ILLINOIS POLLUTION CONTROL BOARD
February 16, 2006

MIDWEST GENERATION, LLC, WILL COUNTY GENERATING STATION,	)	
Petitioner,	)	
v.	)	PCB 06-60
	)	(CAAPP Permit Appeal - Air)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

ORDER OF THE BOARD (by A.S. Moore):

This is one of 21 appeals filed by electrical power generating facilities challenging various conditions of permits issued by the Illinois Environmental Protection Agency (Agency). These permits were issued on September 29, 2005, under the provisions of the Clean Air Act Permit Program (CAAPP), which is set forth in Section 39.5 of the Environmental Protection Act (Act) (415 ILCS 5/39.5 (2004)). The CAAPP permits replace expiring State operating permits for the same activities.

Today, the Board is not ruling on the merits of the CAAPP permit appeal brought by Midwest Generation, LLC, Will County Generating Station (Midwest). Instead, this order addresses Midwest's request for a stay of the CAAPP permit and the Agency's request for relief from certain record-filing requirements.

The CAAPP permit appeals raise similar issues regarding the relationship between the CAAPP provisions of the Act and the stay provisions of the Illinois Administrative Procedure Act (APA) (5 ILCS 100/10-65(b) (2004)). The question is whether the CAAPP permit is subject to the APA's "automatic stay" and, if not, whether the facts in the case justify the Board's exercise of its discretion to issue a stay of some or all of the CAAPP permit's conditions.

Petitioners in these appeals have argued that the APA stays the new CAAPP permit in its entirety, allowing that entity to operate under its old State operating permit. Alternatively, petitioners have argued that the Board should exercise its discretion to stay either the entire CAAPP permit or only the contested conditions of the permit. The Agency argues that the APA does not apply, and urges in various cases either that the Board should grant no discretionary stay, or that any stay should be limited to the contested conditions of the CAAPP permit.

Each case also raises issues about how the Agency can best file the voluminous administrative records in these appeals, considering both the benefits and detriments of paper (hard copy) and electronic filing. The Agency has requested additional time to file the records

and leave to file the records on sets of compact disks that, due to cost concerns, cannot be electronically searched.

In this particular appeal, the Agency issued a CAAPP permit to Midwest for its facility at 529 East 135th Road in Romeoville, Will County. Midwest challenges CAAPP permit conditions concerning, among other things, recordkeeping and reporting for hazardous air pollutant emissions.

For the reasons below, the Board finds that the APA's automatic stay applies to Midwest's CAAPP permit, consistent with long-standing case law under the Act: Borg-Warner Corp. v. Mauzy, 100 Ill. App. 3d 862, 427 N.E.2d 415 (3rd Dist. 1981). Section 10-65(b) of the APA (5 ILCS 100/10-65(b) (2004)) in effect issues a stay of the CAAPP permit by operation of law. It is therefore unnecessary for the Board to reach the issue of whether to exercise its discretion to enter a stay.

As to the filing of the Agency's administrative record, after considering the arguments concerning costs and ease of access to information in the record, the Board finds that the Agency must still file the original paper or hard copy version of the record. The Agency may file the additional required four copies of the record on compact disks; these need not be in a searchable format. The Board grants the Agency's motion for additional time to file the record and directs the hearing officer to set the record-filing deadline after consulting with the parties.

PROCEDURAL BACKGROUND

On November 2, 2005, Midwest filed its petition for review in which Midwest not only contests the Agency's CAAPP permit determination, but also requests a stay of the issued CAAPP permit. In a November 17, 2005 order, the Board accepted the petition for hearing but reserved ruling on the stay issue.

On November 18, 2005, the Agency filed a response opposing Midwest's request for stay. On December 2, 2005, Midwest filed a reply supporting a stay and responding to the Agency's opposition to a stay, along with a motion for leave to file the reply. On December 19, 2005, the Agency filed a surreply and a motion for leave to file the surreply. On December 30, 2005, Midwest filed a response to Agency's motion for leave to file a surreply.[1] The Board grants the parties' respective motions for leave to file.

On December 1, 2005, the Agency filed a motion for an extension of time to file the administrative record. Midwest filed a response on December 15, 2005. On January 30, 2006, the Agency filed a motion for leave to file the administrative record on a set of compact disks, to which Midwest filed a response on February 3, 2006.[2]

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[1] The Board cites the Agency's November 18, 2005 response opposing Midwest's request for stay as "Ag. Stay Resp. at _."

[2] The Board cites the Agency's January 30, 2006 motion to file the administrative record on compact disks as "Ag. Mot. to File at _."

