

ORIGINAL

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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MAR 14 2003

NORTH SHORE SANITARY DISTRICT,)

STATE OF ILLINOIS
Pollution Control Board

Petitioner,)

PCB No. 03-146
(Permit Appeal)

v.)

ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)

Respondent.)

NOTICE

To: Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Fred C. Prillaman
Mohan, Alewelt, Prillaman & Adami
1 North Old Capital Plaza, Suite 325
Springfield, Illinois 62701-1323

Bradley P. Halloran
Hearing Officer
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board an original (1) and eleven (11) copies of an **APPEARANCE and MOTION IN OPPOSITION TO PETITIONER'S EMERGENCY MOTION FOR STAY** of the Respondent, Illinois Environmental Protection Agency, a copy of which is herewith served upon the attorney for the Petitioner, North Shore Sanitary District.

Respectfully submitted by,

Robb H. Layman

Robb H. Layman
Special Assistant Attorney General

Dated: March 14, 2003
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217)524-9137

*Fax Copy of appearance
Submissions
Doy Hearing Office
3/14/03*

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ILLINOIS ENVIRONMENTAL)

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PROTECTION AGENCY,)

)

Respondent.)

APPEARANCE

NOW COMES Robb Layman, as a Special Assistant Attorney General, and enters his appearance on behalf of the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, in the above-captioned matter.

Respectfully submitted by,



Robb H. Layman
Special Assistant Attorney General

Dated: March 14, 2003
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217)524-9137

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD STATE OF ILLINOIS
OF THE STATE OF ILLINOIS Pollution Control Board

NORTH SHORE SANITARY DISTRICT,)
Petitioner,) PCB No. 03-146
v.) (Permit Appeal)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
Respondent.)

MOTION IN OPPOSITION TO
PETITIONER'S EMERGENCY MOTION FOR STAY

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by and through its attorneys, and moves the Illinois Pollution Control Board ("Board") to deny the Petitioner's, NORTH SHORE SANITARY DISTRICT ("NSSD"), Emergency Motion for Stay filed in the above-captioned matter.

1. NSSD submitted a permit application to the Illinois EPA on or about February 12, 2003, seeking to modify a condition of a construction permit, Permit No. 01040045, that was previously issued by the Illinois EPA on March 11, 2002.

2. The Illinois EPA subsequently sent a Request for Additional Information to NSSD on March 3, 2003, which identified several facets of information that were deemed necessary by the Illinois EPA to evaluate the permitting request.

3. NSSD filed a Petition for Permit Review ("Petition") with the Board on March 7, 2003, challenging the Illinois EPA's March 3, 2002, permitting decision. The Illinois EPA received a copy of the pleadings on March 10, 2003.

4. In conjunction with the filing of the Petition, NSSD also filed an Emergency Motion for Stay ("Motion"). In its Motion, NSSD seeks a stay of the "force and effect of Standard Condition 1" of the construction permit. *See, Motion at page 1.* Standard Condition 1 of Permit No. 01040045 generally provides that the construction permit, in the absence of a permit extension or new permit, will expire within one (1) year of the date of permit issuance unless the permittee has started construction by such time.

5. By way of historical background, NSSD contends that third-party litigation and a judicial restraining order have precluded the timely commencement of construction of the permitted sludge dryer/melter. As a result, NSSD has sought to suspend the legal effect of Standard Condition 1 in at least two ways: first, by seeking provisional variance relief from the Illinois EPA, and secondly, by seeking its present motion for stay.

6. NSSD submitted a request for provisional variance with the Illinois EPA on or about February 11, 2003, and, according to NSSD at the time of its filing of the permit appeal, the Illinois EPA has never responded to the request. In fact, the Illinois EPA is authorized a period of thirty (30) days in which to review provisional variance requests under the Illinois Environmental Protection Act ("Act"). 415 ILCS 5/37(b)(2002). Having only recently completed its review of NSSD's request for provisional variance, the Illinois EPA has formally notified NSSD, as of March 13, 2003, that said request does not satisfy the applicable criteria of 35 Ill. Adm. Code Part 180.301 and therefore cannot be recommended. Notice of the Illinois EPA's recommendation was forwarded, by letter, to the Board on March 13, 2003.

7. In the context of this proceeding, NSSD argues that an arbitrary and unreasonable hardship will be suffered if the construction permit is allowed, by operation of law, to expire in accordance with Standard Condition 1. In NSSD's view, the expiration of the permit will render the issues in this permit appeal moot, thus making the Board's power to review permitting decisions illusory. *See, Petition at page 4.* Apart from a passing reference to the lack of environmental harm, NSSD offers little else in terms of factual evidence to support its Motion.

8. Both the Administrative Procedure Act and the Act recognize circumstances in which a permittee is entitled to an automatic stay. *See, 5 ILCS 100/10-65(b)(2002); 5 ILCS 5/9.1(f)(2002).* An automatic stay protects a petitioner from the consequences of the permitting decision while judicial or administrative review is pending and, in essence, allows the prior existing permit to remain in force and effect so long as a renewal of said permit is timely sought. In this instance, NSSD's request for stay does not fall within the ambit of the automatic stay provisions.

