

ILLINOIS POLLUTION CONTROL BOARD  
April 18, 2013

|                                  |   |                     |
|----------------------------------|---|---------------------|
| PEOPLE OF THE STATE OF ILLINOIS, | ) |                     |
|                                  | ) |                     |
|                                  | ) |                     |
| Complainant,                     | ) |                     |
|                                  | ) |                     |
| v.                               | ) | PCB 13-35           |
|                                  | ) | PCB 13-36           |
| THE BOARD OF TRUSTEES OF THE     | ) | (Enforcement - Air) |
| UNIVERSITY OF ILLINOIS, a body   | ) | (Consolidated)      |
| corporate and politic,           | ) |                     |
|                                  | ) |                     |
| Respondent.                      | ) |                     |

ORDER OF THE BOARD (by J.D. O'Leary):

On January 3, 2013, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed two complaints against the Board of Trustees of the University of Illinois (University). The Board opened a docket for each complaint, PCB 13-35 and PCB 13-36, and issued separate orders on January 10, 2013, accepting the respective complaints for hearing. Both complaints concern campus facilities in Chicago, Cook County, and allege air pollution control violations by the University.

On February 27, 2013, the University filed a motion in each case, seeking to consolidate the two proceedings and, in turn, to stay the consolidated proceedings. The request for stay is based upon the University's pending action in the Circuit Court of Cook County, No. 13-CH-162. Through the court action, the University seeks a declaratory judgment that jurisdiction over the People's claims against the University rests solely with Illinois Court of Claims. On March 15, 2013, the People filed responses to the motions, stating generally that the People do not object to the requested consolidation or a stay.

For the reasons below, the Board grants the University's motions to (1) consolidate the two Board proceedings for purposes of hearing and decision, and (2) stay the Board proceedings. The stay issued by the Board today, however, will last not until a dispositive ruling is made by the Cook County Circuit Court in the University's lawsuit, as the University requests. Rather, the stay will last until August 19, 2013, unless the Board issues an order terminating the stay earlier. During the term of the stay, each party must file a status report with the Board every 30 days regarding the progress of the declaratory judgment action. Further, while the stay is in effect, each party must promptly file a notification with the Board upon the Circuit Court's final disposition of the University's lawsuit.

In this order, the Board first sets forth the procedural history of the two proceedings before the Board. The Board then discusses the parties' arguments before ruling upon the

consolidation and stay motions. A summary of the rulings made in this order follows the Board's conclusion.

### **PROCEDURAL HISTORY**

As noted, on January 3, 2013, the People filed two complaints with the Board against the University. The one-count complaint filed in PCB 13-35 concerns a power plant located at 1140 South Morgan Street in Chicago, Cook County, for the University's East Campus. Generally, the PCB 13-35 complaint alleges that the University failed to timely renew a Clean Air Act Permit Program (CAAPP) permit. The three-count complaint filed in PCB 13-36 concerns a power plant located at 1717 West Taylor Street in Chicago, Cook County, for the University's West Campus. Generally, the PCB 13-36 complaint alleges that the University constructed air emission sources without a permit, failed to comply with New Source Review requirements, and failed to timely renew a CAAPP permit.

On January 10, 2013, the Board issued two orders separately accepting the People's respective complaints for hearing. In two orders of January 24, 2012, the hearing officer noted that during a January 24, 2013 telephonic status conference with the parties, the University stated that it had filed a declaratory judgment action in Cook County Circuit Court to contest jurisdiction.

Each hearing officer order of January 24, 2012, also provided that by agreement, the University may, by March 8, 2013, file its answer or other pleading responsive to the complaint, including any motion to stay the proceeding or motion to dismiss or strike the complaint. On February 27, 2013, the University filed a motion in each proceeding to consolidate PCB 13-35 and PCB 13-36 and to stay the consolidated proceedings. The University's two motions are essentially identical (Mot.).

