

ILLINOIS POLLUTION CONTROL BOARD
June 21, 2007

AMERICAN BOTTOM CONSERVANCY,)
)
 Petitioner,)
)
 v.) PCB 06-171
) (Third-Party NPDES Permit Appeal)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY and UNITED)
 STATES STEEL CORPORATION -)
 GRANITE CITY WORKS,)
)
 Respondents.)

ORDER OF THE BOARD (by T.E. Johnson):

This order denies a contested May 30, 2007 motion to stay the Board's orders of January 26, 2007 and May 3, 2007, pending appellate review of those orders.

On January 27, 2007, the Board issued a final opinion and order concerning the petition timely filed on May 8, 2006, by American Bottom Conservancy (American Bottom) contesting the May 31, 2006 issuance of a National Pollutant Discharge Elimination System (NPDES) permit. The Illinois Environmental Protection Agency (Agency) on March 31, 2006, issued the permit to the United States Steel Corporation Granite City Works (U.S. Steel) for its steelmaking facility at 20th and State Streets, in Granite City, Madison County.

The sole issue properly raised on appeal was American Bottom's assertion that the Agency improperly denied American Bottom's request for a public hearing prior to issuing the permit, since the record before the Agency demonstrated the existence of "a significant degree of public interest in the proposed permit," within the meaning of Section 309.115(a)(1) of the Board's rules for NPDES permit issuance (35 Ill. Adm. Code 309.115(a)(1)). The Board found that American Bottom had demonstrated that the Agency improperly denied the permit, noting that the rule provides in pertinent part that "instances of doubt shall be resolved in favor of holding the hearing." The Board invalidated the permit.

By order of May 3, 2007, the Board denied motions to reconsider separately filed by U.S. Steel on March 9, 2007, and the Agency on March 12, 2007.

On May 30, 2007, U.S. Steel moved the Board to stay the orders of January 26, 2007 and May 3, 2007. On June 18, 2007, American Bottom filed a response in opposition.

In support of its motion, U.S. Steel asserts that on May 25, 2007, U.S. Steel filed a Petition for Review of the Board Orders to the Appellate Court for the Fifth District. Accordingly, U.S. Steel now moves to stay the Board orders pending appellate review. Mot. at 2.

In support of its motion, U.S. Steel argues that the Board should take guidance from the decision of the Illinois Supreme Court in Stacke v. Bates, 138 Ill. 2d 295, 567 N.E.2d 192 (1990). Mot. at 3. In that case, the court characterized the determination as “a balancing process”. Stacke, 138 Ill. 2d at 309. The factors that can be considered are “whether a stay is necessary to secure the fruits of the appeal in the event the movant is successful,” “the movant’s likelihood of success on the merits,” and “the likelihood the movant will suffer hardship” *Id.* at 305-307. U.S. Steel cites with approval the Stacke court’s statement that:

We believe that in all cases, the movant, although not required to show a probability of success on the merits, must, nonetheless, present a substantial case on the merits and show that the balance of the equitable factors weighs in favor of granting the stay. If the balance of the equitable factors does not strongly favor movant, then there must be a more substantial showing of a likelihood of success on the merits. Thus a strong showing of the likelihood of success on the merits may offset other equitable factors favoring the other party. *Id.* at 309.

The entirety of U.S. Steel’s arguments concerning these Stacke stay factors are that:

A stay is necessary to secure the fruits of U.S. Steel’s appeal, which would be lost if the Board orders are immediately imposed; there is a reasonable likelihood of success for U.S. Steel’s appeal; and U. S. Steel will suffer substantial and irreparable harm if a stay is not granted. Furthermore, even if the appellate court rules that a public hearing should be held on U. S. Steel’s permit, it is likely that the new permit would contain the same conditions as the permit that the Board invalidated. Mot. at 3.

In its June 18, 2007 response in opposition, American Bottom urges the Board to deny U.S. Steel’s stay request. In summary, American Bottom contends:

A stay is not warranted in this case because U.S Steel has not shown a likelihood of success on the merits. U. S. Steel makes only one argument as to its likelihood of success: that the Board applied an incorrect standard of review when it decided ABC’s appeal. This argument was previously rejected when the Board denied U.S Steel’s motion to reconsider. The Illinois Supreme Court has held that the Board is not constrained by the narrow, deferential [arbitrary] standard of review suggested by U.S Steel when reviewing decisions of the IEPA. IEPA v. IPCB, 503 N.E.2d 343, 345 (Ill. 1986).

Granting a stay would also harm the interests of [American Bottom] because the new permit allows illegally high levels of various pollutants to be discharged to Horseshoe Lake. Maintaining this status quo might prejudice IEPA’s decision when the permit is reconsidered after a public hearing. Generally, U. S. Steel has not provided concrete evidence of the harm it would suffer if a stay is not granted. The affidavit offered by the company does not tie specific actions or costs to the Board’s invalidation of the new permit. Response at 2

The Board denies the motion for stay. U.S. Steel fails to argue facts supporting its analysis of the stay factors, providing the Board only with summary conclusions. The motion is particularly unpersuasive on the issue of U.S. Steel's likelihood of success on the merits in this appeal. Again, the sole issue in this case is whether, despite the receipt of two organizations' public comments requesting a public hearing on behalf of their membership prior to permit issuance, the Agency lawfully issued the permit absent hearing. As the Board outlined in its January 26, 2007 opinion and order, the groups requesting hearing each have hundreds of members in the affected area, recent policy developed by the United States Environmental Protection Agency would require a hearing, and the Board rule at issue specifically provides that:

Instances of doubt shall be resolved in favor of holding the hearing. *See* 35 Ill. Adm. Code 309.115(a). This caveat coupled with the strong showing of public interest in the draft permit, renders the Agency's decision in violation of Section 309.115(a). American Bottom Conservancy v. IEPA and United States Steel Corporation - Granite City Works, PCB 06-171, slip op. at 14 (Jan. 26, 2007).

Again, the motion for stay is denied.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 21, 2007, by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board