

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

PLEASE TAKE NOTICE that today I have filed with the Office of the Clerk of the Pollution Control Board the Petitioner's Response to Agency's Motion to Stay Pending Appeal. Copies of these documents are hereby served upon you, via electronic filing or service.

To: John Therriault, Assistant Clerk
Illinois Pollution Control Board
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Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
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Dated: March 30, 2017

BROWN, HAY & STEPHENS, LLP

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Respectfully submitted,

BRICKYARD DISPOSAL &
RECYCLING, INC

By: /s/Claire A. Manning

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v.)	PCB 2016 - 66
)	(Permit Appeal- Land)
ILLINOIS ENVIRONMENTAL PROTECTION)	
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**PETITIONER'S RESPONSE TO AGENCY'S
MOTION TO STAY PENDING APPEAL**

Petitioner Brickyard Disposal & Recycling, Inc. ("Brickyard"), by and through its attorneys Brown, Hay & Stephens, LLP, provides the following Response to the Motion to Stay Pending Appeal filed by the Illinois Environmental Protection Agency ("Agency") on March 14, 2017. Respectfully, Brickyard requests that the Board deny the Agency's request for stay for the following reasons.

I. Context of Case

This may be a case of first impression before the Board, as it does not appear that the Agency has heretofore appealed a remand order of the Board on a completeness determination. Here, the Agency seeks to appeal the Board's decision to remand pursuant the Illinois Environmental Protection Act ("Act") by challenging the Board's legal conclusions made thereunder. Those determinations deal with two discreet issues, in one permit application proceeding: whether siting is required under Section 3.330 and 39.2 of the Act, and whether the Board rules require a new Groundwater Impact Assessment ("GIA") when the applicant claims the existing GIA is sufficient.

The Agency's appeal at this time disrupts the permit proceeding, in a manner that may not be legally cognizable since it serves to set the parties on a course of piecemeal appeal, which our Illinois Supreme Court just recently warned against. See *Carle Foundation v. Cunningham Township*, 2017 IL 120427 (Slip opinion). Here the Board remanded the case to the Agency for a technical review of the merits of Brickyard's permit, but it also included the block reference to Section 41 of the Act, suggesting that the Board's decision was final and appealable. Generally, when a decision is remanded for further proceedings or findings, the order is *not* final but the remanding tribunal retains jurisdiction until final disposition of the matter. See *Lippert v. Property Tax Appeal Bd.*, 273 Ill. App. 3d 150, 153-54 (4th Dist. 1995).

Now, since the Agency has appealed the Board's decision, the Board's jurisdiction to act is limited. See *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 173-75 (2011). In the context of a request for stay, the Board can only entertain matters which are "collateral or incidental" to the judgment (*i.e.*, matters which do not alter the issues on appeal). *Id.* The Agency argues both that the remand is collateral or incidental to the judgment and that the stay is necessary to protect the status quo. Brickyard asserts that it can't be both.

Heretofore, the Board has only entertained stay requests which stay discreet actions required by clearly final orders. Here, the requested stay abates a permit review that Brickyard is entitled to pursuant to the Act; indeed, one in which it has a property interest. As such, Brickyard respectfully requests that, given the nature of the issues here related to jurisdiction, appeal and process, the Board decline to order the stay. Whether to grant or deny a stay is clearly within the Board's discretion, based upon principles discussed below. Brickyard here asks that the Board exercise its discretion to deny the stay; should the Agency continue to pursue this course, it can elect to do so in appellate court, as allowed by Illinois Supreme Court Rule 335 (eff. Jan. 1 2016).

II. Stacke Factors Mitigate Against a Stay

Courts have set forth standards to utilize in evaluating the propriety of a requested stay pursuant to Illinois Supreme Court Rule 335. The Board has recognized such in its procedural rules and in its case law. See 35 Ill. Adm. Code 101.906(c), citing Ill. S. Ct. R. 335; 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). *People v. AET Envtl., Inc.*, PCB 07-95 (June 20, 2013); *People v. Toyal, Inc.*, PCB 00-211 (Sep.16, 2010).

