

ILLINOIS POLLUTION CONTROL BOARD
January 11, 1990

FRED E. JURCAK,)	
)	
Petitioner,)	
)	
v.)	PCB 85-137
)	(Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD BY (M. Nardulli):

This matter comes before the Board upon a "Motion to Modify Permit" filed December 4, 1989 by petitioner Fred E. Jurcak ("Jurcak"). By this motion, Jurcak seeks clarification of the Board's Order of September 28, 1989 regarding the time period of Jurcak's NPDES permit. By Order of December 6, 1989, this Board directed the Illinois Environmental Protection Agency ("Agency") to respond to Jurcak's motion no later than December 20, 1989. The Agency failed to file its response. As directed by the Board, Jurcak filed his reply on December 27, 1989.

The Board will summarize the extensive procedural history of this case. On July 31, 1985, the Agency issued Jurcak a NPDES permit with conditions. Jurcak sought the Board's review of the imposition of condition No. 8. On December 20, 1985, the Board entered its Opinion and Order concluding that it did not have jurisdiction to review a condition in a NPDES permit which was required by the Illinois Water Quality Management Plan ("IWQMP"). Jurcak appealed the Board's decision and the appellate court reversed and remanded the cause to the Board, holding that the Board had the authority to review condition No. 8. On September 28, 1989, this Board entered its decision concluding that the Agency improperly imposed condition No. 8 and ordering the Agency to "strike condition No. 8 from the NPDES permit issued to petitioner on July 31, 1985."

On October 27, 1989, the Agency issued a "modified" NPDES permit striking condition No. 8, but ~~noting~~ noting that Jurcak's NPDES permit expires on July 31, 1990. On November 29, 1989, the Agency issued a second modification of the NPDES permit requiring that "[d]evelopment and use of the property which will be serviced by the permitted facility shall be in accordance with the Condominium Property Act."

By his instant motion, Jurcak argues that the Agency has incorrectly calculated the five-year NPDES permit time period as

running from July 31, 1985 rather than from September 28, 1989, the date the Board ruled upon the propriety of the Agency's imposition of condition No. 8. Jurcak also alleges that the Agency's imposition of the new condition requiring him to use his property as condominiums is improper.

This matter raises the issue of when does a permit become effective where an applicant for an initial¹ NPDES permit pursues his right to appeal the Agency's imposition of conditions to the Board. Although directed by the Board to respond to Jurcak's motion, the Agency has declined from providing any guidance on this matter. The Board's Order of September 28, 1989 does not specifically state that the five-year permit period begins to run from the date the Board enters its final decision. However, it was the Board's intent to affirm the five-year permit period, rather than the specific dates of that permit. (See Testor v. IEPA, PCB 88-191 (January 11, 1990).) For the following reasons, the Board concludes the five-year time period of Jurcak's NPDES permit did not begin to run until this Board reached its decision that the imposition of condition No. 8 was improper and the Agency reissues the permit.

The permitting process is an administrative continuum which becomes complete only after the Board has entered its ruling. (IEPA v. PCB, 138 Ill. App. 3d 550, 486 N.E.2d 293, 294 (3d Dist. 1985), aff'd 503 N.E.2d 343 (1986).) Therefore, where an applicant pursues his right to Board review of the Agency's permitting decision, the permit does not become effective until the Board reaches its final decision. Section 12(f) of the Illinois Environmental Protection Act ("Act") supports this conclusion. Section 12(f) of the Act provides that:

"[i]n any case where a permit has been timely applied for pursuant to section 39(b) of this Act but final administrative disposition of such application has not been made, it shall not be a violation of this subsection to discharge without such permit, unless the complainant proves that final administrative disposition has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application." (Ill.Rev.Stat. 1987, ch. 111 $\frac{1}{2}$, par. 1012(f).)

¹This matter concerns an initial application for a NPDES permit rather than a renewal of an existing permit. Therefore, the automatic stay provisions of section 16 of the Administrative Procedure Act are inapplicable. (Ill.Rev. Stat. 1987, ch. 127, par. 1016.)

Pursuant to section 12(f) of the Act, until this Board reaches its decision in a permit appeal, the applicant who timely applies for a permit and who does not unduly delay the "final administrative disposition" is not subject to an enforcement action for discharging without a permit. Consequently, section 12(f) provides protection to the applicant who chooses to pursue discharge activities while appealing the Agency's decision to the Board.

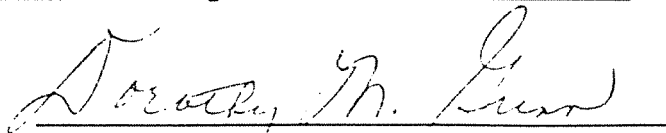
Certainly, Jurcak should not be penalized for pursuing his right to appeal the Agency's imposition of permit conditions. To hold that Jurcak's NPDES permit became effective in July of 1985, even though Jurcak appealed the Agency's decision, would lead to the absurd result that Jurcak's permit will expire six months from the date that he is finally able to utilize the permit. An even more absurd result could occur where the review process of a five-year NPDES permit takes five years or more to become final. In that situation the final decision would be made after the permit has expired rendering moot a determination that the condition was improperly imposed. The Board finds that the Acts permitting provisions cannot be interpreted as mandating such absurd consequences. Rather, the Board concludes that a permit does not become effective until the Board renders its final decision in a permit appeal and the Agency reissues the permit.

The Board also finds the Agency's unilateral imposition of the condition that Jurcak develop and use the subject property which will be serviced by the permitted facility in accordance with the Condominium Property Act to be inconsistent with this Board's Order of September 28, 1989. By its September 28, 1989 Order, the Board directed that the Agency strike condition No. 8. The Agency was not instructed to impose any additional conditions upon remand. Therefore, the Board concludes that the Agency must strike the condition imposed on November 29, 1989.

The Board hereby directs the Agency to reissue Jurcak a permit, with a five-year duration, striking condition No. 8 and the "condominium condition" imposed November 29, 1989 effective the date of the Agency reissues the NPDES permit.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board hereby certify that the above Order was adopted on the 11th day of January, 1990 by a vote of 7-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board