ILLINOIS POLLUTION CONTROL BOARD
August 6, 1998

MCHENRY COUNTY DEFENDERS, INC.,	)	
	)	
Petitioners,	)	
	)	
v.	)	PCB 98-173
	)	(Permit Appeal - NPDES)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and THE CITY OF WOODSTOCK,	)	
	)	
Respondent.	)	

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

On June 24, 1998, McHenry County Defenders, Inc. (petitioners) filed a petition to contest the issuance of an NPDES permit pursuant to Section 40(e) of the Environmental Protection Act (Act) (415 ILCS 5/40(e)(1996)). The permit was issued by the Illinois Environmental Protection Agency (Agency) on May 20, 1998, to the City of Woodstock, McHenry County, Illinois, for its South Sewage Treatment Plant. On July 8, 1998, the Agency filed a motion to dismiss the petition. On July 15, 1998, petitioners filed a response to the motion to dismiss and a motion to amend the petition.

The Agency in its motion asks the Board to either (a) dismiss the petition for review for "failure to name a necessary party" or in the alternative to (b) order petitioners to amend the petition by naming all necessary parties. In support of the motion, the Agency argues that Section 40(e)(3) requires the Agency and the permit applicant to be named as respondents. Petitioners has failed to name the City of Woodstock as a party, although the petitioners did serve them with a copy of the petition, as indicated by the certificate of service.

In response, the petitioners argue that the Agency's motion contains "no citation to any statute, regulation, or case law" which would support a request for dismissal. The petitioners maintain that there is no allegation that the substance of the petition is deficient. The petitioners also assert that the Board's procedural rules (35 Ill. Adm. Code 101, 105) do not require that the applicant be named as a respondent and are therefore in conflict with the statute.

ANALYSIS

Section 40(e) was added to the Act by Public Act 90-274 effective July 30, 1997. Section 40(e) provides:

> e. 1. If the Agency grants or denies a permit under subsection (b) of Section 39 of this Act, a third party, other than the permit applicant

> or Agency, may petition the Board within 35 days from the date of issuance of the Agency's decision, for a hearing to contest the decision of the Agency.
>
> 2. A petitioner shall include the following within a petition submitted under subdivision (1) of this subsection:
>
> A. 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
>
> B. a demonstration that the petitioner is so situated as to be affected by the permitted facility.
>
> 3. If the Board determines that the petition is not duplicitous or frivolous and contains a satisfactory demonstration under subdivision (2) of this subsection, the Board shall hear the petition (i) in accordance with the terms of subsection (a) of this Section and its procedural rules governing permit denial appeals and (ii) exclusively on the basis of the record before the Agency. The burden of proof shall be on the petitioner. The Agency and permit applicant shall be named co-respondents. 415 ILCS 5/40(e)

Thus, the Act requires the applicant to be named as respondent in a third party permit appeal. The Board's procedural rules governing NPDES permit appeals do as well. See 35 Ill. Adm. Code 105.102(b)(5) "[t]he Agency shall appear as respondent" and 35 Ill. Adm. Code 105.102(b)(6) "[a]ll parties other than the petitioner who were parties to or participants at any Agency hearing shall be made respondents."

As indicated above, the addition of Section 40(e) of the Act is recent. This is in fact the Board's first case pursuant to Section 40(e) of the Act, so there is no case law directly on point regarding the consequences of the failure to name a necessary party in an appeal under this section of the Act. However, the Illinois Supreme Court has addressed the issue of failure to name a necessary party under both the Administrative Review Law (735 ILCS 5/3) and the Human Rights Act (775 ILCS 5/8).

Lockett v. Chicago Police Board, 133 Ill. 2d 349, 549 N.E.2d 1266, 140 Ill. Dec. 394 (1990) (Lockett) was a proceeding under a provision of the Administrative Review Law which at that time required that "all persons, other than plaintiff, who were parties of record to the proceedings before the administrative agency. . . be made defendants." Lockett, 549 N.E.2d at 1267, citing Ill. Rev. Stat.1985, ch. 110, par. 3-107. The court found that the procedures under the Administrative Review Law are a departure from common law which must be strictly adhered to and that the language of the Administrative Review Law is "mandatory and specific, and admit[ting] of no modification." Lockett, 549 N.E.2d at 1268. Therefore, the court decided that the failure to name a necessary party to an administrative review proceeding

was a fatal flaw, which appellant could not cure by seeking to amend the proceeding, beyond the 35-day time limit The petition was accordingly dismissed.

