

ILLINOIS POLLUTION CONTROL BOARD  
May 4, 2006

WESLEY BRAZAS, JR.,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	PCB 06-131
MR. JEFF MAGNUSSEN, president,	)	(Third-Party NPDES Permit
VILLAGE OF HAMPSHIRE, and the	)	Appeal – Water)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by N.J. Melas):

On April 14, 2006, the Illinois Environmental Protection Agency (Agency) filed a motion to dismiss three of the four remaining grounds for appeal in this third-party permit appeal. The Agency argues that the Board lacks of jurisdiction over three of the appeal grounds alleged in the petition for review filed by Mr. Wesley Brazas, Jr. Mr. Brazas appeals certain conditions of National Pollutant Discharge Elimination System (NPDES) permit No. IL0020281 for a wastewater treatment plant expansion. To date, Mr. Brazas has not responded to the motion to dismiss. As described in more detail below, the Board grants the Agency’s motion and dismisses three of the four remaining issues on appeal.

The Agency modified the Village of Hampshire’s NPDES permit to allow an increase in the facility’s design average flow and design maximum flow as a result of a plant expansion. The modification keeps the concentration limits and load limits at their current levels. Mr. Brazas appeals on the grounds that: (1) the issued permit deviates from public notice requirements for load limits; (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.” Am. Pet. at 6.

**PROCEDURAL BACKGROUND**

On January 13, 2006, Mr. Brazas filed a petition asking the Board to review a December 9, 2005 determination of the Agency. See 415 ILCS 5/40(a)(1) (2004); 35 Ill. Adm. Code 105.206(a). On December 9, 2005, the Agency issued NPDES permit No. IL0020281 to the Village of Hampshire for its wastewater treatment plant in Kane County. Mr. Brazas appeals on the grounds that the permit is “not sufficiently protective of the environment and not in accord with the law.” Pet. at 8.

On February 2, 2006, the Board found the petition deficient and requested more information from the petitioner before the Board could accept the matter for hearing. Mr. Brazas filed an amended petition for review on February 21, 2006. On March 2, 2006, the Board dismissed the allegations of air and water pollution and accepted the remainder of Mr. Brazas' amended petition, concerning the December 9, 2005 NPDES permit, for hearing.

The Agency filed the record of its determination on March 23, 2006. 35 Ill. Adm. Code 105.116, 105.212(a). A hearing is scheduled for May 15, 2006. On April 14, 2006, the Agency filed its motion to dismiss three of the remaining four grounds for appeal. Mr. Brazas did not respond to the Agency's motion and therefore waives any objection to the Board granting it. 35 Ill. Adm. Code 101.500(d).

### **APPLICABLE LAW AND BOARD RULES**

Section 40(e)(1) of the Environmental Protection Act (Act) (415 ILCS 5/40(e)(1) (2004)) allows certain third parties to appeal Agency determinations to grant NPDES permits. The third party's petition to the Board must contain:

[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; and

[A] demonstration that the petitioner is so situated as to be affected by the permitted facility. 415 ILCS 5/40(e)(2) (2004); *see also* 35 Ill. Adm. Code 105.210(d).

Section 101.506 of the Board's procedural rules provides that all 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, unless the Board determines that material prejudice would result. 35 Ill. Adm. Code 101.506.

### **MOTION TO DISMISS**

The Agency moves the Board to dismiss for lack of jurisdiction three of the four remaining issues in Mr. Brazas' petition for review. Mot. at 1. As set forth in the Board's March 2, 2006 order and restated above, the Agency outlines the four remaining issues as follows:

(1) [T]he 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." Mot. at 1; citing Am. Pet. at 6.

The Agency states that the Act authorizes the Board to hear third party appeals, but with very strict limitations. Mot. at 2; citing 415 ILCS 5/40(e) (2004). In the instance of an NPDES permit appeal, the Act requires that the petition for review show that the petitioner raised the issues contained in the petition during either the public notice period or the public hearing on the permit application, if a public hearing was held. Mot. at 2; citing 415 ILCS 5/40(e)(2)(A) (2004); 35 Ill. Adm. Code 105.210.

