

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 April 7, 2017, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois RESPONDENT'S MOTION FOR LEAVE TO REPLY and RESPONDENT'S REPLY IN SUPPORT OF RESPONDENT'S MOTION FOR STAY, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ David G. Samuels
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CERTIFICATE OF SERVICE

I hereby certify that I did on April 7, 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, RESPONDENT'S MOTION FOR LEAVE TO REPLY, and RESPONDENT'S REPLY IN SUPPORT OF RESPONDENT'S MOTION FOR STAY upon the following persons:

Pollution Control Board, Attn: Clerk
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RESPONDENT’S MOTION FOR LEAVE TO REPLY

Respondent, the Illinois Environmental Protection Agency (Agency), under 35 Ill. Adm. Code 101.500(e), hereby requests the Hearing Officer grant the Agency leave to reply to Petitioner Brickyard Disposal & Recycling, Inc.’s (Brickyard) response to the Agency’s motion for stay.

1. 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 Env’tl. Prot. Agency v. Illinois Pollution Control Bd., No. 4-17-0144 (4th Dist. filed Feb. 24, 2017).

2. On March 14, 2017, the Agency filed a Motion for Stay Pending Appeal with the Board in compliance with Illinois Supreme Court Rule 335(g) and 35 Ill. Adm. Code 101.906(c).

3. A response to the Agency’s motion was due by March 28, 2017.

4. According to a March 28, 2017 Hearing Officer order, counsel for Brickyard spoke with the Hearing Officer to request an extension of time to

file a response to the Agency's motion. Counsel for Brickyard made this request without notice to, or in the presence of, the Agency's counsel, in contravention of the Board's rules.¹

5. On March 28, 2017, the Hearing Officer granted Brickyard an extension of the time to file its reply, without prior notice to the Agency of Brickyard's request.

6. The Agency's counsel only learned of Brickyard's request for an extension by service of the Hearing Officer's order granting the extension.

7. On March 30, 2017, Brickyard filed its reply.

8. Brickyard's reply incorrectly presents the circumstances and law controlling the Board's consideration of the Agency's request for a stay. For example, Brickyard wrongly states the Board's order is not final based on an unsupportable interpretation of the order's legal effects. Brickyard also misstates the standard of review on appeal. Review of the Board's summary judgment is *de novo*, not deferential, as Brickyard contends. *See Natural Res. Def. Council v. Pollution Control Bd.*, 2015 IL App (4th) 140644, ¶19. These, and other, misstatements in Brickyard's response warrant attention.

¹ Rule 101.500(d) allows parties to request more time to respond a motion by filing a motion for extension. 35 Ill. Adm. Code 101.500(d). Rule 101.500(b) requires that "[a]ll motions must be in writing, unless made orally on the record during a hearing or during a status conference" 35 Ill. Adm. Code 101.500(b). Here, Brickyard filed no written motion for an extension. Likewise, no hearing or status conference took place during which Brickyard could have made an oral motion on the record. 35 Ill. Adm. Code 101.500(d).

Moreover, Rule 101.522 conditions extensions on "good cause shown on a motion *after* notice to the opposite party." 35 Ill. Adm. Code 101.522 (emphasis added). Counsel for the Agency had no notice of, nor was a party to, the communication in which Brickyard's counsel made a request to the Hearing Officer for an extension. Brickyard's request was therefore in contravention of the Board's rules. *See also* 35 Ill. Adm. Code 101.114(c) (instructing attorneys make communications with the Board in writing when practical).

9. Brickyard's inaccurate characterizations of the law, the Agency's position, and the Board's order will materially prejudice the Agency if the Agency is not allowed to reply.

