

ILLINOIS POLLUTION CONTROL BOARD
September 17, 2020

GENERAL III, LLC,)	
)	
Petitioner,)	
)	
v.)	PCB 21-07
)	(Permit Appeal - Air)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by C.M. Santos):

On August 13, 2020, the Board accepted from General III, LLC (General III) a petition (Pet.) asking the Board to review a June 25, 2020 determination of the Illinois Environmental Protection Agency (IEPA or Illinois EPA or Agency). In that determination, IEPA issued General III a construction permit for a scrap metal recycling facility to be located at 11600 South Burley Avenue, Chicago, Cook County (Facility). General III appeals certain permit conditions and requests that the Board stay the effectiveness of those specified conditions.

Today the Board addresses General III’s request for a stay. For the reasons below, the Board grants a stay of the contested permit conditions until the Board takes final action on the appeal or until the Board orders otherwise.

Below, the Board first addresses General III’s pending motion for leave to file a reply. The Board then reviews the permit and summarizes the contested conditions before deciding General III’s request for a stay.

MOTION FOR LEAVE TO FILE

IEPA responded to the request for a stay (Resp.), and General III filed its motion for leave to file (Mot.), accompanied by its reply (Reply). A moving party does not have the right to reply, “except as the Board or hearing officer permits to prevent material prejudice.” 35 Ill. Adm. Code 101.500(e).

General III’s motion states that IEPA characterized its request as “conclusory and not supported by specific facts.” Mot. at 1, citing Resp. at 1, 5. It asserts that IEPA’s response omits key facts, mischaracterizes its position, and seeks additional explanation. Mot. at 2, citing 35 Ill. Adm. Code 101.500(e). If it is not granted leave to file, General III argues that “[t]he Board would not be fully briefed on the issues.” Mot. at 2. General III concludes that denying its motion will result in material prejudice. *Id.*

IEPA did not respond and waives objection to the granting of the motion. *See* 35 Ill. Adm. Code 101.500(d) (14-day deadline). The Board grants General III's unopposed motion for leave to file and accepts its reply.

PERMIT AND CONTESTED CONDITIONS

On September 25, 2019, General III filed its permit application. Pet. at 1. General III received a draft permit from IEPA and submitted comments on it. *Id.* IEPA held public hearings and received public comments until June 15, 2020. *Id.* at 2.

IEPA issued General III a final construction permit on June 25, 2020. Pet. at 2. General III states that the final permit "included significant changes to the draft permit in response to public input in order to enhance the permit." *Id.* General III argues that "[t]hese changes exceed the applicable regulatory requirements for a minor source facility" such as its facility. *Id.*

General III specifically appeals the following conditions.

Special Condition 1(f): Expiration Date

Special Condition 1(f) provides in its entirety that "[o]peration of the Scrap Metal Recycling Facility listed above is allowed under this construction permit for a period of twelve (12) months from the date that raw material is first processed through the Hammermill Shredder. This condition supersedes Standard Condition 1 of this construction permit." Pet., Exh. A at 3.

Standard Condition 1 provides in its entirety that "[u]nless the permit has been extended or it has been voided by a newly issued permit, this permit will expire one year from the date of issuance, unless a continuous program of construction or development on this project has started by such time." Pet., Exh. A at 31.

General III argues that, if continuous construction has begun, Standard Condition 1 "allows the construction permit to stay in effect while the Agency takes action on the operating permit application." Pet. at 2. This effectively allows the construction permit at least temporarily to be the operating permit. *Id.*

General III states that the Environmental Protection Act allows an operator "12 months from commencing operation to submit its operating permit application to the Agency." Pet. at 2, citing 415 ILCS 5/39.5(5)(x) (2018). General III argues that it "has no control over how long it will take the Agency to act on the operating permit application." *Id.* at 3. Because IEPA may be delayed in issuing a permit, superseding Standard Condition 1 places General III "at significant risk of being unable to operate under the construction permit." *Id.* at 2-3.

General III argues that IEPA placed a "hard expiration date" in the construction permit and "unlawfully shortened" the deadline to apply for an operating permit. Pet. at 2. General III concludes that Special Condition 1(f) "is contrary to law, infeasible, and arbitrary and capricious because it imposes an unreasonable deadline" which may end operating under the construction

permit. *Id.* General III concludes that Special Condition 1(f) should be struck from the permit and requests that the Board stay the condition during the pendency of this appeal. Pet. at 3.

