

ILLINOIS POLLUTION CONTROL BOARD
December 17, 2015

ILLINOIS POWER GENERATING)	
COMPANY (NEWTON POWER STATION),)	
)	
Petitioner,)	
)	
v.)	PCB 16-60
)	(Permit Appeal - Water)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by J.D. O’Leary):

On November 5, 2015, Illinois Power Generating Company (petitioner) filed a petition (Pet.) asking the Board to review a September 30, 2015 permit determination by the Illinois Environmental Protection Agency (Agency or IEPA). *See* 415 ILCS 5/40(a)(1) (2014); 35 Ill. Adm. Code 101.300(b), 105.206. In that determination, the Agency issued National Pollutant Discharge Elimination System (NPDES) Permit No. IL0049191 with conditions for petitioner’s coal-fired electric generating plant located at 6725 500th Street in Newton, Jasper County. On November 19, 2015, the Board accepted the petition for hearing but reserved ruling on petitioner’s request to stay the effectiveness of contested permit conditions to allow the Agency’s response time to run. *See* 35 Ill. Adm. Code 101.500(d). The Board received no response to the motion. For the reasons below, the Board grants petitioner’s unopposed request for a partial stay.

The Board has consistently held that it “has the authority to grant discretionary stays from permit conditions. The permit appeal system would be rendered meaningless in many cases, if the Board did not have the authority to stay permit conditions.” Community Landfill Co. and City of Morris v. IEPA, PCB 01-48, PCB 01-49 (consol.), slip op. at 4 (Oct. 19, 2000); *see also*, *e.g.*, Hartford Working Group v. IEPA, PCB 05-74, slip op. at 1 (Nov. 18, 2004).

Petitioner requests that the Board stay the applicability of Special Condition 12 to Outfalls 001, 004, 006, 007, and 011; the sampling frequency associated with Outfall B01; and the descriptions of contributory waste streams associated with Outfalls 006, 011, and 012. Pet. at 5, 8. Petitioner states that it “has no objection to the balance of the conditions” in the permit. Pet. at 6. Petitioner adds that, if the Board stays the contested conditions, the previous permit will remain in effect with regard to the stayed conditions. Pet. at 6; *see* Exh. B (NPDES Permit No. IL 0049191, issued Dec. 14, 2006). Petitioner requests that the Board stay the contested conditions until either the Board takes final action in this matter or the Agency issues a revised permit. Pet. at 5, 8.

The Board has long recognized that Illinois law provides standards to help determine whether it is appropriate to grant a discretionary stay:

1. a certain and clearly ascertainable right needs protection;
2. irreparable injury will occur without the injunction;
3. no adequate remedy at law exists; and
4. there is a probability of success on the merits. Community Landfill Co. and City of Morris v. IEPA, PCB 01-48, PCB 01-49 (consol.), slip op. at 4 (Oct. 19, 2000), citing Motor Oils Refining Co. v. IEPA, PCB 89-116, slip op. at 2 (Aug. 31, 1989); *see* Pet. at 6.

The Board is not required to consider each of these factors in making its determination. Bridgestone/Firestone Off Road Tire Co. v. IEPA, PCB 02-31, slip op. at 3 (Nov. 1, 2001). “Although the Board may look to these factors in making its determination of whether to grant a discretionary stay, the likelihood of environmental harm should a stay be granted is of particular concern for the Board.” Motor Oils Refining Co. v. IEPA, PCB 89-116, slip op. at 2 (Aug. 31, 1989).

Petitioner argues that a stay is needed to protect its right to appeal “and to prevent the imposition of unlawful, arbitrary and capricious conditions before Petitioner is able to exercise its right to appeal and be heard by the Board.” Pet. at 6-7. Petitioner asserts that it therefore “has an ascertainable right that needs protection.” *Id.* at 7. Petitioner argues that it will suffer irreparable injury if the contested conditions are not stayed. *Id.* Petitioner states that compliance with contested conditions would require expenditure of resources. *Id.* Petitioner adds that, if it complied with the contested conditions and then prevailed in this appeal, the “costs would be lost. Thus, Petitioner would suffer irreparable injury.” *Id.*

Petitioner argues that it “has no other adequate remedy at law to prevent these injuries or to contest these requirements; a permit appeal is the only remedy available.” Pet. at 7. Petitioner further argues that will likely succeed on the merits of this appeal. Petitioner states that it “is prepared to demonstrate that IEPA made incorrect and/or arbitrary determinations” in imposing the contested conditions. Pet. at 7.

Petitioner argues that a stay of the contested condition would not result in harm to human health or the environment. Pet. at 7. Petitioner states that it will continue to operate the plant as it has been operated. Petitioner adds that it will continue to comply with the previous permit with regard to requirements for which it seeks a stay. *Id.* at 7-8, citing Ameren Energy Generating Co. v. IEPA, PCB 06-67, slip op. at 7 n.1 (Feb. 16, 2006) (finding automatic stay applies to appeal of CAAPP permit). Finally, petitioner asserts that “[t]he Board has granted discretionary stays in a number of cases. . . .” Pet. at 7 (citations omitted).

The Board has reviewed petitioner’s unopposed request for a partial stay. The Board is persuaded that petitioner has an ascertainable right that needs protection. Appeal of the permit conditions would be rendered moot if petitioner was required to comply with contested conditions during the appeal. If petitioner prevailed, “the cost and the point of the appeal would be lost.” Community Landfill Co. and City of Morris v. IEPA, PCB 01-48, PCB 01-49 (consol.),

slip op. at 4 (Oct. 19, 2000). The Board also agrees that this appeal is the remedy available to petitioner to challenge the contested conditions. However, the Board places particular stress on continued compliance with the most recently issued permit regarding the contested requirements. The Board concludes that a stay of the contested conditions would not increase the likelihood of environmental harm.

Exercising its discretion, the Board grants petitioner's unopposed request and stays the applicability of Special Condition 12 to Outfalls 001, 004, 006, 007, and 011; the sampling frequency associated with Outfall B01; and the descriptions of contributory waste streams associated with Outfalls 006, 011, and 012 in NPDES Permit No. IL0049191. In doing so, the Board "makes no findings on the merits of the permit appeal . . ." Motor Oils Refining Co. v. IEPA, PCB 89-116, slip op. at 2 (Aug. 31, 1989). The partial stay will remain in effect until the Board takes final action in this matter or until the Board orders otherwise.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on December 17, 2015, by a vote of 5-0.



John T. Therriault, Clerk
Illinois Pollution Control Board