

ILLINOIS POLLUTION CONTROL BOARD
August 15, 1985

VILLAGE OF GILBERTS,)
)
) Petitioner,)
)
) v.) PCB 85-96
)
)
) HOLIDAY PARK CORPORATION and)
) ILLINOIS ENVIRONMENTAL)
) PROTECTION AGENCY,)
)
) Respondents.)

ORDER OF THE BOARD (by J. Anderson):

This petition, filed by the Village of Gilberts July 2, 1985, requests that the Board "review and rescind... [a] decision of the IEPA amending the [Water Quality Management] Plan and granting Holiday [Park Corp.] a point source discharge to Tyler Creek." (Pet. p. 8). Motions to dismiss for lack of subject matter jurisdiction were filed by Holiday on July 16, and by the Agency on July 17, 1985. Verified responses concerning issuance of an NPDES permit were filed by the Village and the Agency on August 9; the Agency also presented new arguments for dismissal. On August 12, Holiday moved for leave to file an unverified pleading, including a second motion to dismiss. The motion for leave was mooted by the August 14 filing of a verified pleading. A response in opposition to dismissal was filed by the Village August 13". The Village filed a response thereto on August 15.

Holiday Park sought an NPDES permit for a point source discharge from a proposed sewage treatment plant to treat wastewater from a mobil home park proposed to be constructed in the Village. Issuance of this permit apparently would have been inconsistent with the Illinois Water Quality Management Plan (IWQMP, also known as the Section 208 plan) (Pet. p. 1-2).

On June 1, 1984, Holiday filed a Petition For Conflict Resolution with the Agency pursuant to 35 Ill. Administrative Code, Subtitle C, Chapter II, Section 351.101 et seq. (Agency File #7240). (These are rules adopted by the Agency pursuant to the Illinois Administrative Procedures Act, but not the Environmental Protection Act; they are not Board Regulations.) Holiday's Petition For Conflict Resolution requested an amendment to the Illinois Water Quality Management Plan to reflect the addition of a new point source.

During the month of August, 1983 and prior to filing its Petition For Conflict Resolution with the Agency, Holiday Park filed its requested amendment of the IWQMP with the Northeastern Illinois Planning Commission (NIPC). On September 18, 1984 and on October 3, 1984, the Agency conducted a hearing on Holiday's Petition For Conflict Resolution pursuant to 35 Ill. Adm. Code, Section 351.101 et seq.. (Holiday motion, p. 1-2). A draft NPDES permit was also apparently a subject of discussion. The Village asserts that NIPC, Kane-DuPage Counties Solid and Water Conservation District, Kane County, and the Kane County Forest Preserve District all appeared at the hearing and objected to an NPDES permit and amendment of the IWQMP. (Pet. p. 5).

On May 28, 1985, the Agency rendered its Final Decision, which provides in pertinent part:

"It is the Decision of the Agency that the Areawide Water Quality Management Plan for Northeastern Illinois be amended to allow the inclusion of a point source discharge to be located North of Illinois Route 72 at a retention lake which would be tributary to Tyler Creek, Village of Gilberts, Kane County, Illinois, to allow the construction of the sewage treatment plant proposed by Petitioner Holiday Park, and to identify Petitioner Holiday Part as the Designated Management Agency for its facility, subject to the following conditions..." (Holiday Motion, p. 2).

An NPDES permit was issued to Holiday on July 22, 1985 -- 20 days after the filing of this action. The Agency and Holiday assert that the Board lacks jurisdiction to review IWQMP decisions under Section 40 of the Act, and no other provision of the Act confers jurisdiction. The Agency states that the procedure for review of its decision is provided for in its rules, specifically, that [a]ny party may request that the Regional Administrator, United States Environmental Protection Agency, Region V, review the decision of the Agency pursuant to 40 C.F.R 35 1517(c)." (35 Ill. Adm. Code 351.403).

The Board agrees with the Agency that the Board lacks jurisdiction under the Act, although other avenues of review may be available pursuant to state law. This position is consistent with the holding in National Marine Service v. IEPA, 120 Ill. App. 3d 198, 458 N.E.2d 551 (4th Dist. 1983), finding that appeal lies to the circuit court, and not the Board, from an Agency decision not to issue a state certification for a dredge and fill permit pursuant to Section 404 of the Federal Clean Water Act (FCWA), 33 USC 1251 et seq. Citing Peabody Coal Co. v. PCB, 49 Ill. App. 3d 252, 364 N.E.2d 929 (1977) (concerning state certifications review of Agency decisions under Section 402 of the FCWA), the court stated that

"We read Peabody as holding that where a Federal permit system is at hand, the PCB, absent a statutory grant of power, is without authority to become

involved in reviewing the state certification process which must be followed before a Federal permit may issue. This reading is consistent with the restrictive view of the PCB's authority to oversee the IEPA's activities which was noted by our supreme court in Landfill, Inc. v. Pollution Control Board [1978], 74 Ill. 2d 541, 387 N.E.2d 258.*** In light of Landfill, Peabody is properly read as holding that the PCB is without authority to hear an appeal from a denial of section 401 certification."

