

ILLINOIS POLLUTION CONTROL BOARD

October 19, 2000

COMMUNITY LANDFILL COMPANY	)	
and CITY OF MORRIS,	)	
	)	
Petitioners,	)	
	)	
v.	)	PCB 01-48
	)	PCB 01-49
ILLINOIS ENVIRONMENTAL	)	(Permit Appeal - Land)
PROTECTION AGENCY,	)	(Consolidated)
	)	
Respondent.	)	

ORDER OF THE BOARD (by R.C. Flemal):

On September 7, 2000, Community Landfill Company (CLC) and City of Morris (collectively, petitioners), filed these permit appeals regarding certain conditions included in the Illinois Environmental Protection Agency's (Agency) issuance of two significant modification permits for the Morris Community Landfill. On September 11, 2000, petitioners filed a motion to consolidate the appeals and a motion to stay the contested permit conditions (motion to stay). On September 20, 2000, the Board granted the motion to consolidate and deferred ruling on the motion to stay until the Agency's response was due.

On September 25, 2000, the Agency filed a motion for extension of time to file the administrative record, a motion for leave to file *instanter* the response to the motion to stay, and a response to the motion to stay (response). On October 3, 2000, petitioners filed a reply in support of its motion to stay (reply). On October 5, 2000, petitioners filed a motion for leave to file the reply *instanter*. On October 5, 2000, the Board granted the Agency's motion to file the response *instanter* and denied the motion for extension of time to file the administrative record. The Board grants petitioners' October 5, 2000, motion for leave to file the reply *instanter*.

On October 12, 2000, the Agency filed a motion for leave to file a surreply, a surreply to the petitioner's reply, a second motion for extension of time, and a motion for relief from copy requirements. The Board grants the Agency's motion for leave to file a surreply, the second motion for extension of time, and the motion for relief from copy requirements. Finally, for the reasons stated below, the Board grants petitioners' motion to stay the contested permit conditions.

BACKGROUND

Petitioners are the permitted owner and operator of the Morris Community Landfill. The two permits that are the issue of these appeals relate to two parcels of that landfill, A and B. PCB 01-48 is the appeal for Parcel A. PCB 01-49 is the appeal for Parcel B. The Agency issued the permits for parcels A and B on August 4, 2000. Mot. to Stay, Exh. 2.

Petitioners' Motion to Stay

Petitioners argue that certain conditions of the permits should be stayed during the pendency of the appeals before the Board. The challenged conditions address various matters such as pumping restrictions, a leachate storage system and refuse depositing restrictions. Mot. to Stay at 5-6. Petitioners argue that failure to grant the stay would render the appeal moot, would require unnecessary costs and would negate petitioners' right to appeal the contested conditions. Mot. to Stay at 7-8. Petitioners claim that staying the conditions would not cause environmental harm. Mot. to Stay at 8. Furthermore, petitioners argue that the basis for staying these conditions is that they timely filed their permit applications, and the Board has granted stays in previous cases. Mot. to Stay at 8.

### Agency Response

The Agency objects to the motion to stay for three reasons: (1) petitioners did not timely file their permit applications, and therefore are not entitled to an automatic stay of the permit conditions pursuant to 35 Ill. Adm. Code 814.105(b); (2) the Board does not have the authority to issue a discretionary stay of the permit conditions; and (3) petitioners are not entitled to a discretionary stay. Resp. at 2-9.

#### Timely Filing of Applications

The Agency argues that petitioners did not timely file their permit applications, and therefore are not entitled to an automatic stay of the permit conditions pursuant to 35 Ill. Adm. Code 814.105(b). 35 Ill. Adm. Code 814.105(b) states:

An operator who has timely filed a notification pursuant to Section 814.103 and an application for significant permit modification pursuant to Section 814.104 shall continue operation under the terms of its existing permits until final determination by the Agency on its application and any subsequent appeal to the Board pursuant to Section 40 of the Act. During this time, the operator will be deemed to be in compliance with all requirements of this Part. 35 Ill. Adm. Code 814.105(b).

The Agency previously set June 15, 1993, as the deadline for filing the permit applications for parcels A and B. Resp. at 3. CLC failed to file the applications by that deadline and requested a retroactive variance from the Board in which to file the applications. Resp. at 3; Community Landfill Corporation v. IEPA (September 21, 1995), PCB 95-137. The Board denied the variance. The appellate court, however, ordered the Board to issue CLC a 45-day prospective variance. Community Landfill Corporation v. IEPA, 283 Ill. App. 3d 1120, 708 N.E.2d 854 (3rd Dist. 1996). On June 20, 1996, the Board allowed CLC to file its significant modification permit application by August 5, 1996.

The Agency argues that although petitioners may have filed the significant permit modification application within the time allowed by the prospective variance, petitioners did not timely file pursuant to Section 814.105(b), and therefore the Board should not grant an automatic stay of the contested conditions. Resp. at 4.

