BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

BRICKYARD DISPOSAL & RECYCLING, INC.,	)	
Petitioner,	)	
v.	)	PCB No. 16-66
	)	(Permit Appeal—Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on March 14, 2017, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois RESPONDENT'S MOTION FOR STAY PENDING APPEAL, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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CERTIFICATE OF SERVICE

I hereby certify that I did on March 14, 2017, before 5:00 p.m., cause to be served by electronic mail, a true and correct copy of the following instruments entitled NOTICE OF FILING and RESPONDENT'S MOTION FOR STAY PENDING APPEAL upon the following persons:

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RESPONDENT'S MOTION FOR STAY PENDING APPEAL

Respondent, the Illinois Environmental Protection Agency (Agency), under Illinois Supreme Court Rule 335(g) and 35 Ill. Adm. Code 101.906(c), hereby moves the Board to stay its November 17, 2016 order pending appeal.

INTRODUCTION

Petitioner, Brickyard Disposal & Recycling, Inc. (Brickyard), petitioned the Board to review the Agency's rejection of Brickyard's permit application as incomplete. On November 17, 2016, the Board entered a final order granting Brickyard summary judgment, and denying the Agency's cross-motion for summary judgment. On January 19, 2017, the Board denied the Agency's motion for reconsideration. On February 24, 2017, the Agency filed a petition for review of the Board's orders with the Illinois Appellate Court, Fourth District. *See* Illinois Envtl. Prot. Agency v. Illinois Pollution Control Bd., No. 4-17-0144 (4th Dist. filed Feb. 24, 2017).

The Agency now seeks a stay of the Board's November 17, 2016 order pending appeal. In finding Brickyard's application complete, the Board triggered a 180-day deadline for final action on the application. This deadline will almost certainly moot the Agency's appeal. Brickyard has declined to grant the Agency a waiver of the deadline during the appeal, leaving the Agency no option but to seek a stay to preserve its right to appeal. Equitable factors the Board considers when granting a stay pending appeal strongly favor doing so here. Under the circumstances, the Board should grant a stay of its order pending appeal.

STANDARD OF REVIEW

The Board may stay the effect of a final order pending appeal. *See* 35 Ill. Adm. Code 101.906(c); *see also People v. Blue Ridge Const. Corp.*, PCB 02-115 (Dec. 16, 2004); *People v. State Oil Co.*, PCB 97-103 (May 15, 2003). The Board considers several equitable factors when considering a stay, including: (1) whether a stay is necessary to secure the fruits of the appeal if the movant is successful; (2) whether the status quo should be preserved; (3) the respective rights of the litigants; (4) whether hardship on other parties would be imposed; and (5) whether there is a "substantial case on the merits." *People v. AET Envtl., Inc.*, PCB 07-95 (June 20, 2013), slip op. at 4 (citing *Stacke v. Bates*, 138 Ill. 2d 295, 304–06 (1990)); *People v. Toyal, Inc.*, PCB 00-211 (Sep. 16, 2010), slip op. at 4–6. Whether a substantial case on the merits exists is not the sole consideration—the Board must balance it with the other factors.

AET, PCB 07-95, slip op. at 4 (quoting *Stacke*, 138 Ill. 2d at 309). Ultimately, the movant for a stay must "show that the balance of the equitable factors weighs in favor of granting the stay." *Stacke*, 138 Ill. 2d at 309.

ARGUMENT

A stay is necessary to preserve the Agency's right to appeal. Absent a stay, final action on Brickyard's application in less than 180 days will moot the Agency's appeal. This and other equitable factors favor a stay in light of the unique circumstances of this matter. Therefore, the Board should grant a stay of its November 17, 2016 order pending appeal.

