

ILLINOIS POLLUTION CONTROL BOARD

January 6, 2000

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 94-373
) (Enforcement - Land)
WAYNE BERGER and BERGER WASTE)
MANAGEMENT, INC.,)
)
Respondents.)

ORDER OF THE BOARD (by M. McFawn):

This case was decided by the Board on May 6, 1999. In its order adopted on that date, the Board revoked respondent Wayne Berger's landfill operating permit, ordered Berger to close the landfill he operated, and imposed a civil penalty of \$30,000 on Berger. People v. Berger (PCB 94-373), May 6, 1999, slip op. at 28, 2-3, 5. That order is currently on appeal before the Fifth District Appellate Court. Illinois Environmental Protection Agency v. Illinois Pollution Control Board, No. 5-99-0386 (Ill. App. 5th Dist.). On December 15, 1999, respondent Wayne Berger filed "Respondent's Emergency Motion to the Board for Stay of Order," seeking a stay of the Board's May 6 order while the appeal is pending. Berger's motion was served on both counsel for the petitioner in the case before the Board and counsel for the other parties to the appellate court case. No other party filed a response to the motion.

Although this case is currently before the appellate court, Berger's stay motion is properly before the Board under 35 Ill. Adm. Code 101.303 and Illinois Supreme Court Rule 335(g). Section 101.303 provides that "[t]he procedure for stay of any Board order during appeal shall be as provided in [Rule 335]."¹ Rule 335(g) provides in relevant part that "[a]pplication 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 the Board has been reluctant to stay its orders when a stay may result in harm to the public or the environment, this reluctance does not extend to staying orders requiring merely payment of a penalty. See Illinois Environmental Protection Agency v. Pielet Bros. Trading, Inc. (February 4, 1982), PCB 80-185, slip op. at 1, *aff'd sub nom.* Pielet Bros. Trading, Inc. v. Pollution Control Board, 110 Ill. App. 3d 752, 442 N.E.2d 1374 (5th Dist. 1982); Illinois Environmental Protection

¹ Absent a provision like Section 101.303, Supreme Court Rules do not expressly apply to proceedings before the Board. See 35 Ill. Adm. Code 101.100(b).

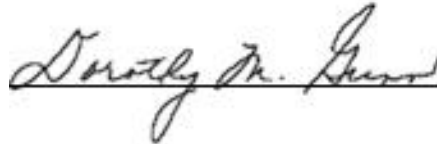
Agency v. Incinerator, Inc. (October 14, 1971), PCB 71-69, slip op. at 1, 3, *aff'd sub nom. Incinerator, Inc. v. Pollution Control Board*, 15 Ill. App. 3d 514, 305 N.E.2d 35 (1st Dist. 1973), *aff'd*, 59 Ill. 2d 290, 319 N.E.2d 794 (1974). The basis of Berger's motion is the asserted hardship that Berger will suffer if the State pursues collection of the penalty. The State has not provided the Board with any reason not to grant this stay. Nevertheless, the Board will not stay those portions of its order revoking Berger's permit and requiring closure of the landfill (Berger, *supra*, ¶¶ 2-3). It will, however, stay the provision of the order imposing the \$30,000 civil penalty (*Id.*, ¶ 5) while Berger's appeal is pending.

Berger's motion for a stay of the Board's May 6, 1999 order is granted as of this date with respect to paragraph 5 on pp. 28-29 of the order, and denied with respect to the other provisions of the May 6, 1999 order.

IT IS SO ORDERED.

Board Member E.Z. Kezelis dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 6th day of January 2000 by a vote of 5-1.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board