Special Condition 10(c): Fugitive Emissions

Special Condition 10(a) provides that “[t]he Scrap Metal Recycling Facility shall be operated under the provisions of a Fugitive Emissions Operating program. This operating program was submitted by the Permittee and designed to limit fugitive particulate matter emissions to ensure compliance with 35 Ill. Adm. Code 212.301 [Fugitive Particulate Matter].” Pet., Exh. A at 10.

Special Condition 10(b) provides in its entirety that the program, “as submitted by the Permittee pursuant to Condition 10(a) dated June 25, 2020, is incorporated herein by reference. The source shall comply with the provisions of this Program and any amendments to the program submitted pursuant to [Special] Condition 10(c).” Pet., Exh. A at 10.

Special Condition 10(c) provides in its entirety that

[t]he Fugitive Emissions Operating Program shall be amended from time to time by the Permittee so that the operating Program is current. Such amendments shall be consistent with Condition 10(a) and shall be submitted to the Illinois EPA within thirty (30) days of amendment. Any future revision to the Program made by the Permittee during the permit term is automatically incorporated by reference unless expressly disapproved by the Illinois EPA within thirty (30) days of submission. In the event that the Illinois EPA notifies the Permittee that further information regarding the revision to the Program is needed, the Permittee shall respond to the notice within thirty (30) days of receipt of notification. Pet., Exh. A at 10.

General III states that no applicable regulation requires it to have fugitive particulate program. Pet. at 3. It argues that amended plans typically are incorporated by reference into the permit automatically. *Id.* However, Special Condition 10(c) provides that the amendment is incorporated “unless expressly disapproved by the Illinois EPA.” *Id.* General III argues that Special Condition 10(c) provides no standard for IEPA to approve or disapprove a program and no procedure for addressing disapproval. *Id.* General III argues that the condition circumvents appeals under Section 40(a) of the Act and violates its due process rights. *Id.*

General III concludes that Special Condition 10(c) is “contrary to law, unreasonable, and arbitrary and capricious by providing the Agency with the unfettered, unilateral right and discretion to disapprove of an amendment” to its Fugitive Emissions Operating Program. Pet. at 3. General III asserts the condition should be amended by striking the phrase “unless expressly disapproved by the Illinois EPA within thirty (30) days of submission.” *Id.* at 3-4. General III also requests that the Board stay Special Condition 10(c) during the pendency of the appeal. *Id.* at 4.

Special Conditions 11(k), 11(l), and 21(a)(iii)(E), (F), and (G):

Emergency Bypass Event Monitoring

Special Condition 11(k) provides in its entirety that

[t]he Permittee shall install, operate and maintain a continuous monitoring device for the control train for the Hammermill Shredder System for one of the following operational parameters. This monitoring device shall make measurements at least every minute and have an accuracy of at least ± 5 percent. The data measured by this device shall be automatically recorded on at least a minute by minute basis and on an hourly average in an electronic database. The Permittee shall determine the gas flow rate to be used to calculate VOM emissions from a Bypass Event using data collected by this monitoring system.

- i. The amperage or usage of electrical power by the motor for the Roll Media Filter fan;
- ii. The shredder exhaust gas flow rate; or
- iii. Other operational parameter(s) approved by the Illinois EPA. Pet., Exh. A at 12-13.

Special Condition 11(l) provides in its entirety that “[t]he Permittee shall install, operate, and maintain a continuous monitoring device for the status of the emergency bypass damper for the RTO [Regenerative Thermal Oxidizer] in the control train for the Hammermill Shredder System, i.e., whether this damper is closed or open. The data collected by this device shall be automatically recorded in an electronic database.” Pet., Exh. A at 13.

Special Condition 21(a) requires General III to maintain records of specified items “to demonstrate compliance with the conditions of this permit.” Pet., Exh. A at 25. Special Conditions 21(a)(iii)(E-G) require records of the following items:

- E. Daily records demonstrating inlet gas stream to the control train for the Hammermill Shredder System for the flammability of this gas stream as a percentage of the lower explosive limit (LEL) of this stream.
- F. Daily records demonstrating amperage or usage of electrical power by the motor for the fan in the control train or inlet gas flow rate of the control train.
- G. Daily records demonstrating status of the emergency bypass vent on the RTO in the control train for the Hammermill Shredder System, *i.e.*, whether this vent is closed or open.” *Id.* at 26.

