

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RIVER RESCUE,)	
)	
Petitioner,)	
)	PCB No. 2008-042
v.)	
)	(Permit Appeal – Third Party)
PEORIA DISPOSAL COMPANY and)	
THE ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondents.)	

MOTION TO DISMISS

NOW COMES the Applicant/Respondent, PEORIA DISPOSAL COMPANY (“PDC”), by its undersigned attorneys, and as and for its Motion to Dismiss this case in its entirety for want of jurisdiction, states as follows:

On November 27, 2007, the Illinois Environmental Protection Agency (the “IEPA”) issued a final Resource Conservation and Recovery Act (“RCRA”) hazardous waste management permit renewal relative to PDC’s landfill in Peoria County, Illinois (the “Permit”). The IEPA reviewed and issued the permit in accordance with the procedures set forth in the Illinois Environmental Protection Act (“Act”) and Part 705 of the Board’s rules. 35 Ill. Adm. Code Part 705. These procedures included a public hearing before the IEPA, held on February 28, 2007, and an extensive public comment period prior to issuance of the subject permit.

While the Board docketed this matter in the name of “River Rescue” as the petitioner, there is no indication of what such entity is, nor is it clear on the face of the letter that any such entity was the intended Petitioner.¹ Instead, the letter is signed by an individual, Mr. Thomas Edwards. Below Mr. Edwards’ signature are the words: Tom Edwards/River Rescue. While the letter uses the pronoun “we” there is no indication that Mr. Edwards filed the letter on behalf of

¹ For convenience, and to eliminate confusion, PDC uses the name River Rescue to refer to the purported petitioner in this matter.

an association named River Rescue. Moreover, there is no indication that Mr. Edwards is a licensed attorney. In accordance with established Illinois and Board case law, only attorneys may represent associations before the Board in adjudicatory proceedings.

As further discussed below, the filing otherwise does not comport with the Act or Board rules. It did not contain a copy of the Appeal. It was not accompanied by the requisite filing fee. It was not served upon PDC or the IEPA.²

Subsequent to the Board's receipt of Mr. Thomas' original letter, and the Board's docketing of the matter and administratively captioning it, the Board received and docketed three additional documents. On January 7, the Clerk's Office docketed a letter which bears a 1/1/08 date and is docketed as "3 Page Addition to 12/31 Request." It is signed by Mr. Edwards, with no reference to River Rescue. The docket entry also indicates that the \$75 filing fee was paid. Also on January 7, the Clerk's Office docketed a second letter from Mr. Edwards. The docketed filing was a letter dated January 4, with the first four pages of the RCRA permit enclosed. The letter, signed by Tom Edwards/River Rescue, reads as follows:

Dear Sir,

Enclosed is a copy of the "revised permit" issued by the Illinois Environmental Protection Agency's permit section manager, Stephen F. Nightingale, to Peoria Disposal Co., dated Nov. 27, 2007.

It is submitted to the IPCB to accompany the appeal of terms and conditions of that permit by this writer, Tom L. Edwards, with the appeal conveyed in two parts by mail postmarked Dec. 31, 2007, and Jan. 1, 2008.

Though we asked for a time extension, too, if that is not permitted we wish to proceed with the enclosed appeal.

Thank you,

² PDC first became aware of this attempted appeal of this RCRA permit when a representative of PDC was reviewing another matter via the Board's online docket system. To date, PDC has not been served. There is also no indication that IEPA is aware of this purported appeal.

Tom L. Edwards/River Rescue

Accompanying that letter is a corrected copy of the filing docketed earlier that day. (The first filing stated that the IEPA had indicated that the permit appeal deadline was January 7, 2008. The corrected filing states that the IEPA actually indicated that the permit deadline was January 1, 2008.)

On January 9, another letter was received by the Board and docketed in this matter. The handwritten letter, unsigned, is from F. Christine Ozuna-Thornton. It states:

“I am appealing the permit being issued to Peoria Disposal Co. for the Hazardous Waste Landfill in Pottstown. It is for 10 years and needs to specify for closing. Please extend one month in this decision because of the holidays. This is potentially too dangerous to rush.”

The letter was administratively docketed as a public comment.