I. The Board Should Grant a Stay Because the Statutory 180-day Deadline for an Agency Decision on Brickyard's Application Will Moot the Agency's Appeal

The clock is ticking on the Agency's review of Brickyard's application. The Board's order finding the application complete effectively filed the application with the Agency. The date of filing is January 19, 2017, the date the Board denied reconsideration. *See* 35 Ill. Adm. Code 101.520(c). A permit will issue automatically 180 days from that date if the Agency does not issue a decision by then. *See* 415 ILCS 5/39(a) (2014). Whether by the Agency or by operation of law, final action on Brickyard's application will occur in less than 180 days—doubtless, far sooner than the appellate court will act.

The problem is that final action on the application would moot the Agency's appeal. An appeal is moot if "intervening events" make it impossible for the court to grant "effectual relief." *People v. Johnson*, 225 Ill. 2d 573, 595

(2007); *see also Vill. of Hillside v. Illinois Commerce Comm'n*, 111 Ill. App. 3d 25, 30 (1st Dist. 1982) (stating issue is moot if court cannot order a return to the *status quo*). Here, final action on Brickyard's application would be an intervening event. It will give Brickyard either the permit it seeks, or the right to appeal an Agency denial of the application. The appellate court could not "undo" ***that*** final action or its consequences through the instant appeal—the court only has jurisdiction over the final action before it (the Board's order on the completeness of Brickyard's application). The court therefore could not issue effectual relief returning the parties to the *status quo* that existed before the Board's November 17, 2016 order. The appeal would be moot.

An appeal is also moot if there is no actual controversy for the court to resolve. *Johnson*, 225 Ill. 2d at 595. The controversy here is whether Brickyard's application is complete. By Board rule, the Agency's permit review is a two-stage process, looking first for "completeness" before proceeding to "compliance." *See* 35 Ill. Adm. Code 813.103(b). The Board created the completeness-then-compliance phasing to ensure the Agency can "focus its finite resources to the review of permit applications which contain all of the required information." *In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills*, PCB R88-7, app. A1 at 97 (Aug. 17, 1990); *see also Atkinson Landfill Co. v. Ill. Envtl. Prot. Agency*, PCB 13-8 (June 20, 2013), slip op. at 11. The point of "completeness," then, is to determine whether the Agency should expend finite resources on reviewing

the merits of an application (*i.e.*, for compliance). *See Atkinson Landfill*, PCB 13-8, slip op. at 10–11. If the Agency reviews Brickyard's application for compliance here, the Agency will have done what it sought to avoid by appealing the Board's order. There would no longer be an actual controversy as to whether the application is complete, mooting the Agency's appeal.

A stay is therefore necessary for the Agency to realize its right to appeal. As noted, it is a near certainty that the appellate court will not reach a decision before the 180-day decision deadline expires on July 18, 2017. It is also, then, a near certainty final action on the permit application will occur, mooting the Agency's appeal. The Agency can do nothing to prevent this, and Brickyard declined to waive the decision deadline pending the appeal. Issuing a stay is the only way to pause the deadline set in motion by the Board's order, preventing otherwise guaranteed final action mooting the Agency's appeal. The Board should therefore grant a stay of its November 17, 2016 order pending appeal.

II. The Board Should Grant a Stay Because the Equitable Factors Weigh in Favor of a Stay

All of the equitable factors the Board considers when granting a stay pending appeal weigh in favor of doing so here. First, a stay is necessary to secure the fruits of a successful appeal. Second, a stay is required to preserve the *status quo*. Third, the respective rights of the litigants fall squarely on the side of the Agency. Fourth, a stay will impose no hardship on other parties. Finally, the Agency has a "substantial case on the merits" on appeal. In light

of these equitable considerations, the Board should grant a stay of its November 17, 2016 order pending appeal.

A. A Stay is Necessary to Secure the Fruits of a Successful Appeal by the Agency

The only way for the Agency to secure the fruits of a successful appeal is if the Board grants a stay. For the reasons explained above, the 180-day decision deadline will moot the Agency's appeal absent a stay. Obviously, a moot appeal can bear no fruit. A stay is therefore necessary to ensure the Agency can enjoy the fruits of a successful appeal.

