

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY
 DIVISION OF LEGAL COUNSEL
 1021 NORTH GRAND AVENUE EAST, POST OFFICE BOX 19276
 SPRINGFIELD, ILLINOIS 62794-9276
 TELEPHONE (217) 782-5544 FACSIMILE (217) 782-9807

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FROM: Robt Layman

RE: Christian County Generation

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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276 - (217) 782-3397
JAMES R. THOMPSON CENTER, 100 WEST RANDOLPH, SUITE 11-300, CHICAGO, IL 60601 - (312) 814-6026

ROD R. BLAGOJEVICH, GOVERNOR DOUGLAS P. SCOTT, DIRECTOR

October 12, 2007

Ms. Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1341 G Street NW, Suite 600
Washington, D.C. 20005

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ENVIR. APPEALS BOARD

Re: Christian County Generation, LLC
PSD Appeal No. 07-01

Dear Ms. Durr:

Earlier this week, I informed you that I tentatively planned to appear at oral argument scheduled by the Environmental Appeals Board for October 17, 2007, in the above-captioned matter. However, I also qualified my commitment by noting that certain events might nonetheless impede my ability to attend the proceeding on behalf of my client, the Illinois Environmental Protection Agency ("Illinois EPA"). At this time, I must regrettably inform you that circumstances do not appear to permit me to fulfill my earlier commitment to participate in next week's oral argument.

Some historical background might be helpful in explaining my dilemma. In Illinois, both the state's constitution and common law recognize the Illinois Attorney General's Office ("AGO") as being the legal officer of the State in all matters in which the State of Illinois is the real party in interest. This authority extends to representation of the Governor's agencies, including the Illinois EPA, in various lawsuits before state and federal courts, as well as enforcement actions brought before our Pollution Control Board ("PCB"). The AGO has traditionally asserted the same prerogative in permit appeals brought before the state PCB and the Environmental Appeals Board. However, legal representation before these latter two tribunals have been routinely handled by attorneys for the Illinois EPA pursuant to special appointments granted by the AGO. For the last several years, these appointments have been issued to individual Illinois EPA attorneys for a one-year term, expiring at the end of each fiscal year (i.e., June 30th), and extend to administrative matters before these tribunals generally, as opposed to appointments provided on a case-specific basis.

For whatever reason, it has not been uncommon for the AGO's issuance of legal appointments to lag behind a fiscal year's passage. For example, the appointments granted to my colleagues and me at the Illinois EPA for the 2006 fiscal year were dated August 11, 2006. This year proved no different, as several weeks initially went by before a formal inquiry by Illinois EPA's senior management was made to the AGO about the

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status of the appointments. Staff attorneys were informed at that time that the delays in the appointments were due merely to administrative oversight and that they would still be forthcoming, as in past years. Legal representation by Illinois EPA attorneys in both pending and new matters continued before the Board, as evidenced by the filing of my appearance and the Illinois EPA's formal Response Brief in this matter.¹

As of this date, my colleagues and I have not received formal appointment letters from the AGO. Recent attempts to secure assurances that our representation in pending matters could proceed without the threat of ethical implications (i.e., unauthorized practice of law) have been unavailing. And as recently as this week, my senior management informed my colleagues and me that the decision as to whether to continue representation in pending cases was now best left to one's own judgment until such time that the situation is resolved. Unfortunately, I cannot speculate as to when that might occur, although meetings between senior officials of the Illinois EPA and AGO are reportedly scheduled for as early as next week. With my conscience as my only guide, and notwithstanding my earnest desire to participate in oral argument, I am reluctant to continue with my representation of my client in this matter at this immediate time. Absent a continuance, the Board may have no other option than to proceed without the Illinois EPA's participation in the oral argument.

I should note that neither I nor my client's senior management have any reason to believe that the AGO considers our prior filings with the Board in this case to constitute an *ultra vires* act or to be otherwise improper. As mentioned, I have represented my client in this proceeding based on representations that the delay in our appointments was the result of an administrative oversight. Accordingly, I would urge that the Board withhold any judgment concerning the propriety of my client's past filings until such time that either the AGO or its duly appointed representative has reason to address the matter in the near future.

If you require any further information or assistance in this regard, you may reach me at (217) 524-9137.

Sincerely,



Robb H. Layman
Assistant Counsel
Illinois EPA

¹ Based on the same understanding, my colleague, Sally Carter, filed her appearance and a Partial Response to Petition in *In re: ConocoPhillips Wood River Refinery*, PSD Appeal No. 07-02. While the remainder of the Response is not due until October 29, 2007, Ms. Carter will apprise the Board, in advance of the prescribed date, of her ability to timely file the response in light of the situation described above.

SERVICE LIST

Eurika Durr,
Clerk of the Board
Environmental Appeals Board
U.S. Environmental Protection Agency
1341 G Street, N.W. Suite 600
Washington, D.C. 20005

Richard Ossias
Associate General Counsel
Office of General Counsel
1200 Pennsylvania Ave., NW
Washington, D.C. 20460-0001

Bruce Nilles
Sierra Club
122 West Washington Ave., Suite 830
Madison, Wisconsin 53703

James R. Thompson
James H. Russel
35 W. Wacker Drive
Chicago, Illinois 60601

Brian L. Doster
Kristi M. Smith
U.S. EPA
Air and Radiation Law Office
Office of General Counsel
Ariel Rios Building
1200 Pennsylvania Ave., NW
Washington, D.C., 20460

Robert A. Kaplan,
Acting Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3507

Robert J. Myers
Acting Assistant Administrator
Office of Air and Radiation
U.S. EPA (MC-6101A)
Ariel Rios Building
1200 Pennsylvania Ave., NW
Washington, D.C., 20460

David Bender
Garvey McNeil & McGillivray, S.C.
634 W. Main Street
Madison, Wisconsin 53703

Steffen N. Johnson
Luke W. Goodrich
1700 K Street, N.W.
Washington, D.C. 20006