

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WESLEY BRAZAS, JR.,)
))
Petitioner)
))
v.)
))
MR. JEFF MAGNUSSEN, PRESIDENT)
VILLAGE OF HAMPSHIRE)
and the)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
))
Respondents)

PCB 06-131

(Appeal from Illinois EPA decision granting modified NPDES permit)

NOTICE OF FILING

TO:

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite. 11-500
Chicago, Illinois 60601

Jeffrey R. Magnussen, President
Village of Hampshire
234 South State Street, P.O. Box 457
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Mark Schuster
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Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board an original and nine (9) copies of the **MOTION TO DISMISS FOR LACK OF JURISDICTION** of the Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: _____/S/_____
James Allen Day
Assistant Counsel
Division of Legal Counsel

Dated: April 14, 2006
Illinois Environmental Protection Agency
1021 North Grand Avenue East
Springfield, Illinois 62794-9276
(217) 782-5544

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v.)	PCB 06-131
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MR. JEFF MAGNUSSEN, PRESIDENT)	(Appeal from Illinois EPA decision
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and the)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
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MOTION TO DISMISS FOR LACK OF JURISDICTION

NOW COMES the Respondent, the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by one of its attorneys, James Allen Day, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500, hereby requests that the Illinois Pollution Control Board (the "Board") dismiss three of the four remaining issues raised by the Petitioner in the above-captioned matter for lack of jurisdiction. In support of this motion, the Illinois EPA states as follows:

I. INTRODUCTION

1. In an Order dated March 2, 2006, the Board reduced the Petitioner's permit appeal to the following four issues: (1) the issued permit violates public notice requirements; (2) the Agency and the Village of Hampshire failed to perform a study assuring that the increase in discharge will not cause a violation of any other applicable water quality standard as required by Special Condition 5; (3) the permit fails to require monitoring of radium in the effluent in violation of Special Condition 9; and (4) the modified permit "unnecessarily jeopardizes the water quality of Hampshire Creek."

2. The four remaining issues numbered (1), (2), (3) and (4) in the March 2, 2006, Board Order correspond to paragraphs 24, 25, 27 and 28, respectively, in the Petitioner's *Amended Petition for Review of a Decision by the Illinois Environmental Protection Agency*. Amended Petition, page 6.

II. LEGAL STANDARDS

3. The Illinois Environmental Protection Act, 415 ILCS 5/1 et seq. ("Act"), grants the Board the authority to hear third party permit appeals, with certain limitations. 415 ILCS 5/40(e).

4. One such limitation on third party appeals is set forth at Section 40(e)(2)(A) of the Act, which requires that the petition include: "a demonstration that the petitioner raised the issues contained within the petition during the public notice period or during the public hearing on the NPDES permit application, if a public hearing was held." 415 ILCS 5/40(e)(2)(A). This statutory requirement is restated at Section 105.210 of the Board rules. 35 Ill. Adm. Code Section 105.210.

III. ANALYSIS

5. To demonstrate that he raised the issues contained within his Amended Petition during the public notice period or public hearing, the Petitioner attached as Exhibit 3 to his Amended Petition a copy of a letter dated October 11, 2005. Amended Petition, Exhibit 3; Record, page 485.

6. Petitioner's letter of October 11, 2005, indisputably raises the issue identified as issue (1) in the March 2, 2006, Board Order (corresponding to paragraph 24 of the Amended Petition), relating to the mathematical calculation of effluent limits. Amended Petition, Exhibit 3, pages 1 and 4; Record, pages 485 and 488. However, Petitioner's letter of October 11, 2005, is clearly and unequivocally devoid of any mention of the issues identified as issues (2), (3) and

(4) in the March 2, 2006, Board Order (corresponding to paragraphs 25, 27 and 28 of the Amended Petition).

7. Specifically, the issue identified as issue (2) in the March 2, 2006, Board Order (corresponding to paragraph 25 of the Amended Petition) involves “a study assuring that the increase in discharge, when combined with other sources, will not cause a violation of any applicable water quality standard as required by Special Condition 5.” Petitioner’s October 11, 2005, letter contains no mention of this issue.

8. The issue identified as issue (3) in the March 2, 2006, Board Order (corresponding to paragraph 27 of the Amended Petition) involves radium monitoring and reporting. Petitioner’s October 11, 2005, letter contains no mention of radium monitoring or reporting, or “radium” in any context.

9. The issue identified as issue (4) in the March 2, 2006, Board Order (corresponding to paragraph 28 of the Amended Petition) involves the metals monitoring required by Special Condition 9 of the draft permit. Petitioner’s October 11, 2005, letter contains no mention of metals or Special Condition 9.

10. Based upon the limitation set forth at Section 40(e)(2)(A) of the Act, the Board does not have authority to issue a final decision in this case with respect to the issues identified as issues (2), (3) and (4) in the March 2, 2006, Board Order (corresponding to paragraphs 25, 27 and 28 of the Amended Petition).

IV. TIMELINESS

11. Generally, motions to strike, dismiss, or challenge the sufficiency of any pleading filed with the Board must be filed within 30 days after the service of the challenged document. 35 Ill. Adm. Code 101.506. However, the rule provides an exception if material prejudice would result.

12. Here, forcing the Board to hear, and the Respondents to defend, issues on appeal which are plainly and affirmatively barred by statute would constitute material prejudice. The Board's statutory jurisdiction to hear third-party permit appeals—strictly limited to issues previously raised—cannot be broadened (in contravention of the statute) merely by the action or inaction of another party to the appeal. Further, the Board's well-established commitment to administrative economy would not be served by moving forward with a case in which three of the four issues are not permitted by statute.

13. In addition to the “material prejudice” exception, this Motion to Dismiss is exempt from the time limitation set forth at 35 Ill. Adm. Code 101.506 because the Motion “purports to challenge the Board's authority to issue a final decision in this case” People of the State of Illinois v. Michel Grain Company, Inc., et al., PCB 96-143, 2003 WL 22334782 (October 2, 2003), *citing* Ogle County Board v. PCB, 272 Ill. App. 3d 184, 196-7, 649 N.E.2d 545, 554 (2d Dist. 1995).

14. Alternatively, if this Motion to Dismiss is not accepted, the Board should dismiss the statutorily barred issues on its own motion in the interest of administrative economy and to avoid impermissibly expanding the statutory authorization for third-party permit appeals.

V. CONCLUSION

The Petitioner has not demonstrated that he raised the issues identified as issues (2), (3) and (4) in the March 2, 2006, Board Order (corresponding to paragraphs 25, 27 and 28 of the Amended Petition) during the public notice period or during the public hearing, as is required by the Act and Board rules. 415 ILCS 5/40(e)(2)(A); 35 Ill. Adm. Code Section 105.210. Issues not previously raised in the permitting process are not eligible for appeal, and the Board lacks statutory authority to hear such novel issues.

WHEREFORE, for the reasons stated above, the Illinois EPA hereby respectfully requests that the Board dismiss the issues identified as issues (2), (3) and (4) in the March 2, 2006, Board Order (corresponding to paragraphs 25, 27 and 28 of the Amended Petition).

Respectfully submitted,

Illinois Environmental Protection Agency

By: _____/S/_____

James Allen Day
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel

DATED: April 14, 2006

Illinois Environmental Protection Agency
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THIS FILING PRINTED ON RECYCLED PAPER

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have served electronically the attached
MOTION TO DISMISS FOR LACK OF JURISDICTION, upon:

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite. 11-500
Chicago, Illinois 60601

And, by mailing it from Springfield, Illinois on April 14, 2006 with sufficient postage
affixed for first class mail, upon the following:

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