GENERAL STATUTORY FRAMEWORK

Chronology

The Act and General Procedural Rules: 1970-74

The Act became effective in July 1970. Three months later, the Board adopted its first set of procedural rules, including rules for conducting contested cases and permit appeals. Procedural Rules, R70-4 (Oct. 8, 1970). As of July 1, 1977, the version of the procedural rules in effect was an updated version adopted in 1974. Revised Procedural Rules of the Pollution Control Board, R73-4 (Oct. 10, 1974).

The APA: 1977

In 1977, the APA came into effect. The APA provides in pertinent part:

Sec. 1-5. Applicability.

(a) This Act applies to every agency as defined in this Act. Beginning January 1, 1978, in case of conflict between the provisions of this Act and the Act creating or conferring power on an agency, this Act shall control. If, however, an agency (or its predecessor in the case of an agency that has been consolidated or reorganized) has existing procedures on July 1, 1977, specifically for contested cases or licensing, those existing provisions control, except that this exception respecting contested cases and licensing does not apply if the Act creating or conferring power on the agency adopts by express reference the provisions of this Act. Where the Act creating or conferring power on an agency establishes administrative procedures not covered by this Act, those procedures shall remain in effect.

Sec. 1-35. "License" includes the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law, but it does not include a license required solely for revenue purposes.

Sec. 1-40. "Licensing" includes the agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.

Sec. 10-65. Licenses.

(a) When any licensing is required by law to be preceded by notice and an opportunity for a hearing, the provisions of this Act concerning contested cases shall apply.

(b) 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.

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(d) Except as provided in subsection (c), no agency shall revoke, suspend, annul, withdraw, amend materially, or refuse to renew any valid license without first giving written notice to the licensee of the facts or conduct upon which the agency will rely to support its proposed action and an opportunity for a hearing in accordance with the provisions of this Act concerning contested cases. At the hearing, the licensee shall have the right to show compliance with all lawful requirements for the retention, continuation, or renewal of the license. If, however, the agency finds that the public interest, safety, or welfare imperatively requires emergency action, and if the agency incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. Those proceedings shall be promptly instituted and determined.

(e) Any application for renewal of a license that contains required and relevant information, data, material, or circumstances that were not contained in an application for the existing license shall be subject to the provisions of subsection (a). 5 ILCS 100/1-5, 1-35, 1-40, 10-65 (2004).

The Borg-Warner Case: 1981

The relationship between the Act and the stay provisions of the APA has been examined and construed in only one reported case: Borg-Warner, 427 N.E.2d 415. The Borg-Warner Corporation (Borg-Warner) had timely filed an application for renewal of its National Pollutant Discharge Elimination System (NPDES) permit. The Agency issued the permit May 21, 1989, to become effective June 21, 1980. Borg-Warner sought relief simultaneously before the Board and a circuit court.

Borg-Warner's appeal to the Board challenged several permit conditions. Borg-Warner sought, and was granted by the Board, a stay of enforcement of contested conditions pending resolution of the circuit court action.

In the circuit court, Borg-Warner sought injunctive and declaratory relief and a determination of "whether Borg-Warner was entitled to an adjudicatory hearing, under the Illinois APA, prior to any EPA action on the permit application." Borg-Warner, 427 N.E.2d at 417. The court granted the relief requested and ordered the Agency to grant Borg-Warner an adjudicatory hearing on its application for renewal of its NPDES permit. The Agency appealed the circuit court decision to the Appellate Court, arguing that no hearing was necessary.

The Appellate Court first looked to the applicability section of the APA. The court found that the Board's 1974 NPDES procedural rules were not effective until NPDES authorization in October 1977. The court further found that because there were no effective Illinois procedures for handling NPDES permit decisions as of July 1, 1977, the provisions of the APA applied. Borg-Warner, 427 N.E.2d at 417-18.

The court went on to find that the licensing section of the APA applied in the NPDES permit context. The court held, however, that a pre-permit issuance hearing before the Agency was discretionary under federal law and hence the APA; the only hearing required under federal law is the hearing to contest permit denial or conditions. Borg-Warner, 427 N.E.2d at 419-20.

