ILLINOIS POLLUTION CONTROL BOARD
July 10, 2008

PEOPLE OF WILLIAMSON COUNTY *Ex REL.* STATE'S ATTORNEY CHARLES GARNATI AND THE WILLIAMSON COUNTY BOARD,	)	
Petitioners,	)	
v.	)	PCB 08-93
	)	(Permit Appeal-Land)
KIBLER DEVELOPMENT CORPORATION, MARION RIDGE LANDFILL, INC. and ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondents.	)	

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

This matter comes before the Board on a May 29, 2008 petition for review (Pet.) filed by the People of Williamson County *ex rel.* State's Attorney Charles Garnati and the Williamson County Board (collectively, Williamson County or petitioners). Williamson County seeks to appeal the May 15, 2008 modification of a permit for an existing municipal waste and non-hazardous special waste landfill for the Marion Ridge Landfill. The permit modification was issued by the Illinois Environmental Protection Agency (Agency) to the landfill's owner, Kibler Development Corporation (Kibler), and operator, Marion Ridge Landfill, Inc. (Landfill). Under the permit modification, the Landfill is authorized to dispose of municipal solid waste (MSW) and non-hazardous special waste

Today's opinion and order first considers the motions to dismiss filed by the Agency on June 23, 2008 and Kibler and the Landfill jointly on June 26, 2008. Having considered the petition, the motions to dismiss, and the petitioners' July 7, 2008 joint response in opposition, the Board grants the motions to dismiss. The Board finds that petitioners lack standing to bring this action, and that the Board therefore has no jurisdiction under Section 40 of the Environmental Protection Act (Act), 415 ILCS 5/40 (2006), to hear this purported third-party appeal of the grant of a permit to a non-hazardous special waste landfill or a municipal solid waste landfill (MSWLF). The Board denies as moot the Agency's June 26, 2008 motion to stay this proceeding and Kibler's and the Landfill's July 7, 2008 motion to extend the time for response to discovery requests, noting that petitioners opposed both motions. The hearing scheduled by the Board for July 28, 2008 is cancelled.

BACKGROUND

Permit Being Challenged

The original permit issued to Kibler and the Landfill[1], known by the Agency as Permit No. 2000-199-LF, approved:

> B. The development of a new MSWLF unit consisting of an approximately 358 acre facility with 189 acres for disposal with an "in-place" disposal capacity of approximately 37,152,000 cubic yards, including daily and intermediate cover, but excluding final cover. The maximum final elevation shall be approximately 640 feet above mean sea level [and the l owner and waste boundaries, waste footprint, and final contours are as shown on specified drawings, and]
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> D. Acceptance of special waste streams without individual special waste stream authorizations, upon individual waste stream authorizations, upon obtaining a permit allowing waste disposal, in accordance with the special conditions listed in Part III of this permit. Pet. Exh. A, Permit at 1-2.

The April 25, 2008 permit modification that is the subject of this appeal recites that it approves revisions to the permit's special conditions to "settle two permit appeals" pending before the Board.[2] *Id*. at 2. The modification also states that the Agency made modifications in

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[1] Williamson County's grant of site location suitability approval for this Landfill under Section 39.2 of the Act, 415 ILCS 5/39.2 (2006), was the subject of three third-party appeals to this Board: *See* Concerned Citizens of Williamson County and Rev. Paul Crain and Rose Rowell, as members of Concerned Citizens of Williamson County, *et al*. v. Bill Kibler Development Corp. a/k/a Kibler Development Corp. and the Williamson County Board of Commissioners, PCB 96-60 (Feb. 15, 2006) (siting affirmed); Concerned Citizens of Williamson County, Rev. Paul Crain and Rose Rowell v. Bill Kibler Development Corp. a/k/a Kibler Development Corp. and Williamson County Board of Commissioners, PCB 94-262 (Jan. 19, 1995 and Mar. 16, 1995) (reversed and remanded for cure of procedural fundamental unfairness); and Concerned Citizens of Williamson County and R. S. Blakely and Max Strucker, as members of the Concerned Citizens of Williamson County v. Bill Kibler Development Corp. a/k/a Kibler Development Corp. and the Williamson County Board of Commissioners, PCB 92-204 (May 20, 1993) (siting vacated due to County lack of jurisdiction caused by defective newspaper notice).

