

ILLINOIS POLLUTION CONTROL BOARD

August 5, 2010

MILL CREEK WATER RECLAMATION)	
DISTRICT,)	
)	
Petitioner,)	
)	
v.)	PCB 10-74
)	(Third-Party Permit Appeal - Water)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY, and GRAND)	
PRAIRIE SANITARY DISTRICT,)	
)	
Respondents.)	

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

Today the Board grants two motions to dismiss this case. The third-party petitioner, Mill Creek Water Reclamation District (Mill Creek), lacks standing to seek review of the decisions of the Illinois Environmental Protection Agency (Agency) to issue wastewater treatment plant permits to Grand Prairie Water Reclamation District (Grand Prairie). The Board accordingly is without jurisdiction to hear Mill Creek's appeal.

On March 25, 2010, Mill Creek filed a third-party petition (Pet.) asking the Board to review the February 19, 2010 permit determinations of the Agency. The Agency, in response to an application by Grand Prairie, approved permits that would allow Grand Prairie to construct a sewage works in unincorporated Kane County and provide sewerage service to a proposed housing development known as the "Settlements of LaFox" (Settlements). The Agency issued these permits under the general permitting authority of Section 39(a) of the Environmental Protection Act (Act) (415 ILCS 5/39(a) (2008)).

On April 27, 2010, the Agency filed a motion to dismiss Mill Creek's appeal (Ag. Mot.), as did Grand Prairie (GP Mot.). Mill Creek filed a consolidated response opposing the motions on May 14, 2010 (Resp.). On June 3, 2010, Grand Prairie filed a motion for leave to reply, alleging legal and factual inaccuracies in Mill Creek's response and attaching the reply. The motion for leave, which is unopposed, is granted and the Board accepts Mill creek's reply (Reply). *See* 35 Ill. Adm. Code 101.500(d), (e).

As described below, the Board grants the respective dismissal motions of the Agency and Grand Prairie because Mill Creek lacks standing to bring, and the Board lacks jurisdiction to hear, this appeal. The Board therefore dismisses the case and closes the docket. In this opinion and order, the Board first describes Mill Creek's petition and the Agency's determinations. Next, the Board discusses the motions to dismiss filed by the Agency and Grand Prairie, the consolidated response filed by Mill Creek, and the reply filed by Grand Prairie. The Board then analyzes the issues and rules on the motions.

BACKGROUND

Mill Creek's Third-Party Petition

The third-party petition states that Mill Creek was established in 1992 in Kane County to provide potable water and sewage treatment for the Mill Creek Planned Unit Development and other properties within its "Facility Planning Area" (FPA). Pet. at 2. Mill Creek currently provides those services to about 2,000 homes. *Id.* Mill Creek represents that it is the "Designated Management Agent" (DMA) for the Mill Creek FPA. *Id.*

Mill Creek states that Grand Prairie was established in 2002, and that Grand Prairie's boundaries encompass a 1,247-acre parcel of land that has been zoned as a planned unit development (Settlements) by Kane County. Pet. at 2. Mill Creek claims that the Settlements are located within the boundaries of the Mill Creek FPA; that the developers of the Settlements represented in their zoning application that the Settlements would be served by Mill Creek; and that the developers committed to "annex[ing] the Settlements into the corporate boundaries of Mill Creek." *Id.* at 2-3. Mill Creek further alleges that the Agency issued permits to Mill Creek in 2007 and 2008 for the construction and operation of improvements to Mill Creek's water supply and sewage treatment systems to serve the Settlements. *Id.* at 3. According to Mill Creek, it raised its objections over Grand Prairie's permit requests with the Agency. *Id.* at 6.

Mill Creek appeals on three grounds. First, Mill Creek asserts that the decision of the Agency to issue Grand Prairie's permits violates the federal Clean Water Act (33 U.S.C. § 1288(d)), which, according to Mill Creek, prohibits issuing a permit to build a treatment works in an FPA to an entity other than the DMA for that area. Pet. at 7-8.

