

ILLINOIS POLLUTION CONTROL BOARD  
September 18, 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,	)	
	)	
Respondents.	)	

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

The Board denies an August 13, 1997 motion for reconsideration of a final Board order filed by Department of the Navy, acting through the Naval Training Center Great Lakes (the Navy). The Navy requests that the Board reconsider its July 10, 1997 order which dismissed a third-party National Pollutant Discharge Elimination System (NPDES) permit appeal due to the lack of statutory authority under Section 105.102(b)(3) of the Board's present procedural rules.

In support of its motion to reconsider (Mot. to Reconsider), the Navy argues that because Senate Bill 814 became effective on July 30, 1997, allowing third-party appeal rights, the Board should now allow this NPDES third-party appeal. The Navy asserts that "[t]he [t]hird [p]arty [a]ppeal [l]aw applies to this case because (1) this proceeding was pending at the time the amendment became effective and (2) the third party appeal statute intended to clarify what the law should have been all along and, since it does not change any existing law, it is by definition retroactive and applicable to this action." Mot. to Reconsider at 2. The Navy argues that since the Board order was not yet final due to the pending expiration of the 35-day period to file a motion to reconsider pursuant to Section 101.246 of the Board's procedural rules (35 Ill. Adm. Code 101.246), the "[p]ermit (issued to Lavin) continued to be vulnerable to challenge" up through and including 35 days after issuance of the Board's July 10, 1997 order. Mot. to Reconsider at 6. The Navy further believes that because Senate Bill 814 was enacted to "clarify" the law rather than "change" the law, retroactive effect is permissible. Mot. to Reconsider at 10.

Respondents, the Illinois Environmental Protection Agency (Agency) and R. Lavin & Sons, Inc. (Lavin), responded separately to the motion to reconsider (Agency Response and Lavin Response) by arguing, among other reasons, that Senate Bill 814 would have an impermissible retroactive impact on both Lavin and the Agency, and should only be applied

prospectively. The Agency asserts that the third party appeal law was not designated by the General Assembly to have retroactive effect. Agency Response at 3. Additionally, the respondents argue that because Lavin's right to the NPDES permit had already vested, retroactive application of the third party appeal law would interfere with such vested right. Lavin Response at 4-6; Agency Response at 7. The Agency argues that the third party appeal law was not adopted to clarify a misinterpretation of the Environmental Protection Act occurring in 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), but rather was enacted to comply with a directive by the United States Environmental Protection Agency (USEPA) requiring that states adopt rights for third party appeals of NPDES permits. Agency Resp. at 9-10. Lavin argues alternatively that the Navy lacks standing to appeal the Agency's decision to issue the NPDES permit due to the standing requirements of Senate Bill 814. Lavin Resp. at 10.

The Navy filed a motion to file a reply and a reply to the responses raised by the respondents which the Board allows. In the Navy's reply (Reply), it asserts that the respondents have not identified a vested interest which would be impaired if the third party appeal law were applied retroactively. Reply at 2-4. Further, the Navy argues that the USEPA directed the third party appeal law to be adopted by the states in order to correct state court decisions which limited third party rights. Reply at 5-6. The Navy also states that it had standing pursuant to the requirements of Senate Bill 814. Reply at 8.

In ruling upon a motion for reconsideration, the Board is to consider factors including, but not limited to, error in the previous decision and facts in the record which are overlooked. 35 Ill. Adm. Code 101.246(d). In Citizens Against Regional Landfill v. County Board of Whiteside County (March 11, 1993), PCB 93-156, the Board stated that "[t]he intended purpose of a motion for reconsideration is to bring to the court's attention newly-discovered evidence which was not available at the time of the hearing, changes in the law, or errors in the court's previous application of the existing law." Korogluyan v. Chicago Title & Trust Co., 213 Ill. App.3d 622, 572 N.E.2d 1154 (1st Dist. 1992).

The Board denies the Navy's motion to reconsider the Board's July 10, 1997 order. The Navy has not demonstrated that any newly-discovered evidence, a change in the law (applicable to a previous action), or any other reason to conclude that the Board's decision was in error which would require the Board to reconsider its July 10, 1997 order. In making its decision to dismiss this third-party NPDES permit appeal on July 10, 1997, prior to the adoption of Senate Bill 814 on July 30, 1997, the Board reasoned that, at the time that Lavin's permit was issued, no statutory authority existed to allow for third-party NPDES permit appeals. See Navy v. Lavin (July 10, 1997), PCB 97-134, slip op. at 4. The same holds true on this date: at the time that Lavin's permit was issued, no statutory authority existed to allow for third-party NPDES permit appeals.

Although the Navy argues that "the [p]ermit continued to be vulnerable to challenge" during the timeframe upon which to file a motion to reconsideration (Mot. to Reconsider at 6), only the Board's July 10, 1997 decision could be challenged during this timeframe, rather than

Lavin's NPDES permit. The Board's order was a final and appealable order as of July 10, 1997, upon which date the docket was closed. As the Illinois Supreme Court decided in Sepmeyer v. Holman, 162 Ill. 2d 249, 254, 642 N.E.2d 1242, 1244 (1994), the legislature lacks the power to reach back and breathe life into a time-barred claim. The Board agrees that as of July 30, 1997, there has been a change in the law to allow for prospective third-party permit appeals; however, this change in the law cannot be retroactively applied to an NPDES permit previously issued by the Agency. The legislative intent of Senate Bill 814 does not require retroactive application of an NPDES appeal. A general rule of statutory construction is that an amendment will be construed as prospective, absent express language to the contrary. See People v. Fiorini, 143 Ill. 2d 318, 333, 574 N.E.2d 612, 617 (1991). The legislature enacted Senate Bill 814 because it was required by federal law, rather than to reverse the holding of Citizens Utilities. See 90th Ill. Gen. Assem., Senate Proceedings, March 18, 1997, at 117-18; 90th Ill. Gen. Assem., House Proceedings, May 8, 1997, at 1-2.

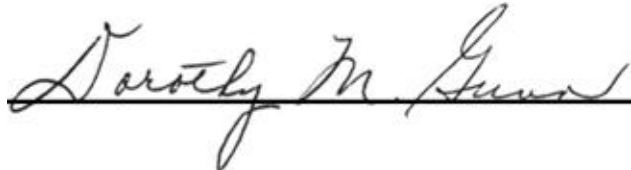
The Board need not address the issue of standing as required by Senate Bill 814 since Senate Bill 814 does not apply to the instant case.

Accordingly, the Navy's motion to reconsider is denied.

Board Member K.M. Hennessey abstained.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 18th day of September 1997, by a vote of 6-0.

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

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board