

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

BUNGE MILLING, INC.)	
)	
Petitioner,)	
)	
v.)	PCB 2023-092
)	(Permit Appeal – Air)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY)	
)	
Respondent.)	
)	

NOTICE OF ELECTRONIC FILING

TO: Illinois Pollution Control Board	Office of the Attorney General
Attn: Clerk’s Office	Christina Nannini
Don Brown, Clerk	500 S. Second Street
Carol Webb, Hearing Officer	Springfield, IL 62706
60 E. Van Buren St., Suite 630	Christina.Nannini@ilag.gov
Chicago, IL 60605	
Don.Brown@illinois.gov	
Carol.Webb@illinois.gov	

PLEASE TAKE NOTICE that on March 27, 2023, Bunge Milling, Inc., electronically filed with the Office of the Clerk of the Illinois Pollution Control Board the MOTION FOR LEAVE TO FILE A REPLY TO RESPONDENT’S RESPONSE TO PETITIONER’S REQUEST FOR STAY OF CONTESTED CONDITIONS and REPLY TO RESPONDENT’S RESPONSE TO PETITIONER’S REQUEST FOR STAY OF CONTESTED PERMIT CONDITIONS, copies of which are hereby served upon you.

Respectfully submitted,

BUNGE MILLING, INC.

Dated: March 27, 2023

By: /s/ Thor W. Ketzback
Counsel for Bunge Milling, Inc.

Thor W. Ketzback
Nora J. Faris
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CERTIFICATE OF E-MAIL SERVICE

I, the undersigned, on oath state the following:

That I have served the MOTION FOR LEAVE TO FILE A REPLY TO RESPONDENT’S RESPONSE TO PETITIONER’S REQUEST FOR STAY OF CONTESTED CONDITIONS and REPLY TO RESPONDENT’S RESPONSE TO PETITIONER’S REQUEST FOR STAY OF CONTESTED PERMIT CONDITIONS by e-mail upon the following persons:

Illinois Pollution Control Board
 Attn: Clerk’s Office
 Don Brown, Clerk
 Carol Webb, Hearing Officer
 60 E. Van Buren St., Suite 630
 Chicago, IL 60605
Don.Brown@illinois.gov
Carol.Webb@illinois.gov
 Via electronic mail on 3/27/2023

Office of the Attorney General
 Christina Nannini
 500 S. Second Street
 Springfield, IL 62706
Christina.Nannini@ilag.gov
 Via electronic mail on 3/27/2023

That my e-mail address is Nora.Faris@bclplaw.com

That the number of pages in the e-mail transmission is 12.

That the e-mail transmission took place before 4:30 p.m. on Monday, March 27, 2023.

/s/ Nora J. Faris
 Nora J. Faris
 Bryan Cave Leighton Paisner LLP
 161 N. Clark St., Suite 4300, Chicago, IL 60601
Nora.Faris@bclplaw.com
 314-259-2209

Dated: March 27, 2023

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**BUNGE’S MOTION FOR LEAVE TO FILE A REPLY TO RESPONDENT’S
RESPONSE TO PETITIONER’S REQUEST FOR STAY OF CONTESTED
CONDITIONS**

NOW COMES Petitioner, Bunge Milling, Inc. (“Petitioner” or “Bunge”), by and through its attorneys, pursuant to 30 Ill. Adm. Code § 101.500(e), and moves that the Illinois Pollution Control Board (“Board”) grant Petitioner leave to file the attached Reply to the Illinois Environmental Protection Agency’s (“Agency”) Response to Petitioner’s Request for Stay of Contested Permit Conditions (“Response”). In support of this Motion, Petitioner states as follows:

1. On January 4, 2023, the Agency issued Federally Enforceable State Operating Permit 96020027 (the “FESOP” or “Permit”) for Bunge’s grain elevator and corn milling facility in Danville, Vermilion County, Illinois (the “Facility”).
2. On February 13, 2023, Bunge filed a petition with the Board appealing certain conditions in the FESOP and requesting a stay of the contested permit conditions (“Petition”).
3. On February 27, 2023, the Agency filed an unopposed Motion for Extension of Time to Respond to Bunge’s Request for Stay.
4. On March 2, 2023, the Board accepted Bunge’s Petition for hearing but reserved ruling on Bunge’s stay request.

5. The Agency subsequently filed its Response to Bunge's Request for Stay of Contested Permit Conditions on March 13, 2023. In its Response, the Agency argues that Bunge's request should be denied as to permit conditions 12.f, 23.a.vii and 23.a.viii. Resp. at 6.