General III asserts that the terms “control train for the Hammermill Shredder System” and “control train” are “undefined and ambiguous.” Pet. at 4. As a result, the permit does not clearly indicate what is required to comply with these conditions. *Id.*

General III objects to these conditions because they are “ambiguous, unnecessary, unreasonable, and arbitrary and capricious” by requiring a continuous monitoring device for the control train and maintaining records for it. Pet. at 4. General III proposed to amend these contested conditions “to remedy ambiguities.” *Id.* at 4-5.

For Special Condition 11(k), General III proposed that

[t]he Permittee shall install, operate and maintain a continuous monitoring device to monitor the shredder exhaust gas flow rate to be used to calculate VOM emissions from a Bypass Event for the control train for the Hammermill Shredder System for using one of the following operational parameters. This monitoring device shall make measurements at least every minute and have an accuracy of at least ± 5 percent. The data measured by this device shall be automatically recorded on at least a minute by minute basis and on an hourly average in an electronic database. ~~The Permittee shall determine the gas flow rate to be used to calculate VOM emissions from a Bypass Event using data collected by this monitoring system.~~

- i. The amperage or usage of electrical power by the motor for the Roll Media Filter fan; or
- ii. The shredder exhaust gas flow rate; or
- iii. Other operational parameter(s) approved by the Illinois EPA. Pet. at 4-5.

For Special Condition 11(l), General III proposed that “[t]he Permittee shall install, operate, and maintain a continuous monitoring device for the status of the RTO emergency bypass damper ~~for the RTO in the control train for the Hammermill Shredder System~~, i.e., whether this damper is closed or open. The data collected by this device shall be automatically recorded in an electronic database.” Pet. at 5.

For Special Conditions 21(a)(iii)(E-G). General III proposed that

- E. Daily records demonstrating the flammability of the shredder exhaust gas inlet gas stream to the control train for the Hammermill Shredder System for the flammability of this gas stream as a percentage of the lower explosive limit (LEL) ~~of this stream.~~
- F. Daily records demonstrating the shredder exhaust gas flow rate, pursuant to Condition 11(k) amperage or usage of electrical power by the motor for the fan in the control train or inlet gas flow rate of the control train.

- G. Daily records demonstrating the status of the RTO emergency bypass damper vent on the RTO in the control train for the Hammermill Shredder System, *i.e.*, whether this damper vent is closed or open.” Pet at 5.

General III requests that the Board stay Conditions 11(k), 11(l), 21(a)(iii)(E), 21(a)(iii)(F), and 21(a)(iii)(G) during the pendency of this appeal. Pet. at 5.

Special Conditions 16(a)(i) and (ii): Emissions Testing

Special Conditions 16(a)(i) and (ii) provide in their entirety that

Within sixty (60) days after the date raw material is first processed through the Hammermill Shredder, the Permittee shall:

- i. Conduct opacity observations from the Hammermill Shredder System stack, each emission unit in the Ferrous Metal Separation System, Fines Processing Building (DC-01), each emission unit in the Non-Ferrous Material Separation System, and Miscellaneous Fugitive Sources during conditions which are representative of maximum emissions in order to demonstrate compliance with 35 Ill. Adm. Code 212.123 [Visible Emissions Limitations for All Other Emission Units] and Condition 3(a) of this permit. Thereafter, this testing shall be conducted once every five (5) years from the preceding testing date.
- ii. Measure and quantify (gr/dscf and lb/hr) the emissions of PM, PM₁₀ and PM_{2.5} from the Fines Processing Building (DC-01) during conditions which are representative of maximum emissions in order to demonstrate compliance with 35 Ill. Adm. Code 212.321, 35 Ill. Adm. Code 212.324(b), and Conditions 3(d) – (g), and 12(e)(1) of this permit. Thereafter, this testing shall be conducted once every five (5) years from the preceding testing date. Pet., Exh. A at 19-20.