The hearing officer issued an order in each Board case on February 28, 2013, stating that with no objection from the University, the People would be given until March 21, 2013, to file their respective responses to respondent's motions to consolidate and stay. On March 15, 2013, the People filed separate responses to the University's motions. The People's two responses are essentially identical (Resp.).

Each hearing officer order of February 28, 2013, also stated that by agreement, the University may, by May 20, 2013, file its answer or other pleading responsive to the complaint, including any motion to dismiss or strike.

### **THE UNIVERSITY'S MOTIONS**

#### **Circuit Court Action**

The University's motions for consolidation and stay provide background on the University's pending declaratory action in the Circuit Court of Cook County, No. 13-CH-162. Mot. at 1, 4. The University states that on January 3, 2013, before the People filed their complaints with the Board, the University filed its lawsuit in Circuit Court, involving one count

seeking a declaratory judgment. *Id.* The University further states that it filed the declaratory judgment action to resolve a jurisdictional question: “What is the appropriate forum for lawsuits against the University of Illinois, an arm of the State, which allege claims seeking civil penalties and other relief for violations of the Illinois Environmental Protection Act and the Act’s corresponding regulations?” *Id.* at 1. The University argues that “the proper forum for such lawsuits is the Illinois Court of Claims,” not the Board. *Id.* at 2. On February 4, 2013, the People filed a motion to dismiss the University’s declaratory judgment action. *Id.* at 4. On February 8, 2013, the University filed a motion for summary judgment with the Circuit Court. *Id.* On February 13, 2013, the Circuit Court entered a briefing schedule on the People’s dismissal motion and set arguments for April 15, 2013. *Id.*, Exh. 2.

### **Consolidation Requests**

On consolidating the two Board proceedings, the University states that PCB 13-35 and PCB 13-36 are both enforcement actions involving alleged violations of the Environmental Protection Act (Act) (415 ILCS 5 (2010)) and Board regulations. Mot. at 4. Both cases, continues the University, have the same parties and burdens of proof and some essentially identical allegations. *Id.* at 4-5. The University claims that consolidating the proceedings would promote efficiency by eliminating the need for duplicative status conferences, hearing officer orders, and filings on common matters. *Id.* at 5. According to the University, to the extent the two cases involve distinct matters, “they will be capable of being addressed just as efficiently in a consolidated case as in separate cases.” *Id.* The University adds that the issue of whether the University is subject to the Board’s jurisdiction in the two cases is identical. *Id.* at 4. The University therefore asks that the Board consolidate the two cases into “a single proceeding for hearing and decision.” *Id.* at 5.

### **Stay Requests**

The University argues for staying the Board proceedings because they could be rendered moot by the decision of the Cook County Circuit Court in the University’s declaratory judgment action. Mot. at 2, 6, *citing Borg-Wagner Corp. v. IEPA*, PCB 80-116, slip. op. at 1 (Oct. 2, 1980); *U.S. Steel Corp. v. IEPA*, PCB 10-23, slip. op. at 12 (Feb. 2, 2012). According to the University, “if the University’s position is correct, continuing proceedings before the Board would force the University to defend itself in a forum that lacks jurisdiction, which is an injury in itself.” Mot. at 2. The University cites the potentially unnecessary expenditure of Board and party resources as support for a stay, arguing that the parties and the Board have “a strong interest” in avoiding the expenses of proceeding in the Board cases. *Id.* at 6, 8. The University requests a stay “until a dispositive ruling by the Circuit Court in the University’s suit.” *Id.* at 8.

The University also asserts that a stay is justified because the Board proceedings “do not involve the risk of ongoing environmental harm.” Mot. at 7. The University maintains that “[n]one of the alleged violations” in the People’s complaints pose “immediate threats to the environment.” *Id.* at 2. According to the University, it “continues to operate under the previously approved CAAPP Permits for the East and West Campuses and under the temporary construction permit issued by [the Illinois Environmental Protection Agency (Agency)] for Boiler #4 at the West Campus.” *Id.*; *see also* Mot. Affidavit of Heather Jackson, University of

Illinois at Chicago Assistant Director, Chemical Safety and Environmental Compliance (Jackson Aff.).