[2] Kibler and the Landfill filed the two pending appeals to challenge various conditions contained in permit modifications they had requested. *See* Kibler Development Corp. and Marion Ridge Landfill, Inc. v. IEPA, PCB 97-043 (filed Nov. 20, 2006) and Kibler Development Corp. and Marion Ridge Landfill, Inc. v. IEPA, PCB 05-35 (filed Aug. 25, 2004). By filing of June 4, 2008 in each of these cases, Kibler and the Landfill noted the pendency of the third-party appeal by Williamson County in PCB 08-93, and stated that they could not dismiss their permit appeals during the pendency of PCB 08-93.

response to the Board's adoption of revisions in its landfill rules.[3] The modification includes a table listing the ten approved revisions from the original permit. The approved modifications include revised standards for geomembrane testing, and new conditions requiring the approval of the Federal Aviation Administration (FAA) before acceptance of MSW[4].

Contents of Petition for Review

In the petition, Williamson County cites as the jurisdictional basis for this appeal Section 5/3-9005(a)(1) of the Illinois Counties Code, 55 ILCS 5/3-9005(a)(1) and Section 105.204(f) of the Board's rules codified at 35 Ill. Adm. Code 105.204(f). Pet. at 1. The County also asserts that it has standing to appeal under precedent including City of Waukegan, *et al*. v. IEPA *et al.*, PCB 02-173 (May 2, 2002), citing Landfill, Inc. v. PCB, 74 Ill.2d 541, 387 N.E.2d 258 (1978). *Id*. at 2.

Williamson County alleges that the permit modification, among other things, changes the type of waste allowed to be accepted at the landfill to non-putrescible waste, unless the FAA approves otherwise, with the result that:

> Illinois EPA has modified the permit to allow a landfill that was not sited by Williamson County. Thus, it is in the public interest of Williamson County to seek the review of the subject permit approval with conditions, to, among other things, ensure that the siting decision of the County is honored by Illinois EPA and that a facility which was not the subject of the public site location hearing is permitted by Illinois EPA in derogation of the County Board's decision making authority and due process, and of the public's interest to participate in such a proceeding. Pet. at 3.

Among other things, the petition additionally alleges that:

- Williamson County never received a proper notification of the application to modify the permit;
- the permit improperly allows development of the facility over a public roadway, changing traffic patterns;
- the permit's conditions unlawfully extend and change landfill boundaries;
- the Agency should have determined siting approval was needed for the modification; and
- the Agency has no authority to issue a development permit for a facility "other than what received site location approval." Pet. at 4-5.

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[3] *See* Amendments to Solid Waste Landfill Rules, 35 Ill. Adm. Code 810 and 811, R07-8 (Nov. 15, 2007).

[4] *See* 49 U.S.C. § 44718(d)(1) prohibiting construction of MSWLF to receive putrescible waste within six miles of a public airport without FAA exemption. The permit recites that the Landfill boundaries and the runways of the Williamson County Regional Airport appear to be separated by 2.2 miles at their closest points. Pet. Exh. A, Permit at 2-3.

In their relief request, petitioners request the Board to enter:

> an order allowing this Petition and reversing Illinois EPA's approval with conditions of the subject permit modification and denying that permit modification. If this Board finds that the Petitioners herein do not have standing based on the precedent referenced in Paragraph 4, above, the Petitioners respectfully request that the Board clearly and specifically acknowledge the jurisdictional ground of standing being the sole reason for the denial, as was done, for example, in City of Waukegan, *et al.* v. IEPA, *et al.*, PCB 02-173 (May 2, 2002), and allowing for the future enforcement or other action by the State's Attorney or County Board. Pet. at 5.

Procedural History

Under the Board's procedural rules, motions to strike or dismiss pleadings must be filed within 30 days after service of the document. 35 Ill. Adm. Code 101.506. The Board accordingly took no action on the May 29, 2008 petition at its meetings of June 5 and 19. The Board did, however, assign a hearing officer for the purpose of handling any case management issues.

On June 23, 2008, the Agency's attorney filed a limited appearance[5], and a motion challenging the Board's jurisdiction of this matter, asserting that the Board's authority to hear third-party permit appeals is limited to circumstances where such appeals are specifically authorized by the legislature. Landfill, Inc. v. PCB, 387 N.E.2d 258 (1978). On June 25, 2008, Kibler and the Landfill filed a joint motion to strike and dismiss the petition, similarly alleging that petitioners lack standing to bring the matter and that the Board lacks jurisdiction to hear a challenge to the grant of this permit.

