

ILLINOIS POLLUTION CONTROL BOARD
May 17, 2012

A&H IMPLEMENT COMPANY,)
)
Petitioner,)
)
v.) PCB 12-53
) (UST Appeal)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

ORDER OF THE BOARD (by J.A. Burke):

A&H Implement Company (A&H) appeals a September 1, 2011 letter from the Illinois Environmental Protection Agency (Agency or Illinois EPA) concerning A&H's submittal of a corrective action plan budget for the leaking underground storage tank (UST) site located at 202 Cumberland Road in Altamont, Effingham County.

For the reasons below, the Board denies the Agency's motion to dismiss this appeal.

PROCEDURAL HISTORY

On October 5, 2011, A&H filed a petition for review of an Agency UST decision (Petition) asking the Board to review the Agency's September 1, 2011 determination "reject[ing] a budget submittal." Pet. at 1. A&H's petition included two exhibits: (A) a letter from CSD Environmental Services, Inc. to the Agency dated June 10, 2011; and (B) a letter from the Agency to A&H dated September 1, 2011. On October 20, 2011, the Board accepted the petition for hearing. The Board ordered the Agency to file the record by November 4, 2011. To date, the Agency has not filed the record and has not requested an extension of time to do so.

On March 7, 2012, the Agency moved to dismiss the petition. On March 21, 2012, A&H filed a response to the motion to dismiss. On March 27, 2012, the Agency filed a reply supporting its motion to dismiss.

PETITIONER'S FACTUAL ALLEGATIONS

In 2004, a release was reported from a facility located at 202 Cumberland Road in Altamont, Effingham County. Pet. at 1. A&H conducted a site investigation and removed tanks from the site. *Id.* On December 22, 2006, A&H submitted to the Agency a corrective action plan and budget to complete a Tier 2 analysis, although A&H also had collected information for a Tier 1 analysis. *Id.* The Agency approved the plan and budget on February 22, 2007. *Id.*

On February 15, 2007, the Board issued regulations modifying Tier 1 soil remediation objectives. Pet. at 1-2.¹ The Board's regulations became effective on February 23, 2007. *Id.* at 2.

On March 30, 2009, A&H submitted an amended corrective action plan and budget to the Agency "to define the extent of contamination subject to the new Tier 1 soil objectives." Pet. at 2. The Agency rejected this submittal on July 20, 2009, stating "the extent of soil and groundwater contamination has already been defined to Tier 1 objectives." *Id.* On September 9, 2009, A&H submitted additional information "in support of retracting [the Agency's] July 20, 2009 denial." *Id.* The Agency rejected this submittal on December 17, 2009. *Id.*

On March 15, 2011, A&H submitted a new corrective action plan and budget which proposed "additional investigation because the extent of contamination is still not defined to Tier 1 site remediation objectives." Pet. at 2. An Agency employee told A&H's consultant that "the Agency's previous denials had been mistaken" and requested a breakdown of costs between the proposed additional work and the costs previously submitted. *Id.* In response to the Agency's request, on June 8, 2011, A&H first submitted revised pages from the March 15, 2011 submittal "containing only costs to determine the extent of soil and groundwater contamination pursuant to Tier 1 objectives." *Id.* at 3. On June 9, 2011, the Agency approved the June 8, 2011 submittal. *Id.*

On June 10, 2011, A&H next submitted a budget of costs described by A&H as:

. . . associated with preparation of the Corrective Action Plan (CAP) and Budget dated March 30, 2009, as well as those associated with the revised submittal received by the Agency on September 9, 2009. These costs were incurred in order to receive approval to perform additional investigation work to define the extent of contamination. Petition at 3 and Ex. A.

On September 1, 2011, the Agency issued a letter informing A&H that the Agency "has completed the review of your request to reconsider an Illinois EPA decision on Corrective Action Plan Budget (budget)" Pet. at Ex. B. The Agency further stated:

In accordance with Section 57.7(c) of the Act and 35 Ill. Adm. Code 734.505(b) the Illinois EPA issued a final decision on July 20, 2009 and December 17, 2009 regarding costs associated with Corrective Action Budget for reconsideration. Further, in accordance with Section 57.7(c) of the Act and 35 Ill. Adm. Code 734.505(b), the Illinois EPA's action to reject or modify any plan, budget, or report was subject to appeal to the Illinois Pollution Control Board within 35 days of receipt of the Illinois EPA's final action. No appeal was filed with the Illinois Pollution Control Board. *Id.*

¹ See Proposed Amendments to Tiered Approach to Corrective Action Objectives (TACO): 35 Ill. Adm. Code 742, R06-10 (Feb. 15, 2007)

A&H appeals the Agency's September 1, 2011 letter and asks the Board to find that the Agency erred in issuing the letter. Pet. at 4.