The Agency states that the letter Mr. Brazas attached to his amended petition to show that he participated during public comment period does not mention three of the four remaining contested issues. Mot. at 2; citing Am. Pet. Exh. 3. The Agency concedes that Mr. Brazas' letter, dated October 11, 2005, asks why the load limit calculations required by the public notice differ from the load limit calculations contained in the issued permit. Am. Pet. at 6. The Agency maintains, however, that the October 11, 2005 letter contains no mention of the second, third, or fourth issues. Mot. at 2-3.

According to the Agency, the letter does not mention the requirement alleged by Mr. Brazas that a study must be performed to show 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. The Agency contends that the letter also does not mention radium monitoring and reporting or metals monitoring requirements. Mot. at 3. Pursuant to Section 40(e)(2)(A) of the Act, the Agency concludes the Board does not have jurisdiction to hear the second, third, and fourth issues in the March 2, 2006 Board order. *Id*; citing 415 ILCS 5/40(e)(2)(A).

The Agency argues that even though the motion to dismiss was not filed within 30 days of service of the amended petition as provided in 35 Ill. Adm. Code 101.506, the motion is proper under the section's "material prejudice" exception. Mot. at 3. . The Agency states that forcing the Board to hear issues that are barred by statute would constitute material prejudice, under Section 101.506 of the Board's procedural rules. The Agency further argues that the motion to dismiss is exempt from the Section 101.506 time limit because the motion challenges the Board's authority to issue a final decision on three of the four issues remaining in the proceeding. Mot. at 4; citing People v. Michel Grain Co., Inc., et al., PCB 96-143 (Oct. 2, 2003); citing Ogle County Bd. v. PCB, 272 Ill. App. 3d 184, 196-7, 649 N.E.2d 545, 554 (2d. dist. 1995).

### **DISCUSSION**

On the issue of timeliness of the Agency's motion under Section 101.506, the Board finds that material prejudice to both the Board and parties would result from proceeding to hearing on issues not within the Board's jurisdiction. Further, a challenge to jurisdiction can be made any time prior to a final decision on the merits. Accordingly, the Board considers the motion timely, and will rule on the issues raised.

An administrative agency such as the Board is a "creature of statute," and, therefore, has only the authority given to it by the Act. Granite City Div. of Nat. Steel Co. v. PCB, 155 Ill. 2d 149, 171, 613 N.E.2d 719, 729 (1993). To have standing in an NPDES permit appeal as a third-

party petitioner under Section 40(e)(2) of the Act, Mr. Brazas must show that he raised the issues contained in the petition during the public comment period. 415 ILCS 5/40(e)(2) (2004).

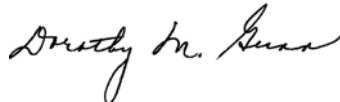
A “demonstration that the petitioner raised the issues contained within the petition during the public notice period” is all that is required to confer standing to a third party under Section 40(e)(2). Mr. Brazas submitted a timely public comment, but the comment raised only one of the four issues contained in his petition. Am. Pet. Exh. 3. The comment did not mention Mr. Brazas’ allegation that a study must be performed to show 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. The letter also does not mention radium monitoring and reporting or metals monitoring requirements. Accordingly, the Board grants the Agency’s motion and dismisses the second, third, and fourth issues.

The Board directs the parties to proceed expeditiously to hearing, currently set for May 15, 2006, on the remaining issue, which is whether the issued permit violates public notice requirements. The Board reminds the parties that Section 40(e)(3) of the Act places the burden of proof on the petitioner. *See* 415 ILCS 5/40(e)(3) (2004). As the petitioner, Mr. Brazas bears the burden of proving that the permit, as issued, would violate the Act or Board regulations.

Hearings “will be based exclusively on the record before the Agency at the time the permit or decision was issued.” 35 Ill. Adm. Code 105.214(a). Currently, the decision deadline is July 6, 2006.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 4, 2006, by a vote of 4-0.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board