ILLINOIS POLLUTION CONTROL BOARD
August 7, 2008

UNITED CITY OF YORKVILLE, a municipal corporation,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 08-95
	)	(Third-Party Appeal - Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and HAMMAN FARMS,	)	
	)	
Respondents.	)	

OPINION AND ORDER OF THE BOARD (by T.E. Johnson):

Today the Board grants two motions to dismiss this appeal based on the Board's lack of jurisdiction. On June 4, 2008, United City of Yorkville (Yorkville) filed a third-party petition asking the Board to review a May 1, 2008 determination of the Illinois Environmental Protection Agency (Agency). In the determination, the Agency, in response to the request of Hamman Farms (Hamman), allows Hamman to apply landscape waste to its fields in Kendall County at a rate greater than otherwise permissible under the Environmental Protection Act (Act) (415 ILCS 5 (2006)).

On July 7, 2008, the Agency and Hamman filed separate motions to dismiss Yorkville's appeal. Yorkville filed separate responses opposing the motions on July 21, 2008. On July 30, 2008, Hamman filed a motion for leave to reply to Yorkville's response, which the Board denies as unnecessary. *See* 35 Ill. Adm. Code 101.500(e).

As described below, the Board grants the respective dismissal motions of the Agency and Hamman because the Board lacks jurisdiction under the Act to hear this case. The Board therefore dismisses this appeal and closes the docket. In this opinion and order, the Board first describes Yorkville's petition and the Agency's determination. The Board then discusses the motions to dismiss of the Agency and Hamman and the responses of Yorkville before ruling on the motions.

BACKGROUND

Yorkville's Third-Party Petition

The third-party petition (Pet.) states that Yorkville is located in Kendall County, and that Hamman is a farming operation located in and near Yorkville on 2,200 acres of land in Kendall County. Pet. at 2, 3. According to Yorkville, Hamman has admitted to applying landscape waste at rates greater than agronomic rates without a permit, and Yorkville residents have

complained of a "strong and offensive odor" coming from Hamman's fields since it began applying landscape waste in the early 1990's. *Id.* at 4. Yorkville represents that it has complained to the Agency about Hamman's application of landscape waste. *Id.*

Yorkville asks the Board to review the Agency's May 1, 2008 approval of Hamman's request to "raise the agronomic rate." Pet. at 2. According to Yorkville, Hamman, on April 10, 2008, applied for "permission to apply landscape waste at rates greater than the agronomic rate of twenty (20) tons per acre per year." *Id.* This application, continues Yorkville, included various documents and was followed by a "supplemental application" from Hamman on April 16, 2008. *Id.* Yorkville states that the Agency's determination allows Hamman to "apply landscape waste at rates up to eighty (80) tons per acre per year and includes several conditions." *Id.*

Yorkville appeals on the grounds that the Agency's review of Hamman's application was:

> deficient and failed to utilize the investigation necessary to evaluate whether Hamman's soil characteristics or crop needs required the application of greater amounts of landscape waste. Consequently, the Agency's Decision is erroneous and must be reversed. Pet. at 2.

Further, Yorkville maintains the Agency's conditions included in the determination are "completely unworkable and inadequate to protect the environment and ensure Hamman's compliance." *Id.* at 3.

Citing Section 5(d) of the Act (415 ILCS 5/5(d) (2006)), Yorkville argues that the Board has the authority to review the Agency's determination because it is "a final determination made pursuant to 21(q) of the Act" and was "made in violation of the Act and was not based on Hamman's soil characteristics or crop needs." Pet. at 4.

<u>The Agency's Determination</u>

Attached to Yorkville's petition is the Agency's May 1, 2008 determination (Ag. Det.). The determination was issued to Hamman in response to Hamman's request for "an increase to the agronomic rate for application of landscape waste to the fields of Hamman Farms in accordance with Section 21(q)." Ag. Det. at 1. The Agency states that based upon the information submitted by Hamman, the Agency "is allowing an application rate of no more than 80 tons/acre per year of landscape waste at Hamman Farms, until December 31, 2011," under eight conditions which are set forth in the determination letter. *Id.* at 1-2.