General III states that its proposed facility “will be a minor source of emissions.” Pet. at 6. It argues that “[t]here is no regulatory basis for requiring the testing described in Conditions 16(a)(i) and (ii) to be conducted once every five (5) years.” *Id.* It adds that IEPA can assess compliance “based on the initial emissions testing, along with monitoring of operating parameters contained in the permit.” *Id.* General III argues that periodic testing “is neither technically necessary nor the norm for Agency minor source construction permits.” *Id.* General III concludes that these conditions are “contrary to law, unreasonable, unnecessary, and arbitrary and capricious.” Pet. at 6.

General III proposes to revise Special Conditions 16(a)(i) and (ii) by striking the final sentence from them. General III clarifies that it “intends to comply with the initial testing

requirements” in those conditions and “requests that the Board stay only the requirement for subsequent testing.” *Id.*

Condition 16(a)(iv): Emissions Testing

Special Condition 16(a)(iv) provides in its entirety that, within 60 days after the date on which raw material is first processed through the Hammermill Shredder, the Permittee shall

[m]easure (ppmv) and quantify (lb/hr) from the inlet and outlet emissions of VOM from the RTO, measure VOM capture efficiency of capture system, determine the destruction efficiency of the RTO, and calculate overall VOM control efficiency for the capture system and RTO, during conditions which are representative of maximum emissions in order to demonstrate compliance with 35 Ill. Adm. Code 218.986(a), and Condition 12(b)(1) of this permit. If VOM capture efficiency meets the criteria of a PTE [permanent total enclosure] as determined by USEPA Method 204 or an alternate method adopted by the USEPA to demonstrate capture efficiency, testing under this condition shall be conducted once every five (5) years from the preceding testing date. However, if the VOM capture efficiency does not meet the criteria of a PTE, subsequent testing shall be conducted within twelve (12) months from the preceding testing. Pet., Exh. A at 20.

General III states that its proposed facility “will be a minor source of emissions.” Pet. at 7. The applicable regulation requires “that emission capture and control equipment achieve an overall reduction in uncontrolled VOM emissions of at least 81%.” *Id.*, citing 35 Ill. Adm. Code 218.986(a) (Control Requirements). General III designed its facility to meet the regulatory requirement “with the capture from the enclosure and associated equipment, in conjunction with the RTO.” Pet. at 7. “[A]n RTO is a well-established and common means of controlling volatile organic compounds (VOCs) and hazardous air pollutants (HAPs).” *Id.* Its enclosure “is not a total enclosure.” *Id.* General III argues that “[i]t is infeasible for the VOM capture efficiency of the enclosure to meet the criteria of a PTE.” *Id.*

General III asserts that subsequent testing “based on whether the VOM capture efficiency meets the criteria of a PTE goes beyond the regulatory requirements and is unreasonable.” *Id.* at 7-8. General III adds that IEPA can assess compliance “based on the initial emissions testing, along with monitoring of operating parameters contained in the permit.” *Id.* It proposes to revise Condition 16(a)(iv) by striking the final two sentences from it. *Id.* at 8. General III “intends to comply with the initial testing requirements” in this condition and “requests that the Board stay only the requirement for subsequent testing.” *Id.*

General III adds that “[u]ncaptured emissions from the enclosure will be addressed in a forthcoming application for modification of the permit.” Pet. at 8, n.2.

REQUEST FOR STAY OF CONTESTED CONDITIONS

General III “is expressly not seeking a stay of the entire permit.” Pet. at 9. It requests that the Board exercise its discretionary authority and stay for the duration of this appeal only the contested conditions or portions of them described in its petition: 1(f), 10(c), 11(k), 11(l), 16(a)(i), 16(a)(ii), 16(a)(iv), 21(a)(iii)(E), 21(a)(iii)(F), and 21(a)(iii)(G). *Id.* at 9-10.

The Board has found that “it has the authority to grant discretionary stays from permit conditions.” Community Landfill Co. and City of Morris v. IEPA, PCB 01-48, 01-49 (consol.), slip. op. at 4 (Oct. 19, 2000). The Board noted that it “has previously granted or denied discretionary stays in permit appeals, both when the Agency did and did not consent to such stays.” *Id.*, citing Allied Tube and Conduit Corp. v. IEPA, PCB 96-108 (Jan. 18, 1996); Motor Oils Refining Co. v. IEPA, PCB 89-116 (Aug. 31, 1989). The Board has elaborated that permit appeals “would be rendered meaningless in many cases, if the Board did not have the authority to stay permit conditions.” Midwest Generation v. IEPA, PCB 06-156, slip op. at 6 (July 20, 2006), citing Community Landfill Co. and City of Morris v. IEPA, PCB 01-48, 01-49 (consol.), slip. op. at 4 (Oct. 19, 2000).

