

of a permit. On March 26, 1987, the Agency denied the application for a permit finding it to be incomplete. Joliet filed the instant Petition for Review on April 30, 1987 (hereinafter "the second permit denial"). The response further states that Joliet has followed all procedures of the Illinois Environmental Protection Act (hereinafter "the Act") and Administrative Code and that Joliet does not understand how the Board could be divested of jurisdiction.

On June 4, 1987, the Agency filed a "Memorandum in support of Respondent's Motion to Dismiss." That memorandum argued that the Board lacks jurisdiction in this case under the theory articulated in Alburn, Inc. v. IEPA, PCB 81-23, March 19, 1981, and Caterpillar Tractor Company v. IEPA, PCB 79-180, July 14, 1983. The Agency argues that such a holding is necessary to avoid a "continuous stream of hearings and appeals with no decision ever being final." On June 9, 1987, Joliet filed a response to the Agency's memorandum stating that no "motion" has been filed and the memorandum should be struck, that the time for a dismissal motion has passed and that Alburn and Caterpillar do not apply. Since the jurisdictional issue was raised by the Board in its first order in this proceeding, all arguments to that issue are timely and will be accepted.

The relevant facts in this proceeding seem clear. The first permit denial concerned an application by Joliet to operate a sand and gravel processing plant at 2509 Mound Road. Joliet asserted that the application contained "adequate information" to demonstrate that its operations would not violate Board regulations or the Act regarding particulate emissions. The Agency denied that application for inadequate information and that denial was, in part, affirmed by this Board on February 5, 1987. Joliet appealed the Board's decision in that matter to the Third District Appellate Court on March 12, 1987 (Case No. 3-87-0141). That appeal is presently pending before the Third District.

The second permit denial concerned an application by Joliet to conduct the same sand and gravel operation at the same location. Joliet again asserted that the application contained "adequate information" to demonstrate that its operations would not violate Board regulations or the Act regarding particulate emissions.

The Board does not believe that the Act allows a facility to seek multiple contemporaneous permit reviews before this Board and the courts involving the same facility attempting to conduct the same operations under the same regulatory framework (the particulate emissions regulations).

In both Alburn and Caterpillar, the Board held that the Agency lacks the authority to issue a second valid and legally

enforceable permit to the same facility for the same operations under the same regulatory framework while the first permit is under review by this Board. In Alburn, the Agency moved to dismiss a pending permit appeal because of the probable issuance of subsequent permits resolving the controversy. The Board denied dismissal:

The permits issued on September 9, 1980, to petitioner, once appealed to the Board, could not be nullified by Agency modification or reissuance until dismissal of the petitions. Negotiations and settlements subsequent to the lawful issuance of a permit cannot render the permit of no legal import once it has been appealed to the Board.

Unless the proceedings in PCB 80-189 and 80-190 are to be withdrawn, and modified or new permits are to be subsequently issued, the prior permits remain in full legal effect. It is axiomatic that two permits covering the same process or equipment and issued pursuant to the same legal authority cannot have simultaneous legal effect. Because neither petitioner nor respondent has alleged that either permit is of no legal effect, the Board concludes that the ones issued prior in time have primacy and that the later permits, assuming they exist, did not nullify the legal effect of the prior permits. (Alburn, March 19, 1981).

In Caterpillar, the permit applicant moved to dismiss the pending permit appeal after issuance of a subsequent permit which resolved the controversy. The Board first considered whether the second permit could issue at all:

This motion indicates that confusion still exists concerning the ability of the Agency to modify a permit by issuing yet another permit during the pendency of its appeal to the Board. In Alburn, Inc. v. IEPA, PCB 81-23, 23 (March 19, 1981, as reaffirmed May 1, 1981), the Board considered the effect of the Agency's purported "issuance" of a new permit covering the same operation of the same facility which was the subject of an earlier, still pending, permit denial appeal. The Board found that the earlier issued permits "could not be nullified by Agency modification or reissuance until dismissal of the petitions."

