

BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

A & H IMPLEMENT COMPANY,	)	
	)	
Petitioner,	)	
v.	)	PCB No. 12-53
	)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
Respondent.	)	

**NOTICE OF FILING AND PROOF OF SERVICE**

To:	John T. Therriault, Acting Clerk Illinois Pollution Control Board 100 West Randolph Street State of Illinois Building, Suite 11-500 Chicago, IL 60601	Melanie Jarvis Illinois Environmental Protection Agency 1021 North Grand Avenue East P.O. Box 19276 Springfield, IL 62794-9276
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Carol Webb, Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue East  
P.O. Box 19274  
Springfield, IL 62794-9274

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, pursuant to Board Procedural Rule 101.500(d), PETITIONER’S RESPONSE TO MOTION TO DISMISS, a copy of which is herewith served upon the attorneys of record in this cause.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the document described above, were today served upon counsel of record of all parties to this cause by enclosing same in envelopes addressed to such attorneys with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office Mailbox in Springfield, Illinois on the 21<sup>st</sup> day of March, 2012.

Respectfully submitted,  
A & H IMPLEMENT, Petitioner

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY: /s/ Patrick D. Shaw

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**PETITIONER’S RESPONSE TO MOTION TO DISMISS**

NOW COMES Petitioner, A & H IMPLEMENT COMPANY, pursuant to Section 101.500(d) of the Board’s Procedural Rules (35 Ill. Adm. Code 101.500(d), in response to the Motion to Dismiss filed by the Illinois Environmental Protection Agency (hereinafter “the Agency”), stating as follows:

**I. THE MOTION TO DISMISS SHOULD BE DENIED AS UNTIMELY.**

The motion to dismiss is brought “pursuant to 35 Ill. Adm. Code 101.500, 101,506 and 101.508.” (Mot. Dism. at p. 1) The Board’s procedures require such a motion to be filed within thirty days:

**All motions to strike, dismiss, or challenge the sufficiency of any pleading filed with the Board must be filed within 30 days after the service of the challenged document, unless the Board determines that material prejudice would result.**

(35 Ill. Adm. Code 101.506)

The subject petition was filed on October 5, 2011. It was deemed received by the Agency on October 9, 2011. (35 Ill. Admin. Code § 101.300(c)) Therefore, the motion to dismiss should have been filed by November 8, 2011.

Furthermore, the Agency has not alleged any “material prejudice” would result if it does not allow a motion to be filed 119 days late. Particularly in the context of an appeal with a 120-day decision deadline, such a delay is not reasonable. Instead of belatedly filing an optional motion, the Agency should have filed the record, which was required to have been filed by November 4, 2011 (Order of Oct. 20, 2011)

**II. THE MOTION TO DISMISS IS IMPROPERLY SUPPORTED BY EXHIBITS.**

“In ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant.” Schilling v. Hill, PCB 10-100 (March 15, 2012). A complainant is not required to set out all of its evidence. United City of Yorkville v. Hamman Farms, PCB No. 08-96, at p. 55-56 (Oct. 16, 2008). Facts not of record must be supported by affidavit. (35 Ill. Adm. Code § 101.502(c)) A motion to dismiss is not properly supported by evidentiary exhibits that challenge the allegations of the pleading attacked. People v. Six-M, PCB 12-35 (Nov. 17, 2011)

The Agency has filed selective portions of the record that it believes supports its case in order to challenge the allegations of the petition for review, or at the very least the reasonable inferences that are drawn from them the allegations of the petition. This is an improper motion. If the evidence in the record contradicts the pleadings, then the proper response is to file the entire record and a proper motion for summary judgment.

**III. THE PETITION MEETS THE REQUIREMENTS OF THE BOARD'S PROCEDURAL RULES FOR APPEALS.**

An appeal from an Agency decision is unlike an original action, such as an enforcement case. Enforcement actions are subject to fact-pleading requirements. People v. Waste Hauling Landfill, PCB 10-9, at p. 37 (Dec. 3, 2009). The Board's Part 103 procedural rules require the complaint to specify dates, locations and people that give rise to each cause of action. 35 Ill. Adm. Code 103.204(c)(2))

In contrast, an appeal to the Board is the last step in an "administrative continuum," IEPA v. IPCB, 138 Ill. App. 3d 550, 551 (3<sup>rd</sup> Dist. 1985), that is initiated by the filing of an application to the Agency, culminating in a denial letter from the Agency and an appeal to the Board, which will holds "hearings and allow for a development of the issues which may not have been adequately developed" in the short period before the Agency. E.S.G. v. IEPA, PCB 94-243, at p. 15 (Mar. 21, 1996). Unlike Part 103 enforcement actions, an appeal to the Board need only contain:

- a) **The Agency's final decision;**
- b) **A statement specifying the date of service of the Agency's final decision; and**
- c) **A statement specifying the grounds of appeal.**

(35 Ill. Adm. Code 105.408)

The first and second items are sufficient for the Board to determine whether or not it the appeal is frivolous by eliminating non-final decisions, decisions by bodies other than the Agency, and late appeals. The third item does not require factual allegations, but notice of the grounds of appeal to allow for development of those issues that may not be apparent on the face of the Agency's final decision. It is comparable to the statement required to appeal a circuit court decision to the Appellate Court, (S. Ct. R. 303(b)(2)), and would appear to require no more

specificity than the “statement of specific reasons why the Act and the regulations might not be met” required of the Agency in denying a permit or LUST plan or budget. (415 ILCS 5/40(a)(iv)) The petition filed herein clearly contains more specific statement of the grounds of appeal than the Agency ever provides in its denial letters.

The Board has already ruled that “A&H’s petition meets the content requirements of 35 Ill. Adm. Code 105.408.” (Order of Oct. 20, 2011) Whether or not that ruling is insurmountable by new law or evidence, it is clearly strong evidence in an appeal that sufficient information was provided to meet the needs of a petition for review. Accordingly, the motion to dismiss should be denied.

**IV. THE AGENCY’S ARGUMENTS ARE ERRONEOUS.**

The Agency mistakenly denied a LUST submittal based upon its misunderstanding of the Board’s 2007 revisions to TACO. (Petition at ¶5 & ¶7) After several attempts to work around the problem with other submittals, the Agency recognized its error and re-solicited the previous plan and budget. (Id. ¶ 11) Also, the Agency requested that the resubmittal be broken into two submissions, the first dealing with the previously denied plan and budget, and the second dealing with the post-denial costs of getting approval from the Agency. (Id.) The Agency approved the first submission, which is more arguably a reconsideration, but denied the second part which dealt with the subsequent costs of the mistaken denial. (Id. at ¶14 - ¶16) The petition alleges that the submittal under review was new for several reasons. (Id. at ¶ 17)

The Agency argues that the Board is without jurisdiction because the Agency believes it was without jurisdiction. The question of jurisdiction is reviewable before the Board; the Board

has jurisdiction to decide that issue. For example, when the Agency rejects a plan and budget because it believes that there has not been a LUST incident and therefore the Agency is without jurisdiction, the question of whether there has been a LUST incident is reviewable. E.g., Dickerson Petroleum v. IEPA, PCB No. 9-87 (Feb. 4, 2010). Or when a party fails to comply with jurisdictional filing requirements necessary for Board review of a siting appeal, the Board has jurisdiction to rule on whether it has jurisdiction. E.g., Bevis v. Pollution Control Bd., 289 Ill. App. 3d 432, 436 (5th Dist. 1997). The Board clearly has jurisdiction to determine whether or not the Agency's given reason for rejecting the budget are supported by the law and the evidence. To hold otherwise would be to allow the Agency to isolate its decisions from administrative review at its own whim.

With respect to estoppel, “[t]he estoppel principle has been applied to both the Agency and the Pollution Control Board in certain circumstances.” Dean Foods v. IEPA, PCB 81-151 (Aug. 22, 1984). “Whether the doctrine of estoppel may be applied against a municipal corporation in a given case will be determined from a consideration of all the circumstances of the case. If under all of the circumstances the affirmative acts of the public body have created a situation where it would be inequitable and unjust to permit it to deny what it has done or permitted to be done, the doctrine of estoppel may be applied against it.” Wachta v. Pollution Control Bd., 8 Ill. App. 3d 436, 439 (2d Dist. 1972) (emphasis added). “Estoppel may apply when a party reasonably and detrimentally relies on the words or conduct of another.” Estate of Slightom v. IEPA, PCB 11-25 (Nov. 17, 2011) (factual dispute precludes summary judgment). Given the totality of the factual circumstances are essential to determine whether an estoppel will be applied, the Agency's motion to dismiss is particularly inappropriate.

WHEREFORE, Petitioner, A & H Implement Company, prays that: (a) the Agency produce the Record; (b) a hearing be held; (c) the Board find the Agency erred in its decision, (d) the Board direct the Agency to approve the budget at issue, (e) the Board award payment of attorney's fees; and (f) the Board grant the Petitioner such other and further relief as it deems meet and just.

A & H IMPLEMENT COMPANY

Petitioner

By its attorneys,  
MOHAN, ALEWELT, PRILLAMAN & ADAMI

By: /s/ Patrick D. Shaw

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