

ILLINOIS POLLUTION CONTROL BOARD

July 10, 1997

DEPARTMENT OF THE NAVY, NAVAL)	
TRAINING CENTER GREAT LAKES,)	
)	
Petitioner,)	PCB 97-194
)	(Permit Appeal - NPDES)
v.)	
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY and R. LAVIN)	
& SONS, INC., an Illinois corporation,)	
)	
Respondent.)	

ORDER OF THE BOARD (by C.A. Manning):

This matter is before the Board on two motions to dismiss. The first motion to dismiss was filed by R. Lavin & Sons, Inc. (Lavin) on May 16, 1997, and the second motion to dismiss was filed by the Illinois Environmental Protection Agency (Agency) on May 22, 1997. On May 27, 1997, the Department of the Navy, acting through the Naval Training Center Great Lakes (Navy) filed a response memorandum in opposition to both motions to dismiss. Lavin filed a motion to file a reply and a reply to the Navy's response on June 3, 1997. The Board grants Lavin's motion to file a reply to the Navy's response. For reasons more fully explained below, the Board grants both motions to dismiss.

BACKGROUND

On May 2, 1997, the Navy filed a petition for review concerning the Agency's issuance of an April 4, 1997, renewal National Pollutant Discharge Elimination System (NPDES) permit IL0002755 to Lavin, previously known as North Chicago Refiners & Smelters Division of R. Lavin & Sons, Inc., at its facility located in North Chicago, County of Lake, Illinois. In filing this NPDES permit appeal, the Navy believes, among other reasons, that the Agency's actions are inconsistent with State and federal regulations and that the Agency's actions lack support from the record before the Agency. As noted previously, both Lavin and the Agency filed motions to dismiss the permit appeal.

Lavin raises two contentions in its motion to dismiss (Lavin Mot. to Dis.): (1) that the Board has no jurisdiction to hear the Navy's third-party appeal of Lavin's NPDES permit, and (2) that the Navy lacks standing to bring its petition for review. Regarding the jurisdictional argument, Lavin asserts that no provision of the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (1996)) authorizes third-party appeals of NPDES permits. Citing Citizens Utilities Co. of Illinois and Village of Plainfield v. Pollution Control Board, 265 Ill. App. 3d

773, 780, 639 N.E.2d 1306, 1312 (3rd Dist. 1994), *cert. denied*, 158 Ill. 2d 550, 645 N.E.2d 1356 (1994), Lavin argues that because the Illinois Appellate Court, Third District, dismissed a third-party appeal of an NPDES permit for lack of jurisdiction, the Board does not have the authority, either by statute or by the ruling of any Illinois court, to hear a third-party appeal of an NPDES permit. Lavin Mot. to Dis. at 3. Additionally, Lavin argues that Section 105.102 of the Board's procedural rules (35 Ill. Adm. Code 105.102), which purportedly gives some third parties the right to appeal the issuance of NPDES permits, is not a valid regulation supported by a statutory basis. Lavin Mot. to Dis. at 3. Lavin argues that because the Board has proposed revisions to eliminate all third-party appeal rights of NPDES permits in the Board's procedural rules (see In the Matter of: Revisions of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130 (October 3, 1996), R97-8), the Board has recognized that Section 105.102(b)(3) is without any statutory basis and is void. Lavin Mot. to Dis. at 4.

Regarding the issue of standing, Lavin argues that even if Section 105.102 is valid, the Navy has not met the requirements to bring a third-party appeal before the Board. Lavin states that Section 105.102(b)(3) allows "[a]ny 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" Lavin asserts that the Navy was not a party to, nor a participant at, any Agency hearing. Lavin argues that the Navy's submission of written comments and phone conversations with the Agency do not amount to participation at a hearing as required by Section 105.102(b)(3) of the Board's procedural rules. Lavin Mot. to Dis. at 5.