6. Pursuant to 35 Ill. Adm. Code § 101.500(e), a moving party may file a reply "as permitted by the Board or the hearing officer to prevent material prejudice." Bunge would be materially prejudiced if the Board does not grant leave to reply to the arguments set forth in the Agency's Response. The Agency's Response omits or ignores relevant context and significantly overstates the likelihood of environmental harm associated with a stay of the contested conditions. Unless the Board grants Bunge leave to file a reply, the Board's decision on Bunge's stay request will be based on an incomplete factual record and only a partial briefing of the key issues.

7. 35 Ill. Adm. Code § 101.500(e) further provides that "[a] motion for permission to file a reply must be filed with the Board within 14 days after service of the response." This Motion is timely, having been filed within 14 days of receiving the Agency's Response on March 13, 2023.

WHEREFORE, for the reasons set forth above, Petitioner, Bunge Milling, Inc., requests that the Board grant its Motion for Leave to File a Reply to Respondent's Response to Petitioner's Request for a Stay of Contested Conditions and accept for filing the attached Reply.

Respectfully submitted,

BUNGE MILLING, INC.

By: /s/ Thor W. Ketzback
Counsel for Bunge Milling, Inc.

Dated: March 27, 2023

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BUNGE’S REPLY TO RESPONDENT’S RESPONSE TO PETITIONER’S REQUEST FOR STAY OF CONTESTED PERMIT CONDITIONS

NOW COMES Petitioner, Bunge Milling, Inc. (“Petitioner” or “Bunge”), by and through its attorneys, pursuant to 35 Ill. Adm. Code § 101.500(e), and replies to the Illinois Environmental Protection Agency’s (“Agency”) Response to Petitioner’s Request for Stay of Contested Conditions (“Response”) as follows:

INTRODUCTION

In its Petition for Review of Federally Enforceable State Operating Permit (“Petition”) and Request for Stay of Contested Conditions (“Request”) filed February 13, 2023, Bunge identified certain conditions in its Federally Enforceable State Operating Permit (“FESOP”) 96020027 that should be revised or rescinded because they are arbitrary, unlawful, and/or technologically and economically infeasible. Among these conditions are Conditions 12.f, 23.a.vii and 23.a.viii¹ of the FESOP, which require Bunge to determine compliance with annual emission limits using a

¹ Condition 12.f requires 365-day rolling total recordkeeping, rolled on a daily basis, while Conditions 23.a.vii and 23.a.viii require records of “hours/day” of operation of baghouse equipment and “daily” emissions of PM10. With respect to Condition 23.a.vii, Bunge notes that a daily calculation of PM10 emissions is not possible based on the records currently required to be maintained under the FESOP. For example, source-wide PM and PM10 would include emissions from the facility’s boilers; however, boiler throughput data is only required to be kept on a monthly basis.

365-day rolling total, calculated on a daily basis, for all 135 emission units at the Facility—a requirement that is wholly impracticable based on current Facility operations. As described more fully below, the Agency’s arbitrary 365-day rolling total recordkeeping requirement provides no greater level of environmental protection than Bunge’s suggested 12-month rolling total method, while imposing a significant and unworkable administrative burden that will inevitably siphon resources away from other legitimate environmental compliance objectives.

A stay of these contested conditions is proper because (i) any likelihood of environmental harm associated with a stay is purely conjectural; (ii) Bunge will suffer irreparable harm if forced to attempt to comply with these arbitrary and overburdensome conditions; (iii) failure to stay these conditions will render Bunge’s appeal moot; (iv) Bunge has no adequate remedy at law; and (v) Bunge has demonstrated a strong probability of success on the merits. Bunge respectfully requests that the Board grant a stay of Conditions 12.f, 23.a.vii and 23.a.viii until the merits of this appeal have been resolved. Failure to grant the requested stay would indisputably undermine Bunge’s right to an appeal of these arbitrary and improper permit conditions.

STANDARD FOR GRANTING A DISCRETIONARY STAY

The Board has consistently held that it “has the authority to grant discretionary stays from permit conditions,” even where the Agency “did not consent to such stays.” *See Illinois Power Generating Co. v. IEPA*, PCB 16-60, slip op. at 2 (Dec. 17, 2015). Indeed, “[t]he permit appeal system would be rendered meaningless in many cases”—including the present one—“if the Board did not have the authority to stay permit conditions.” *Id.* In deciding whether to grant a discretionary stay, the Board may consider the following factors: (i) whether a certain and clearly ascertainable right of the petitioner needs protection; (ii) whether irreparable injury will result without the requested stay; (iii) whether there is some adequate remedy at law; and (iv) whether

petitioner has demonstrated a probability of success on the merits. *Id.* While not required to consider each of the factors listed above, the Board gives particular consideration to the likelihood of environmental harm if the stay is granted. *Bridgestone/Firestone Off Road Tire Co. v. IEPA*, PCB02-31, slip op. at 3 (Nov. 1, 2001). In light of these factors—each of which weighs in Bunge’s favor—a grant of the requested stay is proper.