After consultation with the parties, the hearing officer issued an order June 25, 2008. People of Williamson County *ex rel.* State's Attorney Charles Garnati and the Williamson County Board v. Kibler Development Corporation, Marion Ridge Landfill, Inc., and IEPA, PCB 08-93 (hearing officer order June 25, 2008). As to the pending motions to dismiss, the hearing officer's order of June 25, 2008, required petitioners to file any responses[6] in opposition to the

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[5] Section 101.400(a)(5) of the Board's procedural rules provides that:

> Any person appearing before the Board may appear in a special limited capacity to contest jurisdiction. 35 Ill. Adm. Code 101.400 (a)(5).

[6] The Board's procedural rules provide that responses are typically due within 14 days after service of a motion, and that:

> Unless undue delay or material prejudice would result, neither the Board nor the hearing officer will grant any motion before expiration of the 14 day response period except in deadline driven proceedings where no waiver has been filed. 35 Ill. Adm. Code 101.500(d).

motions to dismiss on July 7, 2008, to allow the Board to consider the issue at its July 10, 2008 meeting. *Id*. at 1.

But, assuming *arguendo* that the Board would accept the case for hearing and assuming that a 120-day decision deadline applied [7], the hearing officer set a hearing date of June 28, noting that no decision-deadline waiver was expected from Kibler and the Landfill. Discovery requests were to be served by June 25, 2008, and responses by July 9, 2008. Depositions were to be conducted during the week of July 14, 2008. Due dates for simultaneous post-hearing briefs were set as August 11, 2008 for opening briefs and August 18, 2008 for responses. *Id.* The order also set a status conference for July 1, 2008.

On June 26, 2008, the Agency filed a motion to stay (Ag. Stay Mot.) the case in its entirety, or in the alternative to stay the Agency's response to discovery (due June 26, 2008) and the filing of the Agency's administrative record (due June 28, 2008 under 35 Ill. Adm. Code 105.116). The Agency stated as the basis for its motion that:

> After the filing of a limited appearance, a person is confined to contesting only issues relating to jurisdiction or procedural matters such as standing. That persons' participation in other aspects of the trial would destroy the limitation of his appearance and may waive the jurisdictional objection. *See, e.g.*, J.C. Penney Co. Inc. v. West (1983), 114 Ill. App. 3d 644, 70 Ill. Dec. 314, 449 N.E.2d 188. Falstad v. Falstad (1987) 152 Ill. App. 3d 648. A finding that jurisdiction exists is a necessity for a matter to be docketed and heard and such a challenge is appropriate at any time during the proceeding. Further, dealing with issues of jurisdiction directly following the filing of a matter fosters judicial and economic economy. Ag. Stay Mot. at 2.

The Agency also argued that it would incur significant costs litigating this action and would thus be prejudiced by proceeding with discovery and the filing of the administrative record prior to Board ruling on the motions to dismiss and acceptance of the case for hearing. *Id*. The motion was directed to both the hearing officer and the Board.

No responses to the Agency's stay motion had been filed prior to the scheduled July 1, 2008 telephone status conference between the parties and the hearing officer. The hearing

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[7] Third-party permit appeals are managed as required by Section 40 of the Act, 415 ILCS 5/40 (2006), and the Board's procedural rules at 35 Ill. Adm. Code 105. The Board may dismiss petitions for various reasons, including that the petitioner lacks standing. *See* 35 Ill. Adm. Code 105.108(d). Based on the May 29, 2008 petition filing date, a decision deadline of September 26, 2008 applies, requiring Board decision at its September 18, 2008 meeting. The Board has consistently held that the ability to waive or extend the deadline under 35 Ill. Adm. Code 101.308(c) rests with the permitee rather than the third-party petitioner. *See, e.g.*, Tom Edwards v. IEPA and Peoria Disposal Co., PCB 08-42, slip op. at 5 (Mar. 6, 2008) (accepting for hearing third-party petition for review of renewal permit for hazardous waste landfill).

officer reminded the parties that she had no authority to stay a deadline-driven proceeding, absent a decision-deadline waiver.

