

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.)

DISSENTING OPINION (by E.Z. Kezelis):

Because I believe respondent's motion for stay should be denied, I respectfully dissent from the majority opinion adopted today. The decision to grant or deny a motion for stay is vested in the sound discretion of the Board. See People v. ESG Watts, Inc. (March 19, 1998), PCB 96-107. Because respondent waited more than seven months before seeking a stay, and because no good cause for granting a stay was presented in respondent's motion, I believe the better exercise of the Board's discretion would be to deny it.

While the record reflects that cross-appeals from our final order of May 6, 1999, were filed and are pending in the Fifth District Appellate Court, the record is silent as to whether respondent ever complied with our order to immediately close the landfill. From the record, we do know, however, that respondent did not pay the penalty imposed upon him, and that on December 9, 1999, the Illinois Environmental Protection Agency (Agency) notified respondent that it would impose interest on the unpaid \$30,000 penalty and commence collection. Presumably as the direct result of that notice, on December 15, 1999, respondent filed an "Emergency Motion for Application of Stay" with the Board. In that motion, respondent stated that Illinois Supreme Court Rule 335 directs litigants to seek a stay in the first instance from the agency whose decision is being appealed, and argues that his financial circumstances warrant a stay.

Complainant has not filed a response to respondent's motion for stay. While Section 101.241 of the Board's procedural rules provides that a party failing to file a response to a motion shall be deemed to have waived objection, the rule also provides that such waiver does not bind the Board in its decision of the motion. 35 Ill. Adm. Code 101.241.

Despite complainant's apparent waiver of objection, I believe respondent's motion for stay should, nonetheless, be denied because it is untimely. Section 103.240 of the Board's procedural rules gives a party 35 days from the adoption of a final Board order to file a motion for rehearing, for modification, to vacate, or for other relief. 35 Ill. Adm. Code 103.240. Our

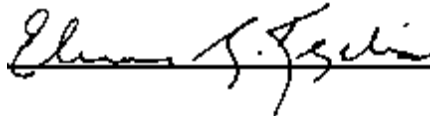
May 6, 1999 order was a final, appealable order, and relief from that final order should have been sought within the time period provided.

The Board has previously denied a motion for stay as untimely when that motion was filed nearly three months after entry of the Board order from which a stay was sought. See Sangamon County v. Miller (April 22, 1993), AC 92-37. In this case, respondent's motion was filed more than seven months after entry of the Board's final order, and only after further enforcement was threatened by the Agency. Respondent has not provided any justification for this delay.

Second, the only justification that is provided in support of respondent's motion for stay is his financial condition. Absent other extenuating circumstances, the Board has denied similar motions in other cases. See *e.g.*, People v. ESG Watts, Inc. (March 19, 1998), PCB 96-107; and People v. Chicago Heights Refuse (February 6, 1992), PCB 90-112.

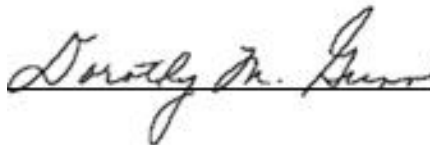
Cases cited by the majority in support of the decision to grant a stay are readily distinguishable. See *e.g.*, IEPA v. Incinerator, Inc. (October 14, 1971), PCB 71-69 (the Board granted a stay as to penalty payment on the condition that respondent post an appropriate bond¹); and IEPA v. Pielet Brothers Trading, Co. (February 4, 1982), PCB 80-185 (the Board granted a stay as to penalty payment based, at least in part, on the Agency's written response in which it specifically stated that it had no objection to the stay).

For the reasons set forth herein, I would deny respondent's motion as untimely and unjustified. Therefore, I respectfully dissent from today's majority opinion.



Elena Z. Kezelis
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above dissenting opinion was submitted on the 10th day of January 2000.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

¹ It is also worth noting that the respondent in Incinerator, Inc. had taken significant steps toward returning its facility to compliance prior to seeking a stay.