In evaluating a request for stay the Board looks to the factors set forth by the Illinois Supreme Court in *Stacke v. Bates*, 138 Ill. 2d 295, 304–06 (1990). In translating those factors to the specific role and expertise of the Board under the Act, the Board has balanced such factors as the avoidance of irreparable harm to the petitioner (*i.e.*, the regulated entity) against the “likelihood of environment harm” if it were to grant such stay. See *Phillips 66 Company v. IEPA*, PCB 12-101 (Aug. 8, 2013) citing *Community Landfill v. IEPA*, PBC 01-48 (Oct. 19, 2000) and *Motor Oils Refining Co. v. IEPA*, PCB 89-116 (Aug. 31, 1989). Here, denial of the Agency’s requested stay would pose no threat to the environment since the issue being stayed is the Agency’s technical review of the applicant’s permit – an evaluation to which Brickyard is entitled under the Act and other relevant bodies of law.

The Agency argues that an application of the *Stacke* factors supports its stay request. Specifically, the Agency asserts that absent a stay, the Agency’s appeal will be moot because, during the appeal, the Agency would have had to either act on the permit application or it would be considered granted by operation of law; the Agency also argues that the *Stacke* equitable factors support a stay, to wit: (a) a stay is necessary to “secure the fruits of a successful appeal by the Agency”; (b) a stay is necessary to preserve the status quo; (c) a stay will not

unreasonably burden the permit applicant; (d) a stay will not impose a hardship on other parties; and (e) the Agency has a substantial case on its merits.

Each of the above premises is flawed. Taking the last first: the Agency has no substantial case on the merits. The appellate court will defer to the Board's expertise in this case, as it is the Board's role under the Act to apply statutory provisions, and its regulations, to the regulatory constructs with which it has quasi-judicial authority. 415 ILCS 5/5(d). It is the Agency's responsibility to implement the permit program, and to abide by Board remand orders. See 415 ILCS 5/4(f) and 5/39 and *Grigoleit v. Pollution Control Board*, 245 Ill. App. 3d 337, 343-344 (4th. Dist. 1993). Here, the Board thoroughly and thoughtfully considered the Agency's legal arguments – twice (in the initial case and on reconsideration). The Board made its determination based upon a comprehensive evaluation of all relevant case law, as well as the facts set forth in the parties' stipulation of facts and the Agency's voluminous record. It found the Agency's arguments to be without merit in the context of this case and, utilizing the appropriate review standards, the appellate court will likely affirm.

As to relative hardships that might result from a stay, the only party that would be harmed by a stay is Brickyard, as it will not have the benefit of processing its permit during the appeal period so that, if there are other technical areas that need to be addressed, it can do so now. The Agency cannot seriously claim harm based upon effective use of its "finite resources" since it is the Agency's job to evaluate permits and, in the context of this case, that's exactly what the Board ordered it to do. As to the Agency's arguments that the stay is necessary to "secure the fruits of its appeal" Brickyard respectfully asks: exactly what are the "rights" the Agency so passionately asserts? Siting pursuant to Section 39.2 of the Act is the statutory replacement for local zoning. As a state agency, the Agency has no role in the local proceeding.

The prescribed statutory relationship is between local government, its citizens, and the Board on review. The Agency is not a party to siting; its role is simply to require proof that the location of the facility has been approved by the relevant local authority prior to issuing a permit. 415 ILCS 5/39(c). Here, the Board determined that Brickyard provided such proof.

Regarding the issue as to whether a new GIA is or is not required pursuant to Section 814.317, the Board, interpreting its own rules, determined that a new GIA was not a prerequisite here since there was an existing GIA. The Board found Brickyard's application to be complete as it contained a demonstration that the existing GIA was adequate. The Agency's objection to the Board's interpretation of its regulatory scheme has no apparent nexus to the Agency's role in protecting the environment, since it has not even technically reviewed the application.

Finally, the Agency's argument that the stay is necessary to preserve the status quo is also without merit. The status quo is that a permit is before the Agency for technical review; the Board remanded it for such. If, as Brickyard believes, issuance of the permit will not violate the Act or Board's rules, Brickyard is entitled to a permit. If the Agency is going to require further information, Brickyard is entitled to know what, so that it can provide it. In the highly unlikely event the Board's decision is reversed on appeal, any permit that issued during the course of the appeal would be without legal effect, since the underpinnings for such would be flawed. Brickyard is committed to working with the Agency if it needs more time to conduct its evaluation. Indeed, despite the rhetoric in the Agency's Motion, the permit application has been proceeding along its regular course; in fact, Brickyard just granted another extension of time to the permit unit so that it might respond to initial comments.¹ See Exhibit 1, Manning Affidavit.

¹ In its Motion the Agency asserts, without citation to authority, that the permit review time is 180 days. The Agency itself has been proceeding as if the review time is 90 days, which Brickyard agrees is the accurate statutory time frame. See Exhibit 1, Attachments A and B.