Even if the decision deadline did not implicate mootness, reviewing the application could still deny the Agency the fruits of a successful appeal. As discussed, the point of "completeness" is to determine whether the Agency should expend finite resources on reviewing the merits of an application for compliance. *See Atkinson Landfill Co. v. Ill. Envtl. Prot. Agency*, PCB 13-8 (June 20, 2013), slip op. at 10–11. Here, if the Agency begins reviewing the application and later prevails on appeal, it will have expended resources on an application it did not have to review under the circumstances.[1] Avoiding that potentially unnecessary expenditure is one fruit of the Agency's appeal that only a stay can ensure is available to the Agency if it prevails.

[1] Reversal of the Board's order by the appellate court would entail either summary judgment for the Agency or remanding the proceeding to the Board for a hearing. No review would be necessary if the Agency received summary judgment. And no review would be necessary on remand unless Brickyard later prevailed at hearing. In either event, the Agency would not have to review the application due to the Board's November 17, 2016 order.

B. A Stay is Necessary to Preserve the *Status Quo*

For nearly 25 years, Brickyard has maintained a waste-free separation wedge between its waste-disposal units—a configuration it requested to avoid application of more stringent regulations to its older unit. The Agency has previously determined that Brickyard's current development permit reflecting this design complies with the Environmental Protection Act and Board regulations. Also, prior to the Board's order, the Agency did not have to devote its finite resources to reviewing Brickyard's application for compliance. That is the *status quo* that existed prior to the Board's order.

The Board's order set in motion a process that will alter the *status quo*. The 180-day decision deadline will undoubtedly expire before the appellate court renders a decision. If a permit issues automatically at that time, it will convert the waste-free separation zone into a new waste-disposal unit (as the Board recognized). That upends the *status quo*—and does so without regard for the application's compliance with environmental protections.[2] Only a stay can ensure the *status quo* during the Agency's appeal, and that Brickyard's development permit complies with environmental protections.

Indeed, even Agency action to prevent automatic issuance will alter the *status quo*. The Agency must review Brickyard's application for compliance before making a final decision. But, as noted, the Agency did not have to devote resources to reviewing the application before the Board's order. And

[2] The Agency's earlier conclusion that Brickyard's existing groundwater impact assessment does not adequately represent the proposed expansion is some indication that an unvetted, automatic permit may cause violations of the Act and Board regulations. *See* R. at 47567–69.

for the same reasons it would moot the Agency's appeal and deny the Agency fruits of a successful appeal, performing compliance review would indelibly alter that no-review *status quo*—once Agency resources are expended on review, they cannot be recovered. Thus, whether the Agency acts or not, the decision deadline will alter the *status quo*. A stay is therefore necessary to ensure preservation of *status quo* during the pendency of the Agency's appeal.

C. A Stay Will Not Unreasonably Burden Brickyard

The impact on the litigants of whether the Board grants a stay could not be more lopsided. As explained above, without a stay, the 180-day decision deadline will moot the Agency's appeal, deny the Agency the fruits of a successful appeal, and imperil the *status quo*'s guarantee of a compliant permit. Given the near-certainty that the appellate court will not make a decision in that timeframe, the Agency's interests will be profoundly and permanently affected without a stay.

By contrast, the detriment to Brickyard would be minimal if the Board grants a stay. Brickyard would have to wait a little longer for the Agency to review its permit application, if the appellate court affirms the Board's order. But such delay would not unreasonably impact Brickyard's operations. Its own estimates suggest Unit 2 has about 14 years' worth of capacity as of January 2017. *See* R. at 47069. And Brickyard has developed its landfill for over two decades with the waste-free zone in place—again, a design feature it requested. Any urgency in revisiting that decision, then, is solely of Brick-

yard's own making in waiting to do so. Therefore, a stay would not unduly burden Brickyard or harm its interests in any manner that outweighs the irreparable harm to the Agency's interests. The respective rights of the parties thus weigh in favor of a stay.

