

ILLINOIS POLLUTION CONTROL BOARD
March 23, 1989

FANSTEEL/ESCAST, INC.,)
)
 Petitioner,)
)
 v.) PCB 89-31
)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by R. C. Flemal):

On February 15, 1989 Fansteel/Escast, Inc. ("Fansteel") filed a Petition for Review of permit denial regarding disposal of its sodium hydroxide wastestream at Browning-Ferris Industries, Inc.'s ("Browning Ferris") disposal site located in Waukegan, Illinois. On the same day Fansteel filed a Motion for Stay of Agency Denial and Expedited Decision. Today the Board addresses Fansteel's motion.

On March 9, 1989 the Illinois Environmental Protection Agency ("Agency") filed a response to Fansteel's motion, accompanied by a Motion to File Instanter; this instanter motion is granted.

Also on March 9, 1989 the Board, noting that disposition of the stay portion of Fansteel's motion may hinge on whether the waste at issue has been previously disposed of pursuant to the terms and conditions of a valid permit, ordered Fansteel to file a copy of its prior permit(s). On March 20, 1989 Fansteel timely filed the requested documents.

In the meantime, on March 10, 1989 the Agency filed its record in the permit appeal, also accompanied by a Motion to File Instanter; this instanter motion is also granted.

STAY

The threshold issue here is whether the Illinois Administrative Procedure Act ("APA"), as applied to the particular circumstances of this case, confers an automatic stay, and hence renders Fansteel's motion for stay moot. (see Borg-Warner Corp v. Mauzy, 100 Ill. App. 3d 862, 427 N.E.2d 415 (1981); and City of St. Charles v. Illinois Environmental Protection Agency, PCB 88-148 Slip. Or. 11/17/88). In pertinent part, the APA specifies at Ill. Rev. Stat. 1987, ch. 127, par. 1016(b):

When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license shall continue in full force and effect until the final agency decision on the application has been made unless a later date is fixed by order of a reviewing court.

It is uncontested that Browning-Ferris made timely application for a license (permit) to dispose of Fansteel's sodium hydroxide waste (see Agency Record, Exhs. 1 and 3). It is likewise uncontested that the application was for renewal of a license (permit) previously issued (see Agency Record, Exh. 2). In addition, the courts have held that the Agency-Board review of permit applications constitutes an "administrative continuum" in which a final decision is not rendered until the Board has taken its final decision (IEPA v. PCB and Waste Management, Inc., 138 Ill. App. 3d 550, 551 (1985); affirmed 503 N.E.2d 343 (1986)); such final Board action has not yet occurred. On its face, therefore, Section 16(b) of the APA would appear to grant an automatic stay by virtue of maintaining the full force and effect of the existing license (permit) under which Fansteel has disposed of its sodium hydroxide wastestream.

Nevertheless, the Agency contends that Fansteel's reliance on Section 16(b) is misplaced. However, the Agency does not address the matter of why it believes Section 16(b) does not apply. Rather, it recites the text of Section 39(h) of the Illinois Environmental Protection Act (35 Ill. Rev. Stat., Ch. 111^{1/2}) ("Act"). This section specifies, among other matters, that after January 1, 1987 authorization for disposal of hazardous waste streams may be granted only if the generator has reasonably demonstrated that alternatives to landfill disposal of the untreated wastestream are not technologically feasibility and economically reasonable. The Agency contends that the Legislature adopted Section 39(h) because of a need to reduce the deposit of hazardous wastestreams, that the Legislature did not intend this public policy to be circumvented by permit appeals, and that Fansteel has not shown that alternate disposal arrangements cannot be made.

The Board, frankly, is at pains to understand the point of the Agency's argument. Such worth as these arguments may have is directed to the merits of this case, without seeming relevance to the instant matter of the applicability of Section 16(b). The Board does agree with the Agency that Section 39(h) establishes a public policy intended to reduce the deposit of hazardous wastestreams. However, Section 39(h) does not either explicitly or implicitly extinguish an applicant's rights under Section 16(b). Moreover, should the Agency refuse to grant authorization, Section 39(h) specifically allows applicants to

appeal pursuant to the permit appeal provisions of Section 40(a) of the Act. Finally, that Fansteel has or has not shown that alternative disposal arrangements cannot be made is a matter yet to be determined by this Board, as the trier of fact.

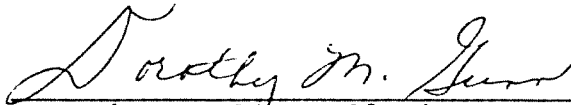
The Board therefore finds that Section 16(b) of the APA applies to the facts of the instant matter, and renders an automatic stay. Accordingly, Fansteel's Motion for Stay is denied as moot in so far as the stay is conferred as a matter of law.

EXPEDITED DECISION

As previously noted in its order of February 23, 1989 setting this matter for hearing, the Board will make every effort to decide this matter as expeditiously as possible and is consistent with its case load.

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 23rd day of March, 1989, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board