Second, Mill Creek claims that Kane County did not hold a public hearing on "the siting of Grand Prairie's proposed pollution control facility." Pet. at 8, citing 415 ILCS 5/39.2(d) (2008). Accordingly, continues Mill Creek, Grand Prairie could not provide proof of local siting approval to the Agency, a prerequisite to issuance of a development or construction permit for a new pollution control facility. *Id.*, citing 415 ILCS 5/39(c) (2008). Mill Creek argues that the Agency had no authority to grant the permits prior to receiving proof of local siting approval, and that by issuing the permits absent that approval, the Agency violated Section 39(c) of the Act (415 ILCS 5/39(c) (2008)). *Id.*

Third, Mill Creek alleges that for issuing permits, Section 351.502 of the Agency's rules (35 Ill. Adm. Code 351.502) sets forth limited instances when the Agency may recognize exceptions to boundaries of FPAs without revising the approved Water Quality Management Plan. Pet. at 9. According to Mill Creek, the issuance of Grand Prairie's permits does not fall within any of the circumstances listed in Section 351.502. *Id.*

Mill Creek asks the Board to set aside the two permits issued by the Agency to Grand Prairie on February 19, 2010, and order the Agency to deny Grand Prairie's permit applications. Pet. at 10.

Agency's Determinations

In 2009, Grand Prairie submitted an application to the Chicago Metropolitan Agency for Planning (CMAP) to construct and operate a sewage treatment facility to serve the Settlements. Pet. at 3; GP Mot. at 1. The CMAP Wastewater Committee forwarded the Grand Prairie application to the Agency without a recommendation of support or non-support. Pet. at 5; Pet. Exh. F; GP Mot. at 2. On February 19, 2010, the Agency issued to Grand Prairie a permit for the construction and operation of a wastewater treatment facility and spray irrigation system to serve the Settlements, as well as a permit to construct and operate a lift station for the Settlements. Pet. at 7; Pet. Exhs. I, J (Permit Nos. 2010-AA-2825 and 2010-IA-3153, respectively); GP Mot. at 1-2.

DISCUSSION

Agency's Motion to Dismiss

The Agency argues that the Board must dismiss Mill Creek's petition for lack of standing and jurisdiction. Ag. Mot. at 2, 3. The Agency states that it issued two permits on February 19, 2010, "authorizing [Grand Prairie] to construct, own, and operate a wastewater treatment facility, spray irrigation system, and a lift station to provide sanitary sewerage service within its corporate boundaries." *Id.* at 1.

The Agency argues that "as a third-party appellant, [Mill Creek] is without standing to challenge the permit issued." Ag. Mot. at 3, citing *Koers v. IEPA*, PCB 88-163 (Oct. 20, 1988). The Agency points out that "[o]nly the applicant can appeal the issuance of a general permit issued with conditions under Section 39." *Id.* at 4, citing 415 ILCS 5/40(a)(1) (2008). The Agency maintains that third-party appeals of granted permits are generally not allowed, and that although "[s]ome exceptions have been made by the legislature," none are applicable in this case. *Id.* at 3-4, citing *Riverdale Recycling, Inc. v. IEPA*, PCB 00-228 (Aug. 10, 2000). According to the Agency, because "[t]here is no explicit statutory authority granting a third party [the ability] to attack a permit granting the right to construct and operate Wastewater Treatment Facilities," the Board is "without authority to allow the challenge." *Id.* at 4.

The Agency separately argues that the Board "lacks jurisdiction to reverse the issuance of a permit" by the Agency to Grand Prairie. Ag. Mot. at 2. "If the Board were to become the overseer of the [Agency's] decision making process through the evaluation of challenges to permits, it would become the permit granting authority, a function not delegated to the Board by the Act." *Id.* at 3, citing *Landfill, Inc. v. PCB*, 74 Ill. 2d 541, 557, 387 N.E.2d 258 (1978). The Agency asserts that the Board is without the power to reverse the grant of these permits as Mill Creek requests. *Id.*, citing *Citizens Utilities Co. of Illinois v. PCB*, 265 Ill. App. 3d 773, 780, 639 N.E.2d 258 (3rd Dist. 1994).

