

ILLINOIS POLLUTION CONTROL BOARD

August 20, 2015

IN THE MATTER OF: )  
)  
WATER QUALITY STANDARDS AND ) R08-9 (Subdocket D)  
EFFLUENT LIMITATIONS FOR THE ) (Rulemaking - Water)  
CHICAGO AREA WATERWAY SYSTEM )  
AND LOWER DES PLAINES RIVER: )  
PROPOSED AMENDMENTS TO 35 ILL. )  
ADM. CODE 301, 302, 303, and 304 )

ORDER OF THE BOARD (by D. Glosser):

On June 18, 2015, the Board adopted a final opinion and order in this rulemaking. The adopted rules were published in the *Illinois Register* on July 10, 2015. 39 Ill. Reg. 9388, 9423, 9433 (July 10, 2015). The notice pages of the rules stated that the effective date of the rules was July 1, 2015. *Id.*

As a preliminary matter, the Board notes that on July 23, 2016, the Salt Institute appealed the Board’s decision in this rulemaking. *See Salt Institute v. Illinois Pollution Control Board*, No. 1-15-2003. As a general rule “[o]nce a notice of appeal is filed, the trial court may not enter any order changing or modifying a judgment or its scope, or interfering with the review of that judgment.” *In re Marriage of Ward*, 267 Ill. App. 3d 35 (2nd Dist. 1994). Further, as noted in *General Motors Corp v. Pappas*, 242 Ill. 2d 163 (2011):

Once the notice of appeal is filed, the appellate court’s jurisdiction attaches *instanter*, and the cause of action is beyond the jurisdiction of the circuit court. *Daley v. Laurie*, 106 Ill. 2d 33, 37, 86 Ill.Dec. 918, 476 N.E.2d 419 (1985). The circuit court however retains jurisdiction after the notice of appeal is filed to determine matters collateral or incidental to the judgment. *Illinois State Toll Highway Authority v. Heritage Standard Bank & Trust Co.*, 157 Ill. 2d 282, 289–90, 193 Ill.Dec. 180, 626 N.E.2d 213 (1993) (“notice of appeal from final judgment in condemnation suit did not divest trial court of jurisdiction to hear petition for fees and costs” (citing *Town of Libertyville v. Bank of Waukegan*, 152 Ill. App. 3d 1066, 1072–73, 105 Ill.Dec. 787, 504 N.E.2d 1305 (1987))). This court has specifically recognized that a stay of judgment is collateral to the judgment and does not affect or alter the issues on appeal. *Steinbrecher*, 197 Ill. 2d at 526, 259 Ill.Dec. 729, 759 N.E.2d 509.

Libertyville offers further instruction stating:

While the general rule is that the filing of a notice of appeal divests the trial court of jurisdiction, the trial court retains jurisdiction to determine matters collateral or incidental to the judgment. (*In re Estate of Rice* (1985), 130 Ill. App. 3d 416, 426, 85 Ill.Dec. 577, 473 N.E.2d 1382; *In re Marriage of Magnuson* (1984), 128

Ill. App. 3d 130, 132, 83 Ill.Dec. 254, 470 N.E.2d 9.) Collateral or supplemental matters include those lying outside the issues in the appeal or arising subsequent to delivery of the judgment appealed from. In re Estate of Denaro (1983), 112 Ill. App. 3d 872, 878, 68 Ill.Dec. 455, 445 N.E.2d 1308. Libertyville, 152 Ill. App. 3d 1072-73.

The Board retains jurisdiction only to decide matters independent of and collateral to a judgment, but is divested of jurisdiction to enter an order involving a matter of substance. Wierzbicki v. Gleason, 388 Ill. App. 3d 921 (1st Dist. 2009), citing In re Marriage of Steinberg, 302 Ill. App. 3d 845, 849, 236 Ill.Dec. 21, 706 N.E.2d 895, 898 (1998).

In People v. Community Landfill Co. Inc., PCB 03-191 (Nov. 5, 2009), the Board stated: “Although the Appellate Court acquired jurisdiction of this case once a notice of appeal was filed with the court, the Board retains jurisdiction to determine ‘matters collateral or incidental to the judgment. . . . A stay of judgment is a matter that is collateral to the judgment because it neither affects nor alters the issues on appeal.’ Sears Holdings Corp. v. Maria Pappas, 391 Ill. App. 3d 147, 158-59, 908 N. E. 2d 556, 566-567 (1st Dist. 2009) (citations omitted).” PCB 03-191 slip op. at 4. The Board is convinced that the motion for clarification is collateral or incidental to the Board’s decision and that it is not a matter of substance. Therefore, the Board has jurisdiction to rule on the motion.

