

ILLINOIS POLLUTION CONTROL BOARD

January 8, 2009

PRAIRIE RIVERS NETWORK AND)
SIERRA CLUB,)
)
Petitioners,)
)
v.) PCB 09-46
) (Third Party NPDES Permit Appeal)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY and SUGAR)
CAMP ENERGY, L.L.C,)
)
Respondents.)

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

On January 5, 2009, Prairie Rivers Network and Sierra Club timely filed a petition asking the Board to contest issuance of a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to Section 40(e) of the Illinois Environmental Protection Act (Act). *See* 415 ILCS 5/40(e) (2006); 35 Ill. Adm. Code 105.206(a). The permit was issued by the Illinois Environmental Protection Agency (Agency) on December 2, 2008, to Sugar Camp Energy, L.L.C. for its coal mining facility in Franklin County.

Prairie Rivers Network and Sierra Club appeal on several grounds including that (1) the Agency did not identify and quantify proposed pollutant load increases and the potential impacts of those increases on the affected waters; (2) the Agency failed to consider the impact of suspended solids and sediment on existing uses, (3) the Agency failed to consider the impact on existing uses of the additional pollutant loadings from underground mine pumpage; (4) the permit does not include special conditions requiring minimization of sulfate formation and chloride leaching; (5) the permit does not include a special condition requiring appropriate drainage control for non-point source mine discharge in accordance with 35 Ill. Adm. Code 406.108, and evaluate the need for clay liners in five of the eight sedimentation ponds; and (6) the Agency failed to take the steps necessary to comply with 35 Ill. Adm. Code Section 302.105(c) by assuring that all technically and economically reasonable measures to avoid or minimize the extent of the proposed increase in pollutant loadings be incorporated into the permit and perform the required financial analyses regarding pollution control costs. The petition meets the content requirements of 35 Ill. Adm. Code 105.210. The Board accepts the petition for hearing.

A third-party appeal of an NPDES permit is authorized by Section 40(e) of the Act. 415 ILCS 5/40(e) (2006). The Board's procedural rules state that "[i]f the Agency grants or denies a permit under subsection (b) of Section 39 of the Act, a third party, other than the permit applicant or Agency, may petition the Board for a hearing to contest the decision of the Agency (415 ILCS 5/40(e)(1) 2006))." 35 Ill. Adm. Code 105.204(b). Section 40(e)(2) requires that the

petition contains “a demonstration that the petitioner raised the issues contained within the petition during the public notice period or during the public hearing of the NPDES permit application, if a public hearing was held, and a demonstration that the petitioner is so situated as to be affected by the permitted facility.” 415 ILCS 5/40(e)(2) (2006). Further, Section 40(e)(3) provides that if the Board determines that the petition is not duplicitous or frivolous and contains a satisfactory demonstration under Section 40(e)(2), the Board shall “hear the petition.” 415 ILCS 5/40(e)(3) (2006).

Petitioners appeared at and gave testimony on the permit at a public hearing held on September 23, 2008, and presented written comments. However, petitioners maintain that the Agency did not appropriately consider the comments. Petitioners raised legal and scientific issues regarding flaws in the draft permit. The petition also states that petitioner will be adversely affected when pollution discharged under the permit causes or contributes to the creation of offensive conditions into Middle Fork Big Muddy River, two unnamed tributaries of the Middle Fork, Akin Creek and three unnamed tributaries of Akin Creek.

The Board finds that the petition is neither duplicitous nor frivolous, and that the petition contains a satisfactory demonstration under Section 40(e)(2) of the Act. 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 the Board noted in McHenry County Defenders, Inc. v. IEPA (August 6, 1998), PCB 98-173, slip op. at 4-5, the Board has construed the Act and Section 40(e) 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. Sugar Camp Energy, L.L.C., 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 the 120 days would allow the permit applicant, Sugar Camp Energy, L.L.C., to pursue an appellate court order as detailed in Section 40(a)(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. After hearing, the hearing officer must submit an exhibit list, a statement regarding credibility of witnesses, and all actual exhibits to the Board within five days after the hearing.

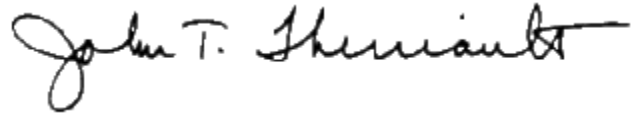
Any briefing schedule must provide for final filings as expeditiously as possible. Absent any future waivers of the decision deadline, the statutory decision deadline is now May 5, 2009, (120 days from January 5, 2009). The Board meeting immediately preceding the decision deadline is scheduled for April 16, 2009.

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 all of the parties, the hearing officer shall unilaterally set a hearing date. 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.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on January 8, 2009, 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 flourish extending to the right.

John Therriault, Assistant Clerk
Illinois Pollution Control Board