

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ANIELLE LIPE and NYKOLE GILLETTE)

Complainants,)

v.)

ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY)

Respondent.)

PCB No. 12-95
(Third-Party Permit Appeal)

NOTICE OF FILING

TO: Attached Service List

PLEASE TAKE NOTICE that on January 26, 2012, I filed with the Clerk of the Illinois Pollution Control Board, Respondent's, Illinois Environmental Protection Agency, Appearance and Motion to Dismiss, copies of which are attached and served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: Gerald T. Karr

Gerald T. Karr
Senior Assistant Attorney General
Environmental Bureau
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DATED: January 26, 2012

THIS FILING IS SUBMITTED ON RECYCLED PAPER

SERVICE LIST

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Electronic Filing - Received, Clerk's Office, 01/26/2012
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APPEARANCE

I hereby enter my appearance in this proceeding on behalf of the Respondent, The Illinois Environmental Protection Agency.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S MOTION TO DISMISS PETITION FOR REVIEW

NOW COMES Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (Illinois EPA), by its attorney, LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Illinois Pollution Control Board (Board) Procedural Rule 101.506, 35 Ill. Adm. Code 101.506, and hereby moves the Board to dismiss Complainant's, ANIELLE LIPE and NYKOLE GILLETTE (Lipe/Gillette) Complaint for challenging the issuance of a Construction Permit by the Illinois EPA. In support of its Motion to Dismiss, Illinois EPA states as follows:

I

INTRODUCTION

On December 9, 2011, the Illinois EPA issued a permit authorizing TOUGH CUTS CONCRETE SERVICES, INC., (Tough Cuts) to construct emission unit(s) and/or air pollution control equipment consisting of a clean concrete/asphalt pavement crushing plant that includes one 360 tons/hour primary crusher, two 200 tons/hour secondary crushers, one screen and two conveyors.

On or about December 22, 2011, Lipe/Gillette filed a Complaint ("Complaint") challenging the decision by Illinois EPA to issue the construction permit to Tough Cuts. The Complaint was received by the Illinois EPA on December 27, 2011. On January 20, 2012, the Office of the Attorney General received a request from the Illinois EPA for representation in this matter.

Lipe/Gillette have requested that the permit issued by the Illinois EPA to Tough Cuts be set aside. Illinois EPA respectfully requests that the Board enter an order dismissing Lipe/Gillette's Complaint.

II

ARGUMENT

A. THE BOARD LACKS JURISDICTION TO HEAR THE APPEAL

The Board lacks jurisdiction to reverse the issuance of a permit by the Illinois EPA to Tough Cuts. Where the tribunal has no jurisdiction an appeal can confer no jurisdiction on the reviewing court. Citizens Utilities Co. of Illinois v. Illinois Pollution Control Board, 265 Ill.App.3d 773, 777, 639 N.E.2d 1306 (3rd Dist. 1994). The Board's principal function is to adopt regulations defining the requirements of the permit system. Landfill, Inc. v. Pollution Control Bd., 74 Ill.2d 541, 557, 387 N.E.2d 258 (Ill. 1978). The Illinois EPA's role is to determine whether specific applicants are entitled to permits. Id. If the Board were to become the overseer of the Illinois EPA'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. To confer jurisdiction on the Board in this instance would improperly usurp a power from the Illinois EPA in a manner that is contrary to the Act.

The one exception is when a permit has been denied. Id. Specific procedural requisites are established for Board review of a permit denial. Citizens Utilities Co. of Illinois, 265 Ill.App.3d at 780. There are no comparable statutory provisions for Board review on either substantive or technical grounds of the Agency's grant of a permit, thus indicating a legislative intent not to provide for such a proceeding. Id.

The relief requested by Lipe/Gillette from the Board is exactly the type of relief the Board is without power to give. Further, the scenario in this case does not fall within the single exception that grants the Board review of an Illinois EPA permit decision because there was no denial of a permit. Since this case involves the grant of a permit by the Illinois EPA, the Board is without power to reverse the Illinois EPA's decision to grant the permit.

B. LIPE/GILLETTE ARE WITHOUT STANDING TO CHALLENGE THE ISSUANCE OF THE COMPLAINT

Lipe/Gillette, are acting as third-party appellants, and are without standing to challenge the permit issued to Tough Cuts. Generally, third party standing to attack issued permits and permit conditions is well settled: Third party challenges to permits are not allowed. Koers v. Illinois EPA, PCB 88-163 (October 20, 1988)(citing Landfill, Inc. v. Pollution Control Bd., 74 Ill.2d 541, 557, 387 N.E.2d 258 (Ill. 1978)). Some exceptions have been made by the legislature, but the Board does not have general authority to allow third party challenges without explicit statutory authority. Riverdale Recycling, Inc. v. Illinois Environmental Protection Agency, PCB 00-228 (August 10, 2000)(citing Citizens Utilities Co. of Illinois, 265 Ill.App.3d 773, 775, 639 N.E.2d 1306 (3rd Dist. 1994)). There is no explicit statutory authority granting a third party to attack a permit granting the right to construct and operate concrete/asphalt pavement crushing

facilities. Since there is no affirmative grant, the Board is without authority to allow the challenge.