To put this more clearly, the Board finds that the Agency has no jurisdiction to issue any subsequent permits once the disputed permit has been appealed to the Board, just as the Board has no authority to modify its Orders once they have been appealed to the courts. The April 18, 1983, "permit issued" to Caterpillar is a nullity. (Caterpillar, June 3, 1983).

After additional briefing of the issue, the Board was persuaded by the parties arguments that a subsequently issued permit was voidable:

Caterpillar's primary argument is that the April 18, 1983, permit should be considered a voidable permit, rather than a void one. The argument is premised on the fact that since the Agency has the legal power to issue permit modifications according to Illinois contract law, any unauthorized use of that power by the Agency would result in a permit which could be voided or validated by the permittee, but which could not be repudiated by the Agency. See Litchfield v. Litchfield Water Supply Co., 95 Ill.App. 647 (1901), and Corbin on Contracts, Section 6 (1952). Caterpillar argues that its Motion to Dismiss amounts to a satisfaction of the modified permit, which would be upheld by a Board Order dismissing the appeal.

* * *

However, the Caterpillar "voidable but not void" permit argument, as buttressed by the Agency's "draft permit subject to USEPA review" argument, is persuasive. The Board finds that the permit "issued" April 18, 1983, is a voidable permit, having no effect until the dismissal of the instant permit appeal. Caterpillar's May 6, 1983, motion to dismiss is hereby granted. (Caterpillar, July 14, 1983).

In both proceedings, the Board was considering the validity of a subsequent permit decision regarding the same facility for the same operations, under the same regulatory framework. In both proceedings, the Board held that the second permit decision was of no force and effect while the first permit decision was still under appeal to this board

The Board did not hold in Alburn or Caterpillar that the permit applicant and the Agency were completely foreclosed from attempting to resolve their differences once a matter was on appeal. The Board held that any subsequent permit decision by the Agency was "voidable" by the applicant. If the applicant and the Agency believe they can resolve their differences, they can proceed through the permitting procedures that are mandated by state and federal law. If the "voidable" permit decision which results from that process is acceptable to the applicant, the applicant can move to dismiss the pending permit appeal. Once the prior permit appeal is dismissed, the "voidable" permit decision would become legally effective. This ensures that requirements which are placed on the permitting process can be met (e.g., public notice, hearing and participation in the development and revision of any permit; 40 CFR Part 25, Part 51, Part 124), while still encouraging negotiations to settle disputes. That process is exactly what occurred here. While the first matter was on appeal, Joliet submitted a second application, the Agency evaluated that application within the procedural confines of the law and rendered a decision. That decision (a determination of incompleteness) is voidable by the applicant. It is not, however, appealable since it is of no legal force and effect until the applicant dismisses the pending permit appeal, or until a "final" determination is made on the permit appeal. Since the first permit denial is presently under review in the Third District, no "final" decision has been issued in that controversy. Since the second permit denial has no legal force and effect while the first permit denial is still under judicial review, this Board lacks jurisdiction to review the second permit denial. Accordingly, the April 30, 1987, petition for review filed by Joliet is hereby dismissed.

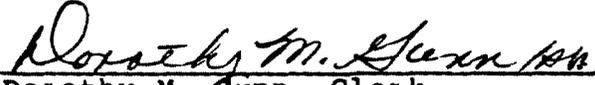
The Board notes that this proceeding provides an even more compelling case that subsequent permit decisions lack the force and effect of law that would allow their appeal. Permitting decisions must be made by the Agency in short time periods, usually 120 days. Review of those decisions by the Board and courts can ultimately take several years, during which time the applicant can continue to submit permit applications. If each Agency decision were reviewable, an applicant could have many "permit decisions" under review by the Board, the appellate courts and the Supreme Court. This could encourage permit applicants to submit minimal information in the first application and provide more information in each subsequent permit application until the Agency granted a permit or a favorable decision was reached by one of the reviewing bodies on one of the many "permit decisions."

As the Board has determined that it lacks jurisdiction in this matter, all other pending motions are dismissed as moot.

IT IS SO ORDERED

Board Member Joan Anderson dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 10th day of JUNE, 1987, by a vote of 5-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board