

ILLINOIS POLLUTION CONTROL BOARD  
February 10, 1983

PHILLIPS PIPE LINE COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 82-151
	)	
ILLINOIS ENVIRONMENTAL PROTECTION	)	
AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by I. G. Goodman):

On January 10, 1983 the Illinois Environmental Protection Agency (Agency) filed a Motion to Dismiss the permit appeal filed by Phillips Pipe Line Company (Phillips) on December 27, 1982. Phillips filed a Motion to File Instantly and a Response on January 25, 1983. Motion to File Instantly is granted.

In support of its Motion, the Agency cites Abbott Laboratories v. Illinois Environmental Protection Agency, PCB 81-33 (March 19, 1981); 41 PCB 119). Dicta contained in the Abbott decision states that should a permit be "reopened" by the Agency prior to a permit appeal being filed with the Board the appeal would be moot since there would be no final action by the Agency for purposes of such a review. On this premise, the Agency argues that since the permit appeal and permit reapplication were filed simultaneously, the former should be dismissed. However, in this instance, the permit appeal is not mooted. The Agency has not rescinded its decision to include the contested conditions on the permit issued, or in the alternative, issued the requested Malfunction and Breakdown permits. Thus, the Agency's decision is properly appealed by Phillips under Section 40 of the Act. Neither the Agency (other than by rescinding its prior decision) nor the Board can deny Petitioner that statutory right. The Motion to Dismiss is denied.

In its Motion the Agency raises the legitimate concern that, within the concurrent ninety-day periods, conflicting actions could be taken by the Agency, in its permitting capacity, and the Board, within its adjudicatory posture. However, pursuant to the decision in Alburn, Inc. v. Illinois Environmental Protection Agency, PCB 81-23 and PCB 81-24 (March 19, 1981; 41 PCB 113) this conflict cannot arise. The Board stated therein that once permits are issued and appealed to the Board, they cannot be nullified by Agency modification or reissuance until the appeal is determined.

The Board's rationale was that "two permits covering the same process or equipment and issued pursuant to the same legal authority cannot have simultaneous legal effect." Under Section 39(a) of the Act, the Agency is obligated to render a decision on the permit application now before it within ninety days. Pursuant to the Alburn decision, that permit concerning the same matters at issue cannot be modified or issued until final action is taken by the Board in this permit appeal. Since the Petitioner controls this proceeding, a pro tanto waiver of the Agency's ninety-day decision period is implicit.

In Alburn, the Board acknowledged that negotiations and settlements are on-going during the appellate process. The Phillips' Response requested a stay for sixty days, with an accompanying sixty-day waiver of the Board's ninety-day decision period, to facilitate such negotiations. The stay is granted with the understanding that at its conclusion the appeal will proceed expeditiously pursuant to Board rules.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 10<sup>th</sup> day of February, 1983 by a vote of 3-0.



Christan L. Moffett, Clerk  
Illinois Pollution Control Board