9. The Board has also recognized its inherent authority to grant discretionary stays in certain cases. In doing so, the Board frequently evaluates whether the requested stay will result in any potential environmental harm. *Bridgestone/Firestone, PCB 02-31* (November 1, 2001); *Community Landfill Company and City of Morris v. Illinois EPA,* PCB 01-48 and PCB 01-49 (October 19, 2000). The Board has deemed this issue of particular importance. *See, Motor Oils Refining Company, Inc., v IEPA,* PCB 89-116 (August 31, 1989).

10. No issue of environmental harm is presented here. Because NSSD has yet to commence construction of the permitted source, no environmental harm will result in

maintaining the status quo. Even assuming that NSSD will be freed from constraints of third-party litigation anytime soon, the prior issuance of the underlying construction permit was premised upon the recognition that the sludge dryer/melter, as proposed, would not violate the Act or Board regulations. As such, a stay that would, in essence, allow NSSD to commence construction of the permitted facility during the pending review of the appeal could not be expected to cause environmental harm under the present circumstances.

11. The mere absence of environmental harm, however, should not be the determinative factor in the Board's evaluation of NSSD's request. First and foremost, the exercise of the Board's discretion to grant stays should be premised upon a showing of some necessity. If any party to a Board proceeding can obtain a discretionary stay without demonstrating the need for such relief, then the object and protection afforded by such relief might become a mere pretext for seeking Board review in the first instance. This is especially true in this type of case, where the Petitioner has not demonstrated a probability of success on the merits of its permit appeal and where, judging from the totality of facts, the pleadings may have only been filed for the purpose of avoiding the legal consequences of a lapsed permit.

12. The Board's approach in reviewing other stay requests is consistent with the aforementioned framework for analysis. The Board has often looked to the factors established by Illinois courts in reviewing common law injunctions: (1) a certain and clearly ascertainable right that requires protection, (2) irreparable injury occurring in the absence of injunctive relief, (3) no existence of an adequate remedy at law and (4) a probability of success on the merits. *See, Bridgestone/Firestone Off-road Tire Company*

v. Illinois EPA, PCB 02-31 (November 1, 2001)(emphasizing the existence of a right deserving of protection and the potential for irreparable harm), citing *Junkunc v. S.J. Advanced Technology & Manufacturing*, 498 N.E.2d 1179 (1st Dist. 1986); *Community Landfill Company and City of Morris v. IEPA*, PCB 01-48 and 01-49 (October 19, 2000)(granting stay to protect right of appeal and prevent hardships “too onerous” to be justified); *ESG Watts, Inc., v. IEPA*, PCB 95-133 (May 18, 1995)(financial implications, together with lack of environmental harm and short-term delay in filing renewal application, were sufficient reasons to grant stay).

13. NSSD has failed to account for any of the relevant factors. For example, NSSD has not demonstrated that the continuation of the construction permit beyond its specified, one-year term warrants the legal protection of a stay. While the interest acquired by a permittee in a construction permit may be important, representing a cognizable, legal right to commence construction in accordance with the terms of the permit, it is not tantamount to a fundamental property right. Cf., *People v. Eck*, 664 N.E.2d 1147, 1149 (5th Dist. 1996), citing *People v. Dvorak*, 658 N.E.2d 869, 875 (Ill. 1995) (driver’s license may be subject to due process limitations, but it is not a “fundamental property right in the constitutional sense”).

14. Moreover, an examination of this issue requires that construction permits be distinguished from renewal or operating permits. The interest arising from a construction permit is much less of a perfected or ascertainable right than that which exists in an operating permit, the latter being recognized by courts as requiring the observance of certain due process rights prior to the government’s denial or revocation. *Wells Manufacturing v. IEPA*, 552 N.E.2d 1074 (5th Dist. 1990); *Martell v. Mauzy*, 511 F.

Supp. 729 (N.D. Ill. 1981); *cf.*, *West Suburban Recycling and Energy Center, L.P., v. IEPA*, PCB 95-119 and 95-125 (October 17, 1996)(no property interest exists at the "development permit stage" such that due process rights are implicated). Any such right in the continuation of a construction permit is also significantly more diminished by the relative position of the permittee at the time of the requested renewal. In this case, NSSD, in the waning days of a permit's effective duration, has yet to commence construction and, further, cannot even chance a prediction as to when such efforts might ensue. At best, NSSD has possessed merely an expectation to a property interest.

