

ILLINOIS POLLUTION CONTROL BOARD
September 20, 2012

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 D. Glosser):

On September 14, 2012, Ameren Energy Generating Company (Coffeen Power Station) (Ameren) and the Illinois Environmental Protection Agency (Agency) filed a joint motion asking the Board to lift the stay of the uncontested conditions and remand the permit to the Agency. For the reasons discussed below the Board grants the motion.

The Board will first discuss the procedural background of this proceeding and then summarize the motion. The Board will then set forth its decision.

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 Clean Air Act Permit Program (CAAPP) permit with conditions. *See* 415 ILCS 5/40.2(a) (2004); 35 Ill. Adm. Code 105.302(e). Ameren is challenging numerous conditions, including conditions relating to reporting and recordkeeping, as well as the issuance date and effective date of the permit. The CAAPP permit application concerns Ameren’s coal-fired power plant at 134 CIPS Lane in Coffeen, Montgomery County.

On February 16, 2006, the Board found that the Administrative Procedure Act (APA) automatic stay provision¹ applied to this case, consistent with long-standing case law under the Environmental Protection Act: Borg-Warner Corp. v. Mauzy, 100 Ill. App. 3d 862, 426 N.E.2d 415 (3rd Dist. 1981). The Board stated that “Section 10-65(b) of the APA (5 ILCS 100/10-65 (2010)) 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.” Ameren Energy Generating Company, Coffeen Power Station v. IEPA, PCB 06-64, slip op. at 10 (Feb. 6, 2006).

¹ *See generally* 5 ILCS 100/1-5, 1-35, 1-40, 10-65 (2010).

On September 12, 2012, the parties filed a joint motion (Mot.) asking the Board to lift the stay of uncontested permit conditions and remand to the Agency the permit. The motion also asked that the Board rule on the motion expeditiously.

MOTION

The parties indicate that the United States Environmental Protection Agency (USEPA) issued a “90 day notice to the Illinois EPA threatening to reopen the Title V permit for the Coffeen facility if the Illinois EPA fails to effectuate the current permit under appeal.” Mot. at 1-2. The parties claim that to meet the requirements of the USEPA notice, the first step is for the Board to lift the stay as to the uncontested conditions. Mot. at 2.

The parties have been negotiating a settlement and have reached substantial agreement on the contested conditions; however, the conditions need to be revised in the CAAPP permit to resolve the appeal. Mot. at 2. The parties opine that several of the negotiated conditions may constitute “significant modifications” and will subject the permit to public participation and USEPA review. *Id.* Other negotiated changes, according to the parties, “qualify for treatment as administrative amendments or minor modifications.” *Id.* The Agency has developed a multi-step process for incorporating the agreed conditions into the permit.

The parties request that the Board lift the stay as to uncontested conditions and remand the permit, to allow the parties to implement the Agency’s approach. Mot. at 2. The parties indicate that the Agency, once the CAAPP permit is remanded, will “establish new effective and expiration dates reflecting the five-year tenure of the permit, thereby establishing a valid and effective Title V permit for the Coffeen power station.” *Id.* Further, the Agency will submit certain negotiated permit conditions as “minor modifications” for USEPA review and begin the public comment period for other negotiated permit conditions that are “significant modifications”. Mot. at 2-3.

The parties expect that once the procedures for the modifications are complete, the permit will be amended with the negotiated conditions. Mot. at 3. When the agreed permit is in final form, Ameren will “request the appropriate Board action to bring this matter to resolution.” *Id.*

DISCUSSION

The parties ask the Board to lift the stay on the uncontested provisions of the permit and ask the Board to remand the permit, while retaining jurisdiction over the contested conditions. The parties make this request without a single citation to authority. The Board will discuss each request below.

