

ILLINOIS POLLUTION CONTROL BOARD
October 5, 1989

IBP, INC.,)
)
 Petitioner,)
)
 v.) PCB 89-128
) (Permit)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by J. Marlin):

On August 21, 1989, the Illinois Environmental Protection Agency (Agency) filed a Motion to Dismiss. IBP, Inc. (IBP) filed a Response to the Agency's Motion to Dismiss on August 25, 1989.

The Agency requests that the Board dismiss IBP's permit appeal because the time to appeal has elapsed or, in the alternative, because the Agency did not make a final decision in this matter and therefore the issue is not ripe for appeal. The Agency also suggests that the instant appeal is moot due to a recently issued permit.

By its Order of August 31, 1989, the Board ordered the parties to make additional filings verifying factual statements asserted in previous filings and address Caterpillar Tractor Co. v. Illinois Environmental Protection Agency, PCB 83-86 (October 18, 1983).

IBP filed its response to the Board's Order on September 21, 1989. The Agency filed its response on September 28, 1989 with a Motion to File Instanter. That motion is granted. On October 3, 1989, the Agency filed a Motion to Amend its Motion to Dismiss. The amendment is hereby allowed.

The factual assertions made by the recent filings have been verified by accompanying affidavits. As a result it appears that the following represents an accurate chronology of events.

March 16, 1989 - The Agency received IBP's application for a renewal of its permit to spread paunch manure.

April 13, 1989 - The Agency attempted to send to IBP a letter, dated April 12, 1989, entitled

Notice of
Incompleteness.

- July 21, 1989 - IBP received a copy of the April 12th Agency letter.
- August 7, 1989 - The Agency received a second application for the renewal of the permit to spread paunch manure.
- August 10, 1989 - IBP filed a Petition for Review challenging the Agency's April 12, 1989 decision.
- September 22, 1989 - The Agency issued IBP a permit to spread paunch manure.

The Agency asserts that the above facts are analogous to those presented in Caterpillar and Reichold Chemicals, Inc. v. Illinois Environmental Protection Agency, PCB 89-94 (June 8, 1989). As a result, the Agency states that those decisions should be followed and IBP's August 10th petition should be dismissed. Additionally, the Agency states that since IBP now has a permit the instant appeal is moot.

IBP seems to be concerned with the impact a dismissal will have on the effectiveness of the permit which it sought to renew. Specifically, IBP raises the issue as to the timing of its renewal application. In its response to the Board's Order, IBP states:

If the Board determines that the effective date of the reapplication, if any, relates back to the date of initial application, then Petitioner will concede that the issues raised on appeal are moot. However, if the effective date is the date of submission of additional information to the Agency, the appeal is not moot....

(IBP Response to Order,
p.2).

While not expressly mentioning it, IBP is likely referring to the issue of a stay under the Administrative Procedure Act (APA). Section 16(b) of the APA provides:

When a licensee has made a timely and sufficient application for the renewal of a

license ... the existing license shall continue in full force and effect until the final agency decision on the application has been made....

Ill. Rev. Stat. 1989, ch.
127, par. 1016(b).

The Board is persuaded by the Agency that Caterpillar and Reichold Chemicals are controlling. Here, IBP re-opened its application for a permit renewal subsequent to the Agency's April 12th decision yet prior to filing an appeal of that decision with the Board. The same relative timing of events occurred in Caterpillar and Reichold Chemicals. In both those cases, the Board dismissed the pending permit appeal.

The outcome does not change even though the Agency did issue a permit on September 22, 1989. While IBP may now file an appeal with respect to the September 22nd permit, the instant appeal was improperly filed; the April 12th decision was not final, since IBP pursued its application further with the Agency.

An analogous situation occurs when the Board makes a decision. After a decision by the Board, a party may either file a motion for reconsideration with the Board or file an appeal with the Illinois Appellate Court. If the former option is chosen, the Board's initial decision is not considered final for the purposes of appeal to the appellate court, and any such appeal, prior to the Board's action on reconsideration, is improper and subject to dismissal. Clean Air Coordinating Committee v. Environmental Protection Agency, 42 Ill. App. 3d 124, 355 N.E. 2d 573 (1st Dist. 1976).

However, the situation at hand is different from one where the Agency issues a permit subsequent to the proper filing of a permit appeal. In such a situation the subsequently issued permit is considered "voidable". The pending permit appeal must be dismissed before the new permit may become effective. Joliet Sand and Gravel Company v. Illinois Environmental Protection Agency, PCB 87-55, 78 PCB 400 (June 10, 1987).

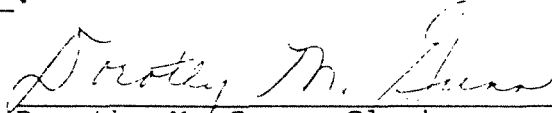
Finally, if IBP were entitled to an automatic stay under Section 16(b) of the APA, such a stay would certainly be effective until the Board renders a decision with respect to a properly filed permit appeal. See Borg-Warner Corp. v. Mauzy, 100 Ill. App. 3d 862, 427 N.E. 2d 415 (1981). It must be remembered that the permit appeal process is an administrative continuum involving the Agency and the Board. It is only complete after the Board rules. Illinois Environmental Protection Agency v. Illinois Pollution Control Board, 138 Ill. App. 3d 550, 486 N.E. 2d 293, 294 (3rd Dist. 1985) aff'd, Environmental Protection Agency v. Pollution Control Board, 115 Ill. 2d 65, 503 N.E. 2d 343 (1986).

For the above reasons, the Agency's motion is granted, and this matter is hereby dismissed.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1987 ch. 111 $\frac{1}{2}$ par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 5TH day of October, 1989, by a vote of 6-0.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board