In its motion to dismiss (Ag. Mot. to Dis.), the Agency argues that the Act does not confer authority on the Board to review third-party appeals of NPDES permits. Citing Citizens Utilities and the Board's October 3, 1996, opinion of the Procedural Rules Revisions, the Agency argues that the Board lacks statutory authority to provide for third-party appeals of NPDES permits. Ag. Mot. to Dis. at 4-5. The Agency further notes that the Navy submitted written comments regarding the public notice draft of Lavin's NPDES permit after the 30-day public comment period ended, but that the Navy never requested a public hearing regarding the draft NPDES permit. Ag. Mot. to Dis. at 2.

The Navy asserts in its response (Resp.) that the Board is authorized to hear this third-party NPDES permit appeal. The Navy states that the Board has such authority pursuant to Section 105.102(b)(3) of the Board's procedural rules. In support of its argument, the Navy cites three cases where the Board upheld the rights of third-party permit appeals. See Village of Gilberts v. Holiday Park Corp. et al. (August 15, 1985), PCB 85-96 ; Village of Sauget and Monsanto v. IEPA (July 11, 1986), PCB 86-57 and 86-62 ; Damron v. IEPA et al. (April 21, 1994), PCB 93-215. Resp. at 2-3. The Navy further asserts that the proposed revisions of the Board's procedural rules do not have any significance since the revised procedural rules have not yet been adopted by the Board. Resp. at 3. The Navy also argues that Citizens Utilities is inapplicable to this matter because the case was decided by the Third District Appellate Court and this matter, if appealed, would be heard by the Second District Appellate Court. Therefore, the Navy states that a decision of the Third District is not applicable or binding to the instant matter. Resp. at 4. Additionally, the Navy argues that because the Navy is an instrumentality of the federal government, an appeal would have to be filed in the

federal district court which would not be bound by the decision of a lower state court. Resp. at 4-5.

The Navy also argues that the Board should disregard the decision in Citizens Utilities. The Navy believes that other sections of the Act (Sections 11, 13 and 28.2 (415 ILCS 5/11, 13, 28.2(1996))) provide a statutory basis for third-party permit appeals. Resp. at 6. The Navy asserts that the Board is empowered to adopt regulations which reflect federal requirements, including regulations contesting NPDES permits. The Navy further states that the United States Environmental Protection Agency (USEPA) issued a final rule requiring that “state programs implementing the Clean Water Act allow third party judicial appeals in order to retain federal approval due to recent federally mandated changes to NPDES program requirements.” Resp. at 7-8. The Navy argues that the Board must continue to provide for third-party appeals in order for the State to retain primacy of its program under the Clean Water Act. Such a decision to the contrary, the Navy argues, would endanger “the Illinois program.” Resp. at 8-9.

Finally, the Navy argues that it has standing to bring this appeal. The Navy states that although it neither requested nor participated in a public hearing at the Agency level, the Navy was “substantially involved in the permitting process prior to issuance of the Permit on April 4, 1997.” Resp. at 10. The Navy states that it received an extension of time to submit comments after the expiration of the 30-day comment period. The Navy argues that its involvement in the permit process was substantial. Resp. at 11.

Lavin asserts in its reply (Reply) that the Navy’s arguments are unfounded. Lavin states that the Board is bound by the decisions of the Illinois Appellate Courts. Lavin states that because no precedent exists regarding the issues in this matter within the Second District, the Board must follow the precedent of other appellate districts within the State. Reply at 2-3. Lavin argues that the recently promulgated USEPA rule, which the Navy states provides the Board with the statutory authority to enact regulations for Illinois to administer the NPDES permit program, does not require compliance in Illinois until 1998. Reply at 5. Lavin asserts that the Navy’s argument of the USEPA rule is an *ex post facto* justification which cannot retroactively apply to the Board’s statutory authority in promulgating and amending Section 105.102(b)(3) in 1980 and 1994.

