ILLINOIS POLLUTION CONTROL BOARD
February 16, 2006

AMEREN ENERGY GENERATING COMPANY, COFFEEN POWER STATION,	)	
Petitioner,	)	
v.	)	PCB 06-64
	)	(CAAPP Permit Appeal – Air)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

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

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) on September 29, 2005. These permits were issued by the Agency under the provisions of the Clean Air Act Permit Program (CAAPP) under 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.

Each of the cases raises similar issues regarding the inter-relationship of various provision of the Act and the Illinois Administrative Procedure Act (APA), 5 ILCS 100/10-65(b) (2004). The essential question is whether the CAAPP permit is subject to the "automatic stay" provisions of the APA, 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. Petitioner in each case has argued alternatively that the APA stays the new CAAPP permit in its entirety, allowing that entity to operate under its old state operating permit. Failing that, petitioners have argued that the Board should stay either only the contested conditions of the CAAPP permit, or the permit in its entirety. The Agency argues that the APA does not apply, and urges in various cases either that the Board should grant no discretionary, or that any stay should be limited to the contested conditions of the CAAPP permit.

Each of the cases also raises issues about how the Agency can best file the voluminous records in these appeals, considering both the benefits and detriments of paper (hard copy) and electronic filing. The Agency has requested leave to file the administrative record on a set of compact disks that, due to cost concerns, cannot be electronically searched.

In this particular appeal, the Agency issued the CAAPP permit to Ameren Energy Generating Company (Coffeen Power Station) (Ameren) for Ameren's coal-fired power plant at 134 CIPS Lane in Coffeen, Montgomery County. Ameren is challenging numerous conditions, including conditions relating to reporting and recordkeeping, as well as the issuance date and effective date of the permit.

For the reasons expressed below, the Board finds that the APA's automatic stay provision 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). Section 10-65(b) of the APA in effect issues a stay by operation of law, so that it is unnecessary for the Board to reach the issue of whether to exercise discretion to enter a stay in a particular case.

As to the filing of the Agency record, after consideration of the arguments concerning costs and ease of access to information in the record, the Board finds that it is essential for the Agency to file at least one original hard, paper copy of the record. The Agency may file the additional required four copies of the record on compact disk; these need not be in a searchable format. The Board directs the hearing officer to set the time for the filing of the record in consultation with the parties.

PROCEDURAL BACKGROUND

On November 3, 2005, Ameren timely filed a petition asking the Board to review a September 29, 2005 determination of the Agency to issue a CAAPP permit with conditions. Ameren filed the petition for review and included a request seeking a stay of the permit. The Board accepted this matter for hearing on November 17, 2005, but reserved ruling on the requested stay. On November 18, 2005, the Agency filed a motion in partial opposition and partial support of the Ameren's request for stay (Ag. Stay Mot.). Ameren responded on November 30, 2005 and on December 15, 2005, the Agency filed a motion for leave to file a surreply and surreply. The Board grants the Agency's motion to file a surreply.

On January 30, 2006, the Agency filed a motion for leave to file the administrative record on compact disks. The Agency indicates that petitioner does not object to the motion.

On February 3, 2005, Ameren responded to the motion for leave to file the administrative record on compact disk. Ameren indicates that it has no objection to the Agency filing the record on compact disk provided that the Agency includes "a complete index to the record correlated with the bates-stamped numbers." Further, Ameren asks that the Agency agree to provide hard copy promptly to the Board in case of technical difficulties in scanning or accessing the documents.

GENERAL STATUTORY FRAMEWORK

Chronology

The Act and General Procedural Rules: 1970-74

The Environmental Protection Act became effective in July 1970. Three months later the Board adopted its first set of procedural rules, including rules for the conduct of contested cases and specific permit appeal rules. 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 Illinois Administrative Procedures Act 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 inter-relationship of the Act and the stay provisions of the APA has been examined and construed in only one 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 contested 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 determination of the issue as to "whether Board-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, arguing that no hearing was necessary.

The court first looked to the applicability Section of the APA. Noting that the Board's 1974 NPDES procedural rules were not by their terms to become effective until NPDES authorization, the court found that the NPDES rules were not in effect until October 1977. The court found that since there were no effective Illinois procedures for handling NPDES permit decisions as of July 1, 1977, the court found that the provisions of the APA applied. Borg-Warner, at 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. But, the court found 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, at 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 say of the effectiveness of the renewal permit, until after its hearing before the PCB." The court went on to specifically find that it need not reach that 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. Borg-Warner, 427 N.E.2d at 421.

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 sparked the General Assembly's adoption of Section 39.5 of the Act, establishing the CAAPP in P.A. 92-24 and 93-32, respectively effective July 1, 2001 and July 1, 2003.

Section 39.5 of the Act is much 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. 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 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 rule 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). The R93-24 rules

themselves did not specifically address the issue of stays during the pendancy of CAAPP appeals. The original Agency proposal contained a section specifically requiring an applicant to specifically seek a stay of a CAAPP permit during the appeal. The Agency position that a specific Board-entered stay was necessary in every case was vigorously contested by a number of other 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).