The University further asserts that it applied to renew its CAAPP permits for both the East Campus and the West Campus in December 2006, adding that the Agency has “acknowledged receipt and administrative completeness of the applications, but [the Agency] has not issued, denied, or taken any other formal action on the University’s renewal applications.” Mot. at 2-3, *citing* Jackson Aff. at ¶ 5. According to the University, the People’s claims concern “past alleged violations that the University has addressed to the extent it can, and a further resolution is now in the hands of the [Agency].” Mot. at 3.

The University also argues that the parties will not suffer any prejudice if the Board stays these proceedings. Mot. at 7. The University maintains that the stay “should be relatively short-lived” as the Circuit Court action is “proceeding to what should be a prompt conclusion.” *Id.* at 4, 7. The University offers that the parties could provide the Board with “periodic updates as to the proceedings before the Circuit Court to keep the Board apprised of the timeline that the parties envision.” *Id.* at 7-8.

Finally, the University asks that the Board’s order provide that the time for the University to answer the complaint or move to strike or dismiss the complaint be “stayed until no less than 30 days following the lifting of the stay.” Mot. at 8.

### **THE PEOPLE’S RESPONSES**

As for the University’s request to consolidate, the People recognize that both cases before the Board involve the same parties and similar allegations of violations at two campus facilities. Resp. at 1. The People also acknowledge that consolidation would serve “convenience and efficiency.” *Id.* The People state that they do not object to consolidation. *Id.*

As for the University’s request to stay, the People agree that, given the “expedited pace” of the declaratory judgment proceedings in Cook County Circuit Court, it would be “prudent” to stay PCB 13-35 and PCB 13-36 until the “jurisdictional issue is resolved.” Resp. at 2. As was suggested by the University, the People maintain that the Board should require periodic updates on the progress of the declaratory judgment action to ensure the continued necessity of the stay. *Id.*

The People “vehemently” deny, however, various statements made in the University’s motions, including the University’s claims that the People’s alleged violations are in the past and that the Board proceedings do not involve the risk of on-going environmental harm. Resp. at 2. The People emphasize that the University is operating its CAAPP facilities without the required CAAPP permits, constituting “on-going, present violations.” *Id.* The People add that “at any point in time the University could unilaterally choose to stop complying with the terms of its

expired CAAPP Permits and the State would not have any recourse other than what is presented in these Board cases.” *Id.* at 2-3.<sup>1</sup>

## **DISCUSSION**

### **Consolidation**

The Board’s procedural rules allow for consolidating proceedings:

The Board, upon the motion of any party or upon its own motion, may consolidate two or more proceedings for the purpose of hearing or decision or both. The Board will consolidate the proceedings if consolidation is in the interest convenient, expeditious, and complete determination of claims, and if consolidation would not cause material prejudice to any party. The Board will not consolidate proceedings where the burdens of proof vary. 35 Ill. Adm. Code 101.406.

The parties are the same in PCB 13-35 and PCB 13-36. Both cases involve alleged air pollution control violations at University power plants located in Chicago, Cook County. The People bear the burden of proof in these enforcement actions. The Board finds that consolidating the two proceedings is in the interest of conveniently, expeditiously, and completely determining claims. The Board also finds that consolidation would not cause material prejudice to either party. Additionally, the People have stated that they have no objection to the Board consolidating these proceedings. Under these circumstances, the Board grants the University’s motions to consolidate PCB 13-35 and PCB 13-36 for purposes of hearing and decision. Future filings must reflect the amended caption of this order.

### **Stay**

The Board’s procedural rules address motions for stays:

Motions to stay a proceeding must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed, and in decision deadline proceedings, by a waiver of any decision deadline. A status report detailing the progress of the proceeding must be included in the motion. (See also Section 101.308 of this Part.) 35 Ill. Adm. Code 101.514(a).

