

ILLINOIS POLLUTION CONTROL BOARD  
July 23, 2015

KINCAID GENERATION, L.L.C., )  
 )  
 Petitioner, )  
 )  
 v. ) PCB 15-203  
 ) (Permit Appeal – Water, NPDES)  
 ILLINOIS ENVIRONMENTAL )  
 PROTECTION AGENCY, )  
 )  
 Respondent. )  
 )  
 )

ORDER OF THE BOARD (by G. M. Keenan):

On June 18, 2015, the Board accepted for hearing a petition for review (Pet.) filed by Kincaid Generation L.L.C. (petitioner). Kincaid requested that the Board review an April 30, 2015 permit determination of the Illinois Environmental Protection Agency (Agency). *See* 415 ILCS 5/40(a)(1) (2014); 35 Ill. Adm. Code 101.300(b), 105.206. The determination involved petitioner’s renewed National Pollutant Discharge Elimination System (NPDES) permit with conditions for petitioner’s coal-fired steam electric generating plant located 4 miles west of Kincaid on Route 104 in Christian County. Petitioner contested certain conditions in the permit and the lack of a condition present in its prior NPDES permit. Pet. at 2-4. With the petition, Kincaid filed a motion to stay the effectiveness of the contested permit conditions and stay the prohibition of the condition present in its prior permit. Pet. at 4-7.

Although the Illinois Administrative Procedure Act subjects certain permits in their entirety to an automatic stay during appeals (5 ILCS 100/10-65(b) (2014)), a petitioner may choose not to avail itself of this stay and instead request that the Board stay only the contested conditions of the permit. *See Ameren Energy Generating Co. v. IEPA*, PCB 06-67 (Feb. 16, 2006), slip op. at 7, n.1. The Board has consistently held that it “has the authority to grant discretionary stays from permit conditions.” *Community Landfill Co. and City of Morris v. IEPA*, PCB 01-48, PCB 01-49 (consol.) (Oct. 19, 2000). As the Board has explained, the permit appeal system would be “rendered meaningless in many cases, if the Board did not have the authority to stay permit conditions.” *Community Landfill*, PCB 01-48, PCB 01-49 (consol.) slip op. at 4 (granting stay of challenged permit conditions).

In deciding whether to grant a discretionary stay, the Board may consider various factors, including avoidance of irreparable harm to the petitioner and “the likelihood of environmental harm if a stay is granted.” *Community Landfill*, PCB 01-48, 01-49 (consol.) slip op. at 4, citing *Motor Oils Refining Co. v. IEPA*, PCB 89-116, slip op. at 2 (Aug. 31, 1989).

Petitioner argues that it will suffer irreparable injury if the contested conditions are not stayed. Pet. at 6. Petitioner claims that compliance with the permit's contested conditions would entail substantial costs and that petitioner would potentially be forced to violate the permit until modifications necessary for compliance are made.

Petitioner also argues that no harm to human health or the environment will result from staying the contested conditions. Pet. at 7. Petitioner states it will continue to operate as it had under the prior permit with respect to the contested conditions.

In addition, petitioner claims that this appeal is its only remedy to contest these conditions and that it "has no other adequate remedy at law . . ." Pet. at 6. Petitioner also believes that it is likely to succeed on the merits of its appeal, as it is prepared to demonstrate that the contested conditions were based on mistake, error, or oversight. *Id.* Finally, the petitioner claims that "[t]he Board has granted discretionary stays in a number of cases." Pet. at 7 (citations omitted).

In its June 18, 2015 order accepting this petition for review, the Board reserved ruling on the requested stay of the contested permit conditions to allow the Agency's response deadline to run. *See* 35 Ill. Adm. Code 100.500(d). The Board has not received a response from the Agency. The Agency is deemed to have waived any objection to granting the motion. *Id.*

The Board has reviewed petitioner's motion for a stay of the contested permit conditions. Exercising its discretion, the Board grants the stay, as requested. In making this determination, the Board "makes no findings on the merits of the permit appeal . . ." Motor Oils, PCB 89-116, slip op. at 2. The partial stay is to remain in effect until the Board takes final action in this appeal or until the Board orders otherwise.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on July 23, 2015, by a vote of 5-0.



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John T. Therriault, Clerk  
Illinois Pollution Control Board