Grand Prairie's Motion to Dismiss

Like the Agency, Grand Prairie argues that Mill Creek's appeal must be dismissed because Mill Creek lacks standing to petition for review of these Agency permit decisions and the Board therefore lacks authority to hear the appeal. GP Mot. at 3-5.

"The Permits issued to [Grand Prairie] do not fall within any of the categories in which the Act authorizes a third-party appeal," according to Grand Prairie. GP Mot. at 3. Grand Prairie notes that Section 40(a)(1) of the Act (415 ILCS 5/40(a)(1) (2008)) provides only the applicant with the right to appeal the issuance of a general permit under Section 39. Grand Prairie contrasts this with Section 40(b) of the Act (415 ILCS 5/40(b) (2008)), which extends to third parties the right to appeal the issuance of a Resource Conservation and Recovery Act (RCRA) permit for a hazardous waste disposal site. *Id.* Grand Prairie asserts that this distinction in legislative wording between the two sections cannot be overlooked. *Id.*, citing Illinois Dept. of Revenue v. Illinois Civil Service Comm., 357 Ill. App. 3d 352, 366 (1st Dist. 2005).

According to Grand Prairie, the Board's authority to hear permit appeals "'must find its source within the provisions of the statute by which the agency was created,'" and Mill Creek's petition is outside the scope of appeals authorized by the Act. *Id.* at 4, quoting Illinois Dept. of Revenue, 357 Ill. App. 3d at 363.

Mill Creek's Consolidated Response to the Motions to Dismiss

Mill Creek asserts that this appeal is proper for "two independent reasons." Resp. at 4. First, Mill Creek contends that it has third-party standing to bring an appeal under Section 40.1(b) of the Act (415 ILCS 5/40.1(b) (2008)). *Id.* Mill Creek maintains that the Board has "implicit jurisdiction" to review the permits issued for Grand Prairie's "proposed pollution control facility" in light of the "purported approval" obtained from the local siting authority. *Id.* According to Mill Creek, because the Board can hear third-party appeals of local siting approvals, it would be "nonsensical" to conclude that the Board cannot hear third-party appeals when the local siting approval process has been "flatly ignored." *Id.* The Agency's issuance of these alleged "pollution control facility" permits without proof of local siting approval, Mill Creek argues, violated Section 39(c) of the Act (415 ILCS 5/39(c) (2008)). *Id.* at 6-7.¹

Second, Mill Creek asserts that Section 105.204(f) of the Board's procedural rules (35 Ill. Adm. Code 105.204(f)) provides the Board with an alternative source of authority to hear Mill Creek's third-party appeal. Resp. at 3-4. The rule provides that "[i]f 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." *Id.* at 3, quoting 35 Ill. Adm. Code 105.204(f) (emphasis added by Mill Creek). Mill Creek goes on to state that "in addition to sending notice to Grand Prairie of the IEPA's decision to conditionally grant the permits, the IEPA also directed its decision to Mill Creek by sending a notice letter to Mill Creek." *Id.* at 4;

¹ Mill Creek maintains that the Agency violated other provisions by issuing the permits. Resp. at 4-10.

see Resp. Exh. 1. Mill Creek argues that because the Agency decision was “directed to Mill Creek,” Mill Creek obtained standing to appeal under Section 105.204(f). *Id.*

Grand Prairie’s Reply

For three reasons, Grand Prairie disagrees with Mill Creek’s claim that Section 105.204(f) of the Board’s procedural rules provides standing to any person “to whom the Agency directs its final decision.” Reply at 1, quoting 35 Ill. Adm. Code 105.204(f). First, Grand Prairie points out that subsection (a) of Section 105.204 applies to general permit decisions, not subsection (f) of Section 105.204. *Id.*, citing 35 Ill. Adm. Code 105.204(a). Grand Prairie states that under subsection (a), only the applicant may petition for a hearing. *Id.* at 2.