The decision to grant or deny a motion for stay is “vested in the sound discretion of the Board.” See People v. State Oil Co., PCB 97-103 (May 15, 2003), *aff’d sub nom State Oil Co. v. PCB*, 822 N.E.2d 876 (2nd Dist. 2004). The University and the People agree that the Board proceedings should be stayed until the Cook County Circuit Court decides what both parties describe as the jurisdictional question presented by the University’s declaratory judgment action.

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<sup>1</sup> The complaints’ requests for relief include, among other things, “[o]rdering the Respondent to comply with the terms and conditions of its expired CAAPP Permit until a renewal CAAPP permit is issued.” PCB 13-35 Complaint at 5; PCB 13-36 Complaint at 14.

The Board finds that a stay will help to avoid the potentially unnecessary expenditure of resources by the parties and the Board.

Both parties expect prompt resolution of the Circuit Court proceedings. Of course, the parties have not represented precisely when the Circuit Court action will conclude. Ultimately, the People state that “a stay is warranted *in the short-term . . .*” Resp. at 3 (emphasis added). As described above, the parties also provide divergent characterizations of the nature of the violations alleged in the complaints, as well as the import of the University’s statement that it is operating under previously-approved permits. The Board finds that these circumstances militate in favor of a stay that would last no more than four months, instead of allowing the stay to simply last until the Circuit Court decides the declaratory judgment action.

The Board grants the University’s motion for stay, but the stay will last until August 19, 2013, unless the Board issues an order terminating the stay sooner. Both parties indicate that progress reports should be filed with the Board regarding the University’s declaratory judgment action. Every 30 days during while the stay is in effect, the Board requires that each party file a status report with the Board regarding the progress of the Cook County Circuit Court case. Further, during the term of the stay, each party must promptly file with the Board a notification upon the conclusion of the Circuit Court proceeding. Any request to terminate the stay or extend the stay must be made in the form of a motion directed to the Board.

Lastly, the University’s answers to, or motions to strike or dismiss, the complaints may be filed no later than 45 days after the date of the stay’s termination. The University’s filing of a motion to strike or dismiss a complaint during this 45-day period will stay the 45-day period to answer the corresponding complaint until the Board disposes of the motion.

### **CONCLUSION**

The Board grants the University’s motions to consolidate PCB 13-35 and PCB 13-36 for purposes of hearing and decision. The Board also grants the University’s motions to stay the consolidated proceedings, but the stay is in effect until August 19, 2013, unless the Board issues an order terminating the stay sooner. During the term of the stay, each party must file a status report with the Board every 30 days regarding the progress of the University’s Cook County Circuit Court action. Further, while the stay is in effect, each party must promptly file a notification with the Board upon the Circuit Court’s final disposition of the University’s lawsuit.

### **SUMMARY OF ORDER**

1. The Board grants the University’s motions to consolidate PCB 13-35 and PCB 13-36 for purposes of hearing and decision. Future filings must reflect the amended caption of this order.
2. The Board grants the University’s motions to stay the proceedings consolidated in paragraph 1 of this order. The stay of these consolidated proceedings is in effect until August 19, 2013, unless the Board issues an order terminating the stay earlier.

3. During the term of the stay issued in paragraph 2 of this order:
  - a. The University and the People must file separate status reports with the Board every 30 days regarding the progress of the University's declaratory judgment action, Cook County Circuit Court, No. 13-CH-162; and
  - b. The University and the People must promptly file separate notifications with the Board upon the Cook County Circuit Court's final disposition of the University's declaratory judgment action, No. 13-CH-162.
4. The University's answers to, or motions to strike or dismiss, the complaints in PCB 13-35 and PCB 13-36 may be filed no later than 45 days after the date of the termination of the stay issued in paragraph 2 of this order. The University's filing of a motion to strike or dismiss a complaint during this 45-day period will stay the 45-day period to answer the corresponding complaint until the Board disposes of the motion.

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 April 18, 2013, by a vote of 5-0.



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John T. Therriault, Assistant Clerk  
Illinois Pollution Control Board