The Agency determination also provides that if Hamman would like to continue with an application rate of landscape waste "greater than 20 tons/acre per year, for calendar year 2012 and beyond," Hamman must submit a "request to continue the use of the increased agronomic rate by December 31, 2011." Ag. Det. at 2. The determination letter then specifies the minimum information that the request must contain. *Id.* at 2-3.

DISCUSSION

Agency's Motion to Dismiss

The Agency moves the Board to dismiss Yorkville's petition because Yorkville lacks standing to bring, and the Board lacks jurisdiction to hear, the appeal. In its motion to dismiss (Ag. Mot.), the Agency states that it determined on May 1, 2008, that "80 tons/acre per year was the agronomic rate for application of landscape waste" at the Hamman facility. Ag. Mot. at 1. According to the Agency, this determination "was made pursuant to Section 21(q)" of the Act, and Yorkville "was not a party to this determination." *Id.* Yorkville, the Agency continues, therefore "filed this appeal as a third party." *Id.*

The Agency asserts that any authority to file with the Board an appeal of an Agency determination "must be derived originally from Section 40 of the Act [415 ILCS 5/40 (2006)]." Ag. Mot. at 1-2. Under that Section, the Agency first points out that when the Agency denies or conditionally grants a permit, it is only "*the applicant*" who can appeal the Agency determination to the Board. *Id.* at 2, quoting 415 ILCS 5/40(a)(1) (2006) (emphasis added by Agency). The Agency maintains that because Yorkville "is not the applicant," Yorkville "lacks standing under this provision to appeal." *Id.* at 2.

The Agency acknowledges that Section 40 of the Act does provide for third-party appeals "in several instances," citing, among other provisions, 415 ILCS 5/40(c) (2006) concerning permits for "new hazardous waste facilities" and 415 ILCS 5/40(d) (2006) concerning Clean Air Act Permit Program (CAAPP) permits. Ag. Mot. at 2. The Agency emphasizes, however, that "[a]ll of these situations involve the administration of federally delegated programs by Illinois EPA." *Id.* In contrast, continues the Agency, Section 21(q) "relates to landscape waste composting, which is solely a State concern." *Id.* Moreover, the Act's explicit provision of third-party appeal rights in other instances, but not here, precludes this appeal, according to the Agency. *Id.*

The Agency argues that Yorkville "has not presented the Board with any basis to allow the Board to conclude that it has jurisdiction to hear this matter." Ag. Mot. at 2. The Agency quotes the following from the Illinois Supreme Court's 1978 decision in Landfill, Inc. v. IPCB:

> If the Board were to become involved as the overseer of the Agency's decision-making process through evaluation of challenges to permits, it would become the permit-granting authority, a function not delegated to the Board by the Act.
> ***
> A third-party challenge to the allowance of a permit is dissimilar to a hearing upon a permit applicant's petition to review the Agency's denial of a permit. …[T]o permit challenges to the allowance of a permit before the Board undermines the statutory framework. *Id.* at 2-3, quoting Landfill, Inc., 74 Ill. 2d 541, 387 N.E.2d 258, 264-65 (1978).

The Agency concludes that "[t]hese statements of long-standing law are no less applicable to the case at hand." *Id.* at 3.

Hamman's Motion to Dismiss

Hamman filed a memorandum of law (Hamman Memo) simultaneously with the filing of and in support of its motion to dismiss (Hamman Mot.). Hamman argues that the Board does not have authority to hear Yorkville's appeal because the Agency's "technical determination of the soil characteristics or crop needs of a farm" under Section 21(q) of the Act is not "a subject which the Board is authorized to regulate" within the meaning of Section 5(d) of the Act. Hamman Mot. at 2; Hamman Memo at 2-3, 7. Hamman further asserts that no statutory or regulatory provision authorizes the Board to review the Agency's findings here or reverse the Agency's "technical determination of the appropriate agronomic rate for the subject farm." Hamman Mot. at 2-3; Hamman Memo at 3-5, 7.