On July 7, 2008, Kibler and the Landfill filed a response to the motion for stay (Kibler Stay Resp.). These respondents took no position on the motion, but "restated their intention not to agree to any waiver of the decision deadline". Kibler Stay Resp. at 1. However, these respondents filed a motion for extension (Kibler Ext. Mot.) of time for the filing of discovery responses from July 9 to July 11, 2008, after any July 10, 2008 Board ruling on the motions to dismiss. The motion asserts that the slight delay will cause no prejudice. Kibler Ext. Mot. at 1-2.

On July 7, 2008, Williamson County electronically filed a joint response in opposition to the motions to dismiss (County Joint Resp. Mot. Dis.). In summary, the petitioners contend that they participated in the permit process and have standing to bring this appeal.

Williamson County also filed a joint response in opposition to the motions to stay and extend the discovery response deadline (County Joint Resp. Mot. Stay and Ext.). Williamson County contends that even a short stay or delay in discovery responses will prejudice them, given the scheduled July 28 hearing date and scheduled July 14 date for the beginning of depositions. County Joint Resp. Mot. Stay and Ext. at 1-2. The County asserts that the Agency's assertion that its "limited appearance" precludes the filing of the record or discovery responses is incorrect and unsupported by law, citing. KSAC Corp. v. Recycle Free, Inc., 364 Ill. App. 3d 593, 594 (2nd Dist. 2006), citing former Rule 2-301(a) of the Code of Civil Procedure. County Joint Resp. Mot. Stay and Ext. at 2-3. Williamson County requests an order "denying Petitioners' Motions (*sic*), requiring a waiver of the statutory deadline[8], and expediting discovery in this matter." *Id*. at 4.

On July 8, 2008, the Agency filed replies to Williamson County's two July 7, 2008 responses. The Board's procedural rule at 35 Ill. Adm. Code 101.500(e) provides that a motion's movant has no right to file a reply to a response except as permitted by the Board or hearing officer to prevent material prejudice. The Agency has neither sought nor received leave to file replies. On its own motion, the Board strikes both filings, which it has not considered in its resolution of the contested issues.

MOTIONS TO DISMISS

The Board first turns to analysis and discussion of the motions to dismiss the petition: a Board finding of a lack of jurisdiction to proceed to hear the case eliminates the need to consider the other motions. The Board first lays out the respondents' motions and Williamson County's response, and then analyzes the arguments and makes a ruling.

[8] Such relief is beyond the ability to grant consistent with Section 40(a) of the Act. *See, supra* at 5, n.7.

The Agency's Arguments

In its June 23, 2008 motion to dismiss (Ag. Mot. Dis.), the Agency argued first that the Board lacks statutory authority to hear a third-party appeal of this type of permit. Under Section 40(a)(1) of the Act, the Agency contends, only the permit applicant may file an appeal. 415 ILCS 5/40(a)(1) (2006). The Agency believes that:

> Basically the Petitioner is trying to use this forum to enjoin the applicant's development of a facility that has been issued a permit. A third party permit appeal is not the correct mechanism for that type of relief. Ag. Mot. Dis. at 2.

The Agency then contends that petitioners have not presented any valid jurisdictional argument:

> Regarding jurisdiction, the Board has long recognized that it is not authorized to hear an appeal for this type of permit from a person other than the permit applicant. See e.g. City of Waukegan *et al.* v. Illinois EPA and North Shore Sanitary District, PCB 02-173 (May 2, 2002) (citing Landfill, Inc. v. PCB, 74 Ill. 2d 541, 387 N.E.2d 258 (1978)). Further, as the Board previously noted in Kibler Development Corporation and Marion Ridge Landfill v. Illinois EPA, PCB 05-35, "the Supreme Court in Landfill, Inc. made clear in 1978 that the Board has no authority to, by rule, extend appeal rights beyond those granted in the Act under Section 40." Landfill, Inc. v. Illinois Pollution Control Board, 387 N.E.2d 258. The Board went on to note that "there simply are no statutory rights to appeal landfill permits, other than those for hazardous waste disposal sites under Section 40(b)." Ag. Mot. Dis. at 2-3.

Kibler's and the Landfill's Arguments

In their June 26, 2008 motion to strike and dismiss the petition (Kibler Mot. Dis.), Kibler and the Landfill also argue that there is no authority for petitioners' appeal under Section 40(a)(1) of the Act, citing Landfill, Inc., and Citizens Utility Company of Illinois v. PCB, 265 Ill. App. 3d 773, 782, 639 N.E.2d 1306, 1313 (3rd Dist. 1994); *see,* City of Waukegan *et al*. v. IEPA *et al.*, PCB 02-173 (May 2, 2002). Kibler Mot. Dis. at 1-2.