ARGUMENT

A. A stay of the contested permit conditions will not result in any environmental harm.

Bunge agrees with the Agency that, when considering a request for a discretionary stay, “[t]he likelihood of environmental harm should a stay be granted is”—and should be—“of particular concern for the Board.” Resp. at 2–3 (citing *Bridgestone/Firestone Off Road Tire Co.* at 3). However, Bunge strongly *disagrees* with the Agency’s unsupported contention that the requested stay will result in any increased likelihood of environmental harm.

The Agency claims, without any basis, that if Bunge does not record emissions data using the Agency’s mandated method (i.e., a 365-day rolling total), environmental harm may result. Resp. at 3–5. According to the Agency, “the[] emission limits. . .of the Permit have been set to restrict the potential to emit (“PTE”) of the facility below major source thresholds,” and the 365-day period ensures “that the annual emission limits of the Permit are enforceable as a practical matter.” *Id.* at 5. But the level of practical enforceability required of the FESOP emission limits is an issue that goes to the substantive merits of Bunge’s appeal—not to the more fundamental question of whether granting a stay will result in an increased likelihood of environmental harm.

The Agency wrongly contends that “[t]he inability to determine compliance with the annual emission limits of the Permit would necessarily result in an increased likelihood of environmental harm.” Resp. at 5. Accepting this position would require the Board to ignore the

fact that the Facility is, essentially, physically incapable of exceeding its permitted PTE threshold under realistic operating conditions. As Bunge noted in its Petition, “the Facility’s [PTE] of 98 tpy of PM10 is based on a theoretical 24/7/365 operating schedule, assuming that *all* equipment is running *all the time*. In reality, the Facility cannot operate all equipment at the same time, continuously. That fact is borne out by the Facility’s actual annual emissions of PM10, which have ranged between 27.3 and 32.9 tpy since 2011—well below the Facility’s PTE. Even assuming the Facility processed the maximum possible grain throughput[] and . . . operated all equipment 24 hours a day year-round (which would never be the case in practice), the emission limits and the overall PTE still would not be exceeded.” Petition at 9–10. The likelihood of the Facility exceeding its annual emission limits or the major source threshold under normal operating conditions (i.e., non-continuous operations at less-than-maximum throughput) is purely hypothetical. The Agency’s conclusory assertion that a stay would invariably result in an increased likelihood of environmental harm is based on pure conjecture. Because it is substantially impossible for Bunge to exceed its permit limits, a stay of the recordkeeping provisions during the pendency of this appeal will not result in any increased likelihood of environmental harm.

B. Bunge will suffer irreparable harm if the stay is denied.

While a grant of the requested stay is unlikely to result in any harm to the environment, denial of the stay is certain to result in irreparable harm to Bunge. As currently written, the contested permit conditions would require Facility personnel to calculate and catalog actual daily emissions for 135 emission units, 365 days a year. Based on current Facility operations and staffing, this requirement would be effectively impracticable to administer. Attempting to maintain records on a 365-day rolling basis for each of the permitted emission units would require a significant re-allocation of personnel’s already limited time, detracting from other more pressing

environmental compliance and operational priorities. The 365-day rolling total recordkeeping requirement is unnecessarily inflexible, and even routine employee absences or general plant turnover could make adequate compliance nearly impossible to achieve.

If no stay is granted, Bunge would be forced to incur significant costs in terms of the additional employee training, increased number of personnel hours, lost plant productivity, and development of internal systems that would be necessary to attempt to administer the 365-day recordkeeping program. Bunge would also have to equip each of the 135 emission units plant-wide with an hour meter and develop a means to monitor and record, on a daily basis, the hours-of-operation data generated by each of those monitors. These costs would not be recoverable if Bunge prevails on its permit appeal. The potentially significant resources Bunge will have to expend to attempt to comply with the contested permit conditions would constitute a tangible and irreparable loss to the company. *See, e.g., Illinois Power Generating Company v. Illinois EPA*, PCB 16-60, slip op. at 2–3 (Dec. 17, 2015) (granting stay where compliance with contested conditions would require expenditure of resources that would be lost if petitioner prevailed on its appeal). Ultimately, the very real administrative and economic burden associated with a denial of the stay far outweighs the very remote likelihood of any environmental harm associated with a grant of the stay.