The Board believes that this analysis is equally applicable to the Agency's actions pursuant to Section 208 of the FCWA.

The Board's rules governing NPDES permit appeals allow "any person other than the applicant who has been a party to or participant at an Agency hearing with respect to the issuance or denial of an NPDES permit by the Agency" to file a petition for review of such action. 35 Ill. Adm. Code 105.102 (b)(3). "The petition shall be filed and notice issued within 30 days from the date the Agency's final decision has been mailed to the applicant and all other persons who have right of appeal. The method of filing shall be in accordance with Sections 103.122 and 103.123." 35 Ill. Adm. Code 105.102 (b)(4). "The petition shall contain a statement of the decision or part thereof to be reviewed." 35 Ill. Adm. Code 102.105 (b)(7).

The Agency asserts that, to the extent that the petition may be construed as a challenge of an NPDES permit, that the action should be dismissed because a) the Village lacks standing to pursue the action, b) the petition was untimely, since there was no permit in existence at the time of its filing, and c) the petition is insufficient, in that it does not specify which portion or portions of the permit are to be reviewed. Holiday Park also asserts that the petition was untimely, but on the basis that the 30 day appeal time should run from May 28, the date of the Agency's IWQMP decision, rather than July 22, 1985 the date of issuance of the NPDES permit; this argument is summarily rejected.

The Agency's lack of standing argument is premised on the position that Section 40 of the Act does not explicitly authorize third party appeals of NPDES permits, and thus to the extent Section 105.102 (b)(3) asserts such jurisdiction, the rule is invalid pursuant to the holding of Landfill, Inc., supra.

However, this argument does not take into account Section 11 of the Act. Section 11(a) recites the legislative findings of the desirability of Illinois' securement of NPDES enforcement primacy. Section 11(b) "authorize(s), empower(s), and direct(s) the Board to adopt such regulations ... as will enable the State to secure federal approval to issue NPDES permits ...". The question then becomes one of whether third party appeals of NPDES permits is federally required.

The regulations at issue were adopted in Docket R73-11 and 12, In The Matter of: National Pollutant Discharge Elimination System Regulations Orders of August 29 and September 5, 1974, and Opinion of December 5, 1974. In summary, the Opinion does not note that the third party appeal is federally required, although it does note at some length that the opportunity for public hearing at the Agency level is required prior to issuance or denial of a permit. (See esp. pp. 1, 4-7). The Board has also reviewed the October 20, 1977, USEPA/Illinois Memorandum of Agreement giving the State NPDES enforcement primacy; it does not specifically reference permit appeal procedures, although these procedures were part of the package submitted to secure the NPDES program for the state.

40 CFR Part 123 sets forth state program requirements for NPDES, RCRA and other programs, and Part 124, set out procedures for decisionmaking by USEPA. Section 124.91 provides that third parties may appeal NPDES permit decisions; this is not a requirement which has been made specifically applicable to State programs in Part 123.

However, it should also be noted that Section 124.19, giving third party appeal rights concerning RCRA and UIC permits, is also not specifically applicable to state programs pursuant to the terms of Part 123. Notwithstanding, USEPA interpreted third party appeals as being an essential portion of the state RCRA authorization package, so the Board adopted rules giving such rights, see R84-10, In The Matter of RCRA and UIC Procedural Rules, Order of December 20, 1984, Opinion of January 10, 1985. On this basis, the Board believes USEPA, if asked, would conclude that third party appeal rights are an essential part of the NPDES package. If the Board does not allow appeals of NPDES permits to proceed, the State's NPDES primacy could be jeopardized.

However, the Board does believe the Agency's arguments concerning timeliness and sufficiency of the Village's petition have merit, and dismisses the action on these grounds. The Board notes, however, that this does not preclude the Village from initiating a new action by the timely filing of a sufficient petition for review of the July 22, 1985 permit, specifying the portion of the permit for which review is sought.

Finally, to the extent that the Village's petition may charge violations of the Act, they have been made in a procedurally improper manner. If the Village's intent is to file an enforcement action pursuant to Section 31(b) of the Act, cf. Landfill, supra, a proper complaint should be filed and served in accordance with 35 Ill. Adm. Code Part 103, the Board's procedural rules governing enforcement cases.

Accordingly, for all of the foregoing reasons, this action is dismissed.

IT IS SO ORDERED.

J. Theodore Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 15th day of August, 1985, by a vote of 6-1.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board