AGENCY'S MOTION TO DISMISS

On March 7, 2012, the Agency moved to dismiss the petition. The Agency argues that the Board does not have jurisdiction to hear A&H's appeal of the Agency's September 1, 2011 letter. Mot. at 7.

The Agency's September 1, 2011 letter referenced two prior final decisions dated July 20, 2009 and December 17, 2009 and was not itself a final appealable decision. Mot. at 8. The Agency argues that it cannot reconsider its final decisions from July 20, 2009 and December 17, 2009 because it has no statutory authority to reconsider a permit decision or final decision. *Id.* at 7-8, citing Reichhold Chemicals, Inc. v. PCB, 204 Ill. App. 3d 674, 561 N.E.2d 1343 (3d Dist. 1990). Further, the Agency "has no inherent authority to amend or change its decision and may undertake reconsideration only where authorized by statute." *Id.* at 7, citing Pearce Hospital v. Public Aid Commission, 15 Ill.2d 301, 154 N.E.2d 691 (1958); Reichhold, 204 Ill. App. 3d 674, 561 N.E.2d 1343. The Agency likens this case to Kean Oil Co. v. Illinois EPA where the Board dismissed a reimbursement appeal as "an attempt by petitioner to misuse the submittal process in order to remedy its failure to properly appeal the first decision by the Agency." PCB 97-146, slip op. at 22 (May 1, 1997).

The Agency points out that the Board has the authority to review Agency decisions. Mot. at 8, citing Reichhold, 204 Ill. App. 3d 674, 561 N.E.2d 1343. However, the Board has held that "a condition imposed in a permit, not appealed to the Board under Section 40(a)(1), may not be appealed in a subsequent permit." *Id.* at 8, citing Panhandle Eastern Pipe Line Co. v. IEPA, PCB 98-102, slip op. at 30² (Jan. 21, 1999). The Board reached a similar decision in a UST appeal in Mick's Garage v. Illinois EPA, PCB 03-126 (Dec. 18, 2003) which the Agency cites as an example of a case where the Board found that it lacked jurisdiction to review the untimely appeal of an Agency deductibility determination. *Id.* at 8.

The Agency also discusses "the estoppel argument in the Petitioner's Petition for Review" premised on alleged statements by an Agency employee, setting forth the law of estoppel in the process. Mot. at 9-11. The Agency discusses the Board's decision in Panhandle, finding that it was unreasonable for a facility to rely on Agency employee statements which were inconsistent with formal Agency letters. *Id.* at 10, also citing People v. Chemetco, Inc., PCB 96-76, slip op. at 11-12 (Feb. 19, 1998) (party unreasonably relied on an Agency employee's alleged statements about not having to meet certain monitoring requirements in part because the party received a letter from the Agency stating that the party must meet the monitoring requirements). The Agency also discusses White & Brewer Trucking v. IEPA, PCB 96-250 (Mar. 20, 1997) where the Board found that it was not reasonable to rely on an Agency permit reviewer's statements which were inconsistent with regulations. *Id.* at 11. In each of these cases, the

² The Board notes that, while the Agency motion references page 30, the citation referred to appears on page 13 of the case.

statements of the Agency employee did not estop the formal Agency action. *Id.* Likewise in this case, the Agency argues, the project manager's statements are "irrelevant." *Id.*

A&H'S RESPONSE TO AGENCY'S MOTION

First, A&H objects to the Agency's motion as untimely. Resp. at 1. A&H points out that the Board's regulations require that a motion to dismiss be filed within thirty days after service of the challenged document. *Id.* at 1, quoting 35 Ill. Adm. Code 101.506. A&H calculates that the motion to dismiss should have been filed by November 8, 2011. *Id.* at 1. The Agency has not alleged "any 'material prejudice' would result if it does not allow a motion to be filed 119 days late." *Id.* at 2.

Second, A&H objects to the documents attached to the Agency's motion. Resp. at 2. A&H argues that "[a] motion to dismiss is not properly supported by evidentiary exhibits that challenge the allegations of the pleading attacked." *Id.* at 2, citing People v. Six-M, PCB 12-35 (Nov. 17, 2011).

