

ILLINOIS POLLUTION CONTROL BOARD

May 15, 2003

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
 v. )  
 )  
 STATE OIL COMPANY, an ILLINOIS )  
 corporation, WILLIAM ANEST f/d/b/a S & S )  
 PETROLEUM PRODUCTS, CHARLES )  
 ABRAHAM, JOSEPHINE ABRAHAM, and )  
 MILLSTREAM SERVICE, INC., an Illinois )  
 corporation, )  
 )  
 Respondents. )

PCB 97-103  
(Enforcement – Water, Land)

ORDER OF THE BOARD (by T.E. Johnson):

On April 18, 2003, the People of the State of Illinois (People) filed a motion asking the Board to modify a March 20, 2003 opinion and order. On April 30, 2003, respondents Charles and Josephine Abraham (the Abrahams), and Millstream Service, Inc. (Millstream) filed a response in opposition to the motion to modify. On May 5, 2003, respondents State Oil Company (State Oil), and William and Peter Anest (the Anests) filed a response opposing the motion to modify. On May 8, 2003, the Abrahams and Millstream filed a motion for stay of order pending appeal. On May 13, 2003, State Oil and the Anests filed a motion for stay of order pending appeal. To date, a response to either motions for stay has not been received.

For the reasons discussed below, the Board grants the motions to stay, and denies the motion to modify the order.

**MOTIONS TO STAY**

The motions to stay are substantively identical. In the motions, the respondents assert that a petition for review of the Board's March 20, 2003 order was timely filed with the Appellate Court of Illinois for the Second District. Motions at 3. According to the motions, the petitions for review were assigned case numbers 03-0463 and 03-0493. The respondents argue that a stay is necessary to preserve the status quo in that the date for payment of the penalty will pass prior to a decision by the Appellate Court. The respondents assert that the People will not be prejudiced by the stay for the duration of the Appellate process, especially in light of the evidence contained in the record that the People waited more than five years before first requesting payment of costs allegedly incurred, and over ten years before asking for penalties. Motions at 4. The respondents assert that a stay of the Board's order will not harm the environment; as the record establishes that the tanks at the site were relined by the Abrahams and Millstream in 1989, and that nothing in the record indicates any releases have occurred in the interim. Motions at 5.

The response time to the motions for stay has not yet lapsed. As stated, no response to the motions to stay has been received by the Board. The Board will not grant any motion before the expiration of the 14 day response period unless undue delay or material prejudice would result. *See* 35 Ill. Adm. Code 101.500(d). In light of the deadline the March 20, 2003 order imposes for payment of penalty, and the appellate court filings, the Board finds that material prejudice will result if the Board waits for the expiration of the 14 day response period before addressing the motions to stay.

Pursuant to Section 101.906(c) of the Board's procedural rules, the procedure for the stay of any final Board order during appeal will be as provided by Rule 335 of the Rules of the Supreme Court of Illinois. 35 Ill. Adm. Code 101.906(c). Supreme Court Rule 335(g) Rule 335 of the Rules of the Supreme Court of Illinois provides that the "[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." 172 Ill. 2d R. 335.

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.*, PCB 96-107 (Mar. 19, 1998), providing that such motions "shall ordinarily be made in the first instance to the agency." The Board uses its discretion when deciding whether to grant a motion to stay of a final Board order. *See Alice Zeman v. Village of Summit, et al*, PCB 92-174 (Apr. 8, 1993); *Village of Mattson v. World Music Theatre et al*. PCB 90-146 (Mar. 25, 1993).

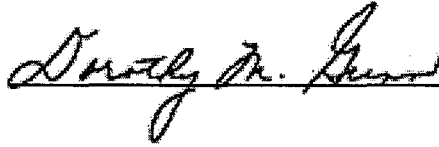
In this instance, the Board finds that a stay of the final Board order is appropriate. Accordingly, the motions to stay the March 20, 2003 Board order are granted.

#### **MOTION TO MODIFY**

The People ask the Board to modify paragraph 6 on page 27 of the March 20, 2003 order. The motion has been fully responded to by all respondents. However, in light of the appeal made to the Appellate Court, the Board denies the motion at this time. The Board has previously considered this issue. The Appellate Court has affirmed the Board's decision not to consider a motion to reconsider because of a petition for review filed with the court in *Watts v. IEPA*, PCB 01-139 (Jun. 6, 2002). The Appellate Court has found that Appellate Court jurisdiction attaches when an appeal of a Board decision is properly made, thus depriving the Board of jurisdiction to modify its order. *See Cain v. Sukkar*, 167 Ill. App. 3rd. 941 (4th Dist. 1988). Accordingly, the Board does not have jurisdiction to grant the motion to modify its March 20, 2003 order, and the motion is denied.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 15, 2003, by a vote of 7-0.

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

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board