Kibler and the Landfill additionally argue that, even if the Board did have "some type of authority to entertain" this appeal, these petitioners have not demonstrated any standing to bring this action. These respondents argue that:

> nothing in Petitioners' pleading states that either of these proposed Petitioners took any role in the proceeding before the Agency, and as a matter of factual accuracy, neither did participate even to the minimal extent of filing public comments. Even in those instances where the General Assembly has seen fit to allow third-party appeals from the grant of a permit, a mandatory prerequisite is meaningful participation in the permit proceedings by the proposed Petitioner; here such participation has not, and cannot, be alleged. See Lake County

> Contractor's Assoc. v. Pollution Control Board, 54 Ill. 2d 16, 294 N.E.2d 259 (1973); see e.g., 35 Ill. Admin. Code 105.302(d) (CAAPP [Clean Air Act Permit Program] permits); 35 Ill. Admin. Code 705.212(a) (RCRA [Resource Conservation and Recovery Act] permits). Kibler Mot. Dis. at 2.

Kibler and the Landfill next relate that the petition cites a "line of decisions" in which the courts granted "a limited right of intervention to certain constitutional officers under certain circumstances." Kibler Mot. Dis. at 2-3 (emphasis in original); *see* Pet. at 2, citing City of Waukegan *et al*. v. IEPA *et al.*, PCB 02-173 (May 2, 2002), citing Landfill Inc. v. PCB, 74 Ill. 2d 541, 387 N.E.2d 258 (1978). Kibler and the Landfill first argue that, as a preliminary matter, the Williamson County Board should be dismissed from the action because it is not a constitutional officer and is a creature of statute not covered by these cases. *Id*. at 2-3; *see* Kibler Development Corp. v. IEPA, PCB 05-35 (May 4, 2006).

Kibler and the Landfill next argue that no standing exists as to the other petitioner: "People of Williamson County *ex rel*. State's Attorney Charles Garnati". Kibler and the Landfill argue that the authorities cited in the petition concerned intervention in proceedings lawfully brought by another party or other parties, or issues not relevant to this situation. *See* Kibler Mot. Dis. at 2-3, distinguishing Land and Lakes Co. v. PCB, 245 Ill. App. 3d 361, 616 N.E.2d 349 (3rd Dist. 1993) (county's intervention as respondent to support a denial of local siting approval by a municipality); and Pioneer Processing Inc. v. IEPA, 102 Ill. 2d 119, 464 N.E.2d 238 (1984) (Attorney General's right to appeal from decisions of the Board concerning the permitting of a hazardous waste facility; *see* 415 ILCS 5/40(b), (c)).

The motion argues that petitioners here seek the "unprecedented" right to appeal *to* the Board. The motion relates that:

> The petition in this case appears to claim that if the landfill is built and operated according to the issued permit, then the landfill will be in violation of various provisions of the Environmental Protection Act, such as those relating to the effect of local siting approval. ***
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> However, if Petitioners truly believe the assertions made in their petition, then the obvious and logical relief, already available to them pursuant to the Environmental Protection Act, is to bring an enforcement action regarding the alleged improprieties. *See* City of Waukegan, PCB 02-173, 2002 Ill. ENV. LEXIS 273 at 1 (May 2, 2002). (Obviously these Respondents reserve all rights under any applicable court rule or statute with respect to any allegations made without factual or legal justification). Kibler Mot. Dis. at 3-4.

Kibler and the Landfill accordingly request that the Board strike and dismiss the petition on the grounds that the Board lacks jurisdiction to hear the appeal and the petitioners lack standing to pursue the appeal.

WILLIAMSON COUNTY'S JOINT RESPONSE

In response to the respondents' motions to dismiss, Williamson County asserts in summary first that petitioners' participation in the permitting process was not mandatory, and then that petitioners have standing to proceed with this action.