In further support of the case law cited above, the General Assembly has provided which entities are authorized to appeal the issuance of permits by the Illinois EPA. The Act provides, "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) (2010). Only the applicant can appeal the issuance of a general permit issued with conditions under Section 39. The permit issued to Tough Cuts does not fall within any of the categories in which the Act authorizes a third-party appeal.

Given the clear statutory language governing challenges to permits before the Board, Lipe/Gillette's challenge to the issuance of a permit may not be heard. "An administrative agency possesses no inherent or common law powers and any authority that the agency claims must find its source within the provisions of the statute by which the agency was created." *Illinois Department of Revenue v. Illinois Civil Service Commission*, 357 Ill.App.3d at 363. "To give validity to its findings and orders, an administrative agency must comply with the procedures and rules promulgated by the legislature." *Ragano v. Civil Service Commission*, 80 Ill.App.3d 523, 527 (1st Dist. 1980). "Any action outside the authority granted by its enabling statute is void." *Pickering v. Illinois Human Rights Commission*, 146 Ill.App.3d 340, 352 (2nd Dist. 1986), see also *Homefinders, Inc. V. City of Evanston*, 65 Ill.2d 115, 129 (1976). Lipe/Gillette's challenge is outside the scope authorized under the Act, and case law in Illinois confirms

that such a challenge may not be heard. The Board should dismiss Lipe/Gillette's complaint challenging the issuance of a construction permit by the Illinois EPA.

C. ILLINOIS EPA'S PERMITS COMPLY WITH ALL RELEVANT LAWS

In the event the Board finds that the Lipe/Gillette have standing to pursue this challenge to the issuance of a construction permit by the Illinois EPA, the Illinois EPA asserts that its permit was properly issued and complies with all appropriate laws and Lipe/Gillette's complaint should be dismissed.

The Illinois EPA Permits Were Issued in Compliance With Section 39 of the Act

Lipe/Gillette argue that the permit issued by the Illinois EPA to the Tough Cuts is invalid because of the failure to go through 'local siting' pursuant to Section 39.2 of the Act, 415 ILCS 5/39.2 (2010) and failed to submit evidence of such pursuant to Section 39(c) of the Act, 415 ILCS 5/39(c)(2010).

The Illinois Environmental Protection Act defines a "pollution control facility" as "any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility, or waste incinerator. This includes sewers, sewage treatment plants, and any other facilities owned or operated by sanitary districts organized under the Metropolitan Water Reclamation District Act." 415 ILCS 5/3.330. Tough Cuts is not operating any type of waste management facility, nor is it any type of sewage works. It simply is not a "pollution control facility". Tough Cuts will be crushing concrete and asphalt pavement on a five acre portion of an 80 acre permitted clean construction and demolition debris processing facility. The Illinois EPA in issuing the construction permit made the determination that no violations of the Act would take place if construction of the facility were to take place pursuant to the permit as issued.


Illinois courts have established that the Illinois EPA is the appropriate body to determine which projects constitute a "pollution control facility" and require siting approval under the Act. In *City of Waukegan v. Illinois Environmental Protection Agency*, 339 Il.App.3d 963 (2nd Dist 2003), the City of Waukegan challenged the Illinois EPA's decision to allow a sanitary district to construct a Biosolids Reuse Project without requiring the sanitary district to go through the siting procedures outlined in Section 39(c) of the Act. The court found that "it is clear that the [IEPA] acted within its jurisdiction when determining that local siting approval was not required in order for the District to obtain its necessary permits." *Id.* at 975. The court continued, "We believe the Agency's expertise is a necessary part of determining whether a facility constitutes a 'new pollution control facility.' There is no allegation in this case that the Illinois EPA failed to make the necessary determinations under section 39(c). Rather, the City simply disagrees with the Illinois EPA's decision that local siting approval is not required." *Id.* at 976. The Court found that the Illinois EPA acted properly by *not* requiring compliance with the local siting approval process. Similarly, in this case where no waste management facility is being considered, the Illinois EPA was not only the appropriate body to determine whether Tough Cuts was required to go through the local siting approval process prior to the issuance of its Permit, but the Illinois EPA correctly determined that no such local siting approval process was necessary or proper under the Act. Therefore, the Board should dismiss Complainants' Complaint challenging the issuance of the permit by the Illinois EPA.

III
CONCLUSION

WHEREFORE, Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, respectfully requests that the Board dismiss Complainants, ANIELLE LIPE and NYKOLE GILLETTE, Complaint challenging the Illinois EPA's Permit Decision with prejudice, and for such other relief as the Board deems appropriate.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY
ex rel. LISA MADIGAN,
Attorney General of the State of Illinois

BY: 
GERALD T. KARR
Senior Assistant Attorney General
Environmental Bureau

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Chicago, Illinois 60602
(312) 814-3369

CERTIFICATE OF SERVICE

I, GERALD T. KARR, an Assistant Attorney General in this case, do certify that on this 26th day of January, 2012, I caused to be served by First Class Mail the foregoing Notice of Filing and Respondent's Appearance and Motion to Dismiss upon the individuals listed on the attached service list, by depositing the same in the U.S. Mail depository located at 100 West Randolph Street, Chicago, Illinois in an envelope with sufficient postage prepaid.


GERALD T. KARR