15. Similarly, NSSD has not demonstrated that a stay is necessary to prevent irreparable harm. In contrast to other stay requests granted by the Board, NSSD does not allege that the expiration of the construction permit will cause a financial burden or otherwise impede its other permitted operations. *Cf. ESG Watts, Inc., v. IEPA*, PCB 95-133 (May 18, 1995)(significant financial implications were posed if petitioner could not operate under prior permits). Because the construction of the permitted sludge dryer/melter has not been commenced, it seems obvious that NSSD will not suffer any economic consequences caused by the loss of an on-going concern. The one legal case authority cited by NSSD in its Motion is inapposite for these very reasons. *See Alburn, Inc., v. Illinois EPA*, PCB 80-189 and 80-190 (February 17, 1982)(finding that lifting of stay would cause "great economic harm," citing earlier Board orders from June 10, July 15 and November 5, 1981).

16. NSSD generally argues that the expiration of the construction permit will cause hardship because it will moot the issues in the permit appeal. This rationale is evidently derived from prior Board cases involving challenges to permit conditions from

a permit issuance. See, *Bridgestone/Firestone Off-road Tire Company v. Illinois EPA*, PCB 02-31 (November 1, 2001); *Community Landfill Company and City of Morris v. IEPA*, PCB 01-48 and 01-49 (October 19, 2000). In those instances, petitioners faced substantial costs in complying with contested permit conditions. The Board reasoned that if the petitioners were compelled to achieve compliance under those circumstances, the integrity of the appeals process could be undermined, as subsequent efforts to litigate the challenged conditions would be altogether pointless. NSSD, on the other hand, does not find itself in any comparable "catch-22." Despite any expiration of the construction permit, NSSD remains free to challenge the merits of the Illinois EPA's decision to require additional information without the imposition of substantial compliance costs.

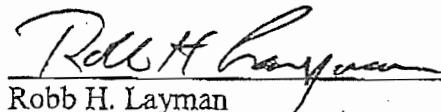
17. NSSD also has not demonstrated that it is likely to prevail in its permit appeal or that it lacks an adequate remedy at law.

18. On the whole, NSSD is not forfeiting any kind of fundamental right or lost opportunity by virtue of the expiration of the construction permit. NSSD need only seek a new construction permit from the Illinois EPA in order to remedy its situation. Such recourse is not likely to be costly or burdensome. While the Illinois EPA understands that third-party litigation may have precluded construction during the permit's term, this and other chain of events are not uncommon. Although NSSD may be forced to experience inconvenience or added delays, these circumstances are an unavoidable part of the permitting process and do not warrant the exercise of the Board's discretionary stay authority on this occasion.

WHEREFORE, the Illinois EPA respectfully requests that the Board deny NSSD's Emergency Motion for Stay or, in the alternative, order such relief as may be deemed appropriate.

Respectfully submitted by,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,



Robb H. Layman
Special Assistant Attorney General

Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217)524-9137

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MAR 14 2003

CERTIFICATE OF SERVICESTATE OF ILLINOIS
Pollution Control Board

I hereby certify that on the 14th day of March, 2003, I did send, by a non-U.S. Postal Service carrier for delivery on Monday, March 17, 2003, one (1) original and eleven (11) copies of the following instruments entitled **APPEARANCE and MOTION IN OPPOSITION TO PETITIONER'S EMERGENCY MOTION FOR STAY** to:

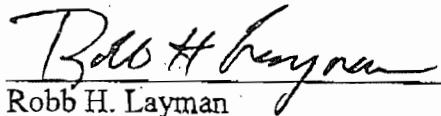
Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

and a true and correct copy of the same foregoing instruments, by First Class Mail with postage thereon fully paid and deposited into the possession of the United States Postal Service, to:

Fred C. Prillaman
Mohan, Alewelt, Prillaman & Adami
1 North Old Capital Plaza, Suite 325
Springfield, Illinois 62701-1323

Bradley P. Halloran
Hearing Officer
James R. Thompson Center
100 West Randolph Street,
Suite 11-500
Chicago, Illinois 60601

By leave of Mr. Bradley Halloran, Hearing Officer for the Board, the Illinois EPA has also faxed a true and correct copy of the same on this date to Dorothy Gunn, Clerk of the Board, for immediate filing in accordance with 35 Ill. Adm. Code 101.302(d).



Robb H. Layman
Special Assistant Attorney General

This filing is submitted on recycled paper.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY
DIVISION OF LEGAL COUNSEL
1021 NORTH GRAND AVENUE EAST, POST OFFICE BOX 19276
SPRINGFIELD, ILLINOIS 62794-9276
TELEPHONE (217)782-5544•FACSIMILE (217)782-9807

DATE: March 14, 2003

FACSIMILE TRANSMITTAL SHEET

PLEASE DELIVER THE FOLLOWING PAGE(S) TO:

PARTY'S NAME: Dorothy Green, Clerk

FIRM/COMPANY'S NAME: Pollution Control Board

FACSIMILE NO.: _____

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FROM: Robb Langman

Re: North Shore Sanitary Dist. v. IEPA, PCB# 03-146

TOTAL NUMBER OF PAGES (INCLUDING THIS PAGE): 12

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COMMENTS: Appearance and Motion in Opposition to
Petitioner's Motion for Stay for filing.

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