Petitioners' Lack of Participation in Permit Proceeding

As to participation in the permitting process, petitioners state "on information and belief", that they "did not receive the required prerequisite notice of the [Landfill's] permit application", so that they "could hardly participate in a process of which they were unaware." County Joint Resp. Mot. Dis. at 2. Petitioners also contend that, "as a constitutional officer, the participation in the permitting process is not required for a State's Attorney." *Id.*

Petitioners assert that the Board should not give "a narrow interpretation to a single statutory provision, such as 415 ILCS 5/40(a)(1)" without full consideration of the special powers, duties, and obligations of State's Attorneys, citing Pioneer Processing Inc. v. IEPA, 102 Ill. 2d 119, 464 N.E.2d 238 (1984) (Attorney General allowed to appeal Board ruling in hazardous waste landfill appeal filed by permittee); AFSCME v. Ryan, *et al.*, 347 Ill. App. 3d 732, 807 N.E.2d 1235 (5th Dist. 2004); Land and Lakes Co. v. PCB, 245 Ill. App. 3d 361, 616 N.E.2d 349, 354-355 (3rd Dist. 1993) (State's Attorney allowed to intervene in siting appeal); Saline County Landfill, Inc. v. IEPA, PCB 02-108 (Apr. 18, 2002) (State's Attorney allowed to intervene in permit appeal). County Joint Resp. Mot. Dis. at 2.

Petitioners argue that:

> Like the Attorney General, the State's Attorney is a constitutional officer and the State's Attorney has duties and powers that largely parallel those of the Attorney General. People *ex rel.* Kunstman v. Nagano, 389 Ill. 231, 249, 59 N.E.2d 96, 104 (1945). One important duty of the State's Attorney is to "commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for his county, in which the people of the State or county may be concerned." 55 ILCS 5/3-9005(a)(1). Clearly, if the Attorney General has the authority, contrary to a specific statute identifying who has standing, to commence an action to determine whether the Illinois EPA failed to follow the proper procedures in issuing a permit, then the State's Attorney of Williamson County has the same authority on behalf of the people and the County Board. In particular, contrary to Illinois EPA's contention [that] Petitioners' lack a "nexus" to this matter, Petitioners' direct interest in this matter is clear when, among other things, Petitioners assert Landfill's failure to notify them of the permit application and Illinois EPA's failure to consider the substance and scope of the County's site location approval. (Illinois EPA Motion ¶3; Petition ¶¶6, 8).
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> Further, the Supreme Court in Pioneer Processing Inc. expressly disavowed any precedential value of Lake County Contractors Assoc. v. Pollution Control Board, 54 Ill. 2d 16, 294 N.E.2d 259 (1973), which has been incorrectly cited by and

> relied on by Landfill for the proposition that participation in the permitting process is mandatory in this circumstance. Pioneer Processing Inc. 102 Ill. 2d at 136, 464 N.E.2d at 246. In doing so, the Supreme Court analogized its decision to a similar decision in People *ex rel.* Scott v. Illinois Racing Board, 54 Ill. 2d 569 (1973), warned that standing should not be read narrowly for a constitutional officer, and distinguished as non-precedent Lake County Contractors Assoc. as it concerned the appeal of contractors associations rather than the Attorney General. Pioneer Processing Inc., 102 Ill. 2d at 136-138, 464 N.E.2d at 246-247. County Joint Resp. Mot. Dis. at 2-3.

Petitioners' Standing

Petitioners argue that, neither the Agency's motion, nor that of Kibler and the Landfill, successfully refutes petitioners' assertion that Pioneer Processing and its progeny confer standing here. Petitioners first distinguish in turn the cases cited by the Agency: City of Waukegan *et al.* v. IEPA *et al.*, PCB 02-174 (May 2, 2002) (City's appeal dismissed); Kibler Development Corp. v. IEPA, PCB 05-35 (intervention denied to City of Marion, City of Herrin, and the Williamson County Airport Authority); and Landfill, Inc. v.PCB, 74 Ill. 2d 541, 387 N.E.2d 258 (1978) (in declaratory judgment action, appellate invalidation of Board procedural rule purporting to allow third-party appeals in cases not authorized by Act). County Joint Resp. Mot. Dis. at 4-5.

Petitioners contend that each of the cases cited above were attempted appeals by private parties, who are subject to statutory standing restrictions not applicable to State's Attorneys. According to petitioners, Landfill, Inc. is also distinguishable as having been decided before Pioneer Processing, and as involving the issue of "whether a private enforcement action against the Illinois EPA could be maintained by the Board, when its sole claim was that the Illinois EPA violated the Illinois Environmental Protection Act by issuing a permit". County Joint Resp. Mot. Dis. at 5.