Hamman stresses that the Agency's determination under Section 21(q) of the Act is not a permit. Indeed, no permit is required to agronomically apply landscape waste, whether at the "statutory default rate" of 20 tons per acre per year or a "higher rate . . . justified by a farm's soil characteristics or by the nutritional needs of its crops." Hamman Memo at 5-6, citing 415 ILCS 5/21(q) (2006). Hamman nevertheless makes arguments similar to those of the Agency concerning the unavailability of third-party permit appeal rights, citing Landfill, Inc., and adds that:

> there is a sound public policy reason for disallowing such challenges, inasmuch as the Board could otherwise find itself deluged by hundreds, if not thousands, of actions each year by third parties who are disgruntled about the granting of a permit. Such a system would be unworkable and would place an undue burden on State resources. Hamman Memo at 6.

Yorkville's Responses to the Motions to Dismiss

Yorkville filed separate responses opposing the Agency's motion to dismiss (Pet. Resp. Ag. Mot.) and Hamman's motion to dismiss (Pet. Resp. Hamman Mot.).

Response to Agency

Yorkville does not specifically address the Agency's contentions concerning the availability of third-party appeals under Section 40 of the Act. Yorkville reiterates the assertion made in its petition (Pet. at 4) that Section 5(d) of the Act gives the Board jurisdiction to hear Yorkville's challenge to the Agency's final determination under Section 21(q) of the Act (415 ILCS 5/5(d), 21(q) (2006)). Pet. Resp. Ag. Mot. at 1-2. Yorkville adds that the subject of landscape waste is one the Board has authority to regulate under Section 22.33(b) of the Act (415 ILCS 5/22.33(b) (2006)). *Id*. at 2.

Yorkville alternatively argues that "granting the Agency unappealable authority to make decisions, such as the one in this matter, is bad public policy and gives rise to the potential for abuse." Pet. Resp. Ag. Mot. at 2. Yorkville contends that the Agency made its determination to allow Hamman to apply landscape waste at rates up to 80 tons per year based on only four soil

samples, even though "the Illinois Agronomy Handbook calls for at least 880 soil samples." *Id.* at 3. Yorkville believes that "sound public policy requires the Board to have reviewing authority over Agency decisions to prevent abuses of power such as the one at issue in this case." *Id.*

Response to Hamman

Yorkville argues that Hamman is "wrong" in concluding that the Agency's determination "does not involve a subject that the [Board] is authorized to regulate" within the meaning of Section 5(d) of the Act (415 ILCS 5/5(d) (2006)). Pet. Resp. Hamman Mot. at 1. Yorkville reminds that the determination was made under Section 21(q) of the Act, and that Section 22.33(b) specifically authorizes the Board to regulate landscape waste compost facilities (415 ILCS 5/21(q), 22.33(b) (2006)). *Id.* at 2.

Yorkville additionally urges that the Board has the technical expertise necessary to review the Agency determination here. Pet. Resp. Hamman Mot. at 2-3. Finally, Yorkville concludes its response to Hamman by reiterating the same public policy arguments it offered in response to the Agency. *Id.* at 4.

Board Analysis and Ruling

The Agency determination allowing a greater rate of landscape waste application by Hamman was made under Section 21(q) of the Act (415 ILCS 5/21(q) (2006)). Section 21(q) states in part:

> No person shall:
>
> ***
>
> (q) Conduct a landscape waste composting operation without an Agency permit, provided, however, that no permit shall be required for any person:
>
> ***
>
> > (2) applying landscape waste or composted landscape waste at agronomic rates;
>
> ***
>
> For the purposes of this subsection (q), "agronomic rates" means the application of not more than 20 tons per acre per year, except that the Agency may allow a higher rate for individual sites where the owner or operator has demonstrated to the Agency that the site's soil characteristics or crop needs require a higher rate. 415 ILCS 5/21(q) (2006).

