

ILLINOIS POLLUTION CONTROL BOARD

February 21, 2008

TOM EDWARDS/RIVER RESCUE,)	
)	
Petitioner,)	
)	
v.)	PCB 08-42
)	(Third-Party Permit Appeal-RCRA)
PEORIA DISPOSAL COMPANY and)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondents.)	

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

This matter comes before the Board on three letters filed *pro se* by Mr. Tom Edwards and received by the Board on January 4 and 7, 2008. Mr. Edwards seeks either an extension of time to file a third-party appeal of a permit implementing the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§6901 *et seq.*, or to proceed with an appeal based on his filings. On January 23, 2008, the permit holder, Peoria Disposal Co. (PDC), filed a motion to dismiss this docket (PDC Mot.), alleging that the Board lacks jurisdiction over the matter. Neither Mr. Edwards nor the permit issuer, the Illinois Environmental Protection Agency (Agency), has filed a response in opposition to PDC's motion.

On February 6, 2008, the Agency filed its own combined motion to contest jurisdiction and dismiss (Ag. Mot.).¹ Neither Mr. Edwards nor PDC has filed a response in opposition to the Agency's motion.

For the reasons stated below, the Board today denies the motions to dismiss. The Board construes Mr. Edwards' filings as a timely, but incomplete, third-party petition for permit review. The Board directs Mr. Edwards to file and serve upon the other parties an amended petition to be *received* no later than March 3, 2008 to allow the Board to again consider this matter at its March 6, 2008 meeting. Any amended petition must remedy the deficiencies outlined in this order, and comply with all requirements for filing a permit appeal as set out in the Environmental Protection Act (Act), 415 ILCS 5/1 *et seq.*, (2006), the Board's procedural rules at 35 Ill. Adm. Code 101, and the Board's RCRA rules at 35 Ill. Adm. Code 705.

¹ The motions of both PDC and the Agency were accompanied by respective counsel's special and limited appearance for the purpose of contesting jurisdiction as allowed under 35 Ill. Adm. Code 101.400(a)(5).

PROCEDURAL HISTORY

Mr. Edwards' Filings

On January 4, 2008, the Board received a three-page request (Req.) for a one-month extension of time in which to appeal a November 27, 2007 renewal of a permit issued by the Agency “for the continued operation of PDC’s hazardous waste landfill at Peoria with no terminal date.” Req. at 1. The initial request page was followed by two pages characterized as “an ‘overview’ of objections and history, which will be followed with detailed objections and suggestions.” *Id.* The letter was dated December 31, 2007 and signed by “Tom Edwards/River Rescue.”² The filing did not include a copy of the permit, proof of service on any person, or a filing fee. The postmark on the filing’s envelope was illegible.

On January 7, 2008, the Board received two separate filings from Mr. Edwards. The first filing, dated January 1, 2008, was three pages characterized by Mr. Edwards as an “Addition [Add.] to my Dec.31 request for time extension to appeal IEPA permit to PDC.” Add. at 1 (emphasis in original). Mr. Edwards stated in the filing’s first paragraph that:

I have to get the essence of my appeal (below) of the IEPA permit to PDC in the mail to meet the Jan. 1 appeal deadline date. Tomorrow I will send in more background material -- and a copy of the bulky 197-page EPA decision. *Id.*

This filing, postmarked January 1, 2008, was accompanied by a \$75.00 check. The filing did not include a copy of the permit, or proof of service on any person

On January 7, 2008, the Board also received from Mr. Edwards a letter characterized by Mr. Edwards as an appeal (App.) dated January 4, 2008 and postmarked January 5, 2008. This letter stated in its entirety that:

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. App. at 1 (emphasis in original).

The document was signed “Tom Edwards/River Rescue.” *Id.* The filing did include a copy of the permit, but did not include proof of service on any person.

² The Board’s Clerk had originally docketed the parties in this matter as “River Rescue v. IEPA and Peoria Disposal Company”. The caption has since been changed to reflect the typewritten signature on Mr. Edwards’ filings. *See* PDC Mot. at 1 and Ag. Mot. at paras. 20-24.

PDC's Dismissal Motion

On January 23, 2008, PDC filed a motion urging the Board to dismiss the case in its entirety, due to want of jurisdiction. PDC begins by reminding that, as a creature of statute, the Board has only that authority specifically granted to it by law. *See Landfill, Inc. v. PCB*, 74 Ill. 2d 541, 387 N.E.2d 258 (1978). PDC therefore asserts that the Board 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. PDC observes that administrative agencies, such as the Board, are “required to apply their rules as written, without making ad hoc exceptions in adjudications of particular cases.” *See Prairie Rivers Network v. PCB*, 335 Ill. App. 3d 391, 269 Ill. Dec. 575 (4th Dist. 2002), citing *Panhandle Eastern Pipe Line Co. v. IEPA*, 314 Ill. App. 3d 296, 303, 248 Ill. Dec. 310, 734 N.E.2d 18, 23-24 (2000).