As a creature of statute, the Board has only that authority specifically granted to it by law. See *Landfill, Inc. v. Pollution Control Board*, 74 Ill. 2d 541, 387 N.E.2d 258, 25 Ill. Dec. 602 (1978). Accordingly, it can only hear permit appeals which are timely and properly filed and, unless set forth in law, it has no authority to grant extensions or exceptions to statutory requirements. Moreover, as an administrative agency, the Board is “required to apply their rules as written, without making *ad hoc* exceptions in adjudications of particular cases.” See *Prairie Rivers Network v. Illinois Pollution Control Board*, 335 Ill. App. 3d 391, 269 Ill Dec. 575, (4th Dist., 2002), citing *Panhandle Eastern Pipe Line Co. v. Environmental Protection Agency*, 314 Ill. App. 3d 296, 303, 248 Ill. Dec. 310, 734 N.E. 2d 18, 23-24 (2000).

The filing requirements for third party RCRA permit appeals are set forth in Part 105 of the Board’s procedural rules and are more specifically delineated in Part 705 of the Board’s

rules, which have been promulgated by the Board in a manner identical to the federal RCRA program, as required by the Act to ensure state consistency with that program.

35 Ill. Adm. Code §105.204(c) provides as follows:

Resource Conservation and Recovery Act (RCRA) Permit for a Hazardous Waste Disposal Site. If the Agency grants a RCRA permit for a hazardous waste disposal site, a third party, other than the permit applicant or Agency, may petition the Board for a hearing to contest the issuance of the permit. * * *

The petition must be filed within 35 days of issuance of the relevant permit:

If * * * any third party who is authorized by law to appeal a final decision of the Agency to the Board, wishes to appeal the Agency's final decision to the Board under this Subpart, the person must file a petition for review with the Clerk within 35 days after the date of issuance of the Agency's final decision.

(35 Ill. Adm. Code §105.206(b)).

Thirty-five days from the issuance of the subject permit was January 1, 2008. As this was a holiday, the actual due date for filing was Wednesday, January 2, 2008. See 35 Ill. Adm. 101.300 (a). When documents are filed via mailing through the United States mail, as here, Section 101.300 (b) (2) of the Board's rules (the "mailbox rule") applies:

If a document is filed by U.S. Mail subsequent to a filing deadline, yet the *postmark date precedes the filing deadline*, the document will be deemed filed on the postmark date, *provided all filing requirements are met as set forth in Section 101.302 of this Part*. Emphasis added.

Here, as indicated by the Board's own January 4 docketing entry, the postmark date was illegible. While Mr. Thomas' letter bears a date of December 31, 2007, he has enclosed no Affidavit or other proof that such letter was actually mailed on that date. Importantly, there was no Affidavit of Service of this document on PDC (the permit applicant) or on the IEPA (the permitting entity), as required by Section 101.302 (f) and Section 101.304. Section 101.304 (b) states that service is the responsibility and duty of the Petitioner:

- b) Duty to Serve. Parties in Board adjudicatory proceedings are responsible for service of all documents they file with the Clerk's Office. Proof of service of initial filings must be filed with the Board upon completion of service.

Section 101.304 (d) further provides, in a user friendly manner:

- d) Affidavit or Certificate of Service. A proceeding is subject to dismissal, and parties are subject to sanctions in accordance with Section 101.800 of this Part, if service is not timely made. Proof of proper service is the responsibility of the party filing and serving the document. *An affidavit of service or certificate of service must accompany all filings of all parties.* A sample form of the affidavit of service and certificate of service is available at the Board's Offices (the locations of the Board's Offices are listed at 2 Ill. Adm. Code 2175.115) and may be obtained electronically at the Board's Web site. Emphasis added.

To date, River Rescue has not served PDC with these filings. For that reason alone, this matter should be dismissed.