Section 21(q) contains no provision for appealing an Agency determination issued in response to a request to apply a "higher rate." Yorkville, however, purports to bring its third-party appeal pursuant to the Board's authority under Section 5(d) of the Act, which provides in its entirety:

> The Board shall have authority to conduct proceedings upon complaints charging violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order; upon administrative citations;

> upon petitions for variances or adjusted standards; upon petitions for review of the Agency's final determinations on permit applications in accordance with Title X of this Act; upon petitions to remove seals under Section 34 of this Act; and upon other petitions for review of final determinations which are made pursuant to this Act or Board rule and which involve a subject which the Board is authorized to regulate. The Board may also conduct other proceedings as may be provided by this Act or any other statute or rule. 415 ILCS 5/5(d) (2006).

Specifically, Yorkville relies on the Board's authority to conduct proceedings upon "petitions for review of final determinations which are made pursuant to this Act." Pet. at 4. Yorkville also relies on the Board's authority to hear "complaints charging violations of the Act." *Id*. According to Yorkville, the Agency's approval of Hamman's request qualifies as a final determination made both pursuant to Section 21(q) and in violation of the Act. *Id*.

The Board, as an administrative agency, is a "creature of statute," and therefore has only the authority given to it by its enabling act. *See* Granite City Div. of Nat. Steel Co. v. PCB, 155 Ill. 2d 149, 171, 613 N.E.2d 719, 729 (1993). The Board is accordingly "powerless to expand its authority beyond that which the legislature has expressly granted to it." McHenry County Landfill, Inc. v. IEPA, 154 Ill. App. 3d 89, 95, 506 N.E.2d 372, 376 (2nd Dist. 1987); *see also* Bevis v. PCB, 289 Ill. App. 3d 432, 437, 681 N.E.2d 1096, 1099 (5th Dist. 1997) ("As the PCB is an administrative agency and is created by statute, its authority is limited by its enabling statute.").

The Board agrees with Yorkville that the Agency's approval here is a "final determination[] made pursuant to this Act." 415 ILCS 5/5(d) (2006). The Board need not resolve the parties' disagreement over whether the Agency's determination "involve[s] a subject which the Board is authorized to regulate." *See id.*; *see also* 415 ILCS 5/22.33 (2006), 35 Ill. Adm. Code 830. Even if the Agency's determination does involve such a subject, the Board finds that the contested general language of Section 5(d) does not by itself authorize appeals by *third parties*.

It is well settled that if the Act does not expressly provide a third-party right to appeal a final permit determination, the right does not exist. *See* Landfill, Inc., 74 Ill. 2d at 557-58, 387 N.E.2d at 264-65 (1978); Citizens Utilities Co. of Illinois v. PCB, 265 Ill. App. 3d 773, 782, 639 N.E.2d 1306, 1312 (3rd Dist 1994); *see also*, *e.g.*, City of Waukegan v. IEPA and North Shore Sanitary District, PCB 02-173, slip op. at 1 (May 2, 2002). Yorkville does not cite to any provision of the Act explicitly providing third parties with the right to appeal Agency determinations on requests for increased rates of landscape waste application. The Board finds that as the right to bring a third-party appeal of a permit determination cannot be implied under the Act, the Act's silence here cannot give Yorkville the right to appeal this determination.

