

ILLINOIS POLLUTION CONTROL BOARD
March 20, 2003

NORTH SHORE SANITARY DISTRICT,)
)
 Petitioner,)
)
 v.) PCB 03-146
) (Permit Appeal - Air)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by W.A. Marovitz):

On March 10, 2003, North Shore Sanitary District (the NSSD) timely filed a petition asking the Board to review a March 3, 2003 determination of the Illinois Environmental Protection Agency (Agency). *See* 415 ILCS 5/40(a)(1) (2002); 35 Ill. Adm. Code 105.206(a). On March 11, 2003, the NSSD filed an emergency motion to stay the Agency's determination. NSSD Mot. at 1. On March 14, 2003, the Agency filed a motion opposing the NSSD's motion to stay, which the Board considers a response to the NSSD's motion rather than a motion, since the Agency asks the Board to do nothing but deny the NSSD's motion. Agency Resp. at 1.

On March 3, 2003, the Agency denied the NSSD's request that the Agency revise Condition 1 in the NSSD's March 11, 2002 construction permit for a sludge dryer/melter to be built at the NSSD's sewage treatment facility on Dahringer Road, Waukegan Lake County. Pet. at 1. The NSSD appeals on the grounds that the denial is contrary to the law, the facts, the equities and Agency precedent.

On March 19, 2003, the NSSD filed a letter with the Board's hearing officer stating that the NSSD intended to file a reply to the Agency's response. In light of the ruling below, the Board finds that such a filing is not necessary.

For the reasons explained below, the Board accepts the petition for hearing and grants the emergency motion to stay.

Condition 1

When the Agency granted the NSSD a construction permit to build the sludge dryer/melter on March 11, 2002, the Agency included a standard condition that the construction had to begin within one year of the permit's issuance, or by March 11, 2003. Specifically, the standard condition reads:

1. Unless the permit has been extended or it has been voided by a newly issued permit, this permit will expire one year from the date of issuance,

unless a continuous program of construction or development on this project has started by such time. Exh. A at 13.¹

It is Condition 1 that the NSSD asks the Board to stay during the appeal.

Motion to Stay

NSSD argues that it has expended substantial funds in the planning, development and permitting of the sludge dryer/melter project. NSSD Mot. at 3. NSSD also argues that to avoid the permit expiring, the NSSD sought a provisional variance from the Agency to temporarily suspend the operation of Condition 1. NSSD Mot. at 3-4. As of March 11, 2003, the Agency had not ruled on the request. NSSD Mot. at 4.

The NSSD claims that it tried to begin construction of the sludge dryer/melter, but was physically prevented from beginning construction. NSSD Mot. at 4. The City of Waukegan erected a barricade and got a temporary restraining order from the Circuit Court of Lake County in Waukegan v. IEPA & NSSD, 01-CH-1777, and that order is now on appeal to the appellate court in Waukegan v. IEPA & NSSD, No. 2-02-0635. NSSD Mot. at 3-4. Neither party submitted the circuit court order, but the NSSD states:

[T]he NSSD has been sued (along with the Agency) in the Circuit Court of Lake (Waukegan v. IEPA & NSSD, Case No. 01-CH-1777). The lawsuit seeks to prohibit construction under the subject permit by alleging that NSSD failed to obtain, and the IEPA failed to require, local siting approval or city zoning approval. The judge ruled in favor of NSSD and the IEPA on the issue of siting, but that judgment is currently on appeal to the Illinois Appellate Court. (Waukegan v. IEPA & NSSD, Appeal No. 2-02-0635) The question of whether zoning is required is also before the Illinois Appellate Court, in the same appeal, and the issue of whether Waukegan improperly denied zoned [sic] to the NSSD is currently on administrative review in the same trial court. NSSD Mot. at 3.

The NSSD further states:

In the absence of action from the IEPA [on NSSD's February 11, 2003 provisional variance request], the NSSD attempted to commence construction of the sludge dryer/melter and was physically prevented from doing so by a barricade erected by the City of Waukegan and subsequently by a temporary restraining order entered by the Circuit Court of Lake county in the above referenced lawsuit, preventing the NSSD from commencing construction in order to preserve the status quo. NSSD Mot. at 3.²

¹ The petition to appeal included Exhibits A-C.

² The Board notes that in its March 3, 2003 denial letter, the Agency states that the NSSD has not justified why the pending litigation should be a basis to extend the effectiveness of the construction permit. Exh. C at 1.

NSSD states that it would suffer an arbitrary and unreasonable hardship if the construction permit is allowed to expire during the appeal before the Board. NSSD Mot. at 4. If the permit expires, the issue in the permit appeal would be moot. NSSD Mot. at 4. NSSD states that no environmental harm will occur if the Board grants the stay. NSSD Mot. at 4.