D. A Stay Will Not Impose a Hardship on Any Other Parties

The Board's order to the Agency to review Brickyard's application only affects the parties. Also, Brickyard's application does not indicate the local community currently needs more waste-disposal capacity. A stay pending appeal would therefore impose no hardship on other parties.

E. The Agency Has a Substantial Case on the Merits

Finally, the Agency's appeal has sufficient merit to warrant a stay. The Agency appeals, amongst other things, the Board's interpretation of the term "boundary" in section 3.330(b)(2) of the Environmental Protection Act, 415 ILCS 5/3.330(b)(2) (2014). In interpreting that term, the Agency applied the Illinois Supreme Court's instructions on interpreting the Act's landfill provisions. *See M.I.G. Investments, Inc. v. Illinois Envtl. Prot. Agency*, 122 Ill. 2d 392, 397–402 (1988). The Board, however, did not address those directives, nor cite countervailing canons of statutory construction in rejecting the Agency's argument. Likewise, the Agency maintains the Board granted Brickyard summary judgment on a ground Brickyard did not argue. The Agency cited the Board's rule that a movant must state and argue the grounds (*i.e.*, rea-

sons) on which its motion seeks relief. *See* 35 Ill. Adm. Code 101.504. The Board did not address the Agency's argument in its reconsideration order.

The Agency thus has a substantive case on the merits. The examples above demonstrate that Agency does not base its appeal on novel theories or generalized dissatisfaction with the Board's rulings. Rather, the Agency advances substantive positions drawn from existing law to address specific perceived errors in the Board's orders.

The Agency also has a reasonable chance of success on appeal. Review of summary judgment and questions of law are both *de novo*, placing the arguments of the Board and Agency on equal footing. *See Nat. Res. Def. Council v. Pollution Control Bd.*, 2015 IL App (4th) 140644, ¶19; *see also Cinkus v. Vill. of Stickney Mun. Officers Electoral Bd.*, 228 Ill. 2d 200, 210, as modified (Apr. 23, 2008) ("an agency's decision on a question of law is not binding on a reviewing court"). Binding authority supports the Agency's positions on summary judgment and reconsideration. Although the Board dismissed these authorities, there is no guarantee the appellate court will do the same, particularly as the Board cited no cases in support of key aspects of its holdings. Respectfully, there is a reasonable chance the appellate court will agree with the Agency and reverse the Board.

The Agency's likelihood of success does not have to be very high, either. In *Stacke v. Bates,* the Illinois Supreme Court held that an applicant for a stay pending appeal is "not required to show a probability of success on the

merits." 138 Ill. 2d 295, 309 (1990); *see also id.* at 304 (rejecting the probable cause standard). Instead, an applicant need only "present a substantial case on the merits and show that the balance of the equitable factors weighs in favor of granting the stay." *Id.* at 309. If the equitable factors strongly favor a stay, a lower showing of likelihood is required. *Cf. id.* ("a strong showing of the likelihood of success on the merits may offset other equitable factors favoring the other party"). And success on the merits is only one factor to be considered when determining whether to grant a stay.

The equitable factors here strongly favor a stay. The harm to the Agency—and, potentially, the environment—greatly outweigh any short-term inconvenience Brickyard might experience. Therefore, the Agency's likelihood of success does not have to be very high to warrant a stay. While the Agency believes that it is likely to succeed on appeal, the equitable factors as a whole warrant a stay in this case even if the Board gauges the Agency's likelihood of success differently.

CONCLUSION

The balance of equitable factors weighs in favor of granting a stay. The Board's orders set in motion a 180-day deadline for final action on Brickyard's permit application that will moot the Agency's appeal absent a stay. As a consequence, all equitable factors support a stay. The absence of a stay will affect the Agency's interests in the appeal far more than the presence of a stay will affect Brickyard's interest in having the Board's order immediately

carried out. The Agency therefore respectfully requests that the Board stay its November 17, 2016 order pending appeal.

Respectfully submitted,

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