Petitioners further contend that Kibler and the Landfill have failed to distinguish cases allowing appeals to be initiated before other State boards, AFSCME v. Ryan, 347 Ill. App. 3d 732, 807 N.E.2d 1235 (5th Dist. 2004) (State's Attorney enforcement action to enjoin facility closure by the Department of Human Services) and People *ex rel.* Scott v. Illinois Racing Board, 54 Ill. 2d 569, 301 N.E.2d 285 (1973) (Attorney General's appeal of licenses issued by Racing Board). Joint Resp. Mot. Dis. at 5.

Petitioners next suggest that cases in which the Board allowed intervention by State's Attorneys in permit appeals brought by others are precedent for allowing them to initiate permit appeals, since intervenors have the same rights to appeal Board decisions as do the original parties. Joint Resp. Mot. Dis. at 5-6. Petitioners urge that they have standing because:

> Section 40(a)(1) of the Act does not exclude the authority of a constitutional officer, such as a State's Attorney, to initiate the review of a permit issued by Illinois EPA and the already established intervener precedent allowing State's Attorneys to intervene in an applicant's petition for review of a permit is likewise

> authority supporting a State's Attorney's rights as an original party in such proceedings. Joint Resp. Mot. Dis. at 5.

In conclusion, petitioners take respondents to task for delaying the filing of their motions to dismiss for nearly the full 30-days allotted them under the Board's procedural rules at 35 Ill. Adm. Code 101.506. Petitioners argue that this has been prejudicial to them, particularly considering that the petition cited the basis for their standing and cases to the contrary, and respondents' agreement to the projected discovery schedule prior to their jurisdictional assertions. As a result, "Petitioners [have been forced] to proceed with this matter as if it[,] the Petition[,] was accepted, preparing and filing discovery requests and preparing for an already scheduled July 28th hearing." Joint Resp. Mot. Dis. at 6.

Petitioners therefore renewed their request that the Board:

> enter an order allowing its Petition and reversing Illinois EPA's approval with conditions of the subject permit modification and denying that permit modification. If this Board finds that the Petitioners herein do not have standing based on the precedent referenced in this Response, the Petitioners respectfully request that the Board clearly and specifically acknowledge the jurisdictional ground of standing being the sole reason for the denial, as was done, for example, in City of Waukegan, *et al.* v. IEPA, *et al.*, PCB 02-173 (May 2, 2002), and allowing for the future enforcement or other action by the State's Attorney on behalf of the people and the County Board. Joint Resp. Mot. Dis. at 6.

BOARD ANALYSIS AND RULING

There is no disagreement that petitioners have no explicit statutory authority under the Act to bring this appeal. There currently are no third-party rights to appeal this non-hazardous waste permit under Section 40 of the Act; Section 40(a)(1) grants appeal rights solely to the permit applicant. 415 ILCS 5/40(a)(1) (2006). Third-party appeal rights for hazardous waste permits are granted only for RCRA permits, and permits granted by the Agency under Section 39.3 of the Act for hazardous waste sites. 415 ILCS 5/40(b), (c), and (e) (2006). Petitioners have failed to assert any basis upon which Williamson County may initiate this appeal, and the Board accordingly finds that Williamson County itself lacks standing to bring this suit.

As to the State's Attorney himself, the parties have correctly identified the major precedents the Board must consider and, if possible, reconcile. The first precedent is the Illinois Supreme Court's determination in the 1978 Landfill, Inc. decision that the Board may hear appeals of landfill permits under Section 40 of the Act only as explicitly authorized by the legislature. The next is the Illinois Supreme Court's 1984 decision in Pioneer Processing that the Attorney General had standing to appeal the Board's decision in the applicant's permit appeal. Having found standing, the Court decided it must address issues the Attorney General raised, including that

> the Agency and the Board in their administrative proceedings failed to implement the legislative policy of according greater rights to the opponents of hazardous-waste landfills . . . [and where]
> * * *
> Petitioners trace a series of legislative changes in the area of environmental protection and maintain that there is an intent on the part of the legislature to afford greater public rights to those persons who oppose the issuance of a hazardous-waste-disposal permit. Pioneer Processing, 464 N.E.2d at 247-248.

