

ILLINOIS POLLUTION CONTROL BOARD
December 15, 1988

VILLAGE OF WINNETKA,)
)
 Petitioner,)
)
 v.) PCB 88-164
)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on a November 22, 1988 motion for confirmation filed by petitioner the Village of Winnetka. Winnetka alternatively submits an amended petition for variance. The Illinois Environmental Protection Agency (Agency) filed its response in opposition to the motion on November 29, 1988.

Winnetka asks that the Board issue an order "confirming" that its petition for variance was filed within 20 days after the effective date of 35 Ill. Adm. Code 212.201 as to Winnetka. Alternatively, Winnetka files an amended petition for variance, with the same text as its first variance petition. Thus, Winnetka states that the amended petition is filed within 20 days of the effective date of 35 Ill. Adm. Code 212.201 as to Winnetka, since it is filed within 20 days of the Board's order of November 3, 1988, denying Winnetka's motion for reconsideration and stay in Proposed Amendment to 35 Ill. Adm. Code 212.209, Village of Winnetka Generating Station, R86-41. By asking for confirmation or filing an amended petition, Winnetka seeks to take advantage of Section 38(b) of the Environmental Protection Act (Act) (Ill. Rev. Stat. 1987, ch. 111^{1/2}, par. 1038(b)). Section 38(b) provides that if a petition for variance from a rule or regulation is filed within 20 days after the effective date of that rule or regulation, the operation of that rule or regulation shall be stayed as to that petitioner pending disposition of the petition. Winnetka maintains that because it became subject to Section 212.201 for the first time when its site-specific petition (R86-41) was denied by the Board on August 4, 1988, with reconsideration denied on November 3, 1988, the filing of its variance petition triggered the automatic stay provision of Section 38(b) of the Act.

In response, the Agency contends that Section 38(b) applies to the effective date of a regulation, not to the date when a

particular entity becomes subject to that regulation. The Agency points out that Section 212.201, which became effective in 1986, is not a new regulation, and argues that the finality of that regulation should not be disturbed by any "as applied" claim by Winnetka. Thus, the Agency opposes Winnetka's motion. However, the Agency suggests that this situation may be appropriate for the grant of a discretionary stay, and states that it would not object to such a discretionary stay.

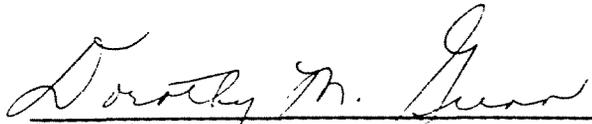
The Board agrees with the Agency that the automatic stay provision of Section 38(b) does not apply to this situation. The Board finds that Section 38(b) applies to situations where a new rule becomes effective, and not to instances where an entity becomes subject to an existing rule. Thus, Winnetka's motion for confirmation is denied. Because the Board today has granted the requested variance, it need not consider the Agency's suggested discretionary stay.

Finally, the Board notes that on December 9, 1988, Winnetka filed a reply to the Agency's response. The Board does not ordinarily accept replies. However, the Board has read the reply, but finds nothing to convince it that Section 38(b) applies to this case.

IT IS SO ORDERED.

J. D. Dumelle concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 15th day of December, 1988, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board