Caselaw provides the Board standards for determining whether a discretionary stay is appropriate. These standards are: “(1) a certain and 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.” Motor Oils Refining Co. v. IEPA, PCB 89-116, slip op. at 1-2 (Aug. 31, 1989), citing Junkunc v. Advanced Technology & Mfg., 498 N.E.2d 1179 (1st Dist. 1986). While the Board looks to these factors in determining whether to grant a stay, it “is particularly concerned about the likelihood of environmental harm if a stay is granted.” Bridgestone/Firestone Off-Road Tire Co. v. IEPA, PCB 02-31, slip op. at 3 (Nov. 1, 2001), citing Community Landfill Co. and City of Morris v. IEPA, PCB 01-48, 01-49, slip op. at 4 (Oct. 19, 2000).

In the following subsections of the opinion, the Board addresses each of these four factors before reaching its conclusion on General III’s request for a stay of the contested permit conditions.

Certain and Clearly Ascertainable Right Needs Protection

General III argued that it has “a statutory right to appeal conditions in its permit.” Pet. at 9. It added that its “petition would be rendered moot if it had to comply with the contested conditions during the appeal.” *Id.* IEPA responded that General III had cited no ascertainable right beyond asserting that Condition 10(c) provides no standard for IEPA to approve or disapprove a fugitive emissions operating program and no procedure for addressing disapproval. Resp. at 3. IEPA added that General III intends to apply for a permit modification to address this condition. *Id.*, citing Pet. at 8, n.2.

General III replied that, if the Board does not grant a stay, its statutory appeal rights “will be undercut” because it will be required to comply with contested conditions before the Board rules on their merits. Reply at 7. It also discounted IEPA’s argument about a permit modification as “misplaced.” *Id.* at 8. It argued that a modification “would not affect the appeal of contested permit conditions.” *Id.*

The Board has found that a “petitioner’s right to appeal the permit conditions should be protected, so that the integrity of the appeal is preserved.” Community Landfill Co. and City of Morris v. IEPA, PCB 01-48, 01-49, slip op. at 5 (Oct. 19, 2000). The Board agrees that complying with contested conditions while the appeal is pending would render the appeal moot. If General III complied with the contested conditions and then prevailed in this appeal, “the point of the appeal would be lost.” *Id.* The Board finds that this factor supports staying the contested permit conditions.

Irreparable Harm

General III argued that, if the contested conditions are not revised, it “would be required to conduct emissions testing and implement other measures that it believes are unlawful and infeasible, and risks having to shut down its operations if the construction permit were allowed to expire” as described in the petition. Pet. at 9. IEPA responded that General III had not asserted that there would be great costs to comply with the contested conditions. Resp. at 3, citing Community Landfill Co. and City of Morris v. IEPA, PCB 01-48, 01-49, slip op. at 5 (Oct. 19, 2000).

For each of the contested conditions, General III replied that denying the stay would cause it irreparable harm. Reply at 3-7.

Condition 1(f). General III argues that this condition places a 12-month limit on operating under its construction permit. If IEPA takes longer than that to act on its application for an operating permit, it argues that it may be required to shut down. Reply at 3-4; *see* Pet. at 2-3. If it shuts down, General III states that it “will experience significant lost revenue” and that its laid-off employees would experience “severe economic hardship.” Reply at 5. General III also lists hardship that may be borne by its suppliers and other firms such as transportation companies that serve it. It also identifies environmental consequences of a shutdown. *Id.*

However, General III states that it “is not seeking to use its construction permit to indefinitely operate under Standard Condition 1,” and it proposed to revise Condition 1(f). Reply at 4. General III requested “to operate under the proposed revision to Condition 1(f) during the term of the stay.” *Id.*

