

ILLINOIS POLLUTION CONTROL BOARD
August 11, 1994

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| BTL SPECIALTY RESINS CORPORATION, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | PCB 94-160 |
| |) | (Permit Appeal) |
| |) | |
| ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, |) | |
| |) | |
| Respondent. |) | |

ORDER OF THE BOARD (by M. McFawn):

On May 26, 1994, BTL Specialty Resins Corporation (BTL) filed a petition captioned "Petition for Review of Final Hazardous Waste Determination." On June 2, 1994, the Board issued an order finding that petitioner failed to set forth a proper jurisdictional basis for its appeal, and directing petitioner to file an amended petition correcting this deficiency. On June 23, 1994 BTL filed an amended petition which set forth the grounds on which BTL asserts jurisdiction is proper. On July 15, 1994, the Illinois Environmental Protection Agency (Agency) filed a motion to dismiss, asserting that petitioner failed to establish a proper jurisdictional basis for its appeal. The Board issued an order on July 21, 1994, accepting the matter for hearing, pending resolution of the jurisdictional issue. On July 22, 1994, BTL filed a response to petitioner's motion to dismiss. The Agency filed a reply to the response on August 1, 1994.¹ Because we find that petitioner has failed to establish a jurisdictional basis for its appeal, we grant respondent's motion to dismiss.

BACKGROUND

BTL operates a chemical manufacturing plant at which, among other things, it uses distillation equipment to produce phenol and acetone from cumene. This process produces a by-product that has been classified as K022 waste. Section 721.132 of the regulations describes K022 waste as:

¹ Pursuant to Section 130.104(c) of the Board's procedural rules, leave of the Board is required to file a reply. Usually, the justification for leave is offered in a motion filed concurrently with a reply. No such motion was made by the Agency. This time, the Board will, on its own motion grant the Agency leave to file a reply.

Distillation bottom tars from the production of phenols/acetone from cumene.

BTL asserts that its wastestream should not be characterized as K022 waste. BTL asserts that the by-product of its process is not a tar; rather, it is a liquid with a consistency "similar to pancake syrup." (Amended Petition at 7.) BTL also asserts that its process is different from the process described in the listing document for K022 waste. (Amended Petition at 9 - 12.)

Upon request from BTL, the Agency issued a letter on April 26, 1994, affirming its view that the waste generated by BTL is K022 waste. This confirmed the Agency position as stated in a March 31, 1994 letter, and agreed with the position taken by the United States Environmental Protection Agency in a memorandum sent to BTL. (See Amended Petition Exh. A.)

ASSERTED JURISDICTIONAL BASIS

In its amended petition, BTL relies on Section 5(d) of the Environmental Protection Act (Act), 415 ILCS 5/5(d) (1992)), in asserting that there is proper jurisdiction for the Board to hear this petition. This section provides:

The Board shall have authority to conduct hearings upon complaints charging violations of this Act or of regulations thereunder; upon petitions for variances; upon petitions for review of the Agency's denial of a permit in accordance with Title X of this Act; upon petition to remove a seal under Section 3 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 hearing as may be provided by rule. (Emphasis added.)

BTL asserts that the jurisdictional requirements are satisfied because the Agency's letter informing BTL that its waste is a K022 hazardous waste constitutes a "final determination" which the Board has authority to review.

ANALYSIS

In asserting that the April 24, 1994 Agency letter constitutes a final determination, BTL states that the letter "completely and definitively resolves the disputed issues between the parties." However, the letter, by itself, has no force or effect. The Agency was not required by statute or regulation to issue the letter; it issued the letter as a public courtesy in response to an inquiry from BTL. The letter therefore cannot constitute a "final determination made pursuant to the Act or a Board rule," pursuant to Section 5(d) of the Act. Thus, petitioner has failed to demonstrate a proper jurisdictional

basis for its appeal.

Furthermore, as the Agency points out in its motion to dismiss, characterizing the April 26, 1994 letter as a final determination would allow almost any responsive correspondence from the Agency to be deemed a final determination. (Motion to Dismiss at 2.) Such an interpretation would severely limit the Agency's ability to communicate constructively with the regulated community.

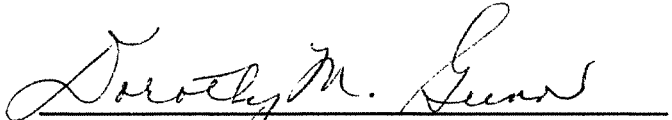
We also note that petitioner is incorrect in asserting that denial of jurisdiction to hear this appeal leaves petitioner without an avenue for appeal. (See Amended Petition at 4.) There are several possible avenues through which petitioner could seek relief. For example, pursuant to 35 Ill. Adm. Code 720.122, petitioner can seek a waste delisting for its wastestream.

There being no proper jurisdictional basis for the appeal as presented, it is dismissed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for the 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 17th day of August, 1994, by a vote of 6-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board