Third, A&H argues that its petition meets the Board's requirements for appeal from an Agency determination. Resp. at 3. A&H points to Section 105.408 which requires three items be included in a UST appeal: (1) the Agency's final decision; (2) a statement specifying the date of service of the Agency's final decision; and (3) a statement specifying the grounds of appeal. *Id.*, citing 35 Ill. Adm. Code 105.408. A&H distinguishes these requirements from the Board's Part 103 procedural rules requiring an enforcement complaint to specify dates, locations, and people that give rise to a cause of action. Resp. at 3, citing 35 Ill. Adm. Code 103.204(c)(2). A&H argues that the statement specifying grounds of appeal does not require factual allegations, but notice of the ground of appeal comparable to the notice of appeal in Supreme Court Rule 303(b)(2). *Id.* A&H notes that the Board's October 20, 2011 order stated "A&H's petition meets the content requirements of 35 Ill. Adm. Code 105.408." *Id.* at 4.

Fourth, A&H addresses the Agency's arguments that the Board does not have jurisdiction in this appeal and the Agency's estoppel discussion. A&H contends that the Board may review the question of whether the Board has jurisdiction. Resp. at 4-5. For example, the Board can review an Agency determination that it is without jurisdiction because there has not been a LUST incident. *Id.* at 5, citing Dickerson Petroleum v. IEPA, PCB 09-87 (Feb. 4, 2010). As to the Agency's estoppel argument, A&H responds that the Agency's motion to dismiss "is particularly inappropriate" in light of the factual circumstances essential to determining whether estoppel applies. Resp. at 5.

AGENCY'S REPLY SUPPORTING ITS MOTION

Under the Board's procedural rules, a party may file a motion for leave to reply within 14 days after service of the response. 35 Ill. Adm. Code 101500(e). The Agency did not file a motion for leave to reply, but the Board received the Agency's reply within the 14 day filing deadline. The Board does not believe that accepting the reply would materially prejudice either

party, and no argument stating otherwise has been made. Therefore, the Board accepts the Agency's reply.

In reply, the Agency argues that its motion to dismiss challenged the Board's jurisdiction to hear the appeal and can be raised at any time. Reply at 1, citing Concerned Boone Citizens, Inc. v. M.I.G. Investments, Inc., 144 Ill. App. 3d 334, 494 N.E.2d 180 (2d Dist. 1986); Ogle County Board v. PCB, 272 Ill. App. 3d 184, 191, 649 N.E.2d 545, 551 (2d Dist. 1995).

The Agency further supports its initial motion by arguing that the September 1, 2011 Agency letter contained no new final decision but rather "informed the Petitioner about the final Illinois EPA decisions which were made in letters dated July 20, 2009 and December 17, 2009." Reply at 2. The Agency contends that the Board does not have jurisdiction to hear this appeal because the September 1, 2011 letter "merely gives [petitioner] notice of two prior final Illinois EPA decisions, which, Petitioner failed to appeal at the time." *Id.*

DISCUSSION

Standard for Granting Motion to Dismiss

The Board looks to Illinois civil practice law for guidance when considering motions to strike or dismiss pleadings. 35 Ill. Adm. Code 101.100(b); *see also* United City of Yorkville v. Hamman Farms, PCB 08-96, slip. op. at 14-15 (Oct. 16, 2008). 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. *See e.g.*, Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004); *see also* In re Chicago Flood Litigation, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997); Board of Education v. A, C & S, Inc., 131 Ill. 2d 428, 438, 546 N.E.2d 580, 584 (1989). "[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003).

Illinois requires fact-pleading, not the mere notice-pleading of federal practice. Adkins v. Sarah Bush Lincoln Health Center, 129 Ill. 2d 497, 518, 544 N.E.2d 733, 743 (1989). In assessing the adequacy of pleadings in a complaint, the Board has accordingly stated that "Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support his cause of action." Grist Mill Confections, PCB 97-174, slip op. at 4 (*citing* LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297, 1303 (2nd Dist. 1993)). "[L]egal conclusions unsupported by allegations of specific facts are insufficient." Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303 (*citing* Estate of Johnson v. Condell Memorial Hospital, 119 Ill. 2d 496, 509-10, 520 N.E.2d 37 (1988)). A complaint's allegations are "sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action." People v. College Hills Co., 91 Ill. 2d 138, 145, 435 N.E.2d 463, 467 (1982). Fact-pleading does not require a complainant to set out its evidence: "[t]o the contrary, only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts." People v.

