

ILLINOIS POLLUTION CONTROL BOARD
October 6, 1994

J. I. CASE COMPANY,)
)
 Petitioner,)
)
 v.) PCB 94-223
)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by M. McFawn):

On August 16, 1994, J.I. Case Company (Case) filed a petition for review of the Illinois Environmental Protection Agency's (Agency) modification of site-specific cleanup objectives established pursuant to its Pre-Notice Site Cleanup Program. On August 25, 1994, the Agency filed a motion to dismiss this matter, claiming that the Board does not have jurisdiction to hear this appeal. On August 31, 1994, Case filed a motion for extension of time until September 12, 1994 to respond to the motion to dismiss, which the Board granted by order dated September 15, 1994. Petitioner also filed a waiver of the decision deadline until March 17, 1995. For the reasons set forth below, we find that the Agency decision to amend the voluntary cleanup objectives did not constitute a final agency action subject to review, and we therefore grant the Agency's motion to dismiss.

BACKGROUND

Case is the owner of property located at 625 Third Avenue, Rock Island, Illinois, which is the site of a former J.I. Case facility. Between 1986 and 1988, Case removed seven UST's from the site in conjunction with the cessation of operations at the facility. When the tanks were removed, Case discovered that there had been a release from the USTs. Upon further investigation, Case discovered a free-oil layer on the groundwater in one sampling well. The Agency established cleanup objectives for the site in December, 1988, and issued site-specific cleanup objectives on April 20, 1989.

On March 28, 1991 the Agency requested that Case voluntarily enter the Pre-Notice Site Cleanup Program. This program, established pursuant to Section 22.2(m)(1) of the Environmental Protection Act (Act)(415 ILCS 5/22.2(m)(1) (1992)), allows the owners and operators of sites contaminated with hazardous substances or pesticides to voluntarily clean up their sites under Agency supervision, where the owner or operator, or an agent of the owner or operator, has requested such supervision.

The Agency is authorized to recover its costs for providing review and evaluation services thereunder.

Independent from this authority, the Agency is authorized pursuant to Section 4(y) of the Act to release any person from further responsibility for corrective or preventive action, following completion of preventive or corrective action undertaken by such person upon written request by such person.

There appears to be a factual dispute as to when Case entered the Pre-Notice Program; the Agency asserts that Case entered the program on June 8, 1993, while Case asserts that it entered the program on January 25, 1989. For purposes of the motion to dismiss, we will accept as true Case's assertion that it entered the program on January 25, 1989. (See Affidavit of Kenneth Meyers at 2.) It is undisputed that in January 1994 the Agency revised the cleanup objectives applicable to the Case site. The Agency explains that this was done to reflect the Groundwater Quality Standards adopted by the Board on November 7, 1991.

On May 4, 1994, Case asked the Agency to reconsider the revision. The Agency responded to this request by letter dated July 12, 1994. Case considered the Agency's response a denial of its request for reconsideration. (Response to Motion to Dismiss at 7.) Case filed this appeal in order to object to the new cleanup objectives established by the Agency in January 1994. Case asserts that the new standards are inappropriate for the conditions at the site, and that the Agency is collaterally estopped from changing the cleanup objectives.

AGENCY'S MOTION TO DISMISS

In its motion to dismiss, the Agency asserts that the Board has no jurisdiction to hear this appeal. The Agency, citing Transtechnology Corporation v. Illinois Environmental Protection Agency, PCB 91-39 (April 25, 1991), asserts the Board lacked jurisdiction on the following grounds:

- 1) the Agency has not set a standard in this matter;
- 2) the Board does not have jurisdiction pursuant to Section (d) of the Act;
- 3) the Agency has not made a final determination; and
- 4) 35 Ill. Adm. Code Section 105.102 is not a proper jurisdictional basis for this appeal.

CASE'S RESPONSE

Case asserts that the Board has jurisdiction to hear this appeal based on Section 5(d) of the Environmental Protection Act, which sets forth the types of enforcement actions which the Board can hear. It provides:

The Board shall have authority to conduct hearings upon complaints charging violations of this Act or regulations thereunder, upon petitions or variances, upon petitions for review of the Agency's denial of a permit in accordance with Title X of this Act; . . . upon other petitions for review of *final* determinations which are made pursuant to the Act or Board rule and which involve a subject which the Board is authorized to regulate; and such other hearings as may be provided by rule. (Emphasis added.)