Condition 10(c). Under this Special Condition, General III expects to revise its Fugitive Emissions Operating Program to reflect actual operations. However, it argues that Special Condition 10(c) provides IEPA “a unilateral right to disapprove an amendment.” Reply at 6. If the Board does not stay this contested condition, General III argues that it “would suffer irreparable harm because it would have no remedies to address a potential disapproval of an amendment.” *Id.*

Conditions 11(k), 11(l), and 21(a)(iii)(E), (F), and (G). General III “fully intends to install, operate, and maintain a continuous monitoring device to monitor the shredder exhaust gas to be used to calculate VOM emissions from a bypass event, monitor the position of the RTO emergency bypass damper, and maintain daily records.” Reply at 6. It suggests that it has not

contested various permit conditions requiring it to monitor and record a number of operating parameters. Reply at 7, citing Exh. A at 26-27 (Condition 21). However, it argues that these contested special conditions do not clearly indicate what is required to comply with them. Reply at 6. General III concludes that it “would suffer irreparable harm if it were required to comply with these ambiguous permit conditions during the pendency of this appeal.” *Id.* at 6-7.

Conditions 16(a)(i), (ii), and (iv). General III does not contest the requirement to conduct initial emissions and capture efficiency testing and objects only to subsequent testing required by these conditions. Reply at 5, 6. General III argues that the permit could require “almost a constant state of testing. – the cost of which is great.” *Id.* at 6. It estimates that testing under Condition 16(a)(iv) costs approximately \$40,000 to \$60,000. *Id.* at 5, n.3. General III concludes that requiring it to comply with these contested testing requirements during the appeal is “too onerous to be justified” and would result in irreparable harm. *Id.* at 6, citing Community Landfill Co. and City of Morris v. IEPA, PCB 01-48, 01-49, slip op. at 5 (Oct. 19, 2000).

IEPA’s response suggested that General III’s stay request did not clearly and adequately address this factor. *See* Resp. at 3. General III replied with specific harms it expects to result from complying with contested conditions while this appeal is pending. IEPA has not sought leave to file a sur-reply to dispute any of these statements. *See* KCBX Terminals Co. v. IEPA, PCB 10-110, 11-43 (consol.), slip op. at 6 (Apr. 21, 2011). If General III complies with the contested conditions and then prevails on appeal, it would have borne costs not required to meet the provisions of the Act and Board regulations. Community Landfill Co. and City of Morris v. IEPA, PCB 01-48, 01-49, slip op. at 5 (Oct. 19, 2000). The Board concludes that this would be an irreparable harm and finds that this factor supports staying the contested permit conditions.

No Adequate Remedy at Law

General III asserted that no adequate remedy at law exists “outside this forum at this time.” Pet. at 9. IEPA responded that the Board should not accept this “conclusory statement.” Resp. at 4. IEPA added that General III intends to apply for a permit modification to address Special Condition 16(a)(iv). *Id.* Although General III acknowledged that it expects to address uncaptured emissions by applying for a permit modification, it argues that the application would not remedy issues raised in the petition. Reply at 8. The Board agrees that this appeal and the requested stay provide General III an opportunity for a remedy and finds that this factor supports staying the contested permit conditions.

Probability of Success

General III argued that, because IEPA imposed permit conditions that are unreasonable and unlawful, “there is a probability of success on the merits of the appeal.” Pet. at 9.; Reply at 1. IEPA responds that this is merely a conclusory statement. It argues that it will prove that the Act and Board regulations support the contested conditions. Resp. at 4. IEPA also stresses its “statutory duty to oversee emissions from contaminant sources.” *Id.*, citing 415 ILCS 5/4(b) (2018). IEPA concludes that the Board should weigh this factor against granting a stay. Resp. at 4.

The parties strenuously disagree on their likelihood of success. The Board does not find this factor helpful in this case and declines to weigh it either on favor of or against granting a stay. *See Community Landfill Co. and City of Morris v. IEPA*, PCB 01-48, 01-49, slip op. at 5 (Oct. 19, 2000).

Absence of Environmental Harm

General III states that its operation will comply “with the applicable permit emission limits, as well as monitoring, recordkeeping and reporting requirements in the permit.” Pet. at 9. It argues that “[t]he environment will not be harmed if a stay is granted.” *Id.* IEPA responded that General III provides no support for a conclusory statement. Resp. at 4. IEPA adds that “this appeal does not concern an existing operation with a prior permit that will ensure emission compliance pending the appeal’s outcome.” Resp. at 4, citing *KCBX Terminals Co. v. IEPA*, PCB 10-110, 11-43 (consol.), slip op. at 6-7 (Apr. 21, 2011).