Among the issues Borg-Warner posed to the court was the issue of whether "due process requires a stay of the effectiveness of the renewal permit until after the PCB's decision following the hearing." Borg-Warner, 427 N.E.2d at 421. The court found that it need not reach the due process issue:

> Under applicable Illinois statutes, such a stay of the effectiveness of a renewal permit is required. [quotation of the text of Section 16(b) (now Sec. 10-65(b)) of the APA omitted] In this case, Borg-Warner made application for renewal of its NPDES permit, that application was timely and sufficient on the record before us, and therefore its original permit continues in effect until final action on the application by the administrative bodies charged with making the determination. A final decision, in the sense of a final and binding decision coming out of the administrative process before the administrative agencies with decision making power, will not be forthcoming in the instant case until the PCB rules on the permit application, after Borg-Warner has been given its adjudicatory hearing before the PCB. Thus, until that time, under Section 16(b), the effectiveness of the renewed permit issued by the EPA is stayed. *Id*.

CAAPP Permit Program: 1990-1994

The CAAPP implements Title V of the federal Clean Air Act, 42 U.S.C. 7401 *et seq*. The federal Clean Air Act Amendments of 1990 led to enactment of Section 39.5 of the Act, establishing the CAAPP in Public Act 92-24 and 93-32, respectively effective July 1, 2001 and July 1, 2003.

Section 39.5 of the Act (415 ILCS 5/39.5 (2004)) is too lengthy to set out in detail here. Among the Section's purposes is establishment of procedures to authorize the Agency to issue CAAPP permits to replace the State operating permits the Agency formerly issued under Section 39(a) of the Act (415 ILCS 5/39(a) (2004)). Section 39.5(4)(g) provides:

> The CAAPP permit shall upon becoming effective supersede the State operating permit. 415 ILCS 5/39.5(4)(g) (2004).

The Section does not, by its terms, address the issue of a stay of a CAAPP permit during the pendancy of any appeal of conditions. On this issue, in this proceeding, the Agency also points only to Section 39.5(7)(i):

> Each CAAPP permit issued under subsection 10 of this Section shall include a severability clause to ensure the continued validity of the various permit requirements in the event of a challenge to any portions of the permit. 415 ILCS 5/39.5(7)(i) (2004).

The Board's procedural rules specifically for CAAPP permit appeals were not adopted and effective until March 18, 1994, in response to the Agency's Section 28.5 fast-track rulemaking proposal. Amendments to the Rule for Clean Air Act Permit Appeals and Hearings Pursuant to Specific Rules, 35 Ill. Adm. Code Parts 105 and 106, R93-24 (Mar. 3, 1994); *see also* 415 ILCS 5/28.5 (2004). The R93-24 rules themselves did not specifically address the issue of stays during the pendancy of CAAPP permit appeals. The original Agency proposal contained a section requiring an applicant to seek a stay of a CAAPP permit during the appeal. The Agency position that a Board-entered stay was necessary in every case was vigorously contested by a number of other rulemaking participants, including the Illinois Environmental Regulatory Group (IERG) and the American Automobile Manufacturer's Association, citing Borg-Warner and Wells Manufacturing Co. v. IEPA, 195 Ill. App. 3d 593, 552 N.E.2d 1074 (1st Dist. 1990).

The Agency's proposed stay provision was removed before the Board adopted final rules. The Board's final opinion made it clear that the participants had not reached agreement on the stay issue. Rather, they suggested, and the Board agreed, that the rulemaking was not the appropriate time or forum to resolve the issue. CAAPP Procedural Rules, R93-24, slip op. at 5 (Mar. 3, 1994).

The Board's R93-24 CAAPP procedural rules were integrated into the existing set of procedural rules during the Board's omnibus procedural rule clean-up, effective January 1, 2001. Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20 (Dec. 21, 2000). The CAAPP procedural rules are set forth at 35 Ill. Adm. Code 105.300-105.304.

BOARD ANALYSIS

Stay Issue

The Agency does not dispute that air permitting constitutes "licensing" under Section 1-40 of the APA. The Agency also agrees that "the Borg-Warner decision may still reflect good law and that it probably warrants, in the appropriate case, application of the doctrine of *stare decisis* by Illinois courts." Ag. Stay Resp. at 4. The Agency contends, however, that the APA does not apply to CAAPP permits for two reasons:

1. In enacting the CAAPP severability clause in Section 39.5(7)(i) of the Act, "the General Assembly has effectively exempted [CAAPP permits] from" the APA, so Borg-Warner is not "a proper precedent." *Id*. at 5.

2. The CAAPP permit appeal process is subject to the "grandfathering clause" of the APA because the Board had air permit appeals on the books before the APA's July 1, 1977 applicability date. *Id*. at 6.