Lifting the Stay

As noted before, the Board had previously found on February 16, 2006 that the automatic stay provisions of Section 10-65(b) of the APA (5 ILCS 100/10-65 (2010)) applied to this appeal. *See Ameren Energy Generating Company, Coffeen Power Station v. IEPA*, PCB 06-64, slip op. at 10 (Feb. 6, 2006). Subsequently, on June 21, 2010, Section 40.2(f) of the Act was

added by P.A. 96-934 (415 ILCS 5/40.2(f)). Section 40.2(f) of the Act specifically provides that “subsection (b) of Section 10-65 of the Illinois Administrative Procedure Act shall not apply to actions” taken under the CAAPP provisions at Section 39.5 of the Act (415 ILCS 5/39.5 (2010)). 415 ILCS 5/40.2(f). Section 40.2(f) of the Act requires the Board to stay the contested conditions upon the request of the applicant, and allows the Board to stay the effectiveness of “any or all uncontested conditions”. *Id.* Therefore, as requested by the parties, the Board will lift the stay of the uncontested conditions, while continuing to stay the contested conditions. The contested conditions are set forth in the petition for review filed on November 3, 2005.

Remand of Permit

As indicated above, the parties ask that the permit be remanded to the Agency while the Board retains jurisdictions. The parties cite no authority for this proposition; however a review of the Board’s statutory authority and case law finds that the Board has retained jurisdiction in certain cases. The Board has retained jurisdiction in enforcement matters in the past until remediation was completed. *See e.g. Pawlowski v. Benchwarmers Pub, Inc.* PCB 99-82 (Apr. 6, 2000) and *Gott v. M’Orr Pork*, PCB 96-68 (Feb. 20, 1997). The Board has also remanded cases to the Agency and retained jurisdiction in trade secret matters. *See Midwest Generation EME, LLC v. IEPA*, PCB 04-185 (Nov. 4, 2004). However, in *Midwest Generation*, the Board noted that the Agency lacks the authority to reconsider a final decision, citing *Reichhold Chemicals, Inc.* PCB, 204 Ill. App. 3d 674, 678-80, 561 N.E.2d 1343, 1345-46 (3rd Dist. 1990). *Midwest Generation*, slip op 31, PCB 04-185. The Board has also reopened a permit appeal in 1983. The Board reopened the air permit and then issued an order directing the Agency to review provisions. *See Illinois Power Company v. IEPA*, PCB 79-7 (Apr. 21, 1983). The Board stated:

The Board shall continue to retain jurisdiction over this matter upon the petition of either party to modify this order as may be necessary for any significant change in facts or law. *Id.*

The Board has reviewed Section 39.5 and 40.2 of the Act (415 ILCS 5/39.5 and 40.2 (2010)). Sections 39.5 (13) and (14) of the Act (415 ILCS 5/39.5 (13) and (14) (2010)) allow for CAAPP permit modification by the Agency, upon submittal of an application by the source. Such modifications may be “administrative amendments”, “minor” or “significant” modifications and the Act sets forth specific procedures for the Agency to follow when modifying a CAAPP permit. *Id.* Thus, the Agency is given specific statutory authority to modify its decision on a CAAPP permit. Because the Act allows the Agency to revisit a permit once the Agency has issued a permit upon the submittal of a new application, the Board finds that the prohibition against reconsideration of the Agency’s decision in *Reichhold* does not apply in this case.

Section 40.2(a) of the Act (415 ILCS 5/40.2(a) (2010)) allows for review of an Agency decision on a CAAPP permit. Therefore, the Agency’s decision on “minor” or “significant” modifications to a CAAPP permit is appealable to the Board. *Id.* The Board is convinced that because the Agency’s decision on a permit modification can be appealed to the Board, retaining jurisdiction is appropriate in this case. The Board’s remanding of the permit while retaining jurisdiction will allow the parties to proceed with the permit modifications, but will also protect

the appeal rights of the parties in this proceeding. In addition, if there continues to be disagreement on contested conditions, a remand will promote a more efficient record and hearing before the Board.

The Board does note that when the the Agency issues the permit with modifications, Section 40.2 of the Act provides for appeals by persons who have standing other than the applicant. *Id.* Thus, even though the Board retains jurisdiction of this matter, if other persons have standing and wish to appeal, those appeals, if appropriate, will be accepted and docketed under a different case number.

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 September 20, 2012 by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board