#### Board Authority to Grant Discretionary Stay

The Agency further contends that the Board does not have the authority to grant discretionary stays of permit conditions. Resp. at 4. Specifically, the Agency argues that the Environmental Protection Act does not grant the Board such authority. Resp. at 5. Additionally, the Agency argues that granting the stay would be similar to granting injunctive relief, which the Board does not have the authority to do. Resp. at 5.

#### Petitioners Not Entitled to Discretionary Stay

The Agency's final argument is that even if the Board has the discretion to grant the stay, petitioners are not entitled to a stay. Resp. at 6. The Agency, citing the Manager of the Agency's Bureau of Land Permit Section, asserts that granting a stay would create the "distinct possibility" of environmental harm. Resp. at 8, Resp. at affidavit. The Agency further argues that any hardship petitioners may suffer from a stay is part of the overall permitting scheme, and, when weighed against other concerns, does not favor the petitioners. Resp. at 9. Lastly, the Agency asserts that the chances of petitioners prevailing on appeal are slim, and notes that petitioners' motion for stay is silent regarding their perceived chances on appeal. Resp. at 9.

The Agency cites Interstate Pollution Control, Inc. v. IEPA (March 1986), PCB 86-19, a case where permits had been denied. Resp. at 6. The Agency notes that the Board considered the Agency's arguments that petitioner did not adequately show what its chances of prevailing were on appeal, and did not show that a denial of the stay would cause irreparable harm. Resp. at 6. The Agency also cites Motor Oils Refining Company, Inc. v. IEPA

(August 10, 1989), PCB 89-116, in which the Board declined to grant an automatic stay due to the untimely filing of the application. Resp. at 7.

### Petitioners' Reply

#### Timely Filing of Applications

In their reply, petitioners argue that the issue before the Board is not whether petitioners timely filed their original permit applications back in 1996. Reply at 6. Petitioners contend that the issue of timeliness of the original applications is currently pending before the Board in People v. Community Landfill Co. PCB 97-193.

Petitioners argue that the relevant permit applications were filed on May 8, 2000. Reply at 5. The filing was made pursuant to an agreement between the Agency and petitioners. Reply at 5. Petitioners assert that they are entitled to an automatic stay under Section 65(b) of the Administrative Procedure Act (415 ILCS 100/10-65(b)), which states:

When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license shall continue in full force and effect until the final agency decision on the application has been made unless a later date is fixed by order of a reviewing court. 415 ILCS 100/10-65(b).

#### Board Authority to Grant Discretionary Stay

Petitioners assert, without further argument, that the Board has the authority to grant a discretionary stay. Reply at 7.

#### Petitioners Request a Discretionary Stay

Petitioners argue that the Board should grant a discretionary stay because without the stay the hardship placed on petitioners is great, and the potential for environmental harm is "either minimal or nonexistent." Reply at 7. Petitioners note that the ten conditions that are the subject of the appeal relate to the manner and timing in which petitioners should implement measures to protect human health and the environment. Reply at 7. They further argue that if petitioners comply with the uncontested provisions, their existing Section 807 permit, and applicable Section 811 regulations, none of the contested conditions would affect human health and the environment. Reply at 7. Additionally, petitioners' engineering and environmental expert, who has conducted engineering operations at the facility during the last eight years, believes that a stay of the contested conditions would not cause any environmental harm. Reply at 7. In contrast, petitioners assert that the Agency's expert has not been to the facility, and her affidavit fails to give specific information regarding any potential environmental harm a stay might cause. Reply at 8.

Petitioners also argue that the financial burden of complying with the contested conditions is great. Reply at 8. As examples, petitioners note that it would cost them approximately \$1 million if they are required to move 475,000 cubic yards of material from Parcel B to Parcel A. Reply at 8. Allowing the material to remain in place during the appeal would prevent petitioners from irrevocably spending the money to make the change. Reply at 8. Petitioners further believe that leaving the material in place would protect the environment. Reply at 8.

Petitioners further argue that if they construct a groundwater interceptor trench, as required, it will render moot their argument that deep wells T-2 and T-4 are more effective. Reply at 8. Petitioners note that they have posted closure and post-closure bonds in excess of \$17 million. Reply at 6, 8-9.

### Agency Surreply

In its surreply, the Agency agrees with petitioners that the relevant applications were filed in May 2000 following discussions between the Agency and petitioners regarding how to resolve outstanding permit issues.

Surreply at 2. However, the Agency argues that the petitioners should not assume that implicit in those discussions was the suggestion that the Agency does not consider the May 2000 applications as untimely filed. Surreply at 2. The Agency's acceptance of the May 2000 applications does not mean that the Agency does not object to the timeliness of the filing. Surreply at 3. In fact, the Agency argues that untimely filing of an application is a matter for enforcement. Surreply at 3. The Agency again argues that an automatic stay of the contested conditions is not justified.

The Agency also reiterates its argument that the Board does not have the authority to grant a discretionary stay of the contested conditions. Surreply at 4. The Agency also takes issue with petitioners' claim that no environmental harm will occur during a stay if petitioners comply with the uncontested conditions of their Section 807 permit, and applicable Section 811 regulations. Surreply at 8. The Agency argues that there are aspects of the contested conditions that are not covered in the Section 807 permit. Surreply at 8. Specifically, design standards for foundation stability or leachate storage relating to Sections 811.304, 305 and 309 are not in Section 807 and do not have any corresponding sections in Section 807. Surreply at 8. The Agency concludes that staying these conditions would not provide safeguards for the stability of the landfill's foundation or proper leachate storage capacity. Surreply at 8.