10. In light of the extension allowed Brickyard in contravention of the Board's rules and the material prejudice it would engender, the Agency respectfully requests leave to file a reply, which is attached to this motion.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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**RESPONDENT’S REPLY IN SUPPORT OF
RESPONDENT’S MOTION FOR STAY**

Respondent, the Illinois Environmental Protection Agency (Agency), under 35 Ill. Adm. Code 101.500(e), hereby replies in support of its Motion for Stay Pending Appeal as follows:

The balance of equitable factors favors a stay. Brickyard has not offered anything that alters this conclusion. First, the Board issued a final order and did not “remand” anything that would undermine the order’s finality. Second, Brickyard does not dispute that the Board’s order set in motion a decision deadline that may moot the Agency’s appeal. Finally, despite Brickyard’s contentions, the relevant considerations weigh in favor of a stay. The Board should therefore grant a stay pending appeal.

I. The Board’s Order is Final

The Agency agrees with the Board that its November 17, 2016 order is final. *See Brickyard v. Illinois Envntl. Prot. Agency*, PCB 16-66 (Nov. 17, 2016), slip op. at 11. There were two issues for the Board to review in Brickyard’s

permit appeal, and the Board's order dispensed with both of them. That makes the order final under the finality doctrine. Brickyard's argument that the order is not final relies on a flawed interpretation of the order's legal effects. None of the issues Brickyard raises affects the order's finality.

A. The Board's Order Meets All Criteria for Finality

In a permit appeal, judicial review turns on the finality of the Board's order. *Town & Country Utils., Inc. v. Pollution Control Bd.*, 225 Ill. 2d 103, 122 (2007). A Board order is final if it "determines the litigation on the merits." *Id.* at 118; *see also Flores v. Dugan*, 91 Ill. 2d 108, 112 (1982) (stating a final order "ascertains and fixes absolutely and finally the rights of the parties in the lawsuit"). If affirmed on appeal, a final order leaves nothing to do on remand except enforcement. *Id.* The Board's order meets this standard.

The order determined the merits of the litigation at hand, PCB No. 2016-66. The only issues before the Board in this proceeding are those in the Agency's incompleteness letter (local siting and groundwater-impact assessment). *See ESG Watts, Inc. v. Illinois Pollution Control Bd.*, 286 Ill. App. 3d 325, 335 (3d Dist. 1997). The Board made findings of facts and conclusions of law determining both issues. The Board's order deemed the application complete, giving rise to the consequences thereof.¹ The order therefore "ascertains and fixes absolutely" the rights of the parties as to the completeness of the permit application.

¹ The "purported application" Brickyard submitted is now an "application" and is considered "filed" with the Agency. *See* 35 Ill. Adm. Code 813.103(b). Only once filed does the decision deadline on an application begin ticking. 415 ILCS 5/39(a).

The Board's order also requires no further action in this proceeding if affirmed on appeal. The order requires no further action by the Board to dispose of the issues in this proceeding—it already has. Nor does the order require the Agency to make any further determinations on remand as to the completeness of Brickyard's application. Again, the Board has already ruled that the application is complete. There is simply nothing left to do or decide in this “completeness” proceeding. If the Illinois Appellate Court affirms the Board's ruling, PCB No. 2016-66 will have run its course. By all measures, then, the order is final.

B. Brickyard's Interpretation of the Legal Effects of the Board's Order is Incorrect

The Board did not “remand[] the case” as Brickyard argues. Pet'r's Resp. at 2. The only “case” was this “completeness” proceeding. Brickyard's petition gave the Board authority to review only the Agency's incompleteness decision. *See* 415 ILCS 5/5(d), 5/40(a). That is all the Board reviewed, concluding that Brickyard's application was complete. Nothing in the order directs the Agency to further consider the application's completeness. Nor could there be—nothing remains before the Board to resolve regarding completeness. This is clear from the Board's direction that the Agency proceed to compliance review, which only occurs if an application is complete. The Board therefore did not remand this “completeness” proceeding to the Agency.

The Board also did not “remand” Brickyard's permit application to the Agency for “technical” (compliance) review as Brickyard suggests. *See* Pet'r's

Resp. at 5. While “remand” of an application may be a common colloquialism in the permitting arena, more precision is required here given Brickyard’s questioning of the order’s finality. The formal action of remand entails transferring jurisdiction over a proceeding. A permit application, however, is just a document, not a proceeding.² So while the Board routinely remands permit appeal *proceedings* to the Agency—which it has not done here—the Board technically does not remand the permit *applications* themselves. The Board therefore did not remand Brickyard’s application to the Agency.

