

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

PRIME LOCATION PROPERTIES, LLC,)	
Petitioner,)	
v.)	PCB 09-67
)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

NOTICE OF FILING AND PROOF OF SERVICE

To: John T. Therriault, Acting Clerk
Illinois Pollution Control Board
100 West Randolph Street
State of Illinois Building, Suite 11-500
Chicago, IL 60601

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, Illinois 62794-9274

Thomas Davis
Assistant Attorney General
500 S. Second Street
Springfield, IL 62706

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, pursuant to Board Procedural Rule 101.302 (d), a RESPONSE IN OPPOSITION TO MOTION TO DISMISS, a copy of which is herewith served upon the hearing officer and upon the attorneys of record in this cause.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the document described above, were today served upon the hearing officer and counsel of record of all parties to this cause by enclosing same in envelopes addressed to such attorneys and to said hearing officer with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office Mailbox in Springfield, Illinois on the 4th day of June, 2009.

Respectfully submitted,
PRIME LOCATION PROPERTIES, LLC,
Petitioner

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY: 
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**BEFORE THE POLLUTION CONTROL BOARD
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PRIME LOCATION PROPERTIES, LLC,)	
Petitioner,)	
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)	(UST Appeal)
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RESPONSE IN OPPOSITION TO MOTION TO DISMISS

NOW COMES Petitioner, PRIME LOCATION PROPERTIES, LLC, by its undersigned counsel, pursuant to Section 101.500 of the Board's Procedural Rules (35 Ill. Admin. Code § 101.500(d)), and responds to the Motion to Dismiss as follows:

INTRODUCTION

On March 9, 2009, Prime Location Properties, LLC timely filed a petition asking the Board to review a January 27, 2009 determination of the Illinois Pollution Control Board. (Order of Board, dated May 7, 2009) The petition was filed by Joe Keebler, whom Petitioner concedes is not licensed to practice law in the State of Illinois. Instead, Keebler, is a member of Prime Locations, LLC. See Exhibit 1 (Illinois Secretary of State records). Prime Locations, LLC is the owner of underground storage tanks that it is seeking to take corrective action regarding. (Petition, ¶ 1) On March 19, 2009, the Board accepted the petition for review as timely, but directed Petitioner to file an amended petition for review, accompanied by the appearance of an attorney, by April 20th. (Order of Board, dated Mar. 19, 2009) Petitioner did so, and the amended petition was accepted on May 7, 2009 by Board Order. The Agency was directed to file the administrative record by May 20, 2009, which it has not done. On May 26, 2009, the Agency

filed a motion to dismiss the amended petition on the grounds that an attorney did not file a petition for review within the original deadline.

I. CHANGING THE BOARD'S LONGSTANDING PRACTICE AND INTERPRETATION OF ITS RULES WOULD BE ARBITRARY.

For decades, non-attorneys, usually either engineers or administrators, represented corporations in proceedings before the Board. Cf. In re Petition of Recycle Technologies, AS No. 97-9 (July 10, 1997) (Manning, concurring). This practice was embodied in former rule 107(a)(2), which stated that "a corporation may appear through any officer, employee, or representative, or by an attorney at law licensed and registered to practice in the State of Illinois, or both." This rule was repealed by the Board's new procedural rules, effective January 1, 2001. 25 Ill. Reg. 446 (R00-20 proceedings).

Repeatedly, the Board has responded to non-attorney filings by requiring the petitioner to file an amended petition, accompanied by an appearance of an attorney.¹ It does not appear that the Agency has ever before objected to non-attorney filings, either before or after the 2001 procedural rule change. The Agency's form denial letter indicates that the "owner or operator" may appeal this final decision without any reference to the need for counsel. (Amend. Pet. Rev.