## ANALYSIS

### Automatic Stay

The Board agrees with petitioners that whether petitioners timely filed applications in 1996 is the subject of count V of the second amended complaint in People v. Community Landfill Co., PCB 97-193, a matter currently pending before the Board. Specifically, count V alleges that petitioners failed to file the required permit application by June 15, 1993. Complaint at 15. The amended complaint further alleges that the permit application was filed on August 5, 1996, in violation of Section 814.104. The Board declines to make a factual finding on whether the relevant applications in this case were timely filed, as the applications appear to be related to the applications filed in 1996, and that issue is currently pending before the Board. Since the Board will not make this factual finding at this time, the Board will not grant an automatic stay of the contested conditions.

### Discretionary Stay

The Board finds that it has the authority to grant discretionary stays from permit conditions. The permit appeal system would be rendered meaningless in many cases, if the Board did not have the authority to stay permit conditions. The Board has previously granted or denied discretionary stays in permit appeals, both when the Agency did and did not consent to such stays. See Allied Tube and Conduit Corporation v. IEPA (January 18, 1996), PCB 96-108; Motor Oils Refining Company, Inc. v. IEPA (August 31, 1989), PCB 89-116. The Board declines to find today that it can no longer issue such stays.

The Board further grants a discretionary stay of the contested conditions in the instant case for 180 days from the date of this order, on April 17, 2001. As the Agency notes in its response, the Board has recognized that Illinois law provides standards to help determine whether stays are appropriate. Resp. at 7, citing Motor Oils Refining Company, Inc. v. IEPA (August 31, 1989), PCB 89-116. Those standards are: (1) a certain and clearly ascertainable right needs protection; (2) irreparable injury will occur without the injunction; (3) no adequate remedy at law exists; and (4) there is a probability of success on the merits. Motor Oils (August 31, 1989), PCB 89-116, slip op. at 1-2, citing Junkunc v. S.J. Advanced Technology & Mfg., 149 Ill. App. 3d 114, 498 N.E. 2d 1179 (1st Dist. 1986). The Board further noted that while it may look to these four factors in determining whether or not to grant a stay, the Board is particularly concerned about the likelihood of environmental harm if a stay is granted. Motor Oils (August 31, 1989), PCB 89-116, slip op. at 2.

The Agency notes that its primary concern is that if a stay were granted, there would be a "definite potential threat to human health and the environment." Resp. at 6. As previously noted, petitioners' expert does not believe that there would be such a threat. Reply at 7. Since there is conflicting expert opinion on this issue, the Board will look to the other standards as announced in Motor Oils.

The Board is persuaded that petitioners' appeal of the permit conditions would be rendered moot if they had to comply with the contested conditions during the appeal. As petitioners noted, the cost of complying with some of the conditions is great. If petitioners complied with the conditions and then prevailed on appeal, the cost and the point of the appeal would be lost. In this instance, the Board finds that petitioners' right to appeal the permit conditions should be protected, so that the integrity of the appeal is preserved.

Additionally, the cost of complying with the contested conditions during the appeal would impose an irreparable hardship on petitioners. If the appeal is resolved in favor of petitioners, but during that time petitioners complied with the contested conditions, the result would be that petitioners had an unnecessary hardship imposed on them. The Agency admits that a stay would impose a hardship, but qualifies the hardship as being part of the permitting scheme. The Board disagrees with the Agency, and finds that requiring petitioners to comply with the contested conditions during the instant appeal is too onerous on petitioners to be justified.

Neither party argues that there is an inadequate remedy at law, and the Board declines to address this standard. Also, the parties have opposing views on who will prevail on this matter. The Board does not find this standard helpful in this instance.

Lastly, although the Board grants the motion to stay, the Board intends that this case should still proceed as expeditiously as practicable and therefore only grants the stay until April 17, 2001.

#### Other Matters

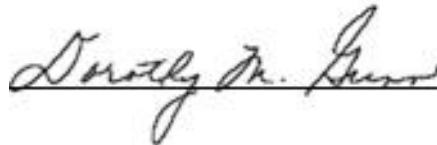
Also pending before the Board is the Agency's second motion for extension of time to file the administrative record and motion for relief from copy requirements. The Agency represents that the administrative record in this matter is approximately 5,552 pages. Second Mot. at 2. As such, the Agency requests it have until October 24, 2000, to file the administrative record. Second Mot. at 2. The Agency also requests that it only be required to file the original record and four, rather than nine copies. The Board grants the second motion for extension of time and relief from copy requirements.

#### CONCLUSION

Petitioners' motion to stay is granted until April 17, 2001. All other outstanding motions are granted. The Agency has until October 24, 2000, to file the original and four copies of the administrative record. The Board orders this matter to proceed accordingly.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 19th day of October 2000 by a vote of 7-0.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board