While the provision was removed prior to adoption of the final rules, the Board's final opinion made it clear that the participants had not reached agreement on the issue. Rather, they were suggesting, and the Board agreed, that the rulemaking was not the appropriate time of forum for resolution of 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, which became effective January 1, 2001, during the Board's omnibus procedural rule clean-up. Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20 (Dec. 21, 2000). *See* 35 Ill. Adm. Code 105-300-105.304.

BOARD ANALYSIS

Stay Issue

The Agency does not dispute that air permitting constitutes "licensing activity" under the 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 Mot. at 4. But, the Agency contends that the APA does not apply to CAAPP permits because

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". Ag. Stay Mot. at 5; and

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 July 1, 1977 applicability date of the APA.

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

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

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

First, the Board finds that Section 39.5 of the Act (415 ILCS 5/39.5 (2004)) does not by its terms specifically exempt CAAPP permits from the APA. The legislature has demonstrated that it knows full well 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." *Id*. 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 various subsections. *See, e.g.*, 415 ILCS 5.39.5(4)(h) 2004. The Board is persuaded that Section 39.5(7)(i) of the Act (415 ILCS 5/39.5(7)(i) (2004)) refers only to the validity of permit conditions, rather than to their effective date, as petitioner 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 in favor of distinguishing or disregarding the Borg-Warner holding here simply are not persuasive. While the Board did have general air operating permit appeal rules on the books in 1974, prior to the APA's applicability in 1977, these were the same general rules that the Borg-Warner court found did not prevent application of the APA in regards 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 rule proposal in CAAPP Procedural Rules, R93-24.

In summary, as did the Borg-Warner court in the NPDES context, the Board finds that the APA's automatic stay provision applies to this CAAPP permit. Section 10-65(b) of the APA (5 ILCS 100/10-65 (2004)) in effect issues a stay by operation of law, so that it is unnecessary for the Board to reach the issue of whether to exercise discretion to enter a stay in this particular case.[1] Petitioner must continue to operate by the terms and conditions of its prior State operating permit during the pendancy of this appeal.

[1] The Board notes that in one of the 21 CAAPP permits, the Board granted the stay of contested permit conditions as requested by the petitioner and supported by the Agency. Soyland Power Cooperative, Inc. v. IEPA, PCB 06-55 (Jan. 5, 2006). Today's holding 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.

The Board additionally remarks that the Agency did not contest the grant of a discretionary stay of contested conditions. Here, since one of the contested conditions is the permit's effective date, a discretionary stay of that condition would stay the entire permit. The effect is the same as that of the stay afforded by Section 10-65(b) of the APA (5 ILCS 100/10-65 (2004)).

Finally, to the extent USEPA may have problems with applicability of the APA stay provisions in CAAPP appeals, the Board cannot find that a tortured reading of both the Act and the APA provides an acceptable solution. If necessary, the Agency may certainly choose to bring legislative attention to the problem. *See* 415 ILCS 5/39(c) where, in response to USEPA problems with variances and permit appeals being granted by operation of law in various federal programs, the Agency proposed and the legislature adopted the mandamus action as an alternative approach to getting quicker resolution of such cases.

Administrative Record Filing

Section 105.302(f) of the Board's procedural rules requires the Agency to file the entire record of its decision within 30 days after the Agency is served with a petition for review, unless the Board or hearing officer specifies another filing date. 35 Ill. Adm. Code 105.302(f). Under Section 101.302(h)(2), the Agency is required to file a signed paper copy original and four duplicate copies five total of the record. 35 Ill. Adm. Code 101.302(h)(2). But, Section 101.302(d) provides that

> 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 cases, the Agency observes that motions for extension of time for the filing of the administrative record are pending, and that the motions were filed due to the volume of material involved, the likelihood that not all cases would actually go to hearing, and "due, in small part, to the review time required for the remaining several hundred miscellaneous electronic mail messages of [Agency] personnel that had not yet been reviewed." Ag. Mot. to File at 4. The current 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 set of compact disks. But, the Agency believes that to produce 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 6, n.1.

But, the Agency points out, 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 6. The Agency accordingly seeks leave to file its record by providing five sets of compact disks containing the record specific to any particular case, 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.*

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 Boards' 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 for the electronic filing of 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. But, paper copies 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 finds that it is essential for the Agency to file at least one original hard, paper copy of the record. The Agency may file the additional required four copies of the record on compact disk; these need not be in a searchable format. However, in response to Ameren's concerns, a complete index to the record correlated with the bates-stamped numbers must also be included. The hearing officer is directed set the time for filing of the administrative record after consultation with the parties.

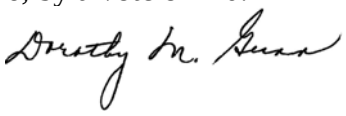
SUMMARY OF FINDINGS

1. The Board finds that the APA's automatic stay provision applies to this case, consistent with long-standing case law under the Act: Borg-Warner Corp. v. Mauzy, 100 Ill. App. 3d 862, 426 N.E.2d 415 (3rd Dist. 1981). Section 10-65(b) of the APA in effect issues a stay by operation of law, so that it is unnecessary for the Board to reach the issue of whether to exercise discretion to enter a stay in a particular case.

2. The Agency's motion for leave to file the administrative record on compact disks is granted in part. The Agency must file at least one original hard, paper copy of the record. The Agency may file the additional required four copies of the record on compact disk; these need not be in a searchable format. The Board directs the hearing officer to set the time for the filing of the record in consultation 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