The Agency agrees that the Board has discretionary authority to issue stays in permit appeals, including those under CAAPP. Further, the Agency notes that the Board has issued orders staying either the contested conditions or the CAAPP permits in their entirety, depending upon the parties' arguments. The Agency now argues, however, that the Board should enter discretionary stays only of contested permit conditions:

1. Because petitioners have failed to prove irreparable harm from having to comply with uncontested permit conditions carried over from previously-existing State operating permits. Ag. Stay Resp. at 10.

2. To effect the legislative policies behind the CAAPP program, noting that the United States Environmental Protection Agency (USEPA) has questioned broad stays of CAAPP permits, as attested to by affidavit. *Id.* at 16, 17-20.

First, the Board finds that Section 39.5 of the Act does not by its terms specifically exempt CAAPP permits from the APA. The legislature has demonstrated that it knows how to exempt particular programs from APA requirements. As the Agency has pointed out, the legislature has done so for the administrative citation program under Section 31.1 of the Act (415 ILCS 5/31.1 (2004)). Section 31.1(e) specifically states in pertinent part that "Sections 10-25 through 10-60 of the [APA] shall not apply." 415 ILCS 5/31.1(e) (2004). The legislature does not do so in Section 39.5. Section 39.5 mentions the APA at various points, but only in the context of Agency adoption of procedural rules under the APA to implement certain subsections. *See, e.g.*, 415 ILCS 5/39.5(4)(h) (2004). The Board is persuaded that Section 39.5(7)(i) refers only to the validity of permit conditions, rather than to their effective date, as Midwest argues.

Next, the Board finds that the CAAPP program is not grandfathered out of the APA, and that Borg-Warner is not distinguishable here. The Agency's arguments for distinguishing or disregarding the Borg-Warner holding simply are not persuasive. The Board did have general permit appeal rules in 1974, prior to the APA's applicability in 1977. These were the same general rules, however, that the Borg-Warner court found did not prevent applying the APA to NPDES permits. The Clean Air Act Amendments were not adopted by Congress until 1990; the General Assembly did not create the CAAPP program until 1992, amending it in 1994; and the Board's specific procedural rules for CAAPP appeals were not adopted and effective until March 18, 1994, in response to the Agency's Section 28.5 fast-track rulemaking proposal in CAAPP Procedural Rules, R93-24.

In summary, as did the Borg-Warner court in the NPDES permit context, the Board finds that the APA's automatic stay applies to this CAAPP permit. Section 10-65(b) of the APA effectively issues a stay of the CAAPP permit by operation of law. Accordingly, the Board need

not reach the issue of whether to exercise its discretion to enter a stay in this particular case.[3] Midwest must continue to operate by the terms and conditions of its prior State operating permit during the pendancy of this appeal.

Finally, even if USEPA has concerns with the APA stay applying to CAAPP permits, the Board cannot find that a strained reading of both the Act and the APA is an acceptable solution. If necessary, the Agency may certainly choose to bring legislative attention to the matter. *See, e.g.*, 415 ILCS 5/39(c) (2004) (in response to USEPA concerns with variances and permit appeals being granted by operation of law in various federal programs, the Agency proposed and the legislature enacted the *mandamus* action as an alternative approach).

Administrative Record Filing

Under Section 105.302(f) of the Board's procedural rules, the Agency must file the entire record of its determination within 30 days after it is served with the petition for review, unless the Board or the hearing officer orders otherwise. 35 Ill. Adm. Code 105.302(f). Under Section 101.302(h)(2), the Agency is required to file a signed paper original and four duplicate copies (five total) of the record. 35 Ill. Adm. Code 101.302(h)(2). Section 101.302(d) provides:

> Filing by electronic transmission or facsimile will only be allowed with the prior approval of the Clerk of the Board or hearing officer assigned to the proceeding. 35 Ill. Adm. Code 101.302(d).

In its January 30, 2006 motion in this and the other 20 CAAPP permit appeals, the Agency observes that its motions for additional time to file the administrative records are pending. The Agency states that these motions for extensions were filed due to the volume of material involved, the likelihood that not all cases would go to hearing, and "due, in small part, to the review time required for the remaining several hundred miscellaneous electronic mail messages of Illinois EPA personnel that had not yet been reviewed." Ag. Mot. to File at 2.