Finally, contrary to Brickyard’s claim, the Board does not retain jurisdiction over the permit application through this proceeding. The Board is only empowered to review “final determinations” on permit applications. 415 ILCS 5/5(d), 5/40(a). Brickyard’s petition here gave the Board authority to review the Agency’s incompleteness decision, not the Agency’s entire permit review process. To the extent the Board could order the Agency to conduct a compliance review in its order here, the outcome of any such review is beyond the scope of this proceeding. Any Agency decision on the merits of the application will constitute a new final agency action, based on a new record, potentially entitling Brickyard to file a new petition allowing the Board to initiate a new proceeding to review that decision, should Brickyard disagree with it. The Board’s directive to the Agency here therefore does not leave this proceeding in limbo until the final action occurs on Brickyard’s application. Hav-

² See 35 Ill. Adm. Code 810.103 (defining “applicant” as “the person submitting an application to the Agency”); 35 Ill. Adm. Code 813.103(b) (“An application for permit . . . shall not be deemed filed . . .”).

ing exercised the only authority it had—review of the Agency’s incompleteness decision—the Board has discharged its jurisdiction by finding the application complete.

II. Brickyard Does Not Dispute That the Agency’s Appeal Will be Moot Absent a Stay

Brickyard apparently does not dispute the two most important parts of the Agency’s motion. Brickyard does not contest that, in deeming Brickyard’s application complete, the Board’s order effectively “filed” the application for purposes of Section 39(a) of the Environmental Protection Act (Act), 415 ILCS 5/39(a) (2014). Nor does Brickyard challenge the Agency’s driving concern that final action on the now-filed application before resolution of the Agency’s appeal will moot the appeal. Despite challenging every other aspect of the Agency’s motion, Brickyard does not deny the Agency’s overriding argument for why a stay is necessary. There is no question then that the Board’s order set in motion a decision deadline mooting the Agency’s appeal absent a stay.

III. The Equitable *Stacke* Factors Favor a Stay

As explained in the Agency’s motion, the balance of equities favors a stay. Brickyard’s analysis of the *Stacke* factors is not a serious engagement with the relevant issues or controlling law. Brickyard claims there is no merit to the Agency’s appeal; no harm to the Agency if a stay is not granted; no right to appeal for the Agency to assert; and no merit in preserving the *status quo ante* before the Board’s order. Brickyard’s extreme position is untenable because it ignores the reality that the absence of stay would jeopardize the

Agency's statutory right to appeal, whereas a stay would pose little, if any, legally cognizable harm to Brickyard.

First, the Agency has laid out a rational explanation of why it has a substantial case on the merits on appeal. Brickyard is incorrect to claim the Agency lacks one because "the appellate court will defer to the Board's expertise" on appeal. Pet'r's Resp. at 4. Review of the Board's summary judgment order is *de novo*. See *Natural Res. Def. Council v. Pollution Control Bd.*, 2015 IL App (4th) 140644, ¶19. Moreover, the issues on appeal involve summary judgment procedure and legal interpretation of parts of the Act within the Agency's purview.³ Respectfully, the appellate court will not afford the Board deference on review. And Brickyard points to no other flaws in the Agency's assessment of its case. Brickyard merely contends the Board was correct in its ruling, which, standing alone, does not undermine the merits of the Agency's appeal. For the unchallenged reasons in its motion, the Agency respectfully maintains it has a substantial case on the merits.