Carriage Way West, Inc., 88 Ill. 2d 300, 308, 430 N.E.2d 1005, 1008-09 (1981) (*quoting Board of Education v. Kankakee Federation of Teachers Local No. 886*, 46 Ill. 2d 439, 446-47 (1970)).

Section 105.408 of the Board's rules sets forth the requirements for a petition to appeal an Agency UST decision:

In addition to the requirements of 35 Ill. Adm. Code 101.Subpart C the petition must 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.

As A&H points out, the Board's October 20, 2011 order stated "A&H's petition meets the content requirements of 35 Ill. Adm. Code 105.408." Resp. at 4.

Timing of Motion

A&H objects to the Agency's motion as untimely because it was filed more than 30 days after service of the petition. Resp. at 1, citing 35 Ill. Adm. Code 101.506. The motion was filed approximately five months after service of the petition, rather than the 30 days specified by 35 Ill. Adm. Code 101.506.

The Board is concerned with the delay in this filing, particularly in a matter with a 120-day decision deadline. However, the Board will not deny the motion on this procedural ground, as there is no evidence of prejudice to any party as a result of the late filing. Furthermore, because the motion purports to challenge the Board's jurisdiction to review the September 1, 2011 letter, the Board will address the motion's merits. *See Ogle County Board v. PCB*, 272 Ill. App. 3d 184, 191, 649 N.E.2d 545, 551 (2d Dist. 1995) (challenges to jurisdiction may be raised at any time during the proceeding); *People v. Michael Grain Co., Inc., et al.*, PCB 96-143, slip op. at 4 (Oct. 2, 2003) (motion to dismiss filed ten months after being served with third amended complaint allowed because motion challenged the Board's authority to issue a final decision).

Board Jurisdiction to Hear Petition

The Underground Storage Tank (UST) Fund was created under the Illinois Environmental Protection Act (Act) and may be accessed by eligible UST owners and operators to pay for the environmental cleanup of leaking USTs. 415 ILCS 5/57. Under Title XVI of the Act, concerning the "Leaking Underground Storage Tank Program," the Agency determines whether to approve proposed cleanup plans and budgets for UST sites. 415 ILCS 5/57.7, 57.8. A UST owner or operator may appeal such Agency determinations to the Board under Section 40

of the Act, which governs Board review of Agency permit decisions. 415 ILCS 5/40(a)(1), 57.7(c)(4), 57.8(i); 35 Ill. Adm. Code 105.Subpart D.

A&H brings this appeal under Section 57.8(i) of the Act, which provides:

If the Agency refuses to pay or authorizes only a partial payment, the affected owner or operator may petition the Board for a hearing in the manner provided for the review of permit decisions in Section 40 of this Act. 415 ILCS 5/57.8(i).

Section 40 of 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).

The Board consistently requires strict adherence to these statutory procedures, dismissing petitions filed after the jurisdictional 35-day appeal period of Section 40. *See, e.g., Illinois Ayers Oil Co. v. IEPA*, PCB 05-48, slip op. at 5 (March 17, 2005); *DuPage Enterprises, Inc. v. IEPA*, PCB 93-143, slip op. at 1-2 (August 5, 1993).

A&H seeks review of the Agency's September 1, 2011 letter. The petition was filed within the 35 day filing period and, as noted above "meets the content requirements of 35 Ill. Adm. Code 105.408." Resp. at 4, citing *A&H Implement Co. v. IEPA*, PCB 12-53, slip op. at 1 (Oct. 20, 2011). The petition is therefore properly filed before the Board, unless other jurisdictional arguments apply.

Board Jurisdiction to Review Agency Decision

The Agency lacks authority to change or reconsider its final determinations. *Reichhold*, 204 Ill. App. 3d at 677-78, 561 N.E.2d at 1345-46, *appeal denied* 136 Ill.2d 554, 567 N.E.2d 341 (1991). A&H alleges that it submitted the June 10, 2011 materials at the request of the Agency's project reviewer. Pet. at 3, 4. A&H also alleges that:

the project reviewer advised Petitioner's consultant that the Agency's previous denials had been mistaken and that while he had no problem approving the costs in the budget, it would help him conduct the review if the costs were broken out between those costs to perform the plan to investigate the extent of contamination to Tier 1 site remediation objectives from those costs incurred in preparing the previous submittals to the Agency seeking approval of such a plan and budget. *Id.* at 2-3.

