ILLINOIS POLLUTION CONTROL BOARD
April 21, 2011

CHICAGO COKE COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 10-75
	)	(Permit Appeal - Air)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent,	)	
	)	
NATURAL RESOURCES DEFENSE COUNCIL and SIERRA CLUB,	)	
	)	
Intervenors.	)	

DISSENTING OPINION (by T.E. Johnson and C.K. Zalewski):

We respectfully dissent from the majority's decision to grant intervention in this appeal. As explained below, we believe that giving party status to the Natural Resources Defense Council (NRDC) and the Sierra Club goes beyond the Board's powers under the Environmental Protection Act (Act) (415 ILCS 5 (2008)). We will discuss the applicable law before detailing our disagreement with the majority.

APPLICABLE LAW

The precedent that the majority ultimately fails to follow is very well-settled. The Board has long held that it "lacks the authority to give party status through intervention to persons the General Assembly does not allow to become parties to this type of proceeding." Sutter Sanitation, Inc. v. IEPA, PCB 04-187, slip op. at 4 (Sept. 16, 2004) (in permit appeal, motion to intervene denied in absence of third-party appeal rights). This rule of law dates back to 1978, when the Illinois Supreme Court made clear that absent explicit statutory authority, the Board cannot entertain third-party actions to review final permit determinations of the Illinois Environmental Protection Agency (Agency). *See* Landfill, Inc. v. PCB, 74 Ill. 2d 541, 557-60, 387 N.E.2d 258 (1978). In Landfill, Inc., the State's highest court found that where the Act provided only for permit appeals by permit applicants, Board rules purporting to allow a third-party challenge to the grant of a permit were "unauthorized administrative extensions of the Board's authority." Landfill, Inc., 74 Ill. 2d at 560.

Applying Landfill, Inc. through the years, the Board has consistently denied motions for third-party intervention in proceedings for which no third-party appeal rights exist under the Act. For example, in Kibler Development Corp. v. IEPA, PCB 05-35 (May 4, 2006), the permit

applicant appealed several conditions in a solid waste permit issued by the Agency. The appeal was filed with the Board under the Act's general permit appeal provision, Section 40(a)(1) (415 ILCS 5/40(a)(1) (2008)), which does not provide third-party appeal rights. The Board, citing its lack of statutory authority, denied a motion to intervene filed by third parties, holding that if the Board were to grant the motion, "the Board would be unlawfully extending appeal rights." Kibler, PCB 05-35, slip op. at 5; *see also* Riverdale Recycling, Inc. v. IEPA, PCB 00-228, slip op. at 2 (Aug. 10, 2000) (denying intervention in solid waste permit appeal and ruling that "[t]he silence of the Illinois General Assembly after the explicit requirement for statutory authority in Landfill, Inc. . . . is a clear indication that the Board does not have the authority under the Act to accept third-party appeals or interventions in this matter.").[1]

The Board has also granted motions for third-party intervention, but only in proceedings for which third-party appeal rights exist under the Act. For example, in U.S. Steel Corp. v. IEPA, PCB 10-23 (Dec. 3, 2009), the permit applicant appealed conditions in a Clean Air Act Permit Program (CAAPP) permit, which was issued by the Agency pursuant to Section 39.5 of the Act (415 ILCS 5/39.5 (2008)). The appeal was filed with the Board under the Act's CAAPP permit appeal provision, Section 40.2(a) of the Act (415 ILCS 5/40.2(a) (2008)), which does provide for third-party appeals. Before exercising its discretion to grant a third-party motion to intervene, the Board found that it is "authorized to allow ABC [American Bottom Conservancy] to intervene in this CAAPP permit appeal" as follows:

> Under Section 40.2(a) of the Act (415 ILCS 5/40.2(a) (2008)), several persons may appeal an IEPA final CAAPP permit determination to the Board, including any person who participated in IEPA's public comment process pursuant to Section 39.5(8) of the Act (415 ILCS 5/39.5(8) (2008)). It is undisputed that ABC so participated before IEPA during U.S. Steel's CAAPP permit application proceeding. Accordingly, ABC could have obtained Board review of IEPA's CAAPP permit determination by filing a third-party petition for hearing with the Board. *See* 415 ILCS 5/40.2(a) (2008).
>
> Granting ABC's motion to intervene would therefore not give party status to a person without standing to have appealed under Section 40.2(a) of the Act. U.S. Steel, PCB 10-23, slip op. at 6, citing Landfill, Inc., 74 Ill. 2d 541, 557-60.