The Illinois Supreme Court looked at the issue five years later in McGaughy v. Illinois Human Rights Commission, 165 Ill. 2d 1, 649 N.E.2d 404, 208 Ill. Dec. 348 (1995) (McGaughy). In each of two consolidated cases reviewed in McGaughy, the petitioners had failed to name all parties of record as respondents in their respective petitions for review of the commission's action. McGaughy, 649 N.E.2d at 406. The court found that the failure to name all parties was a fatal defect and the petitions for review must be dismissed. The court based its decision on Section 8-111(A)(1) of the Human Rights Act which requires that a petition for review must be filed with the appellate court within 35 days after entry of an order by the Human Rights Commission in accordance with Supreme Court Rule 335. 775 ILCS 5/8-111(A)(1) (1994). Supreme Court Rule 335(a) requires that "the agency and all other parties of record shall be named respondents." McGaughy, 649 N.E.2d at 408, citing 134 Ill. 2d R. 335(a). The court further found that even though the petitioners served the parties it did not relieve the petitioners of the obligation to name all necessary parties. The petitions were dismissed.[1]

In considering this decision it is important to note what the court did not address or decide. The court did not specifically determine whether the statutory requirement was jurisdictional or mandatory and, thus, whether or not it is subject to a good faith effort modification. However, the court stated that under either classification, the consequence of failing to name a necessary party was the same, requiring dismissal of the review proceeding. McGaughy, 649 N.E.2d at 410, see also Bevis. The court noted that "neither petitioner sought leave to amend her petition for review to join all necessary parties, and therefore we need not consider here whether, and under what circumstances, amendments to defective petitions should be allowed. See [Worthen]." McGaughy, 649 N.E.2d at 410. Thus, the supreme court did not address the situation where, as here, a party seeks leave to amend the petition to add a necessary party.

Although, as earlier mentioned, there are no cases interpreting Section 40(e)(3) of the Act, on three occasions the appellate court for the fifth district has interpreted the consequences of failure to name necessary parties in third party appeals under Section 40.1 of the Act. These cases involve Board review of decisions by units of local government regarding the siting of regional pollution control facilities. The three cases are: Worthen v. Village of Roxana 253 Ill. App. 3d 378, 623 N.E.2d 1058, 191 Ill. Dec. 468 (5th Dist. 1993) (Worthen); Environmental Control Systems, Inc. v. Pollution Control Board, 258 Ill. App. 3d 435, 630 N.E.2d 554, 196 Ill. Dec. 619 (5th Dist. 1994) (Environmental Control Systems); and Bevis v. Pollution Control Board, 289 Ill. App. 3d 432, 681 N.E.2d 1096, 224 Ill. Dec. 475 (5th Dist 1997) (Bevis). In each of these cases, the appellate court found the good faith effort test was applicable to cases under the Environmental Protection Act. See Bevis.

[1] In P.A. 89-685, effective July 1, 1997, the legislature amended the Administrative Review Law to allow the amendment of a petition for review in certain circumstances.

Worthen was decided after Lockett, but prior to McGaughy. In Worthen, the appellate court addressed the issue of whether the failure to name a necessary party in the caption of a petition for review is a fatal defect if the unnamed party is served with a copy and the petitioner, without delay, requests leave to amend the petition to add the unnamed party. The appellate court found that this scenario was distinguishable from Lockett and allowed the party to amend the petition for review. A year later, in Environmental Control Systems, the court found that the failure to name the county board as respondent in the petition for review divested the court of jurisdiction and the case was dismissed. Environmental Control Systems at 630 N.E.2d 558.

The Board followed this reasoning in dismissing a third party appeal of a landfill siting in which the petitioner failed to name the applicant in the petition for review. Citing McGaughy, the appellate court affirmed that decision in Bevis. The court noted that petitioners had not cited a statutory basis for their assertion that they should be allowed to amend their complaint, and specifically stated that "serving Daubs [the applicant] with a copy of the appeal even though Daubs was not named as a respondent is insufficient." Bevis at 681 N.E.2d 1100. However, the court distinguished this case from its decision in Worthen, stating that the factual settings are "entirely distinct." Bevis at 681 N.E.2d at 1100. The court pointed out that while petitioners acknowledged that they were aware of Daubs and the requirement that they name all applicants, they specifically declined to name Daubs as a respondent. Thus, the court found that petitioners' decision not to name a party a respondent was "more one of strategy rather than one exhibiting a good-faith effort to comply with the requirement." Bevis at 681 N.E.2d at 1100.