Even assuming for this motion that a later Agency project reviewer believes prior Agency action was wrong, the Agency is not allowed to reconsider prior final Agency determinations. *Tolles Realty Co. v. IEPA*, PCB 93-124, slip op. at 4-5 (June 5, 1997) (discussion of cases applying

Reichhold even when the Agency has made an error in its decision). As in Kean, the proper course for A&H to review prior final determinations by the Agency in 2009 would have been to appeal those decisions to the Board within 35 days of either decision.

The Agency's September 1, 2011 letter responded to A&H's June 10, 2011 submittal to the Agency described in the petition as "a budget containing the costs associated with preparation of the plans and budgets improvidently denied by the Agency." Pet. at 3. A&H's June 10, 2011 letter transmitted to the Agency a budget of "costs associated with preparation of the Corrective Action Plan (CAP) and Budget dated March 30, 2009, as well as those associated with the revised submittal received by the Agency on September 9, 2009." *Id.* at Ex. A. According to the petition, the Agency denied the March 30, 2009 submittal on July 20, 2009 and denied the September 9, 2009 submittal on December 17, 2009. *Id.* at 2.

The Board lacks jurisdiction to review a final determination made by the Agency in letters dated July 20, 2009 and December 17, 2009. The Board previously has held that the Board does not have jurisdiction to review Agency final determinations which are not appealed to the Board within the 35 day period prescribed by Section 40 of the Act. *See Mick's Garage*, PCB 03-126, slip op. at 6-7 (Board did not have jurisdiction to review a 1992 Agency deductibility determination which was reaffirmed in a 2003 Agency determination); Panhandle, PCB 98-102, slip op. at 13, *aff'd Panhandle Eastern Pipe Line Co. v. PCB*, 314 Ill. App. 3d 296, 734 N.E.2d 18 (4th Dist. 2000) (Board held that a condition imposed in a permit, not appealed to the Board under Section 40(a)(1), may not be appealed in a subsequent permit). Similarly, A&H cannot now appeal the Agency's determination made in 2009.

The Agency's September 1, 2011 letter references the two prior Agency decisions and treats A&H's June 10, 2011 submittal as a request to reconsider the Agency's prior denials. Pet. at 3, Ex. B. However, A&H contends that its June 10, 2011 submittal was not a request for reconsideration, but "was premised on new information, namely that the Agency had agreed that its prior position was incorrect." *Id.* at 4. A&H also pleads that the June 10, 2011 application included a new owner/operator and engineer certification. *Id.* A&H argues that these facts constitute new information and "at most should be considered a new submission." *Id.* Therefore, the question presented by A&H's appeal is whether A&H's June 10, 2011 submittal was identical or similar enough to prior submittals to support the Agency's September 1, 2011 letter. The Board has jurisdiction to review that question.

Exhibits to Motion to Dismiss

A&H objects to the documents attached to the Agency's motion. Resp. at 2. A&H argues that "[a] motion to dismiss is not properly supported by evidentiary exhibits that challenge the allegations of the pleading attacked." Resp. at 2. A&H cites Six-M, wherein the respondent attached exhibits to its motion to dismiss and the Attorney General objected by arguing that exhibits to a motion to dismiss are improper.

Here, the Agency brings its motion to dismiss A&H's petition pursuant to 35 Ill. Adm. Code 101.506. Motion at 2. A Section 101.506 motion attacks the sufficiency of a pleading

filed with the Board and it is not proper to support the motion with evidentiary material. Rather, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. Beers, slip op. at 2. The Board finds that A&H has adequately pled a petition for review.

However, the Agency also asserts that the Board does not have jurisdiction to consider the September 1, 2011 letter. The Agency attached eight exhibits to its motion. In Six-M, the Board decided a motion to dismiss styled as a motion under 735 ILCS 5/2-619 which also attached supporting documents. See Six-M, PCB 12-35. The Board decided that it was improper to consider the exhibits and denied that portion of the motion to dismiss. *Id.* at 4. Therefore, the Board has not considered the exhibits to the Agency's motion.

The Agency cites to Kean in support of its motion. Mot. at 3, 8. In Kean, the Board granted a motion to dismiss and in doing so considered documents attached to the motion. The Agency's motion, however, is distinguishable from Kean. First, in Kean, the Agency attached the affidavit of an Environmental Protection Specialist to its motion to dismiss. Here, the Agency attached to its motion various documents not accompanied by an affidavit.