Therefore, where there are third-party appeal rights for the type of proceeding at issue, the Board is authorized to grant intervenor status to third-parties. Doing so merely gives party status to persons already recognized by the General Assembly as proper parties to such a proceeding. However, if the third parties seeking intervention could not have brought the action in the first place, the Board is not authorized to grant third-party intervention. Doing so would, contrary to Landfill, Inc. and its progeny, give party status to persons not recognized by the

[1] Prior to the majority's ruling, there had been only one narrow exception to this rule of law, allowing intervention by the Attorney General and State's Attorneys. *See* Pioneer Processing, Inc. v. IEPA, 102 Ill. 2d 119, 137-39, 464 N.E.2d 238 (1984); Land and Lakes Co. v. IEPA, 245 Ill. App. 3d 631, 639-40, 616 N.E.2d 349 (3rd Dist.1993).

General Assembly as proper parties to such a proceeding. *See* Riverdale, PCB 00-228, slip op. at 1 (to give a third party the status of intervenor in a Section 40(a)(1) permit appeal "would essentially allow a third-party challenge to the Agency's permit denial, which the court precluded in Landfill, Inc."). The Board's authority is so limited regardless of whether the third party seeks intervention to support or object to the Agency's final decision. *See id*. at 1-2.

CHICAGO COKE COMPANY'S APPEAL

With any motion to intervene, the Board must first determine whether it has the authority to grant intervention. To do that, the Board must answer two questions: what provision of the Act authorizes the Board to hear the appeal before it, and does that provision allow third-party appeals? The Board already answered the first question in the instant case. Last year, the Agency moved to dismiss the petition of Chicago Coke Company (Chicago Coke), arguing that the Board lacked the authority to entertain the appeal. The Board denied the Agency's motion, ruling that the Board is authorized to hear this appeal under the general language of Section 5(d) of the Act (415 ILCS 5/5(d) (2008)). *See* Chicago Coke Co. v. IEPA, PCB 10-75, slip op. at 7-8 (Sept. 2, 2010). In answer to the first question then, the general language of Section 5(d) is the provision of the Act that authorizes the Board to hear this appeal.

The second question, accordingly, is: does the general language of Section 5(d) allow third-party appeals? The statutory provision states that the Board has the authority to conduct proceedings "upon other petitions for review of final determinations which are made pursuant to this Act or Board rule and which involve a subject which the Board is authorized to regulate." 415 ILCS 5/5(d) (2008). The answer to the second question was provided by the Board's recent decision in United City of Yorkville v. Hamman Farms, PCB 08-95 (Aug. 7, 2008). There, the Board held that "the contested general language of Section 5(d) does not by itself authorize appeals by *third parties*." Hamman, PCB 08-95, slip op. at 6 (emphasis in original). In Hamman, the Board dismissed a third-party petition for review after finding no third-party right to appeal the Agency's Section 21(q) agronomic rate determination. *See id*. at 7. As the Board explained, "[w]here final determinations are appealable by third parties under the Act, the General Assembly has provided the right explicitly." *Id*., citing Landfill, Inc., 74 Ill. 2d at 557-58. The legislature did not do so in the general language of Section 5(d).

Without third-party appeal rights under Section 5(d)'s general language, the Board has no authority to grant the joint motion of the NRDC and the Sierra Club for third-party intervention.[2] Rather than denying the motion on this ground, the majority chooses to rely upon Section 40.2(a) of the Act (415 ILCS 5/40.2(a) (2008)). As discussed above with respect to U.S. Steel, Section 40.2(a) does provide for third-party appeals, but only of CAAPP permit determinations. Final CAAPP permit determinations are made by the Agency pursuant to Section 39.5 of the Act (415 ILCS 5/39.5 (2008)), which codifies the requirements of Title V of the federal Clean Air Act. Section 39.5 includes detailed procedures for CAAPP permit application proceedings before the

[2] The answer would be no different if Chicago Coke's appeal were brought under Section 40(a)(1) of the Act (415 ILCS 5/40(a)(1) (2008)). As discussed in connection with Kibler, this general permit appeal provision, referred to by the majority, also does not provide for third-party appeals.