Second, Grand Prairie argues that even if subsection (f) is relevant, Mill Creek would still not have standing because the permit determinations were not directed to Mill Creek. Reply at 2. The “Courtesy Letter” was not itself the final decision of the Agency, but rather simply notice to Mill Creek of a final decision. *Id.* According to Grand Prairie, the permits were the final Agency decision and those were directed to Grand Prairie. *Id.*

Third and finally, Grand Prairie asserts that Mill Creek’s argument must fail “as a matter of public policy” because “[t]o give credence to [the] argument would allow any curiosity seeker to secure standing merely by commenting on a matter before the IEPA and receiving any acknowledgement in response,” and that would be “silly.” Reply at 2.

Board Analysis and Ruling

It is well settled that if the Act does not expressly provide a third-party right to appeal, the right does not exist. *See Landfill, Inc. v. IPCB*, 74 Ill. 2d 541, 557-59, 387 N.E.2d 258, 264-65 (1978); *Citizens Utilities Co. of Illinois v. PCB*, 265 Ill. App. 3d 773, 781-82, 639 N.E.2d 1306, 1312 (3rd Dist. 1994); *see also, e.g., United City of Yorkville v. IEPA & Hamman Farms*, PCB 08-95, slip op. at 6 (Aug. 7, 2008) (general language of Section 5(d) of the Act does not by itself authorize appeals by third parties); *City of Waukegan v. IEPA and North Shore Sanitary District*, PCB 02-173, slip op. at 1 (May 2, 2002). Mill Creek does not cite any provision of the Act explicitly providing third parties with the right to appeal Agency determinations on permit applications to construct and operate wastewater treatment facilities. 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 Mill Creek the right to appeal the Grand Prairie permit determinations.

Mill Creek nevertheless maintains that its appeal is brought under Section 40.1(b) of the Act (415 ILCS 5/40.1(b) (2008)). However, that provision allows certain third parties to appeal a decision *made by a local government to grant siting approval* for a pollution control facility. The Board therefore has jurisdiction to hear third-party appeals of local siting approvals, but not, as Mill Creek argues, appeals merely “related to” local siting approvals. Resp. at 2. There is no local siting approval here from which Mill Creek can appeal. There are only Agency permit

determinations. Accordingly, the third-party appeal language of Section 40.1(b) is inapplicable and cannot serve as a basis for Mill Creek's petition.

The Agency's determinations to issue the wastewater treatment plant construction and operation permits to Grand Prairie were made under the general permitting authority of Section 39(a) of the Act, which states:

When the Board has by regulation required a permit for the construction, installation, or operation of any type of facility [or] equipment, . . . it shall be the duty of the Agency to issue such a permit upon proof by the applicant that the facility [or] equipment . . . will not cause a violation of this Act or of regulations hereunder. 415 ILCS 5/39(a) (2008).

The right to appeal such permit determinations is addressed in Section 40(a)(1) of the Act, which provides:

If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the *applicant* may . . . petition for a hearing before the Board to contest the decision of the Agency. 415 ILCS 40(a)(1) (2008) (emphasis added).

Section 40(a)(1) provides no third-party appeal rights. Where final permit 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) (2008) (grant of RCRA permit for hazardous waste disposal site); 415 ILCS 5/40(e) (2008) (National Pollutant Discharge Elimination System (NPDES) permit determination). Accordingly, the right to appeal these permit decisions is furnished only to the applicant. For the Board to allow this action to proceed as a permit appeal would unlawfully extend appeal rights. *See Landfill, Inc.*, 74 Ill. 2d at 557-58, 387 N.E.2d at 264-65; *Citizens Utilities*, 265 Ill. App. 3d at 781-82, 639 N.E.2d at 1312.

Mill Creek suggests that the Board should hear this matter because the Agency violated the law by issuing the permits. Pet. at 7-10; Resp. 4-10. Such an argument fails because the Illinois Supreme Court in *Landfill, Inc.* found that the Act does not allow third parties to prosecute the Agency's alleged permitting violations before the Board. A citizen's statutory remedy is "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, 559-60, 387 N.E.2d at 263, 265; *see also Citizens Utilities*, 265 Ill. App. 3d at 781-82, 639 N.E.2d at 1312.