River Rescue has otherwise failed to comport with the filing requirements set forth in Section 101.302. Thus, by the very language of the Board's own mailbox rule ("...provided all filing requirements are met as set forth in Section 101.302 of this Part."), River Rescue is not in a position to avail itself of such rule. First, the filing did not include the appropriate \$75 filing fee as required by Section 101.302 (e) (3):

- e) *The following initial filings require filing fees and will only be considered filed when accompanied by the appropriate fee, which may be paid in the form of government voucher, money order, or check made payable to the Illinois Pollution Control Board, but which may not be paid in cash:*

* * *

- 3) Petition for Review of Agency Permit Decision, UST Decision, or any other appeal filed pursuant to Section 40 of the Act, \$75;

Section 35 Ill. Adm. Code 101.302 (e)(3) Emphasis added.

Second, the filing was not properly captioned, causing the Board to create the caption, which obviously necessitated deciphering the intended petitioning entity, as well as formalizing for petitioner the appropriate respondents. Section 101.302 (g) requires that:

- g) All documents filed with the Board should contain the relevant proceeding caption and number and must be submitted on 8 1/2 x 11 inch recycled paper as defined in Subpart B of this Part, and double sided if feasible.

Also, there is no indication that the filing was on recycled paper, nor is there any indication that River Rescue filed the appropriate number of copies as required in Section 101.302 (h).

Section 101.302 (a) also incorporates all filing requirements of specific proceedings, here a RCRA permit appeal. Thus, in order to comply with Section 101.302 (a), River Rescue also must comply with the Board's permit appeal rules, found in 35 Ill. Adm. Code Part 105 and the more specific rules for filing RCRA permit appeals found at 35 Ill. Adm. Code 705.212. River Rescue failed to comply with these rules.

Section 705.212(a) provides that "[w]ithin 35 days after a RCRA or UIC final permit decision notification has been issued under Section 705.201..." a petition for review of the permit decision may be filed by "[a]ny person who filed comments on the draft permit or who participated in the public hearing on the draft permit." 35 Ill. Adm. Code §705.212(a). There is no indication that River Rescue filed comments or participated in the public hearing.

Also, pursuant to 705.212(c) "[a] petition for review must include a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required in this Part; in all other respects, the petition must comport with the requirements for permit appeals generally, as set forth in 35 Ill. Adm. Code 105." The docketed petition here does not include such demonstration, nor does it otherwise comport with the general permit appeal filing requirements

found at Section 105 of the Board rules. Relevant here, and not observed by River Rescue, are the following requirements:

Section 105.210 Petition Content Requirements

- a) The Agency's final decision or issued permit;
- b) A statement specifying the date of issuance or service of the Agency's final decision or issued permit, as applicable pursuant to Section 105.206 of this Subpart;
- c) A statement specifying the grounds of appeal

The failure to file a proper petition for review of an IEPA permit decision within 35 days of its issuance is jurisdictional:

[The petitioner] argues that the requirement that an appeal be filed within a set time (either 35 days after the Agency's decision or 125 days after the Agency's decision if there is a 90-day extension) is not jurisdictional. That is simply incorrect. The Board has consistently held that the Board cannot and does not accept petitions for review filed outside the statutory time deadline. *Dewey's Service v. IEPA*, PCB 99-107 (Feb. 4, 1999); *Indian Refining v. IEPA*, PCB 91-110 (July 25, 1991); *DuPage Enterprises, Inc. v. IEPA*, PCB 93-143 (Aug. 5, 1993); *Standard Bank & Trust Company and Derk Ball Sr. v. IEPA*, PCB 00-174 (May 4, 2000). This determination by the Board is well grounded in case law as pointed out by the Agency. Furthermore, in *Panhandle Eastern Pipeline v. IEPA and PCB*, 314 Ill. App. 3d 296; 734 N.E.2d 18 (4th Dist. 2000), the court agreed with [the petitioner's] premise that the language of Section 40(a)(1) of the Act (415 ILCS 5/40(a)(1) (2002)) is permissive. However, the court continues on and states: "The corollary rule, of course, is that such challenges may not be filed beyond the limitation periods contained in the statutes." *Panhandle*, 314 Ill. App. 3d at 304; 734 N.E.2d at 24.

Illinois Ayers Oil Co. v. Illinois Environmental Protection Agency, 2005 WL 697369, *5, PCB 05-48 (Illinois Pollution Control Board, March 17, 2005).

