

ILLINOIS POLLUTION CONTROL BOARD
February 5, 2015

KINCAID GENERATION, L.L.C.,)
)
 Petitioner,)
)
 v.) PCB 06-62
) (CAAPP Permit Appeal – Air)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by D. Glosser):

On January 26, 2015, Kincaid Generation L.L.C. (petitioner) 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, Kincaid Generation, L.L.C. (Kincaid) 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) (2012); 35 Ill. Adm. Code 105.302(e). Kincaid is challenging the issuance and effective dates, as well as numerous conditions including those relating to records and reporting, retroactive compliance, boiler operating and testing, handling and processing, maintenance, and repair protocols. The CAAPP permit application concerns Kincaid’s electrical power generating station located four miles west of Kincaid on Route 104, Christian 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 (2004)) 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.” Kincaid Generation L.L.C. v. IEPA, PCB 06-62, slip op. at 10 (Feb. 16, 2006).

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

On January 26, 2015, 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.

MOTION

The parties indicate that an agreement concerning petitioner's contested permit conditions has been reached. Mot. at 1. Further, the agreement has been noticed and undergone a 45-day review period by the United States Environmental Protection Agency. *Id.* In order to incorporate the negotiated changes, the parties ask the Board to lift the stay as to conditions not contested by the petitioner and remand the permit back to the Agency. Mot. at 2. The Agency will establish a new effective date and expiration date and issue a modified permit "on the same day" the Board remands the permit. *Id.* Petitioner will file a motion to dismiss this permit appeal when the new permit, with the negotiated changes is issued. *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 (2012)) applied to this appeal. *See Kincaid Generation, L.L.C v. IEPA*, PCB 06-62, slip op. at 10 (Feb. 16, 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 jurisdiction. In *Ameren Energy Generating Company, Coffeen Power Station v. IEPA*, PCB 06-64 (Sept. 20, 2012), the parties asked the Board to lift the stay of contested CAAPP permit conditions, remand the permit, and retain jurisdiction. The Board reviewed relevant portions of the Act and determined that remanding a CAAPP permit was appropriate. *See Ameren Energy Generating Company, Coffeen Power Station v. IEPA*, PCB 06-64, slip op. at 3 (Sept. 20, 2012). The Board further found that the Board could retain jurisdiction. *Id.* The

requests made in this case are similar to those in the Ameren case. Therefore, the Board will grant the parties request to remand the permit and retain jurisdiction.

The Board reminds 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. 415 ILCS 5/40.2 (2012). 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, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 5, 2015, by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board