DISCUSSION

The Board is a creature of statute which functions in a quasi-legislative and quasi-judicial capacity. As the Illinois Supreme Court stated in Landfill, Inc. v. Pollution Control Board, 74 Ill. 2d 541, 554, 387 N.E.2d 258, 262 (1978), the Board “must determine, define, and implement the environmental control standards and may adopt rules and regulations . . . [the Board] may adopt substantive regulations and procedural rules to accomplish the purposes of the Act.” If, however, the Board lacks statutory authority to promulgate a rule, the rule is void. Landfill, 387 N.E.2d at 262.

The Illinois Appellate Court determined in Citizens Utilities that the Board improperly tried to expand its powers beyond those authorized by statute when the Board enacted a rule

(35 Ill. Adm. Code 105.102(b)(3)) which purports to extend its powers in cases where third parties have filed complaints against permits issued by the Agency. Citizens Utilities, 639 N.E.2d at 1312. The court found no distinction between the Landfill and Citizens Utilities cases though Landfill concerned a sanitary landfill permit while Citizens Utilities involved the issuance of an NPDES permit. In both situations, the court found that the Act provides that the Board may review appeals by applicants when the Agency denies a permit application or grants an application with conditions. Citizens Utilities, 639 N.E.2d at 1312. The court reasoned that if the Board became involved as the overseer of the Agency's decisionmaking process by evaluating challenges to permits, the Board would become a permit-granting authority. Citizens Utilities, 639 N.E.2d at 1312. This is a function which is not authorized to the Board by the Act. Therefore, the court decided that "the Board lacks jurisdiction over third party petitions against the issuance of NPDES permits." Citizens Utilities, 639 N.E.2d at 1310.

The Navy's arguments in opposition to the motions to dismiss do not convince the Board to rule against the motions to dismiss for four reasons. First, the Navy cites Board cases which were decided prior to the Appellate Court's decision in Citizens Utilities on August 10, 1994. Second, if no precedent exists for a case which comes under the jurisdiction of a certain district of the appellate court, then the Board must follow the precedent of other appellate districts within the State. See Sidwell v. Griggsville Comm. School District, 208 Ill. App. 3d 296, 299-300, 566 N.E.2d 838, 840 (4th Dist. 1991), *aff'd* 146 Ill. 2d 467, 588 N.E.2d 1185 (1992). Therefore, the Board must adhere to the precedent set forth in Citizens Utilities since the Third District Appellate Court's decision is one of a higher court to which a lower court (or Agency, in this matter) must follow. Third, the Board does not find that there is any other statutory basis authorized in the Act which provides for third-party permit appeals. Last, the State of Illinois has not yet enacted a statute which allows third-party NPDES permit appeals.¹

Because of the Appellate Court's decision in Citizens Utilities which disallows third-party NPDES permit appeals due to the lack of statutory authority under Section 105.102(b)(3) of the Board's present procedural rules, the Board does not have any jurisdiction to hear this matter.

The Issue of Standing

¹ Though on May 8, 1997, Senate Bill 814 (Mahar/Scully) passed both houses in the 90th General Assembly, the Governor of the State of Illinois still has yet to sign such bill. The deadline for SB 814 to be signed by the Governor is 60 days from June 6, 1997. As of the date of this order, the Governor has not yet signed SB 814. If signed by the Governor, SB 814 would act as an amendment to the Act, specifically authorizing third-party NPDES permit appeals.

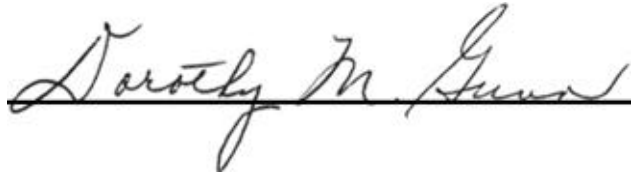
In finding that the Board does not have jurisdiction over the instant matter, the Board need not address the issue of standing. Accordingly, the motions to dismiss are granted. This matter is dismissed and the docket is closed.

IT IS SO ORDERED.

Board Member K.M. Hennessey abstained.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of the date of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 145 Ill. 2d 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 10th day of July 1997, by a vote of 5-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", is written over a solid horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board