The Agency's January 30, 2006 motion addresses the logistics of preparing and filing the voluminous administrative records. The Agency seeks leave to file a scanned version of the administrative record on compact disk. The Agency explains that, due to staff constraints, the Agency has explored the possibility of hiring an outside contractor to perform required copying or scanning of hard copies, and has in fact located a contractor who will scan the record onto a

[3] In one of the 21 pending CAAPP permit appeals, the Board granted a stay of only *contested* permit conditions, as requested by that petitioner and supported by the Agency. Soyland Power Cooperative, Inc. v. IEPA, PCB 06-55 (Jan. 5, 2006). Today's holding here is not inconsistent with that action. As remarked by the Agency regarding stays in permit appeals, the Board has tended to grant parties the relief they request. The Board believes that, in some cases, a permitee may find it advantageous to operate under most of the terms of a renewed permit, rather than under the terms of the old one. The Board finds nothing in the Act or APA that prevents a permitee from electing *not* to avail itself of the APA stay. In such situations, the permitee then would be operating under the terms of the most-recently issued permit, as to all but the conditions explicitly stayed by Board order.

set of compact disks. The Agency believes, however, that to produce a searchable version of the scanned compact disks would be cost prohibitive to the State of Illinois:

> Under the State contract, it costs the Illinois EPA a little over three cents a page to have a document scanned by the contractor. To provide a searchable scanned document via optical character recognition, it would cost the Illinois EPA approximately a dollar a page for a typical written document. While the contractor does not provide a guarantee on the accuracy of this function, it typically operates with 70% degree of accuracy. If the Illinois EPA requested the same search function on all handwritten documents in the Administrative Record as well, it would cost approximately $1.65 per page. Counsel for the Illinois EPA estimates that there are approximately 150,000 pages including countless handwritten documents in the Administrative Record and the related records pertaining to the twenty CAAPP permit appeals involving the other electrical power generating facilities in the State. The cost differential between the varying degrees of searchable records and a non-searchable record is anywhere from $150,000 to $247,500 versus $5,000. Ag. Mot. to File at 4, n.1.

The Agency points out that it "will be providing a type of search mechanism through the bate stamping [*sic*] of the documents that will take place prior to shipment of the documents to the scanning service." Ag. Mot. to File at 4. The Agency therefore seeks leave to file its record by providing five sets of compact disks containing the record specific to any particular appeal, and five sets of compact disks containing "the additional three trial boxes more aptly characterized as general reference material and documents relevant to the decisions underlying the issuance of all twenty-one CAAPP permits to the State's electrical generating facilities." *Id.* at 7.

The Board has long been committed to streamlining its filing process, reducing the number of paper copies filed, and accommodating electronic filing to the extent practicable given its equipment and staffing constraints. *See, e.g.*, Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20, slip op. at 5 (Dec.21, 2000). The Board has successfully completed a pilot electronic filing program, and has continued to gather experience and information with an eye to codifying the electronic filing process. But, the Board has not as yet developed procedural rules outlining all details and requirements to electronically file documents.

The filing of the 21 CAAPP permit appeals has both underscored the desirability of electronic filing, and pointed out some of the practical problems inherent in transitioning from a completely paper file maintenance process to a largely electronic file maintenance process. At this juncture, the Board is not prepared to agree to the filing of this CAAPP record in non-searchable electronic copy only. The Agency correctly notes that paper copy is not searchable in the same way that is electronic text. Paper copies, however, can be physically manipulated to allow for side-by-side comparison of various pages. Hard copies, even photocopies of original documents, generally provide fewer legibility challenges than do documents that have been scanned from hard copy into electronic text, and then printed from electronic text to hard copy.

The Board grants in part the Agency's motion for leave to file the administrative record on compact disks. The Board finds it essential that the Agency still be required to file the original paper or hard copy version of the record. The Agency may file the additional required four copies of the record on compact disks; these need not be in a searchable format. The Board also grants the Agency's motion for more time to file the record and directs the hearing officer to set the filing deadline after consulting with the Agency and Midwest.

SUMMARY OF FINDINGS

1. The Board finds that the APA's "automatic stay" applies to this case, consistent with long-standing case law under the Act: Borg-Warner Corp. v. Mauzy, 100 Ill. App. 3d 862, 427 N.E.2d 415 (3rd Dist. 1981). Accordingly, Section 10-65(b) of the APA (5 ILCS 100/10-65(b) (2004)) effectively stays Midwest's CAAPP permit by operation of law. It is therefore unnecessary for the Board to reach the issue of whether to exercise its discretion to stay Midwest's CAAPP permit.

2. The Agency's motion for leave to file the administrative record on compact disks is granted in part. The Agency must file the original paper or hard copy version of the record. The Agency may file the additional required four copies of the record on compact disks; these need not be in a searchable format.

3. The Board grants the Agency's motion for additional time to file the record and directs the hearing officer to set the record-filing deadline after consulting with the parties.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 16, 2006, by a vote of 4-0.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board