Further, A&H filed its objection to the Agency's motion to dismiss on March 21, 2012. This is unlike in Kean, where no objection to the Agency's motion was filed. As noted by the Board in Kean, a petitioner's failure to file an objection to the motion is construed as a waiver of objection to the granting of that motion. Kean, slip op. at 7. No waiver exists in this case.

Lastly, the Board in Kean granted the Agency's motion to dismiss on May 1, 1997, prior to the Board's revision of its procedural rules. The record filing requirements of 105.410(b) took effect in 2001. See Revision of the Board's Procedural Rules, R00-20 (Dec. 21, 2000). Despite these requirements being set forth, the Agency has requested that the Board grant its motion to dismiss A&H's complaint without the "entire record" as defined in 35 Ill. Adm. Code 105.410(b) before the Board. In order to fully address the Agency's motion to dismiss, the Board would, for example, need to compare A&H's 2009 submittals to the June 10, 2011 submittal to review the costs in each filing. The only documents properly before the Board currently are A&H's June 10, 2011 budget submittal to the Agency and the Agency's September 1, 2011 decision letter, which were attached to A&H's petition.

The Agency contends that A&H's reimbursement request is a request to reconsider the Agency's previous denial of reimbursement. Pet., Exh. B. A&H states that its June 10, 2011 submittal is not a request to reconsider but is premised on "new information" and "at most, should be considered a new submission." *Id.* at 4. To consider this issue, the Board would need to review, for example, the reimbursement requests and possibly other documents required by 35 Ill. Adm. Code 105.410(b), none of which are contained in an Agency record before the Board at this time. Section 105.410(a) states that "[t]he Agency must file the entire record of its decision with the Board in accordance with Section 105.116 of this Part." 35 Ill. Adm. Code 105.410(a). Under Section 105.116, the Agency "must file with the Board the entire record of its decision within 30 days after the filing of the petition for review, unless this Part provides otherwise, of the Board or hearing officer orders a different filing date." 35 Ill. Adm. Code 105.116. As

stated, the requirements for what must be included in the Agency record appear at 35 Ill. Adm. Code 105.410(b).

This situation is similar to McLean County Asphalt v. IEPA, where the Agency filed a motion for summary judgment stating that a final determination had already been issued and that the petitioner did not appeal the determination within the appeal period. McLean County Asphalt v. IEPA, PCB 05-154, slip op. at 2 (Jan. 19, 2006). In that case, the Board denied the petitioner's motion for summary judgment because the record did not contain documents necessary for the Board to render a decision and a genuine issue of material fact existed.

As the Board has previously noted, this appeal has met the petition content requirements of Section 105.408 of the Board's procedural rules. Taking the arguments in a light most favorable to A&H, and with no documents in the record noting otherwise, the motion to dismiss is denied.

Estoppel

In its motion, the Agency felt it "necessary at this juncture to discuss the estoppel argument" in the petition. Mot. at 9. In essence, the Agency argues that it is not estopped from issuing the January 1, 2011 letter by statements of an Agency employee made in conversations with A&H's consultant. *Id.* at 9-11. Having denied the motion to dismiss on the grounds discussed above, the Board need not make a determination regarding the Agency's argument as to estoppel at this time.

Agency Record

As previously stated, the Agency is required to "file with the Board the entire record of its decision within 30 days after the filing of the petition for review. . . ." 35 Ill. Adm. Code 105.116. Therefore, the Board orders that the Agency file the "entire record" as defined by section 105.410(b) of the Board's procedural rules by June 18, 2012, which is the first business day following the 30th day after the date of this order. If the Agency seeks 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." 35 Ill. Adm. Code 105.116. If the Agency "unreasonably fails to timely file the record on or before the date required," the Board may sanction the Agency in accordance with sections 105.118 and 101.Subpart H of the Board's procedural rules.

CONCLUSION

The Board, having taken all well-pled allegations as true in favor of A&H, finds that the petition for review meets all content requirements of 35 Ill. Adm. Code 105.408 and, without a record before the Board stating otherwise, adequately presents a cause of action to survive the Agency's current motion to dismiss. Therefore, the Agency's motion to dismiss is denied. The Agency is directed to file the entire record of its decision by June 18, 2012.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 17, 2012, by a vote of 5-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal stroke at the end.

John Therriault, Assistant Clerk
Illinois Pollution Control Board