

ILLINOIS POLLUTION CONTROL BOARD
December 7, 2000

ROGER STONE,)
)
 Petitioner,)
)
 v.) PCB 01-68
) (Permit Appeal - NPDES)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY and NAPERVILLE)
 PARK DISTRICT,)
)
 Respondents.)

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

On October 18, 2000, an appeal of the issuance of an national pollutant discharge elimination system (NPDES) permit was filed by Roger Stone, pursuant to Section 40(e) of the Environmental Protection Act (Act) (415 ILCS 5/40(e) (1998)). The permit was issued by the Illinois Environmental Protection Agency (Agency) on October 13, 2000, to the Naperville Park District (Naperville) for its trap shooting facility located at 735 S. West Street, Naperville, Dupage County, Illinois. The Board accepted this matter for hearing on November 2, 2000.

On October 24, 2000, petitioner filed a motion asking the Board to “declare” the NPDES permit ineffective pending the Board’s decision or in the alternative to stay the effectiveness of the permit until the Board has rendered its decision. On November 8, 2000, the Agency filed a response to the petitioner’s motion with a request to file the response *instanter*. The Board grants the motion to file *instanter* and accepts the Agency’s response. On November 14, 2000, Naperville timely filed its response to petitioner’s motion.

For the reasons discussed below, the Board denies the request to declare the NPDES permit ineffective and denies the motion to stay the effectiveness of the permit.

STATUTORY AND REGULATORY BACKGROUND

Section 40(e) of the Act provides:

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1. If the Agency grants or denies a permit under subsection (b) of Section 39 of this Act, a third party, other than the permit applicant or Agency, may petition the Board within 35 days from the date of issuance of the Agency’s decision, for a hearing to contest the decision of the Agency.

2. A petitioner shall include the following within a petition submitted under subdivision (1) of this subsection:
 - A. 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
 - B. a demonstration that the petitioner is so situated as to be affected by the permitted facility.

3. If the Board determines that the petition is not duplicitous or frivolous and contains a satisfactory demonstration under subdivision (2) of this subsection, the Board shall hear the petition (i) in accordance with the terms of subsection (a) of this Section and its procedural rules governing permit denial appeals and (ii) exclusively on the basis of the record before the Agency. The burden of proof shall be on the petitioner. The Agency and permit applicant shall be named co-respondents. 415 ILCS 5/40 (1998).

The Board's rule at 35 Ill. Adm. Code 309.119 is titled "Agency Action After Hearing" and provides:

Following the public hearing, the Agency may make such modifications in the terms and conditions of proposed permits as may be appropriate and shall transmit to the Regional Administrator for his approval a copy of the permit proposed to be issued unless the Regional Administrator has waived his right to receive and review permits of its class. The Agency shall provide a notice of such transmission to the applicant, to any person who participates in the public hearing, to any person who requested a public hearing, and to appropriate persons on the mailing list established under Sections 309.109 through 309.112. Such notice shall briefly indicate any significant changes which were made from terms and conditions set forth in the draft permit. All permits become effective when issued.

ISSUES

The petitioner has presented two issues in October 24, 2000 motion. First, petitioner asks whether Naperville can commence discharges once the Agency takes action to grant an NPDES permit when the issuance of the permit is challenged in a third-party appeal. In the alternative, if the permit is effective and Naperville may commence discharges, petitioner asks that the Board stay the permit until after the Board has reached its decision on the third-party challenge.

Whether Naperville can commence discharges once the Agency takes action to grant an NPDES permit when the issuance of the permit is challenged in a third-party appeal

Petitioner argues that the permitting process is an “administrative continuum” so that when the Board’s rules at Section 309.119 state that “all permits become effective when issued” the “when issued” is after the Board has made its determination. Petitioner relies on Environmental Protection Agency v. Pollution Control Board, 115 Ill. 2d 65, 503 N.E.2d 343 (1986) affirming 138 Ill.App.3d 550, 485 N.E.2d 293 (3rd Dist. 1985). The petitioner asserts that this case supports the proposition that the permit process is complete only after the Board has ruled.

Both respondents disagree with petitioner’s argument. Naperville argues that Section 309.119 should be given its ordinary meaning. Further, Naperville asserts that the Environmental Protection Agency does not support the argument of petitioner. Naperville argues that Environmental Protection Agency case, cited by petitioner, “deals only with the standard of review that the Board is to apply to the Agency’s permit determinations.”

The Agency maintains that although the Board and the courts have stayed a permit during an appeal, permits are effective upon issuance by the Agency. The Agency cites to Peabody Coal Company v. Illinois Pollution Control Board, 36 Ill. App. 3d 5, 344 N.E.2d 279 (5th Dist. 1976). Peabody Coal Company was a case where the petitioner questioned the constitutionality of an NPDES regulation which provided that an NPDES permit shall become effective “when issued” by the Agency. The Agency states that the court upheld the validity of the regulation on the basis that the “significant governmental interest outweighs petitioner’s interest in a prior hearing.”

The Board is unpersuaded by the arguments of petitioner. Section 309.119 specifically deals with the action to be taken by the Agency and the rule states that a permit is effective upon issuance. Thus, the plain language of the rule supports respondents’ position that the NPDES permit is effective when issued by the Agency. Further, the regulation under review in Peabody Coal Company was Rule 909(h), which became Section 309.119 upon codification. See 35 Ill. Adm. Code 309.Appendix. Thus, the courts agree that a permit is effective upon issuance by the Agency. Having determined that the NPDES permit is effective the Board will now look at the issue of whether the permit should be stayed.

Should the permit be stayed pending review of the third-party challenge by the Board

Petitioner argues that “stays are intended to preserve the status quo” so a stay is appropriate here. Petitioner maintains that on the face of the petition for review, it appears that no permit could lawfully issue. Therefore, petitioner is likely to prevail on the merits.

The petitioner also argues that, allowing Naperville to operate under the permit as issued by the Agency would result in significant environmental harm caused by settleable solids and bottom deposits as they alter the environmental characteristics of a tributary and cause the loss of fish and benthic organisms. Petitioner asserts that given the material prejudice and irreparable harm resulting from the contemplated discharges the Board should issue a stay.

The Agency takes no position on the issue of whether the permit should be stayed. Naperville however argues that there are no grounds for staying the permit. Naperville argues

that the permit does not violate any provision of the Clean Water Act and that no environmental harm will result from operation under this permit. Specifically, Naperville argues that the permit requires the use of non-toxic shot and targets, while petitioner refers to the past practice of using lead shot prior to the issuance of a permit.

As Naperville notes in its response, the Board has recognized that Illinois law provides standards to help determine whether stays are appropriate. Naperville cites Community Landfill Company, Inc. v. IEPA (October 19, 2000), PCB 01-48 and 01-49. 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. Community Landfill (October 19, 2000), PCB 01-48 and 01-49, slip op. at 6, citing Motor Oils Refining Company, Inc. v. IEPA (August 31, 1989), PCB 89-116. 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. Community Landfill (October 19, 2000), PCB 01-48 and 01-49, slip op. at 6.

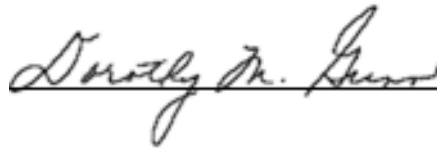
After a careful review of the record, the Board finds that none of the standards enunciated in Community Landfill have been met. Therefore, the Board denies the request to stay the permit.

CONCLUSION

The Board finds that the permit issued to Naperville was effective upon its issuance by the Agency. Further, the Board denies the request to stay the permit at this time.

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 7th day of December 2000 by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", is written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board