

ILLINOIS POLLUTION CONTROL BOARD
July 23, 2009

PRAIRIE RIVERS NETWORK)
and SIERRA CLUB,)
)
Petitioners,)
)
v.) PCB 10-003
) (Third-Party NPDES Permit Appeal -
ILLINOIS ENVIRONMENTAL) Water)
PROTECTION AGENCY and HILLSBORO)
ENERGY, L.L.C.,)
)
Respondents.)

ORDER OF THE BOARD (by G.T. Girard):

On July 2, 2009, Prairie Rivers Network (Prairie Rivers) and Sierra Club timely filed a petition asking the Board to review a May 29, 2009 determination of the Illinois Environmental Protection Agency (Agency). *See* 415 ILCS 5/40(e)(1) (2008); 35 Ill. Adm. Code 101.300(b), 105.204(b). The Agency granted a National Pollutant Discharge Elimination System (NPDES) permit to Hillsboro Energy, L.L.C. (Hillsboro) for its Deer Run Mine coal mining facility located one mile southeast of the town of Hillsboro, in Montgomery County.

Under the Environmental Protection Act (415 ILCS 5 (2008)), the Agency is the permitting authority responsible for administering Illinois' regulatory programs to protect the environment. NPDES permits are required for discharges of contaminants from point sources to surface waters. If the Agency grants an NPDES permit, certain third parties may appeal the Agency's decision to the Board. *See* 415 ILCS 5/40(e)(1) (2008); 35 Ill. Adm. Code 105.204(b). In this case, Prairie Rivers and Sierra Club appeal on the grounds that the Agency: (1) failed to identify and quantify proposed pollutant load increases and their potential impacts on affected waters; (2) failed to consider the impact of additional plant loadings on existing uses; (3) failed to adequately weigh pollution control alternatives; (4) failed to respond to significant comments raised by Prairie Rivers and Sierra Club; and, (5) violated notice requirements by incorporating permit conditions by reference in the draft permit. Prairie Rivers and Sierra Club also appeal on the grounds that the final permit: (1) retains a permit condition which allows a discharge in direct conflict with 35 Ill. Adm. Code § 406.108; (2) fails to define the area of "allowed mixing" contained in a permit condition; and, (3) allows mercury monitoring to cease before the expiration of the permit. For the reasons below, the Board accepts Prairie Rivers' and Sierra Club's petition for hearing.

THIRD-PARTY APPEAL

If a third party wishes to appeal an Agency determination to grant an NPDES permit, the Act requires that the third party's petition to the Board contain:

a demonstration that the petitioner raised the issues contained within the petition during the public notice period or during the public hearing on the NPDES permit application, if a public hearing was held; and

a demonstration that the petitioner is so situated as to be affected by the permitted facility. 415 ILCS 5/40(e)(2) (2008); *see also* 35 Ill. Adm. Code 105.210(d).

The petition also must, among other things, specify the grounds for appeal and include a copy of the issued permit. *See* 35 Ill. Adm. Code 105.210(a), (c). The third party must file the petition within 35 days after the “date of issuance of the Agency’s decision.” 415 ILCS 5/40(e)(1) (2008); *see also* 35 Ill. Adm. Code 105.206(b). If the Board determines that the third party’s petition for review is not “duplicative or frivolous,” the Board will hear the petition. 415 ILCS 5/40(e)(3) (2008); *see also* 35 Ill. Adm. Code 105.214(d).

Prairie Rivers’ and Sierra Club’s petition states that members of both organizations appeared at the Agency’s public hearing on Hillsboro’s NPDES permit application and submitted comments in regard to issues on which Prairie Rivers and Sierra Club now appeal. Prairie Rivers’ and Sierra Club’s petition also states that members of both organizations are so situated as to be affected by the permitted facility and includes a copy of the issued permit. The petition meets the content requirements of 35 Ill. Adm. Code 105.210. Prairie Rivers and Sierra Club also filed their petition within 35 days after the Agency issued its determination.

An action before the Board is duplicative if it is “identical or substantially similar to one brought before the Board or another forum.” 35 Ill. Adm. Code 101.202. An action before the Board is frivolous if it is “a request for relief that the Board does not have the authority to grant” or “fails to state a cause of action upon which the Board can grant relief.” *Id.* No evidence before the Board indicates that this action is duplicative or frivolous. The Board accepts Prairie Rivers’ and Sierra Club’s petition for hearing.

HEARING AND DECISION DEADLINE

Prairie Rivers and Sierra Club have the burden of proof. *See* 415 ILCS 5/40(e)(3) (2008); 35 Ill. Adm. Code 105.112(a). Hearings “will be based exclusively on the record before the Agency at the time the permit or decision was issued.” 35 Ill. Adm. Code 105.214(a); *see also* 415 ILCS 5/40(e)(3) (2008). Accordingly, though the Board hearing affords a permit applicant the opportunity to challenge the Agency’s reasons for denying or conditionally granting the permit, information developed after the Agency’s decision typically is not admitted at hearing or considered by the Board. *See Alton Packaging Corp. v. PCB*, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); *Community Landfill Co. & City of Morris v. IEPA*, PCB 01-170 (Dec. 6, 2001), *aff’d sub nom. Community Landfill Co. & City of Morris v. PCB & IEPA*, 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3rd Dist. 2002).

Hearings will be scheduled and completed in a timely manner, consistent with the decision deadline (*see* 415 ILCS 5/40(a)(3) (2008)), which only Hillsboro may extend by waiver (*see* 35 Ill. Adm. Code 101.308). If the Board fails to take final action by the decision deadline,

Hillsboro “shall be entitled to an Appellate Court order pursuant to subsection (d) of Section 41 [415 ILCS 5/41(d) (2008)].” 415 ILCS 5/40(a)(3) (2008). Currently, the decision deadline is October 30, 2009, which is the 120th day after the Board received the petition. *See* 35 Ill. Adm. Code 105.114. The Board meeting immediately before the decision deadline is scheduled for October 15, 2009.

AGENCY RECORD

Unless the Board or the hearing officer orders otherwise, the Agency must file the entire record of its determination by August 3, 2009, which is the first business day after 30 days from the date on which the Board received Prairie Rivers’ and Sierra Club’s petition. *See* 35 Ill. Adm. Code 105.212(a). If the Agency wishes to seek additional time to file the record, it must file a request for extension before the date on which the record is due to be filed. *See* 35 Ill. Adm. Code 105.116. The record must comply with the content requirements of 35 Ill. Adm. Code 105.212(b).

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 23, 2009, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board