Agency. There is nothing in the record suggesting that these procedures were followed here. The Agency's one-page decision letter does not become a Section 39.5 CAAPP permit determination simply because "ERCs . . . are a part of the Clean Air Act regulatory and permitting scheme." Not surprisingly, no one has argued, and the majority stops short of finding, that the final decision being appealed by Chicago Coke is a final CAAPP permit determination under Section 39.5. Because the Board is not hearing Chicago Coke's appeal pursuant to Section 40.2(a), that provision's third-party appeal language provides no authority for the Board to grant the environmental groups intervention in this case.

As discussed, this appeal is being heard under the authority of the general language of Section 5(d). We are unaware of any precedent for borrowing third-party appeal rights from provisions inapplicable to the proceeding at hand in order to justify intervention. The majority does just this with Section 40.2(a), finding that the Chicago Coke appeal is "procedurally unique." It should be plain, however, that procedural uniqueness cannot itself be a source of Board authority. On the contrary, the Board, as an administrative agency, is a "creature of statute," and therefore has only the authority given to it by its enabling act. *See* Granite City Div. of Nat. Steel Co. v. PCB, 155 Ill. 2d 149, 171, 613 N.E.2d 719 (1993). The Board is accordingly "powerless to expand its authority beyond that which the legislature has expressly granted to it." McHenry County Landfill, Inc. v. IEPA, 154 Ill. App. 3d 89, 95, 506 N.E.2d 372 (2nd Dist. 1987).

This case is just not a CAAPP permit appeal. There is nothing "procedurally unique" about appeals of CAAPP permit determinations. There are over 20 CAAPP permit appeals pending before the Board. The majority's implication that the instant case is unusual should have brought forth the Board's hallmark circumspection when confronted with the limits of the Board's authority. Instead, the majority allows the NRDC and the Sierra Club to become parties to a proceeding for which no third-party appeal rights exist. In doing so, the majority unlawfully expands party status through intervention.

Policy arguments can usually be made both for and against any proposed intervention, but such arguments are irrelevant to the threshold question of whether the Board has the authority to grant intervention. Accordingly, the possibility that rulings in this proceeding could prejudice the environmental groups in a possible future CAAPP permit appeal is "an issue best directed to the legislature." Citizens Utilities Co. of Illinois v. PCB, 265 Ill. App. 3d 773, 782, 639 N.E.2d 1306 (3rd Dist 1994) (affirming Board's dismissal of third-party petition in absence of third-party appeal provision in Act); *see also* Hamman, PCB 08-95, slip op. at 7 ("it is the General Assembly, not the Board, that has the authority to determine the extent of the powers and duties of the Board"). No matter how compelling any policy arguments may be, an extension of third-party appeal or intervention rights "must come from the legislature, not the Board." Kibler, PCB 05-35, slip op. at 5.

Until now, third-party intervenor status in an appeal of an Agency decision has been reserved for those persons who are granted, by statute, the right to bring such an appeal as a third party. The majority's ruling ignores the balance struck by the legislature's careful creation of third-party appeal rights and standing requirements in the Act. *See*, *e.g.*, 415 ILCS 5/40(b) (2008) (grant of RCRA permit for hazardous waste disposal site); 415 ILCS 5/40(e) (2008)

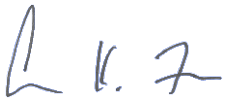
(NPDES permit determination). Moreover, the repercussions of the majority's departure from the long-established case law cannot be known at this time. By loosely analogizing to a third-party appeal provision that does not apply, the majority may have opened the way for unauthorized intervention in other types of appeals before the Board. Such unauthorized third-party intervenors would not be limited to environmental groups. Nothing in the majority's decision would prevent industry organizations or local governments, or for that matter, business competitors, from similarly intervening and garnering all the rights of the original parties to the action.

CONCLUSION

For all of the above reasons, we believe that the majority erred in granting party status to third parties who cannot have party status under the general language of Section 5(d) of the Act. The joint motion for intervention should have been denied.

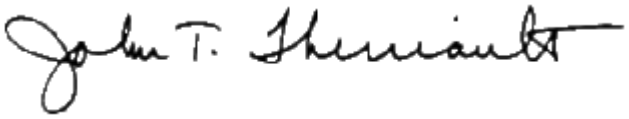
Lastly, the primary issue on appeal is a purely legal one, namely, whether an unpromulgated rule was relied upon by the Agency. We believe that the NRDC and the Sierra Club, without party status, can readily address this issue through *amicus curiae* briefing. *See* Sutter, PCB 04-187, slip op. at 4, citing 35 Ill. Adm. Code 101.110.

Thomas E. Johnson



Carrie K. Zalewski

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the above dissenting opinion was submitted on May 3, 2011.



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