

ILLINOIS POLLUTION CONTROL BOARD
November 15, 2012

PRAIRIE RIVERS NETWORK and SIERRA)
CLUB,)
)
Petitioners,)
)
v.) PCB 13-21
) (Third-Party NPDES Permit Appeal -
ILLINOIS ENVIRONMENTAL) Water)
PROTECTION AGENCY and PEABODY)
GATEWAY NORTH MINING, LLC,)
)
Respondents.)

ORDER OF THE BOARD (by T.A. Holbrook):

On November 2, 2012, Prairie Rivers Network and Sierra Club (collectively, petitioners) timely filed a petition asking the Board to review a September 28, 2012 determination of the Illinois Environmental Protection Agency (Agency). *See* 415 ILCS 5/40(e)(1) (2010); 35 Ill. Adm. Code 101.300(b), 105.204(b). The Agency granted a National Pollutant Discharge Elimination System (NPDES) permit to Peabody Gateway North Mining, LLC (Peabody Gateway) for its coal mining site located at 12968 State Route 13, Coulterville, Randolph County.

Under the Environmental Protection Act (415 ILCS 5 (2010)), the Agency is the permitting authority, responsible for administering Illinois' regulatory programs to protect the environment. NPDES permits are required for discharges of contaminants from point sources to surface waters. If the Agency grants an NPDES permit, certain third parties may appeal the Agency's decision to the Board. *See* 415 ILCS 5/40(e)(1) (2010); 35 Ill. Adm. Code 105.204(b). In this case, petitioners appeal on the grounds that the Agency failed to adequately consider alternatives to the proposed discharge that would reduce pollutant loading, as required under 35 Ill. Adm. Code 302.105(c)(2)(B), which compels the Agency to assure that "all technically and economically reasonable measures to avoid or minimize the extent of the proposed increase in pollutant loading have been incorporated into the proposed activity." For the reasons below, the Board accepts petitioners' petition for hearing.

THIRD-PARTY APPEAL

If a third party wishes to appeal an Agency determination to grant an NPDES permit, the Act requires that the third party's petition to the Board contain:

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

a demonstration that the petitioner is so situated as to be affected by the permitted facility. 415 ILCS 5/40(e)(2) (2010); *see also* 35 Ill. Adm. Code 105.210(d).

The petition also must, among other things, specify the grounds for appeal and include a copy of the issued permit. *See* 35 Ill. Adm. Code 105.210(a), (c). The third party must file the petition within 35 days after the “date of issuance of the Agency’s decision.” 415 ILCS 5/40(e)(1) (2010); *see also* 35 Ill. Adm. Code 105.206(b). If the Board determines that the third party’s petition for review is not “duplicative or frivolous,” the Board will hear the petition. 415 ILCS 5/40(e)(3) (2010); *see also* 35 Ill. Adm. Code 105.214(d).

Petitioners’ petition states that, during the Agency’s public notice period and hearing on Peabody Gateway’s NPDES permit application, petitioners raised the issues on which they now appeal. Petitioners’ petition also states that they are so situated as to be affected by the permitted facility and includes a copy of the issued permit. The petition meets the content requirements of 35 Ill. Adm. Code 105.210. Petitioners also filed their petition within 35 days after the Agency issued its determination.

An action before the Board is duplicative if it is “identical or substantially similar to one brought before the Board or another forum.” 35 Ill. Adm. Code 101.202. An action before the Board is frivolous if it is “a request for relief that the Board does not have the authority to grant” or “fails to state a cause of action upon which the Board can grant relief.” *Id.* No evidence before the Board indicates that this action is duplicative or frivolous. The Board accepts petitioners’ petition for hearing.

HEARING AND DECISION DEADLINE

Petitioners have the burden of proof. *See* 415 ILCS 5/40(e)(3) (2010); 35 Ill. Adm. Code 105.112(a). Hearings “will be based exclusively on the record before the Agency at the time the permit or decision was issued.” 35 Ill. Adm. Code 105.214(a); *see also* 415 ILCS 5/40(e)(3) (2010). Accordingly, though the Board hearing affords a permit applicant the opportunity to challenge the Agency’s reasons for denying or conditionally granting the permit, information developed after the Agency’s decision typically is not admitted at hearing or considered by the Board. *See Alton Packaging Corp. v. PCB*, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); *Community Landfill Co. & City of Morris v. IEPA*, PCB 01-170 (Dec. 6, 2001), *aff’d sub nom. Community Landfill Co. & City of Morris v. PCB & IEPA*, 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3rd Dist. 2002).

Hearings will be scheduled and completed in a timely manner, consistent with the decision deadline (*see* 415 ILCS 5/40(a)(3) (2010)), which only Peabody Gateway may extend by waiver (*see* 35 Ill. Adm. Code 101.308). If the Board fails to take final action by the decision deadline, Peabody Gateway “shall be entitled to an Appellate Court order pursuant to subsection (d) of Section 41 [415 ILCS 5/41(d) (2010)].” 415 ILCS 5/40(a)(3) (2010). Currently, the decision deadline is March 4, 2013, which is the first business day following the 120th day after

the Board received the petition. *See* 35 Ill. Adm. Code 105.114. The Board meeting immediately before the decision deadline is scheduled for February 21, 2013.

AGENCY RECORD

Unless the Board or the hearing officer orders otherwise, the Agency must file the entire record of its determination by December 3, 2012, which is the first business day following 30 days after the Board received petitioners' petition. *See* 35 Ill. Adm. Code 105.212(a). If the Agency wishes to seek 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. *See* 35 Ill. Adm. Code 105.116. The record must comply with the content requirements of 35 Ill. Adm. Code 105.212(b).

IT IS SO ORDERED.

Member J. O'Leary Abstained

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 15, 2012 by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board