Illinois courts have clearly declared that the 35 day filing requirement is jurisdictional, and have compared it to the 35 day filing requirement for administrative review of Board

decisions pursuant to Section 41(a) of the Act. 415 ILCS 5/41(a). See *Panhandle Eastern Pipeline v. IEPA and PCB*, 314 Ill. App. 3d 296; 734 N.E.2d 18 (4th Dist. 2000).

As the Board has correctly recognized:

The Board cannot expand its authority beyond that which the legislature expressly granted to it. See *Landfill, Inc. v. Pollution Control Board*, 74 Ill. 2d 541, 557-58 (1978). According to the long-standing principal of administrative review law, the 35-day filing period for a petition for review is jurisdictional, and the failure to file a timely petition deprives the Board of subject matter jurisdiction. See e.g. *Siciliano v. Illinois Racing Board*, 264 Ill. App. 3d 1085, 637 N.E.3d 612 (1st Dist. 1994).

See *Illinois Environmental Protection Agency v. Jack Busby*, 2000 WL 1860141, *1, AC-01-6 (Illinois Pollution Control Board, December 7, 2000).

It is black-letter law that once a limitations period has expired, a respondent has a right to assert the limitations period as a bar to future actions: “More than a hundred years ago, our court held that once a statute of limitations has expired, the defendant has a vested right to invoke the bar of the limitations period as a defense to a cause of action. That right cannot be taken away by the legislature without offending the due process protections of our state's constitution. *Board of Education of Normal School District v. Blodgett*, 155 Ill. 441, 445-50, 40 N.E. 1025 (1895).” *M.E.H. v. L.H.*, 177 Ill.2d 207, 214-15, 685 N.E.2d 335, 339, 226 Ill.Dec. 232, 236 (1997). Simply, the Board has no jurisdiction to hear this appeal.

Moreover, the Board does not have the power to imply any exemption from the 35-day filing period or other filing requirements for River Rescue in this case. Nor does it possess authority to allow for an extension of this filing period where the statute does not specifically provide for such. See *Landfill, Inc.* and *Prairie Rivers*. Thus, any claim on River Rescue's part that the purported filing properly seeks an extension of the permit filing requirement, and should not to be considered the actual filing, is misplaced. On that point as well the law is clear. Extensions of

the time for filing a permit appeal are limited. The Board can only grant such extension where it has the authority to do so. Here, there is no such authority.

Regarding permit appeals filed by a permit applicant, the Act was amended in 1994 to allow for an extension of the 35 day filing period, for an additional 90 days, upon agreement by the IEPA and the Applicant to do so. 415 ILCS 5/40 (a). As the Board knows, an entire procedure is in place pursuant to this provision, in order to ensure that any extension of the 35 day filing requirement comports with this statutory language. The sole reference in the Act to an extension related to a third party appeal of a RCRA permit appeal is that found in Section 40(c) of the Act: "If another person with standing to appeal wishes to obtain an extension, there must be a written notice provided to the Board by that person, the Agency, and the applicant, within the initial appeal period." See also 35 Ill. Adm. Code 105.208 (b) and (d). The statutory circumstances required to grant River Rescue the extension it purportedly seeks are not present here. Thus, the Board has no jurisdiction to entertain River Rescue's purported appeal or request for extension of time to file such appeal.

Accordingly, for all of the reasons presented above, PDC respectfully requests that the Board dismiss this matter forthwith.

Respectfully submitted,
PEORIA DISPOSAL COMPANY,
Respondent

Dated: January 23, 2008

By: /Claire A. Manning
One of its attorneys

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NOTICE OF FILING AND PROOF OF SERVICE

The undersigned certifies that the Motion to Dismiss of Respondent Peoria Disposal Company was filed with the Clerk of the Illinois Pollution Control Board electronically, and was served on the Petitioner and on Respondent The Illinois Environmental Protection Agency by sending same as set forth below, from Springfield, Illinois, before 5:00 p.m. on the 23rd day of January, 2008:

Mr. Tom Edwards
River Rescue
902 W. Moss Avenue
Peoria, Illinois 61606
(Via U.S. Mail, First Class Postage Prepaid)

Mr. Alec Messina, General Counsel
Illinois Environmental Protection Agency
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P.O. Box 19276
Springfield, Illinois 61794-9276
(Via U.S. Mail, First Class Postage Prepaid)

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