## ILLINOIS POLLUTION CONTROL BOARD July 11, 2013

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)	PCB 13-63
)	(NPDES Permit Appeal)
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ORDER OF THE BOARD (by D. Glosser):

On May 16, 2013, the Board accepted for hearing the petition (Pet.) of Spectrum Preferred Meats, Inc. (Spectrum). The petition seeks review of conditions of a renewed National Pollutant Discharge Elimination System (NPDES) permit issued to Spectrum by the Illinois Environmental Protection Agency (Agency). Spectrum's appeal concerns the company's pork slaughtering and processing facility located at 6194 West Pines Road in Mt. Morris, Ogle County. Within Spectrum's petition for review is the company's motion for partial stay of the NPDES permit. Today the Board grants Spectrum's motion.

## **MOTION FOR PARTIAL STAY**

Spectrum requests that the Board stay the effectiveness of the Agency's imposition of the Total Nitrogen concentration limits at Outfall 001 during the pendency of its appeal. Pet. at 3. Spectrum notes that a permit may be automatically stayed in its entirety when appealed, but the Board retains "discretionary authority" to instead grant a partial stay of the challenged permit when requested by a petitioner. Pet. Mot. at 2., *citing* North Shore Sanitary Dist. v. IEPA, PCB 03-146 (Mar. 20, 2003).

Spectrum directs the Board's attention to <u>Citgo Petroleum Corp. v. IEPA</u>, PCB 07-10 (Sep. 21, 2006). Pet. Mot. at 2. In that case, Citgo argued that the Board had based its past decisions to grant discretionary stays of NPDES permit conditions based on the following standards: "(1) A certain and clearly ascertainable right needs protection; (2) irreparable injury will occur without the injunction; (3) no adequate remedy at law exists; and (4) there is a probability of success on the merits." *Id. See* Citgo's Mot. at 2; citing <u>Nielson & Bainbridge</u>, <u>L.L.C., v. IEPA</u>, PCB 03-98 (Feb. 6, 2003); <u>Saint-Gobain Containers</u>, <u>Inc. v. IEPA</u>, PCB 04-47 (Nov. 6, 2003). Furthermore, Citgo contended that the Board has not found it "necessary to determine that all four standards exist to grant a discretionary stay." Pet. Mot. at 3 citing Citgo's Mot. at 2-3 (quoting <u>Bridgestone/Firestone Off Road Tire Co. v. IEPA</u>, PCB 02-31 (Nov. 1, 2001).

Spectrum argues that it will suffer "irreparable harm" if the Board does not grant the motion for partial stay because:

[t]he incorporation of the Total Nitrogen limitations in the [f]inal NPDES Permit represents a substantial change over the previous NPDES Permit that had been in effect since 2004. Spectrum is not capable of consistently complying with the new Total Nitrogen limitations in the [f]inal NPDES Permit without installing certain equipment, which will require substantial expenditures of time and funds. Pet. at 2.

Spectrum also maintains that a stay of effectiveness of the Total Nitrogen concentration limits is necessary to preserve Spectrum's appeal rights under Section 10-65(b) of the Illinois Administrative Procedure Act (IAPA) 5 ILCS 100/10-65(b). Pet. Mot. at 1.

## **DISCUSSION**

The Board's May 16, 2013 order reserved ruling on Spectrum's motion for partial stay to allow the Agency's 14-day response period to run. *See* 35 Ill. Adm. Code 101.500(d). That time period has elapsed without any Agency response being filed, meaning that by rule, the Agency is deemed to have waived any objection to the Board granting Spectrum's motion for partial stay of the NPDES permit. *Id*.

Although the IAPA (5 ILCS 100/10-65(b) (2010)) subjects certain permits in their entirety to an automatic stay during appeals, a petitioner may choose not to avail itself of this stay and instead ask that the Board stay only the contested conditions of the permit. *See* Ameren Energy Generating Co. v. IEPA, PCB 06-67 (Feb. 16, 2006), slip op. at 7, n.1. The Board has consistently held that it "has the authority to grant discretionary stays from permit conditions." Community Landfill Co. and City of Morris v. IEPA, PCB 01-48, PCB 01-49 (consol.) (Oct. 19, 2000); *see also*, *e.g.*, Hartford Working Group v. IEPA, PCB 05-74, slip op. at 1 (Nov. 18, 2004). As the Board explained in Community Landfill, the permit appeal system would be "rendered meaningless in many cases, if the Board did not have the authority to stay permit conditions." Community Landfill, PCB 01-48, PCB 01-49 (consol.), slip op. at 4 (granting stay of challenged permit conditions).

In deciding whether to grant a discretionary stay, the Board may consider various factors, such as the avoidance of irreparable harm to the petitioner, as well as "the likelihood of environmental harm if a stay is granted." Community Landfill, PCB 01-48, PCB 01-49 (consol.), slip op. at 4, citing Motor Oils Refining Co. v. IEPA, PCB 89-116, slip op. at 2 (Aug. 31, 1989). The Board takes into account the representations of Spectrum described above, and the absence of any Agency response to the motion. Exercising its discretion, the Board grants Spectrum's motion for partial stay. Accordingly, only the NPDES permit's Total Nitrogen concentration effluent limitation for Outfall 001 is stayed. By this ruling, the Board "makes no findings on the merits of the permit appeal . . . ." Motor Oils, PCB 89-116, slip op. at 2. The partial stay remains in effect until the Board takes final action in this appeal or the Board orders otherwise.

## IT IS SO ORDERED.

Board Member J. A. Burke abstains.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 11, 2013, by a vote of 3-0.

John T. Therriault, Clerk

Illinois Pollution Control Board