General III replied that it does not appeal “any of the emissions limits, control requirements or operating parameters in the permit” or the “extensive monitoring, recordkeeping and reporting requirements.” Reply at 3. It will conduct “all of the initial emissions and capture efficiency testing.” *Id.* General III argues that none of the conditions for which it requests a stay “will affect the permitted emissions that will be allowed from this facility.” *Id.*

General III cites the affidavit of its technical consultant, Mr. John Pinion, an engineer with 34 years of air permitting and environmental compliance. Reply at 3; *see* Exh. B. His affidavit states that granting the requested stay will not prevent or delay compliance with emission limits, operation of required monitoring devices, required recordkeeping or reporting of operating data, or initial emission testing. He adds that granting the stay will not affect implementation of the existing Fugitive Emissions Operating Program. Reply, Exh. B. Based on these factors, Mr. Pinion concludes “to a reasonable degree of scientific certainty that the environment will not be harmed if a stay of the contested conditions, as set forth in the Request and Reply, were granted.” *Id.*

The Board recognizes IEPA’s argument that this facility does not operate under a prior permit. However, General III emphatically states that it requests a stay “only as to the contested conditions or portions thereof, as described in its petition.” Pet. at 9; *see* Reply at 1-2. General III attached to its reply a copy of the permit edited to indicate the language that is the subject of its appeal and its proposed revisions. Reply at 2, n.1; *see* Exh. A. General III states that, other than its proposed revisions, it “will be subject to, and intends to fully comply with, all of the conditions in the construction permit as issued by the Agency.” Reply at 3.

General III’s technical consultant has concluded that granting a stay of the contested conditions will not result in harm to the environment. Reply, Exh. B. IEPA has not sought leave to file a sur-reply to dispute any of this conclusion. *See KCBX Terminals Co. v. IEPA*, PCB 10-110, 11-43 (consol.), slip op. at 6 (Apr. 21, 2011). While the Board weighs the likelihood of environmental harm if a request for a stay is granted, the record now before the Board does not indicate that a stay would itself result in this harm.

Board Discussion

The Board has considered the factors it weighs to determine whether to grant a request for a discretionary stay of contested permit conditions. Based on that consideration, the Board grants General III's request for a partial stay of the contested conditions or portions of them as requested in its petition: Special Conditions 1(f), 10(c), 11(k), 11(l), 16(a)(i), 16(a)(ii), 16(a)(iv), 21(a)(iii)(E), 21(a)(iii)(F), and 21(a)(iii)(G). The contested conditions are stayed until the Board's final action in this appeal, or until the Board order otherwise.

Although General III's petition appealed Special Condition 1(f) in its entirety and argued that it should be struck from the permit (Pet. at 2-3), its reply instead proposed to IEPA a revised Special Condition 1(f) (Reply at 4). General III requested "to operate under the proposed revisions to Condition 1(f) during the term of the stay." Reply at 4. While Board can now grant the motion for a partial stay of the contested conditions, it has not reached a substantive conclusion on Special Condition 1(f) and will not revise it at this stage of the proceeding.

The Board stresses that its decision to grant a partial stay makes no finding on the merits of General III's permit appeal. *See KCBX Terminals Co. v. IEPA*, PCB 10-110, 11-43 (consol.), slip op. at 7 (Apr. 21, 2011). The Board also stresses that it makes no finding "on the bearing which any of the filed documents may or may not have on the issues in this appeal." *Motor Oils Refining Co. v. IEPA*, PCB 89-116, slip op. at 2 (Aug. 31, 1989).

Lastly, the Board directs its hearing officer to proceed as expeditiously as practicable consistent with the statutory decision deadline, which is now January 7, 2021.

CONCLUSION

The Board grants General III's unopposed motion for leave to file a reply and accepts its reply. For the reasons above, the Board grants General III's request for a discretionary stay of the conditions or portions of them as requested in its petition.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 17, 2020, by a vote of 4-0.



Don A. Brown, Clerk
Illinois Pollution Control Board