The Board's finding is supported by its procedural rules concerning appeals of final Agency determinations:

> Section 105.204 Who May File a Petition for Review

a) General. *If the Agency refuses to grant or grants with conditions a permit under Section 39 of the Act, the applicant may petition for a hearing before the Board to contest the decision of the Agency.* [415 ILCS 5/40(a)(1)] [italics denote statutory language]

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f) Other Agency Final Decisions. If the Agency's final decision is to deny or to conditionally grant or approve, the person who applied for or otherwise requested the Agency decision, or the person to whom the Agency directs its final decision, may petition the Board for review of the Agency's final decision. In addition, any <u>third party authorized by law to appeal</u> a final decision of the Agency to the Board may file a petition for review with the Clerk. 35 Ill. Adm. Code 105.204(a), (f) (underscoring added for emphasis).

Yorkville, a "third party," may appeal a final Agency determination only as "authorized by law." *Id.* This procedural provision codifies the established case law. *See* <u>Landfill, Inc.</u>, 74 Ill. 2d at 557-58, 387 N.E.2d at 264-65; <u>Citizens Utilities</u>, 265 Ill. App. 3d at 782, 639 N.E.2d at 1312. Where final determinations are appealable by third parties under the Act, the General Assembly has provided the right explicitly, and has articulated standing requirements. *See*, *e.g.*, 415 ILCS 5/40(b) (2006) (grant of Resource Conservation and Recovery Act (RCRA) permit for hazardous waste disposal site); 415 ILCS 5/40(e) (2006) (National Pollutant Discharge Elimination System (NPDES) permit determination); 415 ILCS 5/40.1(b) (2006) (pollution control facility siting approval). The Act simply does not authorize Yorkville to bring a third-party appeal of the Agency's Section 21(q) determination. *See* <u>Landfill, Inc.</u>, 74 Ill. 2d at 557-58, 387 N.E.2d at 264, citing <u>City Savings Assoc. v. International Guaranty & Insurance Co.</u>, 17 Ill. 2d 609, 612, 162 N.E.2d 345, 346 (1959) (the expression of one thing in a statute excludes any other even in the absence of an explicit prohibition).

Yorkville's public policy arguments concerning the benefits of allowing an appeal here are not fruitfully made to the Board. As discussed in this opinion, the courts have made clear that it is the General Assembly, not the Board, that has the authority to determine the extent of the powers and duties of the Board and the Agency.

Finally, contrary to Yorkville's claim, the Board cannot hear Yorkville's petition as a complaint charging the Agency with violating the Act in approving Hamman's request. The Illinois Supreme Court in <u>Landfill, Inc.</u> found that the Act did not allow third parties to prosecute the Agency's alleged permitting violations before the Board. Rather, the court stated, the Act's enforcement provisions enable citizens to bring complaints against permittees and:

> speak in terms of Agency investigation of violations. The focus must be upon polluters who are in violation of the substantive provisions of the Act, since it would be unreasonable to presume these provisions direct the Agency to investigate its own compliance with permit-granting procedures.
>
> ***
>
> The grant of a permit does not insulate violators of the Act or give them a license to pollute; however, a citizen's statutory remedy is a new complaint against the

polluter, not an action before the Board challenging the Agency's performance of its statutory duties in issuing a permit. Landfill, Inc., 74 Ill. 2d at 556, 560-61, 387 N.E.2d at 263, 265; *see also* Citizens Utilities, 265 Ill. App. 3d at 781, 639 N.E.2d at 1312.[1]

CONCLUSION

For the reasons above, the Board finds that it cannot lawfully accept Yorkville's appeal. Specifically, the Board lacks jurisdiction to hear Yorkville's third-party petition for review of the Section 21(q) determination issued by the Agency to Hamman. The Board grants the motions to dismiss filed by the Agency and Hamman, dismisses this appeal, and closes the docket. Consequently, Hamman's pending motions relating to discovery are denied as moot, and the hearing scheduled for August 14 and 15, 2008, is cancelled.

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 Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on August 7, 2008, by a vote of 4-0.

John Therriault, Assistant Clerk
Illinois Pollution Control Board

[1] On the same date that it filed the third-party petition, Yorkville also filed a citizen enforcement action against Hamman, which is pending. *See* United City of Yorkville v. Hamman Farms, PCB 08-96.