

ILLINOIS POLLUTION CONTROL BOARD

April 19, 2007

ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Complainant,	)	
	)	
v.	)	AC 05-40
	)	(IEPA No. 567-04-AC)
NORTHERN ILLINOIS SERVICE	)	(Administrative Citation)
COMPANY,	)	
	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by N.J. Melas):

On September 21, 2006, the Board issued an interim opinion and order, finding that respondent Northern Illinois Service Company (NISC) violated two open dumping provisions of the Environmental Protection Act (Act) (415 ILCS 5 (2004)) at a site in Roscoe, Winnebago County. The Board issued a final opinion and order assessing the civil penalty plus hearing costs on January 26, 2007. On March 8, 2007, NISC filed a motion for modification of the Board's final opinion and order. To date, the Agency has not responded. Today the Board grants NISC's motion.

**BACKGROUND**

In the interim opinion and order of September 21, 2006, the Board found that NISC violated Sections 21(p)(1) and (7) of the Act by causing the open dumping of waste resulting in litter and the deposition of general construction or demolition debris at 4690 Rockton Road, Roscoe, Winnebago County (Roscoe Quarry). 415 ILCS 5/21(p)(1), (7) (2004). The Illinois Environmental Protection Agency (Agency) filed this administrative citation with the Board on November 22, 2004, based on an October 4, 2004 inspection by the Agency of the Roscoe Quarry.

On November 16, 2006, the Board issued a final opinion and order finding violations, imposing the corresponding statutory civil penalty of \$3,000, and assessing the Board's hearing costs totaling \$406.50. The Board then received the Agency's timely mailed statement of hearing costs in the amount of \$265.75 on December 1, 2006. The Board on its own motion reconsidered the final decision of November 16, 2006, and vacated that order on December 7, 2006.

On December 8, 2006, NISC filed a petition for review of the November 16, 2006 order with the Second District Appellate Court, docketed as case No. 02-06-1237. On January 19, 2007, the Second District Appellate Court dismissed NISC's appeal for lack of jurisdiction because the Board had not yet issued a final appealable order.

The Board issued a final opinion and order, again finding violations and imposing the corresponding statutory civil penalty of \$3,000, time assessing the Board's and the Agency's hearing costs, together totaling \$672.25. NISC again appealed the Board's opinion and order, only as to the Section 21(p)(1) violation, to the Second District Appellate Court, docketed as case No. 02-07-0213.

### **MOTION TO MODIFY**

As stated above, the Board's January 26, 2007 final opinion and order found that NISC violated Sections 21(p)(1) and (7) of the Act and assessed the statutory civil penalty for those violations together with hearing costs, for a total of \$3,672.25. NISC has appealed only the Board's finding of a Section 21(p)(1) violation. 415 ILCS 5/21(p)(1) (2004). For this reason, NISC seeks a modification of the Board's final opinion and order to stay payment of only the penalty associated with Section 21(p)(1) and the Board's and the Agency's hearing costs. Because NISC does not contest the Board's finding as to Section 21(p)(7), NISC does not seek to stay payment of the penalty associated with that violation.

Section 101.520(a) of the Board's procedural rules states that "any motion for reconsideration or modification of a Board order must be filed within 35 days after receipt of the order." 35 Ill. Adm. Code 101.502(a). NISC is certified to have received the January 26, 2007 order on February 5, 2007. NISC's March 8, 2007 authorized filing by fax is, therefore, timely.

The Board's procedural rules further provide that "a timely-filed motion for reconsideration or modification stays the effect of the final order until final disposition of the motion . . . ." 35 Ill. Adm. Code 101.520(c). NISC's March 8, 2007 was timely filed and, therefore, the Board's final order requiring payment of the civil penalties within 45 days, or by March 12, 2007, is stayed until the resolution of this motion. Any compliance dates in the Board's January 26, 2007 final opinion and order also run anew from today's ruling on the motion. *See Charter Hall Homeowner's Assoc. v. Overland Trans. Sys., Inc., et al.*, PCB 98-81 (July 8, 1999).

In addressing NISC's motion for stay of part of the Board's assessed penalties, the Board looks to Illinois Supreme Court Rule 335. *See* 35 Ill. Adm. Code 101.906(c); Sup. Ct. Rule 335. Supreme Court Rule 335(g) provides: "application for a stay of a decision or order of an agency pending direct review in the Appellate Court shall ordinarily be made in the first instance to the agency."

While titled a "motion for modification," the Board construes NISC's motion as a motion for stay. The motion effectively asks the Board to stay the civil penalty and hearing costs associated with the found violation that NISC has appealed.

The decision to grant or deny a motion for a stay is discretionary. "The Board has been reluctant to stay its orders when a stay may result in harm to the public or the environment." *People v. Blue Ridge Construction, Corp.*, PCB 02-115 (Dec. 16, 2004); *see also People v. Prior, et al.*, PCB 02-177 (Sept. 16, 2004); citing *Panhandle Eastern Pipeline Co. v. IEPA*, PCB 98-102 (July 8, 1999), *aff'd sub nom Panhandle Eastern Pipeline Co. v. PCB and IEPA*, 314 Ill. App. 3d

296, 734 N.E.2d 18 (4th Dist., 2000). The Board, however, often grants stays of its orders with respect to payment of penalties. Blue Ridge Construction, PCB 02-115, slip op. at 2; citing IEPA v. Piolet Bros. Trading, Inc., PCB 80-185 (Dec. 17, 1981) (granting motion for stay of order's provision requiring penalty payment, but denying motion for stay of order's provision requiring respondent to cease and desist from violations), *aff'd sub nom* Piolet Bros. Trading Co. v. PCB, 110 Ill. App. 3d 752, 442 N.E.2d 1374 (5th Dist. 1982). When granting a stay with respect to the payment of penalties, the Board has reasoned that "[p]ayment of monetary penalty can be delayed without prejudice to the public and it has been our practice to allow such motions pending appeal." Citizens for a Better Environment v. Stepan Chemical Co., PCB 74-210, 74-270, 74-317, slip op. at 1 (June 25, 1975).

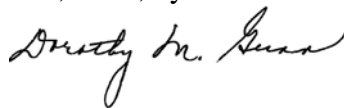
Further, the Agency has not responded to NISC's motion. The failure by a party to respond to a motion is deemed a waiver of any objection to the Board granting that motion. 35 Ill. Adm. Code 101.500(d).

Consistent with this precedent and Illinois Supreme Court Rule 335(g), the Board grants NISC's motion for modification of the Board's January 26, 2007 order to stay payment of the penalty associated with Section 21(p)(1) and the Board's and the Agency's hearing costs. In accordance with the Board's January 26, 2007 opinion and order, NISC must pay the civil penalty of \$1,500 associated with the uncontested found violation of Section 21(p)(7) of the Act within 45 days of the date of this order.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2004); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on April 19, 2007, by a vote of 3-0.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board