Mill Creek also asserts that Section 105.204(f) of the Board's procedural rules authorizes its third-party appeal because the Agency sent notice of its permit decisions to Mill Creek, purportedly qualifying Mill Creek as "the person to whom the Agency direct[ed] its final decision." 35 Ill. Adm. Code 105.204(f). Mill Creek's position lacks merit for several reasons. Section 105.204 addresses who may file a petition for review. *See* 35 Ill. Adm. Code 105.204. Subsection (f) of Section 105.204 is a "catch-all" provision applicable only to "Other Agency Final Decisions," that is, those decisions that do not fall under the other subsections. 35 Ill. Adm. Code 105.204(a)-(e). Who may appeal the general permit decisions at issue here is

addressed by subsection (a) of Section 105.204, which quotes Section 40(a)(1) of the Act (415 ILCS 5/40(a)(1) (2008)), limiting the appeal right to “the applicant.” 35 Ill. Adm. Code 105.204(a).

Additionally, the rule language relied upon by Mill Creek (“the person to whom the Agency directs its final decision”) was added to provide procedures in the event that the Agency, on its own, initiates the appealable final action, as with the involuntary termination of Environmental Management System Agreements. *See* 35 Ill. Adm. Code 105.204(e). Any appeal accommodated by this language would be one undertaken by the recipient (*i.e.*, the subject) of the Agency final action. The language does not contemplate the existence of an application at all, let alone a third-party appeal from final action on an application. In adopting this new procedural rule, the Board made no mention of, and plainly did not intend to create, new third-party appeal rights. *See* Revision of the Board’s Procedural Rules, R00-20, slip op. at 12-13 (Dec. 21, 2000); Revision of the Board’s Procedural Rules, R00-20, slip op. at 28-29 (Mar. 16, 2000); Revision of the Board’s Procedural Rules, R00-20, slip op. at 17-18 (Oct. 3, 1996).

Moreover, the Board *cannot*, by procedural rule, create a third-party appeal right without statutory authorization. Landfill, Inc., 74 Ill. 2d at 557-58, 387 N.E.2d at 264-65; Citizens Utilities, 265 Ill. App. 3d at 781-82, 639 N.E.2d at 1312. The Board, as an administrative agency, is a “creature of statute,” and therefore has only the authority given to it by its enabling act. 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.”).

Finally, Mill Creek fails to refer to the very next sentence of subsection (f), which states: “*In addition*, any third party *authorized by law* to appeal a final decision of the Agency to the Board may file a petition for review” 35 Ill. Adm. Code 105.204(f) (emphasis added). This procedural provision codifies the established case law. *See* Landfill, Inc., 74 Ill. 2d at 557-58, 387 N.E.2d at 264-65; Citizens Utilities, 265 Ill. App. 3d at 782, 639 N.E.2d at 1312. The Act simply does not authorize Mill Creek to bring a third-party appeal of these Section 39(a) permit determinations. *See* Landfill, Inc., 74 Ill. 2d at 557-58, 387 N.E.2d at 264. Mill Creek is not a third party “authorized by law” to appeal the Agency’s permitting decisions to the Board.

CONCLUSION

For the reasons above, the Board finds that it cannot lawfully accept Mill Creek’s appeal. Specifically, Mill Creek does not have standing to initiate this appeal of the wastewater treatment facility construction and operation permits issued to Grand Prairie by the Agency under Section 39(a) of the Act. Accordingly, the Board lacks jurisdiction to hear Mill Creek’s third-party petition for review. The Board grants the motions to dismiss filed by the Agency and Grand Prairie, dismisses this appeal, and closes the docket. Having so ruled on the threshold issues of standing and jurisdiction, the Board need not and therefore does not reach the other issues raised by the parties.

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) (2008); *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 5, 2010, by a vote of 5-0.

A handwritten signature in black ink, reading "John T. Therriault". The signature is fluid and cursive, with a long horizontal stroke at the end.

John Therriault, Assistant Clerk
Illinois Pollution Control Board