Case asserts that, under Section 5(d) of the Act, the Agency decision establishing new cleanup objectives is a "final determination made pursuant to the Act or Board rule." Case asserts that in Gunite Corp. v. IEPA, PCB 94-80 (May 18, 1994) the Board previously held that it has jurisdiction to review site-specific cleanup objectives. Furthermore, Case asserts that the Board has jurisdiction to hear this appeal because the Agency decision imposing new cleanup objectives is a final decision from which Case has no other recourse and which has caused Case direct harm. Case also asserts that the Agency is equitably estopped from amending the cleanup objectives.

ANALYSIS

The Agency is authorized pursuant to Section 22.2(m) of the Act to establish the voluntary cleanup program now known as the Pre-Notice Site Cleanup Program. The services provided thereunder by the Agency include review and evaluations of clean-up actions, which in this case included establishing clean-up objectives. The Board must determine whether the Agency's actions under the Pre-Notice Program constitute final agency actions subject to review.

Section 5(d) of the Act, in relevant part, gives the Board authority to review final determinations which are made pursuant to the Act or Board rule and which involve a subject which the Board is authorized to regulate. An administrative order is final if the process of administrative decisionmaking has reached a state where judicial review will not disrupt the orderly process of adjudication, and the rights and obligations of the parties have been determined, or legal consequences will flow from the agency action. Waste Management of Illinois, Inc. v. Illinois Pollution Control Board, 146 Ill.Dec. 961, 558 N.E.2d. 1295 (Ill.App. 1st Dist.), *reversed on other grounds* 165 Ill.Dec. 875, 585 N.E.2d 606, 145 Ill.2d 345 (1990)(citations omitted.)

In providing review and evaluation services under the Pre-Notice Program, the Agency acts in an advisory capacity, and is not exercising its enforcement powers. The petitioner is not required to act upon the Agency's recommendation, and is not subject to enforcement for failing to do so. Therefore, the cleanup objectives established pursuant to the Pre-Notice Program are voluntary and cannot be considered standards which affect petitioner's legal rights and duties.

Furthermore, participation in the Pre-Notice Program is entirely voluntary, and the petitioner is free to withdraw from the program at any time. Petitioner's participation in or withdrawal from the Pre-Notice Program does not affect petitioner's rights and duties under the Act; those are established by the underlying statutes and regulations applicable to petitioner's site. Agency decisions made pursuant to the Pre-Notice Program do not affect those underlying rights and duties.

For these reasons, we find that the Agency decision in establishing revised voluntary cleanup objectives pursuant to the Pre-Notice Program does not constitute final Agency action. Therefore, the Board has no authority to review these objectives pursuant to Section 5(d) of the Act.

Our decision in this case is consistent with Transtechonology Corporation v. Illinois Environmental Protection Agency, PCB 91-39 (April 25, 1991), wherein the Board dismissed for lack of jurisdiction a petition for review of cleanup objectives established pursuant to the Agency's Voluntary Site Cleanup Program, the prior name for the Pre-Notice Site Cleanup Program. In that case, the Board stated, "for the reasons articulated by the Agency, the Board finds that it lacks jurisdiction to hear this matter." (Id. at 2.) In pertinent part, the reasons articulated by the Agency included:

1) Petitioner was not required to meet the established cleanup objectives and was not subject to sanctions for failing to do so;

2) neither Section 5(d) of the Act nor Section 105.102 of the Board's procedural rules establish the Board's jurisdiction;

(Id. at 1-2.)

Case seeks to distinguish the situation in the present case from that in Transtechonology on the grounds that Case has asked the Agency to reconsider its decision and the Agency has refused to do so. (Petitioner's Response to the Motion to Dismiss (Response) at 7-8.) However, because we hold today that the establishment of voluntary cleanup objectives pursuant to the Pre-Notice Program cannot be considered a final agency action, it

is unnecessary for us to consider whether petitioner has sought to have the Agency reconsider those objectives.


Petitioner's reliance on Gunite Corporation v. Illinois Environmental Protection Agency, PCB 94-80 (May 19, 1994) is misplaced. In Gunite, the petitioner was seeking review of the Agency's refusal to establish site-specific cleanup objectives pursuant to the pre-H.B. 300 UST program. The Agency was acting in its enforcement role in administering the UST program, and any cleanup standards established would have been legally binding upon the petitioner. In contrast, Case's participation in the Pre-Notice Program was voluntary, and the established objectives were not legally binding.

We find that the Agency decision in establishing revised voluntary cleanup objectives was not a final decision affecting petitioner's legal rights and duties. Therefore, we grant the Agency's motion to dismiss for lack of jurisdiction. Having held that the Board lacks jurisdiction to hear this appeal, we do not reach petitioner's other arguments.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.)

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


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board