Concerning the specifics of this case, PDC first argues that Mr. Edwards has failed to meet the filing requirements for third-party RCRA permit appeals as set forth in the Board's procedural rules at 35 Ill. Adm. Code 105 and the Board's RCRA rules at 35 Ill. Adm. Code Part 705. PDC asserts that Mr. Edwards has failed to prove that his piecemeal “appeal” was timely filed within 35 days of the permit's November 27, 2007 issuance. Noting that the due date for the appeal, January 1, 2008, was a State holiday, PDC argues that a complete appeal was due to be filed no later than January 2, 2008.

PDC asserts that, even under the Board's “mailbox rule” codified at 35 Ill. Adm. Code 101.300(b)(2), Mr. Edwards filing was untimely because it was incomplete. The mailbox rule, provides in pertinent part that

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. 35 Ill. Adm. Code 101.300(b)(2).

PDC alleges several deficiencies in Mr. Edwards' filings, citing among other things Mr. Edwards' failure to properly caption the initial filing and enclose the required filing fee. PDC Mot. at 7-8, and cases cited therein. PDC contends that Mr. Edwards' failure to serve either PDC or the Agency alone warrants dismissal of the case. PDC Mot. at 4, citing requirements of 35 Ill. Adm. Code 101.302(f) and 101.304. PDC also argues that Mr. Edwards' filings fail to demonstrate that he has standing to appeal based on having filed public comments on the draft permit or participation in any Agency public hearing, as required by 35 Ill. Adm. Code 705.212(a). PDC Mot. at 6.

Lastly, PDC argues that the Board should not grant any extension of the 35-day appeal period. PDC observes that Section 40(c) of the Act dictates that any request for extension of time to file this permit can be granted by the Board only if, within 35 days, “written notice is provided to the Board by that person [seeking the extension], the Agency, and the [permit applicant]”. 415 ILCS 5/40(c)(2006); *see also* 35 Ill. Adm. Code 105.208(b) and (d). Here, such written notice was not provided by the Agency or PDC.

Agency's Combined Motion

The Agency, in its combined motion, first argues that the Board lacks personal jurisdiction over the Agency, due to Mr. Edwards' failure to serve the Agency with his filings. Ag. Mot. at 1-2. Next, the Agency argues that the case should be "dismissed on the pleadings", contending that Mr. Edwards failed to meet requirements of the Act and Board procedural rules for the filing either of a timely appeal or request for extension of time to appeal. Ag. Mot. at 2-3. Finally, the Agency suggests that the matter should be dismissed due to Mr. Edward's inability to represent "River Rescue", as it appears he is attempting to do, since he is not a licensed Illinois attorney. Ag. Mot. at 3-4, citing 35 Ill. Adm. Code 101400(a)(2); 705 ILCS 205/1 (2006).

No Responses Filed to Either Motion

Neither the Agency nor Mr. Edwards has filed any response to PDC's motion, and neither PDC nor Mr. Edwards has filed any response to the Agency's motion.³ Under Section 101.500(d) of the Board's procedural rules, a party may file a response to a motion within 14 days of service. But, the rule goes on to state that "[i]f no response is received, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board in its disposition of the motion." 35 Ill. Adm. Code 101.500(d). Accordingly, both the Agency and Mr. Edwards are deemed to have waived objection to the granting of the PDC motion, and PDC and Mr. Edwards are deemed to have waived objection to the granting of the Agency motion.

BOARD DISCUSSION

The permit at issue here, as submitted by Mr. Edwards on January 7, 2008, bears on its face an issue date of November 27, 2007. The Agency states, in the first paragraph of the permit that:

A Part B permit is hereby granted pursuant to the Resource Conservation and Recovery Act, Illinois Environmental Protection Act, and Title 35 Ill. Adm. Code Parts 702, 703, 705, and 720 through 729 to the Peoria Disposal Company facility to construct/maintain and operate a waste management facility involved in the treatment, storage and disposal of hazardous waste and specified non-hazardous waste. Peoria Disposal Company is located at

³ The Board notes that on February 7, 2008, the Board received from Mr. Edwards a copy of a letter he sent to various individuals at the Agency. This letter, which does not appear to be identical to any of the documents filed directly with the Board, has been docketed as PC 2. But, in the parenthetical opening paragraph of PC 2, Mr. Edwards states that he:

mistakenly directed my request only to the IPCB rather than also to the IEPA. However, its original points are repeated herein. PC 2 at 1.

Some pages in PC 2 appear to be substantially similar to those in Mr. Edwards' letter to the Board dated January 1, 2008. *Compare* PC 2 at 2-3 with Add. at 1-3.

4349 Southport Road, Peoria, Illinois. App., permit at 1.

The Board calculates, as do the parties, that any appeal of the November 27, 2007 PDC permit was due to be filed or postmarked no later than January 2, 2008, as was any timely extension request.

Appeal Deadline Extension Request Dated December 31, 2007

As the postmark on Mr. Edwards' initial filing (the extension request) was illegible, the Board will make no holdings as to the timeliness of its filing. But, the Board will assume, for the sake of argument, that this first filing, was postmarked on December 31, the same day it was dated. Notwithstanding, the Board agrees, as the parties have argued, that the Board cannot grant this extension request.