In applying these precedents to the facts of this case, the Board is also guided by the rule of statutory construction that courts will liberally construe a right to appeal so as to permit a case to be considered on its merits. Cox v. Board of Fire and Police Commissioners, 96 Ill. 2d 399, 451 N.E.2d 842, 844, 71 Ill. Dec. 688, 690 (1983). In McGaughy, the Illinois Supreme Court did not reach the question of amendment of a petition and thus, left undisturbed the appellate court's decision in Worthen. The appellate court distinguished Bevis from its decision in Worthen and in Environmental Control Services, and specifically found that it could not find that petitioner had made a good faith effort to name all parties or to amend the petition to do so. Environmental Control Services at 630 N.E.2d 558. Here we are dealing with a new statute with which petitioner have exhibited a good-faith effort to timely comply. Therefore the Board denies the Agency's motion to dismiss and grants the alternative motion requiring the petitioners to amend the petition. The petitioners's motion to amend is also granted.

This matter is accepted for hearing. The hearing in this matter must be scheduled and completed in a timely manner, consistent with Board practices and the applicable statutory decision deadline (set out in Section 40 (a)(3) of the Act), or the decision deadline as extended by a waiver.

As previously stated, this is the first case filed under Section 40(e)(3) of the Act. In third party appeal cases of hazardous waste landfill permits under Section 40(b) of the Act (415 ILCS 5/40(b)(1996), the Board has construed the Act as giving the person who had

requested the permit: (1) the right to a decision within the applicable statutory time frame (now 120 days), and (2) the right to waive (extend) the decision period (Alliance for a Safe Environment, *et al*. v. Akron Land Corp., *et al*. (October 30, 1980), PCB 80-184). The Board has consistently construed Section 40.1(b)in the same way; Section 40.1(b) -which confers third party appeal rights in cases involving grant of local siting approval to pollution control facilities. See, *e.g*. Sierra Club and Jim Bensman v. City of Wood River and Norton Environmental (October 2, 1997), PCB 98-43.

The Board therefore construes Section 40(e) of the Act in like manner. The City of Woodstock, the permit applicant, is the party with the right to a decision within 120 days and is the only party with the right to waive the decision deadline. The result is that failure of this Board to act within 120 days would allow the permit applicant, the City of Woodstock, to pursue an appellate court order as detailed in Section 40 (b)(3) of the Act.

The Board will assign a hearing officer to conduct hearings consistent with this order, and the Clerk of the Board will promptly issue appropriate directions to that assigned hearing officer. The assigned hearing officer must inform the Clerk of the Board of the time and location of the hearing at least 30 days in advance of hearing so that a 21-day public notice of hearing may be published. Within five days after the hearing, the hearing officer must submit to the Board an exhibit list, a statement regarding credibility of witnesses, and all exhibits.

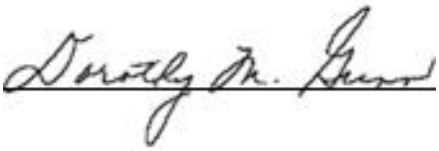
Any briefing schedule must provide for final filings as expeditiously as possible and, in time-limited cases, no later than 30 days before the decision due date, which is the final regularly scheduled Board meeting date on or before the statutory or deferred decision deadline. Absent any future waivers of the decision deadline, the statutory decision deadline is now October 22, 1998 (120 days from June 24, 1998). The Board meeting immediately preceding the decision deadline is scheduled for October 15, 1998.

If after appropriate consultation with the parties, the parties fail to provide an acceptable hearing date or if after an attempt the hearing officer is unable to consult with the parties, the hearing officer will unilaterally set a hearing date in conformance with the schedule above. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible. The Board notes that Board rules (35 Ill. Adm. Code 105.102) require the Agency to file the entire Agency record of the permit application within 14 days of notice of the petition.

IT IS SO ORDERED.

Board Member K.M. Hennessey abstains.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 6th day of August 1998 by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board