### **Motion to Clarify**

On August 14, 2015, the Illinois Environmental Protection Agency (IEPA) filed a motion for clarification and stay (Mot.) in this rulemaking. On August 18, 2015, IEPA filed motions seeking a stay from filing the IEPA’s recommendation on the variance petitions, in three due date cases where no waiver has been filed. *See* Village of Homewood v. IEPA, PCB 16-14; City of Oak Forest v. IEPA, PCB 16-33; and Midwest Generation LLC v. IEPA, PCB 16-19<sup>1</sup>. The basis for the stay in each of those cases is the pending motion for clarification in this docket. Specifically IEPA states, “until the effective date for the chloride water quality standard for purposes of application of Section 38(b) of the Act is determined through clarification by the Board, the IEPA asks the Board to stay the IEPA’s requirement of filing a recommendation on the variance petition since it appears the variance request may be premature.”

In ruling on a motion the Board’s rules provide in part:

Unless undue delay or material prejudice would result, neither the Board nor the hearing officer will grant any motion before expiration of the 14 day response period except in deadline driven proceedings where no waiver has been filed. 35 Ill. Adm. Code 101.500(d).

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<sup>1</sup> The Board notes that on August 19, 2015, the IEPA filed similar motions in related variance cases before the Board.

Because of the filings in the due date cases, the Board finds that undue delay or material prejudice will result if the Board delays ruling on the motion to clarify. Therefore, the Board will rule on the motion before the 14-day response time expires.

IEPA argues that it is unclear what the Board intended with respect to the effective date of water quality standards for chloride and temperature. Mot. at 2. IEPA states this confusion is due to the notice page indicating that July 1, 2015, is the effective date of the rule, while Sections 302.407(g)(2), (3) and 302.408(b) (35 Ill. Adm. Code 302.407(g)(2), (3) and 302.408(b)) state the new temperature and chloride standards are not effective until July 1, 2018. Mot. at 2-3. IEPA asserts that based on these two dates there is confusion.

The Board notes that in response to comments received after a request by the Joint Committee on Administrative Rules (JCAR), the Board discussed the effective date of the rules in the context of variance requests. On June 4, 2015, the Board stated:

Further Section 38(b) of the Act provides:

If any person files a petition for a variance from a rule or regulation within 20 days after the effective date of such rule or regulation, the operation of such rule or regulation shall be stayed as to such person pending the disposition of the petition . . . 415 ILCS 5/38(b) (2014).

Thus, by statute, if a variance or an adjusted standard is sought within 20 days of the effective date of a rule, that rule is stayed pending disposition of the petition. The effective date of any rule is the date the rule is filed with the Secretary of State unless a later date is specified in the rulemaking. 5 ILCS 100/5-40(d) (2014). The Board will specify the effective date of these rules on the notice page of the filing with the Secretary of State. Water Quality Standards and Effluent Limitations For The Chicago Area Waterway System and Lower Des Plaines River: Proposed Amendments To 35 Ill. Adm. Code 301, 302, 303, And 304, R08-9(D) slip op. at 8, (June 4, 2015).

On the notice pages of the filings with the Secretary of State, the Board specified that the effective date of the rules is July 1, 2015. The rules as adopted include water quality standards for chloride and temperature that apply as of July 1, 2015. In addition, more stringent water quality standards apply for chloride and temperature on July 1, 2018. A later compliance date within the rules does not alter the fact that the rules are effective either when filed with the Secretary of State or on the effective date stated on the notice pages filed with the Secretary of State. 5 ILCS 100/5-40(d) (2014). The Board has adopted other rules that include future compliance deadlines. *See e.g. In the Matter of: Proposed New Clean Air Interstate Rule (CAIR) SO<sub>2</sub>, NO<sub>x</sub> Annual and NO<sub>x</sub> Ozone Season Trading Programs, 35 Ill. Adm. Code 225, Subparts A, C, D, E and F, R06-26 (Aug. 23, 2007).*

The Board grants the motion to clarify, and to be clear, the rules adopted by the Board on June 18, 2015, were effective July 1, 2015. While the rules include compliance deadlines of July

1, 2018, the rules were effective July 1, 2015. Because the Board specified the effective date of the rules is July 1, 2015, the request for stay in this docket is moot.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 20, 2015, by a vote of 5-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal stroke at the end.

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John T. Therriault, Clerk  
Illinois Pollution Control Board