¹ E.g., Estate of Eggert, PCB No. 08-35 (Dec. 6, 2007); City of O'Fallon v. IEPA, PCB No. 07-102 (May 3, 2007); Village of River Forest v. IEPA, PCB No. 06-176 (June 1, 2006); Magie Bros./Penreco v. IEPA, PCB No. 06-142 (Mar. 16, 2006); IEPA v. Ray Logsdon Estate, AC No. 05-54 (Mar. 3, 2005); IEPA v. Northern Illinois Serv. Co., AC No. 05-40 (Jan. 6, 2005); Mac's Convenience Stores v. IEPA, PCB No. 05-101 (Dec. 16, 2004); IEPA v. G.T. & L., Inc., A.C. No. 05-04 (Aug. 19, 2004); Johnson Oil Co. v. IEPA, PCB No. 04-190 (Aug. 5, 2004); Johnson Oil Co. v. IEPA, PCB No. 04-183 (July 22, 2004); Martin Oil Mktg. v. IEPA, PCB No. 04-93 (Dec. 18, 2003); Randall Industries v. IEPA, PCB No. 03-219 (Sept. 18, 2003); Vandalia Community School District # 203 v. IEPA, PCB No. 02-50 (Nov. 1, 2001); J.R. & Sons v. IEPA, PCB No. 01-130 (Aug. 9, 2001); Premcor Refining Group v. IEPA, PCB No. 01-116 (April 19, 2001).

Ex. 1) To adopt a new construction of the Board's rules at this time, that is inconsistent with the Board's long-standing practice, without apparent objection from the IEPA, would be entirely arbitrary. See Illinois Environmental Protection Agency v. Pollution Control Bd., 118 Ill. App. 3d 772, 780 (1st Dist. 1983). On this ground alone, Petitioner believes the motion must be denied, but for the sake of addressing any lingering concerns, Petitioner hereinafter addresses why the Board's long-standing practice is reasonable and necessary.

II. THE BOARD'S PRACTICE IS CONSISTENT WITH THE ILLINOIS ENVIRONMENTAL PROTECTION ACT.

Courts generally defer to an agency's interpretation of its own rules and regulations, so long as the "interpretation of its own rules had a reasonable basis in law." Daniels v. Police Bd., 338 Ill. App. 3d 851, 859 (1st Dist. 2003). The Illinois Environmental Protection Act charges the Board with the authority to adopt such procedural rules as are necessary to accomplish the purposes of the Act. (415 ILCS 5/26) "An administrative agency has the power to construe its own rules and regulations to avoid absurd or unfair results." Modine Mfg. Co. v. Pollution Control Bd., 40 Ill. App. 3d 498, 502 (2d Dist. 1976).

The applicable portions of the Act merely state that an applicant may seek review of an Agency decision before the Board. (415 ILCS 5/40(a)(1); 5/57(c)(4)) Nowhere, does the Act direct the Board to require an attorney;² at most, it states that a party "may" be represented by counsel at the hearing. (415 ILCS 5/32) Board proceeding, though of various kinds, are generally

² Consequently, the Agency's citation to ESG Watts, Inc. v. PCB, 191 Ill. 2d 26 (2000) is inapposite. There, the appellant failed to name a party required by the statute giving rise to the right to appeal. No such statutory limitation to review exists here.

mixed between the legal and the technical, the formal and the informal. Indeed, the Act indicates that “Board members are ‘technically qualified’ individuals only and not required to have any legal training.” Environmental Protection Agency v. Fitz-Mar, Inc., 178 Ill. App. 3d 555, 563 (1st Dist. 1988). The environmental permitting and planning process has often been described as an “administrative continuum,” see IEPA v. IPCB, 138 Ill. App. 3d 550, 551 (3rd Dist. 1985), in which the petition for review to the Board is preceded by a more informal process before the Agency, that frequently does not involve lawyers on either side. The issues of law and fact before the Board are framed, not by the formal filing of complaint and answer as they are in the courts, but by the denial letter issued by Agency. EPA v. PCB, 86 Ill. 2d 390, 405 (1981). Undersigned counsel is unaware of an Agency lawyer ever signing the Agency denial letter, and in this case, the denial letter certainly was not. (See Amend. Pet., Ex. 1) While the Board has struggled with the question of at what point, if any, the practice of law begins in this mixed process, there is no basis to conclude that it does so automatically with the filing of the petition for review.

The Act does not require an attorney, but the Board has in its discretion, citing prudential concerns discussed in In re Petition of Recycle Technologies decided to take a conservative approach. As discussed further in the next section, the Board has substantial discretion in establishing its practices and procedures, but cannot do so to work an injustice or defeat the purposes of the Act.

III. THE BOARD’S PRACTICE IS CONSISTENT WITH THE ADMINISTRATIVE PROCEDURE ACT.

Additional guidance is provided by the Administrative Procedure Act (5 ILCS 100/1-1 *et*

seq.), which the Board is required to follow. (415 ILCS 5/26) Therein, administrative agencies are authorized to establish procedures addressing “representation of parties.” (5 ILCS 100/10-10) However, the APA also requires that “[a]n opportunity shall be afforded all parties to be represented by legal counsel.” (5 ILCS 100/10-25(b)) Taken together these provisions authorize the Board to adopt rules concerning representation, but whether such rules are promulgated, an opportunity must always be given to the party to obtain representation. The Board’s practice is consistent with these provisions, while the Agency’s newfound position would deny Petitioner the opportunity for legal representation.