Second, more harm will befall the Agency if a stay is not granted than will Brickyard if one is. Brickyard mistakenly argues "it is the Agency's job to evaluate permits" so "[t]he Agency cannot seriously claim harm based upon effective use of its 'finite resources.'" Pet'r's Resp. at 4. In fact, by Board rule, it is the Agency's "job" to evaluate only **complete** permit applications. See *At-*

³ Section 39(c) "bestows upon the Agency the power to determine" whether siting approval is required. *City of Waukegan v. Illinois Env'tl. Prot. Agency*, 339 Ill. App. 3d 963, 975–76 (2d Dist. 2003). This is because "the Agency's expertise is a necessary part of determining whether a facility constitutes a 'new pollution control facility.'" *Id.* at 976.

kinson Landfill Co. v. Illinois Env'tl. Prot. Agency, PCB 13-8 (June 20, 2013), slip op. at 11. Where the Act gives the Agency the right to review the Board's completeness decision, the Agency may do so—just as Brickyard originally did with the Agency's decision. However, the Agency will lose its right to appeal absent a stay. That harm is irreparable, as the Agency cannot appeal the Board's completeness order in a subsequent proceeding.

Meanwhile, Brickyard fails to assert any legally cognizable harm. Brickyard argues a stay would cause harm because it would delay (potential) issuance of a permit. Brickyard does not contend any harm would actually result from such delay (*e.g.*, reaching capacity, breaching a contract). Instead, Brickyard asserts, without any legal support, that it has a property interest in speedy review of its application. Pet'r's Resp. at 2, 3. Even if it did, a stay would not cause permanent deprivation of such interest. If the appellate court affirms the Board's order, the stay will dissolve and final action on Brickyard's application will occur. Brickyard will therefore suffer no harm outweighing the irreparable harm to the Agency absent a stay.

Third, a stay is necessary for the Agency to secure the fruits of its appeal. The Agency has an interest in reviewing only complete permit applications to conserve finite resources. *Atkinson*, PCB 13-8, slip op. at 11. The Agency also has a right to appeal a completeness ruling it was a party to. 415 ILCS 5/41(a). Being able to realize that right and avoid reviewing an incomplete application are the fruits of a successful appeal. Only a stay ensures the

Agency can enjoy those fruits if it prevails on appeal. Brickyard's diversionary foray into the Agency's role in local siting and rehashing of "whether a new GIA is or is not required," Pet'r's Resp. at 4–5, are the definition of *non sequitur*, bearing no logical relationship to whether a stay is necessary to secure the fruits of a successful appeal.⁴ Thus, Brickyard offers no critique of the Agency's argument that a stay is necessary to secure what the Agency identified as being the fruits of a successful appeal.

Finally, a stay is necessary to preserve the *status quo* that existed before the Board's order (the *status quo ante*). Brickyard is incorrect that the proper frame of reference is the state of affairs after the Board issued its order. The entire point of a stay pending appeal is to prevent the effect of an order in case the appellate court overturns the order. Brickyard's permit application was only "filed" because of the Board's order. Before that, the application was no longer before the Agency because of the incompleteness decision, and there was therefore no looming decision deadline. That *status quo* deserves preservation during the appeal. Absent a stay, the effect of the Board's order will cause final action on the permit application, which will moot the Agency's appeal.

⁴ Contrary to Brickyard's contention, the Agency's role in local siting is not "simply to require proof that the location of the facility has been approved by the relevant local authority prior to issuing a permit." Pet'r's Resp. at 5. *See, supra*, n. 3.

CONCLUSION

On balance, the equitable factors favor a stay pending appeal. The Agency has fairly and carefully explained why that is so, recognizing the relative weights of each parties' circumstances. Brickyard, however, takes the extreme position that there is nothing to even weigh on the Agency's side of the scale. That position is untenable. For the reasons explained in the Agency's motion and reply, a balance of competing interests exists, and it favors a stay.

Although the Illinois Appellate Court may issue a stay if the Board declines to do so, the Board is best suited to. The Illinois Supreme Court vested the Board with authority in the first instance because of the Board's expertise and preexisting familiarity with the facts and issues in its proceedings. Technical proficiency and judicial economy therefore warrant a stay from the Board if one is to be had here. The Agency therefore respectfully requests that the Board issue a stay pending appeal.

Respectfully submitted,

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