Under these circumstances, the Court found that the Agency had *ex parte* communications with permit applicant Pioneer, in violation of the contested-case provisions of Illinois' Administrative Procedure Act (citing Ill. Rev. Stat. ch. 127, par. 1014 (1979); *see* 5 ILCS 5/100/1-30, 5/100/10-25, and 5/100/10-60 (2006)). The Court found the permit invalid. Pioneer Processing, 464 N.E.2d at 249-250.

The final set of precedents is that under which, consistent with Pioneer Processing, the courts and Board have allowed State's Attorneys to intervene in permit appeals before the Board. *See* Land and Lakes Co. v.PCB, 245 Ill. App. 3d 361, 616 N.E.2d 349 (3rd Dist. 1993) (county's intervention as respondent in siting appeal to support siting denial); Saline County Landfill, Inc. v. IEPA, PCB 02-108 (April 18, 2002) (State's Attorney allowed to intervene in permit appeal).

As the parties here have reminded, the Board has already once addressed these precedents and standing issues in the context of the permitting of the Marion Ridge Landfill site following the County's grant of siting. As the Board stated in its ruling denying intervention in Kibler's challenge to conditions in a prior, still-pending permit appeal:

> The Supreme Court in Landfill, Inc. made clear in 1978 that the Board has no authority to, by rule, extend appeal rights beyond those granted in the Act under Section 40. Landfill, Inc., 387 N.E.2d 258 . . . . Intervenors receive the same rights as the original parties to an action, including rights to appeal. Since the decisions in Pioneer Processing [1984] and Land and Lakes [1993], the legislature has granted some additional third party permit appeal rights. See 415 ILCS 5/40(e), *as added by* P.A. 92-574, *eff.* June 26, 2002 (granting third parties the right to appeal NPDES permits). Were the Board to grant Marion, Herrin, and the Airport Authority intervenor status in this appeal of a permit to develop a new municipal solid waste landfill brought under Section 40(a)(1) of the Act, the Board would be unlawfully extending appeal rights. Kibler Development Corp. and Marion Ridge Landfill, Inc. v. IEPA, PCB 05-35, slip op. at 5 (May 4, 2006).

Section 40(a)(1) of the Act, which governs appeals of non-hazardous waste landfill permits, provides in pertinent part:

> If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the *applicant* may, within 35 days after the date on which the Agency served its decision on the *applicant*, petition for a hearing before the Board to

> contest the decision of the Agency. 415 ILCS 5/40(a)(1) (2006) (emphasis added).

The Board finds that the State's Attorney has cited no persuasive authority to support his initiation of this petition for review of a non-hazardous waste landfill permit. For the Board to allow this action to proceed as a permit appeal would amount to an unlawful extension of appeal rights by the Board.

This holding is consistent with both the Landfill, Inc. and Pioneer Processing precedents. The Supreme Court's holding in Landfill, Inc. constrains the Board to hear appeals of the Agency's grant of non-hazardous waste landfill permits consistent with expressed legislative intent; the Supreme Court's holding in Pioneer Processing allowing appeal by the Attorney General of a Board ruling in a hazardous waste landfill appeal is consistent with the noted legislative intent favoring "greater public rights" to opponents of hazardous waste landfill permits. *See* Pioneer Processing, 464 N.E.2d at 248. The cases in which the Board has allowed State's Attorneys to intervene in siting appeals and permit appeals do not serve as a legitimate basis for the right to initiate an appeal of a non-hazardous waste landfill permit. Finding that the State's Attorney and the County each lacks standing to bring this appeal, the Board grants respondents' motions to dismiss.

Again, in summary, the Board dismisses this action on the grounds that the petitioners lack standing to pursue the action under Section 40 of the Act, resulting in the Board's lack of jurisdiction to hear the appeal. The hearing scheduled by the Board for July 28, 2008 is cancelled. The Board's grant of the motions to dismiss this action leads the Board to deny as moot the respondents' motions for stay and extension of the discovery schedule.

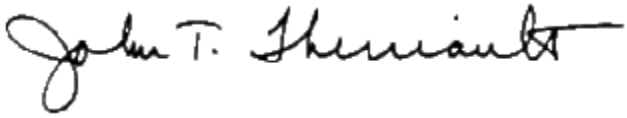
Finally, in response to the State's Attorney's request, the Board remarks that dismissal of this action in no way precludes or otherwise impacts the State's Attorney's ability to proceed with any other action authorized by the Act.

This opinion constitutes the Board's findings of fact and conclusions of law.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2006); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on July 10, 2008, by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board