C. Bunge’s appeal of Conditions 12.f, 23.a.vii and 23.a.viii would be rendered moot if no stay is granted.

Bunge’s permit appeal would be rendered moot if Bunge is required to comply with the contested conditions during the pendency of the appeal. Even if Bunge prevails on the merits of its appeal, “the cost and the point of the appeal would be lost” because Bunge would have been forced to attempt to comply with the very conditions it challenges as arbitrary and infeasible for the potentially quite lengthy duration of the appeal. *See, e.g., Aqua Illinois, Inc. v. IEPA*, PCB 23-

12, slip op. at 2–3 (Aug. 11, 2022). If no stay is granted, Bunge’s right to an appeal of unlawful permit conditions—a certain and clearly ascertainable right that needs protection—is essentially void. The Board has consistently recognized the integrity of the permit appeal process as a compelling factor weighing in favor of granting a discretionary stay. *See Community Landfill Co. v. IEPA*, PCB 01-48, PCB 01-49 (consol.), slip op. at 4 (Oct. 19, 2000) (“[P]etitioners’ right to appeal the permit conditions should be protected, so that the integrity of the appeal is preserved.”).

D. Bunge does not have an adequate remedy at law.

Bunge has no adequate alternative remedy. This permit appeal process represents Bunge’s only available means for obtaining legally enforceable relief from permit conditions it considers arbitrary, unlawful and infeasible.

E. Bunge has a strong probability of success on the merits.

As described in Bunge’s Petition, the challenged permit conditions are arbitrary, unlawful and manifestly unreasonable. The challenged conditions are unnecessary to protect environmental health, and they impose an undue regulatory burden on Bunge’s operations. For the reasons noted above and in its Petition, the challenged conditions cannot withstand Board review. Bunge’s probability of success on the merits further warrants a stay of the contested conditions.

CONCLUSION

Bunge respectfully requests that the Board grant its request for a stay of contested permit conditions 12.f, 23.a.vii and 23.a.viii. The grant of a stay will not result in any increased likelihood of environmental harm and will prevent Bunge from incurring irreparable injury in connection with the implementation of arbitrary and unnecessarily burdensome permit conditions. Bunge maintains that it is entitled to a full stay of the contested permit conditions to protect its clearly ascertainable right to an appeal and to preserve the integrity of these appeal proceedings. However,

as a sign of its good faith, Bunge is willing, with the Board's approval, to maintain records using the method proposed in its Petition—i.e., recordkeeping on a 12-month rolling basis, rolled monthly—pending the resolution of this appeal. Alternatively, Bunge proposes complying with the 365-day rolling total recordkeeping requirement on modified terms. As discussed above, due to personnel and resource constraints, it is simply not possible for Bunge to maintain daily records of actual emissions for all 135 emission units at the Facility. However, Bunge can develop a daily *approximation* of the emissions from these units using information presently collected by the Facility. For example, Bunge can determine (i) the daily amount of grain throughput from grain receiving, grain shipping, and hominy load out (the Facility's three fugitive emissions sources) and (ii) the total daily hours of operation of each department at the Facility (but not the total hours of operation of each emission unit within each department). Multiplying the appropriate grain loading values by the total daily hours of operation of the relevant department for a particular emission unit will provide a close and conservative—although not exact—figure for daily emissions by unit.² While Bunge believes that a full stay of the contested conditions is warranted and urges the Board to grant a stay of the conditions in their entirety, Bunge is willing to adopt either of the two approaches noted above as good-faith interim measures to demonstrate compliance during the pendency of this appeal, provided the Board assents. In doing so, Bunge does not relinquish or waive its opposition to the underlying permit conditions, and Bunge reserves all arguments as to the merits of the permit appeal.

² This calculation would necessarily be somewhat imprecise because Bunge cannot feasibly maintain data on daily hours of operation for all 135 emission units. Bunge's proposed approach would use the hours of operation of each Facility department (information Bunge already routinely maintains) as a proxy for the hours of operation for all equipment within each department. However, while a particular department may operate for 12 hours a day, not all equipment within that department will be operated for the full 12 hours—meaning this approach will necessarily overstate emissions. Bunge is confident that this conservative approach would adequately ensure compliance with the FESOP limits without imposing the unnecessary and onerous burden of maintaining records of daily emissions or operating hours specific to each emission unit. (Although, as noted in Section A, above, the possibility of the Facility exceeding its PTE limits is purely hypothetical to begin with.)

WHEREFORE, for the reasons set forth above, Petitioner, Bunge Milling, Inc., requests that the Board grant its request for a stay of the contested conditions or portions thereof, as described herein, for the duration of the appeal.

Dated: March 27, 2023

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