

ILLINOIS POLLUTION CONTROL BOARD
May 1, 1981

ALBURN, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 80-189
)	PCB 80-190
)	PCB 81-23
)	PCB 81-24
ILLINOIS ENVIRONMENTAL PROTECTION)	
AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by I. Goodman):

On April 14, 1981, Alburn, Inc. (Alburn) filed a motion for stay of the permit conditions contested in PCB 80-189 and PCB 80-190. On April 20, 1981 the Illinois Environmental Protection Agency (Agency) filed a motion to vacate the Board's Order of April 16, 1981 in PCB 80-189 and 80-190 issued in response to Alburn's motion for stay. On April 22, 1981 the Agency filed a motion for reconsideration of the Board's March 19, 1981 Order dismissing PCB 81-23 and 81-24. On April 30, 1981 Alburn filed a motion for emergency decision and oral argument in all four of the cases noted in the caption herein. Since all four of these matters are inter-related and concern the issue of which permit, with what conditions, is in effect during the pendency of a permit appeal, the Board will consider all of the above motions in this Order.

The Agency's April 22, 1981 motion for reconsideration of the Board Order of March 19, 1981 in PCB 81-23 and 81-24 is granted. The Board reaffirms its holding that, as a general matter, during the pendency of a permit appeal, the permit in effect is not the contested permit, but the permit which was in effect prior to the issuance of the permit which is the subject of the appeal. The previous permit continues in effect even if it would have expired by its terms but for the filing of an appeal of the next issued permit.

With regard to Alburn's construction permit, first issued on February 20, 1980 and later revised September 9, 1980, the Board's Order remains the same. With Alburn's filing of its appeal of the September 9, 1980 revised construction permit in PCB 80-190, the appeal has the effect of maintaining the original construction permit of February 20, 1980 in effect until the Board takes final action in Alburn's appeal of the subsequent revision of September 9, 1980. The rationale here is that Alburn is under the constraints of an issued permit and it is presumed that no harm will come to the environment if this situation continues while Alburn pursues its right of appeal. The subsequent permit purportedly issued January 26, 1981 for the same operation can have no legal effect

until Alburn's right of appeal of the September 9, 1980 revision is extinguished.

With respect to Alburn's operating permit, which has been appealed under PCB 80-189, it has now been clarified that the September 9, 1980 permit was the first operating permit issued. The Board, therefore, vacates all portions of the March 19, 1981 Order with respect to the operating permit. As there is no prior permit to remain in effect while the Board considers Alburn's appeal in PCB 80-189, the issue is, therefore, whether Alburn's September 9, 1981 operating permit remains in effect while it pursues its right of appeal concerning certain conditions of that permit.

The Board finds that the mere filing of an appeal of conditions of a permit is not sufficient in and of itself to continue that permit in effect and to stay the appeal conditions. In this case, however, there appears to be no question of environmental harm and indeed neither party has addressed this issue. On the other hand, Alburn has alleged that if it is unable to operate, and the challenged permit conditions are not stayed, that it will suffer "crippling", irreparable financial harm. This being the case, the Board finds that it is reasonable to allow Alburn to proceed under its September 9, 1980 operating permit and to stay the contested permit conditions until such time as the Board makes a decision in PCB 80-189. Having decided that Alburn's September 9, 1980 permit remains in full force and effect, any permit issued subsequently for the same operation can have no legal effect until such time as Alburn's right of appeal of this September 9, 1980 permit is extinguished.

The final result of the Board's reconsideration of the March 19, 1980 Order remains essentially the same. Alburn's construction and operating permit appeals in PCB 81-23 and 81-24 are dismissed. Alburn's operating permit issued February 20, 1980 remains in full force and effect and the revisions issued September 9, 1980 are stayed until such time as the Board makes a final decision in PCB 80-190. Alburn's operating permit issued September 9, 1980 remains in full force and effect and the conditions appealed are stayed until such time as the Board comes to a final decision in PCB 80-189.

The Agency's April 20, 1981 motion to vacate the April 16, 1981 Order in PCB 80-189 and 80-190 is granted in light of the decisions made above. The Agency's further motion to allow Respondent twenty-one days in which to file a memorandum of law in this matter is denied as the Board has been fully informed by the content of the April 20, 1981 motion.

Alburn's April 30, 1981 motion for emergency decision is granted. Alburn's further motion for oral argument is denied.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 13th day of May, 1981 by a vote of 4-0.


Christan L. Moffett, Clerk
Illinois Pollution Control Board