Response in Opposition

The Agency argues that NSSD filed the provisional variance with the Agency on or about February 11, 2003, and the Agency has 30 days pursuant to 415 ILCS 5/37(b) of the Environmental Protection Act (Act) to review the request. Agency Resp. at 2. On March 13, 2003, the Agency notified the NSSD that the Agency would not be recommending a provisional variance for NSSD's failure to satisfy 35 Ill. Adm. Code Part 180.301 (criteria for review provisional variance applications). Agency Resp. at 2. On March 17, 2003, the Board received a copy of the denial from the Agency.

The Agency concedes that there is no issue of environmental harm presented here. Agency Mot. at 3-4. However, the Agency argues that the NSSD has not demonstrated that the continuation of the construction permit beyond its specified, one-year term warrants the legal protection of a stay. Agency Resp. at 5. The Agency also argues that the NSSD has not shown that a stay is necessary to prevent irreparable harm. Agency Resp. at 6. The Agency claims that the NSSD will not suffer any economic consequences because the NSSD has not begun building the sludge dryer/melter. Agency Resp. at 6. The Agency does not believe that the expiration of the construction permit will cause NSSD hardship, because despite the expiration of the permit, the NSSD may still challenge the merits of the Agency's decision to require additional information without the imposition of substantial compliance costs. Agency Resp. at 7.

The Agency believes that the NSSD has not shown that the NSSD will likely prevail in its permit appeal or that the NSSD lacks an adequate remedy at law. Agency Resp. at 7. The Agency concludes that it would not be costly or burdensome to the NSSD to apply for a new construction permit. Agency Resp. at 7.

Analysis

The Board has recognized that Illinois law provides standards to help determine whether stays are appropriate. Community Landfill Company and City of Morris v. IEPA, PCB 01-48, 49 (Oct. 19, 2000), citing Motor Oils Refining Company, Inc. v. IEPA, PCB 89-116 (Aug. 31, 1989). Those standards are: (1) a certain and clearly ascertainable right needs protection; (2) irreparable injury will occur without the injunction; (3) no adequate remedy at law exists; and (4) there is a probability of success on the merits. Motor Oils, PCB 89-116, slip op. at 1-2 (Aug. 31, 1989), citing Junkunc v. S.J. Advanced Technology & Mfg., 149 Ill. App. 3d 114, 498 N.E. 2d 1179 (1st Dist. 1986). The Board has held that it is not required to specifically address each of these factors in making a stay determination. Bridgestone/Firestone Off-Road Tire Company v. IEPA, PCB 02-31 (Nov. 1, 2001).

The Board is persuaded that without the stay, the NSSD will suffer irreparable harm. There is a filing fee involved in requesting a construction permit, as well as costs for developing the permit. The NSSD has already incurred those costs, and the Board finds no justification why the NSSD should have to incur those costs again. Moreover, if the Board does not stay Condition 1 pending the appeal before the Board, the basis for the NSSD's appeal will become moot. The NSSD appealed the Agency's refusal to revise Condition 1 because the condition mandates that the construction permit expire after one year if construction has not begun. If the Board refuses to stay the condition, then there is little reason left for the NSSD to appeal. Additionally, as the Agency has conceded, no environmental harm will come from granting a stay. In any event, given the pending appellate case, the NSSD is unable to begin construction of the sludge dryer/melter. For these reasons, the Board grants the NSSD's motion to stay Condition 1 pending the outcome of this appeal.

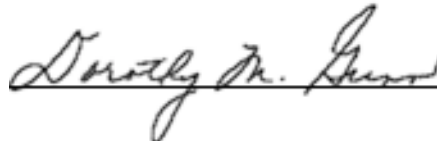
The NSSD's petition meets the content requirements of 35 Ill. Adm. Code 105.210. The Board accepts the petition for hearing.

The NSSD has the burden of proof. 415 ILCS 5/40(a)(1) (2000); *see also* 35 Ill. Adm. Code 105.112(a). Hearings "will be based exclusively on the record before the Agency at the time the permit or decision was issued." 35 Ill. Adm. Code 105.214(a). Hearings will be scheduled and completed in a timely manner, consistent with the decision deadline (*see* 415 ILCS 5/40(a)(2) (2000)), which only the NSSD may extend by waiver (*see* 35 Ill. Adm. Code 101.308). If the Board fails to take final action by the decision deadline, the NSSD "shall be entitled to an Appellate Court order pursuant to subsection (d) of Section 41 of this Act 415 ILCS 5/41(d) (2002)." 415 ILCS 5/40(a)(3) (2000). Currently, the decision deadline is July 8, 2003, (the 120th day after March 10, 2003). *See* 35 Ill. Adm. Code 105.114. The Board meeting immediately before the decision deadline is scheduled for June 19, 2003.

Unless the Board or the hearing officer orders otherwise, the Agency must file the entire record of its determination by April 11, 2003, which is 30 days after the NSSD filed the petition. 35 Ill. Adm. Code 105.212(a). If the Agency wishes to seek additional time to file the record, it must file a request for extension before the date on which the record is due to be filed. 35 Ill. Adm. Code 105.116. The record must comply with the content requirements of 35 Ill. Adm. Code 105.212(b).

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 20, 2003, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board