IV. JUDICIAL PRECEDENT SUPPORTS THE BOARD’S PRACTICE.

The Illinois Supreme Court has rejected the automatic voiding of cases initiated by non-attorneys. “Although the nullity rule is well established in our courts, because the results of its application are harsh it should be invoked only where it fulfills its purposes of protecting both the public and the integrity of the court system from the actions of the unlicensed, and where no other alternative remedy is possible.” Applebaum v. Rush Univ. Med. Ctr., 231 Ill. 2d 429, 435 (2008). For example, where a complaint was filed by a lay agent of the corporation and not by a licensed attorney, it was improper to void the lawsuit where an attorney was present throughout the litigation. Moushon v. Moushon, 147 Ill. App. 3d 140, 147 (3d Dist. 1986). In these cases it is error for a trial court not to allow the plaintiff to proceed to trial with substituted counsel. Janiczek v. Dover Management Co., 134 Ill. App. 3d 543, 547 (1st Dist. 1985); see also Paddock v. Department of Employment Sec., 184 Ill. App. 3d 945, 950 (1st Dist. 1989) (where non-attorney represented appellant on administrative review, the cause would be remanded “to the trial court to afford plaintiff an opportunity to appear pro se or to retain counsel to appear for

her”). Relying upon Janiczek, the Board has previously ruled that the purposes of the Act would be well served if an attorney is retained before proceeding further. In re Petition of Recycle Technologies, AS No. 97-9 (July 10, 1997)

Dismissing the appeal would not protect the petitioner “from the mistakes of the ignorant and the schemes of the unscrupulous.” Janiczek, 134 Ill. App. 3d at 546. One does not protect the unwary from the traps of litigation by pushing them into the deadliest. While there is no statutory requirement that a petition be signed by an attorney, the thirty-five day time limit to file a petition for review is clear. Moreover, the idea of protecting litigants is strained where it is the litigant’s own member acting on its behalf. Limited liability companies act through their members and the actions of the members are those of the company. (805 ILCS 18/13-5((a)(1)) This is obviously not a situation in which a litigant has been deceived into paying for legal services from a fraud. While not directly applicable, the Supreme Court’s allowance of representation by corporate officers in small claims court (S. Ct. R. 282(b)), belies the notion that companies seeking to represent themselves are inherently troubling.

Undoubtably, the Board has an interest in safeguarding “the administration of its proceeding from those lacking the requisite skills.” Janiczek, 134 Ill. App. 3d at 546. However, the Board is able to do so without the harsh sanction of dismissal, by orders, like the one entered in this case, which not only direct a party to obtain an attorney, but stay any decision deadline as well. While Petitioner reiterates that it does not believe the filing of a petition for review constitutes the practice of law, the Board’s “conservative” approach to this issue is understandable, so long as it is measured with the opportunity to obtain counsel.

CONCLUSION

Petitioner, prays for an order, denying the motion to dismiss, and for such other and further relief as the Board deems meet and just.

Respectfully submitted,
PRIME LOCATION PROPERTIES, LLC,
Petitioner,

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI,
its attorneys

BY: _____



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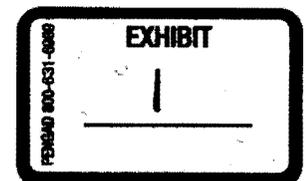
LLC FILE DETAIL REPORT

Entity Name	PRIME LOCATION PROPERTIES, LLC	File Number	01733559
Status	ACTIVE	On	12/10/2008
Entity Type	LLC	Type of LLC	Domestic
File Date	01/12/2006	Jurisdiction	IL
Agent Name	JOSEPH R. KEEBLER	Agent Change Date	01/12/2006
Agent Street Address	3453 S. ILLINOIS AVE.	Principal Office	3453 S. ILLINOIS AVE. CARBONDALE, IL 62903
Agent City	CARBONDALE	Management Type	MBR View
Agent Zip	62903	Duration	PERPETUAL
Annual Report Filing Date	12/10/2008	For Year	2009
Series Name	NOT AUTHORIZED TO ESTABLISH SERIES		

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