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AFFIDAVIT OF CLAIRE A. MANNING

1. As the attorney of record for Brickyard Disposal & Recycling, Inc. (“Brickyard”) in this proceeding, I make this affidavit in order to clarify the record concerning statements made in the Agency’s Motion for Stay (“Agency’s Motion”) filed on March 14, 2017.
2. The Agency’s Motion states, on page 2: “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.”
3. On or around March 8, 2017 counsel of record for the Agency called me to advise that the Agency would be filing a Motion for Stay and asked whether Brickyard would consent to the stay.
4. On March 9, 2017, I responded in the negative, via e mail, indicating that Brickyard was anxious to have its permit technically reviewed on the merits. Counsel for the Agency then asked, in a follow-up email, whether Brickyard would consent to a decision waiver for the length of the appeal. Again, I responded in the negative, stating that there was no appreciable difference between the two – but that Brickyard nonetheless desired to work cooperatively with the Agency during this time and was willing to consider time-specific waivers and have discussions with the Agency concerning the permit.
5. In fact, Brickyard has granted two such time-specific decision waivers since the Board’s November 17, 2016 Order, as requested by the Agency. See **Attachment A** (dated January 24, 2017, extending the decision deadline to March 18, 2017) and **Attachment B** (dated March 16, 2017, extending the decision deadline to May 2, 2017).


FURTHER AFFIANT SAYETH NOT.



Claire A. Manning

SUBSCRIBED and SWORN TO before me on this 30th day of March, 2017.





Notary Public



832 Langsdale Ave, Indianapolis, Indiana 46202
o 317 921 1667 f 317 921 1665 republicservices.com

January 24, 2017

Joyce Munie, P.E.
Permit Section Manager
Bureau of Land
Illinois Environmental Protection Agency
1021 North Grand Avenue East
Springfield IL 62794-9276

Re: 1838040029 – Vermilion County
Brickyard Disposal & Recycling
Illinois EPA Permit No.: 1994-419-LF M
Extension Authorization for Application Log No. 2015-421

Dear Ms. Munie:

Ken Smith requested that Brickyard extend the IEPA's decision date for its technical review of the permit application referenced above. Ken Smith believed that the final permit decision date was February 16, 2017 and he sought our authorization for a 30-day extension. Please consider this letter Brickyard's authorization for an extension of the IEPA's review time, to March 18, 2017, as requested.

If you have any questions or need additional information, please contact Brad Hunsberger at (217) 787-2334 or me at (317) 917-7337. Thank you.

Sincerely,

REPUBLIC SERVICES, INC.

A handwritten signature in cursive script that reads "William Paraskevas".

William Paraskevas
Environmental Manager

cc: Eric Ballenger – Republic Services (email)
Brian Hughes – Republic Services (hard copy and email)
Ken Samet – Brickyard Disposal & Recycling (hard copy and email)
Brad Hunsberger – Andrews Engineering, Inc. (email)
Claire Manning – Brown, Hay and Stephens (email)



2980 Granger Drive, Springfield, Illinois 62707
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March 16, 2017

Joyce Munie, P.E.
Permit Section Manager
Bureau of Land
Illinois Environmental Protection Agency
1021 North Grand Avenue East
Springfield IL 62794-9276

Re: 1838040029 - Vermilion County
Brickyard Disposal & Recycling
Illinois EPA Permit No.: 1994-419-LF M
Extension Authorization for Application Log No. 2015-421

Dear Ms. Munie:

Provided herein is a 45-day extension beyond the current action date of March 18, 2017; the new action date will be May 2, 2017. The extension is submitted to allow time to address draft comments received March 15, 2017 via email from Mr. Kenn Smith.

If you have any questions or need additional information, please contact Brad Hunsberger at (217) 787-2334 or me at (217) 391-0636. Thank you.

Sincerely,

REPUBLIC SERVICES, INC.


Brian Hughes
Environmental Manager

BH:BJH:

cc: Eric Ballenger - Republic Services (email)
Ken Samet - Brickyard Disposal & Recycling (hard copy and email)
Brad Hunsberger - Andrews Engineering, Inc. (email)
Claire Manning - Brown, Hay and Stephens (email)
Kenn Smith - Illinois EPA (email)

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 30th day of March, 2017, I have served by the manner indicated below the attached PETITIONER'S RESPONSE TO AGENCY'S MOTION TO STAY PENDING APPEAL upon the following persons:

John Therriault, Assistant Clerk
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By: /s/Claire A. Manning

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