Any extension of the 35-day appeal period must be made as set out in Section 40 of the Act. Mr. Edwards' first two filings do not make clear under what Section of the Act the permit was issued, or under what Section an appeal was or would be filed. Thus, the Board cannot determine whether any filing extension would even be available for appeal of the permit at issue here. But Section 40 clearly provides that *any* Board appeal extension must be preceded by written notice of the extension filed by the permit applicant and the Agency filed during the 35-day appeal period. *See* 415 ILCS 5/40(a)(1), 40(c) (2006). Any agreement to an extension of the appeal period was due to be filed with the Board or postmarked on or before January 2, 2008, and none was filed here. Accordingly, the Board cannot grant Mr. Edwards' appeal period extension request dated December 31, 2007 (even as supplemented by the addition dated January 1, 2008), because the Board has not received from PDC and the Agency the written notice of agreement to Mr. Edwards' request as required by 415 ILCS 5/40(c) and 35 Ill. Adm. Code 105.208(b). Without the agreement of the permit applicant and the permit issuer, the Board cannot extend the 35-day statutory filing deadline.

"Addition" Letter Dated and Postmarked January 1, 2008

PDC and the Agency are correct that any petition for permit review filed under Section 40 of the Act must satisfy the requirements of the Board's procedural rules for service and filing under Part 101.Subpart C as well as the content requirements of Section 105.210. Among other things, the petition must specify the grounds for appeal and include a copy of the issued permit. Additionally, as the permit stated that it was issued under, among other authorities, 35 Ill. Adm. Code 705, the petition for review must meet the requirements of Section 705.202. These include, among other things, a demonstration that the person filing the petition has standing to challenge the issues being raised based on the person's having previously raised those issues by filing public comments on the draft permit or participating in any Agency public hearing. 35 Ill. Adm. Code 705.212(a).

The Board finds that Mr. Edward's filing, dated and postmarked January 1, 2008, is a timely-filed petition for review under the Board's mailbox rule at 35 Ill. Adm. Code 101.300(b)(2). The January 1, 2008 filing clearly indicated Mr. Edward's awareness of the appeal deadline, specified the "essence of the appeal" (Add. at 1), stated that a copy of the permit

at issue was forthcoming, and contained the statutory \$75 filing fee as specified at 415 ILCS 5/7.5 (2006). The copy of the permit, with its accompanying January 4, 2008 cover letter, arrived in the January 7, 2008 mail along with the filing dated January 1, 2008.

The Board agrees with PDC and the Agency that the petition is clearly deficient. Although the required copy of the permit has been filed, the petition fails to: specify the Section of the Act under which the appeal is brought, address the requirements of 35 Ill. Adm. Code 705.212(a), and to make clear whether Mr. Edwards is appearing on his own behalf or on behalf of an organization. *See* 35 Ill. Adm. Code 101.400(a) specifying when a person can appear himself or must appear through an attorney at law. And last, but by no means least, the petition fails to include the proof of service required by Section 101.304. But, the Board will not dismiss this action on the basis of these deficiencies, and denies both the PDC and Agency motions in their entirety.

Historically, the Board has liberally allowed the amendment of deficient petitions for review; the practice has continued since the updating of the Board's procedural rules effective January 1, 2001. *See* Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20 (December 21, 2000). The practice has been applied across the board, and equally to all to petitions for review of all case types. *See, e.g.* County of Macon v. Tim Walker, AC 07-21 (Dec. 7, 2006) (administrative citation); Interstate Oil, Inc. v. IEPA, PCB 08-38 (Jan. 10, 2008) (permit appeal); Estate of William Eggert v. IEPA (Early Action Reimbursement Application of April 20, 2007), PCB 08-35 (Dec. 6, 2007) (underground storage tank decision appeal); Janis Rosauer, and Batavia, Illinois Residents Opposed to Siting of Waste Transfer Station v. City of Batavia, Illinois and Onyx Waste Services Midwest, Inc., PCB 05-1 (July 22, 2004) (siting appeal).

Amended Petition To Be Received by March 3, 2008

The Board orders Mr. Edwards to file and properly serve an amended petition in accordance with this order and the Board's procedural rules. This amended petition must be *received* by the Board no later than March 3, 2008, or this matter will be subject to dismissal. *See* 35 Ill. Adm. Code 105.108. The March 3, 2008 date is chosen to allow the Board to consider whether the amended petition can be accepted for hearing at its March 6, 2008 meeting, so the mailbox rule will not apply to any filing required by this order.

The 120-day statutory period for the Board to render a final decision will commence upon the filing of the amended petition. *See* 35 Ill. Adm. Code 105.114(b). The Agency record must be filed within 30 days after Mr. Edwards files the amended petition. *See* 35 Ill. Adm. Code 105.116, 105.212. Only PDC, the permit holder, can waive the decision deadline in any appeal under Section 40.

Again, Mr. Edwards is directed to file an amended petition curing noted deficiencies to be *received* by the Board no later than March 3, 2008, or this matter will be subject to dismissal.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 21, 2008, by a vote of 4-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal stroke at the end.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board