subject motion are relegated to these concerns.

7. The fundamental notion that any prejudice might result is suspect. The parties are litigating an enforcement case in accordance with the Board's procedural rules. These rules clearly provide that there is no right of reply. Section 101.504 also requires that both motions and responses must clearly state the grounds for the motions and a concise statement of the relief sought or the party's position in response. Where the rules preclude any reply absent material prejudice, then any movant is thereby on notice and must play by the rules.

8. The People's response complies with Section 101.504 by articulating the positions being taken by the Attorney General in opposition to the motion to dismiss (and it is important to note, such positions are appropriately based upon the well-pleaded allegations of the Complaint being accepted as true for purposes of dismissal consideration). The first three counts of the Complaint pertain to local siting or, more precisely, the lack of local siting. The People's response first clarifies that the Complaint challenges the Respondent's compliance with the statutory requirements: "Complainants allege that the Respondent failed to obtain local siting

from the DeWitt County Board prior to operating its landfill under the conditions of its renewed permit.” Response at page 6. This discussion is largely premised upon the statutes and applicable case law without regard to any disputed facts. The Attorney General’s positions are clearly an expression of *support* for units of local government² and its intended beneficial consequences on the State permitting process, and not any *opposition* to the actions or decisions of the Illinois EPA in the issuance of permits for the landfill. Moreover, as befits the duties and obligations of the Attorney General, the position taken in the response is ultimately a *defense* of the statutes enacted by the legislature to protect the public health and environment.³

9. The motion for leave contends that the People’s response reverses the position taken by the Attorney General “in past cases” and implies (without any attempt at explanation) that this alleged inconsistency (if left unchallenged) would necessarily result in both prejudice and injustice. This unsupported assertion fails to identify such past cases, thus providing no basis in the request for leave for the Board to assess the *materiality* at issue or for the Attorney General to respond with particularity. The People would (again, without regard to whatever arguments may be set forth within the reply itself) simply make the following observations. First, the Attorney General has intervened in this case filed by several local governments and public officials, in furtherance of legislative declarations of public policy, to ensure compliance with the statutory mandates as to the permitting and local siting approval for pollution control and

² E.g., “The local government role is integral to permitting, and to giving the Agency the information needed to make an informed, intelligent permit tailored to the facility and the site.” Response at page 9.

³ E.g., “The change in waste disposal operations pursued by the Respondent is a change that subjects the landfill to local siting. It is inconceivable that an entity may circumvent the statutory safeguards and be rewarded with the permit required to operate. To do so would negate the entire intent of the statutes.” Response at page 10.

hazardous waste disposal facilities. Secondly, the Attorney General is acting on her own motion in furtherance of law and policy, and not as an advocate for or representative of any regulatory agency. Lastly, no record has yet been fully developed and the merits are not being adjudicated at this stage of the litigation, so any claim of inconsistency regarding arguments merely opposing dismissal is also unfairly *premature*.

10. Clinton Landfill, Inc. also contends that it has not yet had any opportunity to address the “new documents”⁴ submitted by the People in its response to the motion to dismiss. The motion for leave to reply does not acknowledge that the “new documents” are an excerpt of a transcript of sworn testimony provided by an authorized corporate representative to the county board at a public forum, and may be considered as a *reversal of position* by Clinton Landfill, Inc. in addition to its relevance in support of the well-pleaded allegations in the Complaint and in opposition to the dismissal motion. The People submit this evidence is admissible both under the Board’s rule regarding official notice and Illinois Evidence Rule 201(b). If the Respondent somehow believes that such submission is improper, then the legitimate recourse is to move to strike. This testimony is hardly the same as “new” information since it is part of the public record (and thus legitimately subject to both official notice and admission as evidence). It is this *public record* in the broad sense that provides the necessary context for any consideration of the local siting authority or lack thereof. Lastly, it is presented as reliable information whose accuracy

⁴ Testimony of Ron L. Edwards, Vice President of Development and Operations, Clinton Landfill, Inc. *DeWitt County Clinton Landfill Siting Transcript*, July 11, 2002, pp. 44-47. An excerpt of this testimony is attached as an exhibit to the Attorney General’s response, and is subject to official notice by the Board under Section 101.630 of its Procedural Rules (“Official notice may be taken of all facts of which judicial notice may be taken. . .”). See Illinois Evidence Rule 201(b) (“A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”).

cannot reasonably be questioned per Rule 201(b)(2), so the lack of any opportunity (at this stage concerning the dismissal motion) is not pertinent.

11. In conclusion, the Respondent simply does not justify its request for leave. Unless and until the rule may be revised to allow a right of reply to the movant, Section 101.500(e) requires a showing of the likelihood of *material prejudice* resulting from denial of the ability to reply, not merely an unsupported allegation. Upon denial of leave to file, the People ask that the reply be stricken from the record.

WHEREFORE, Intervenor, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, hereby objects to the request for leave by the Respondent.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,

LISA MADIGAN,
Attorney General
of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
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Dated: March 8, 2013