

ILLINOIS POLLUTION CONTROL BOARD
March 20, 2008

PARTYLITE WORLDWIDE INC.,)
)
Petitioner,)
)
v.) PCB 08-32
) (Permit Appeal - Air)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

Pursuant to Section 39.5 of the Environmental Protection Act (Act) (415 ILCS 5/39.5 (2006)), PartyLite Worldwide, Inc. (PartyLite) filed an application for a Clean Air Act Permit Program (CAAPP) permit with the Illinois Environmental Agency (Agency). Under Section 39.5(5)(j)(ii) of the Act (415 ILCS 5/39.5(5)(j)(ii) (2006)), the Agency must act on the permit application within two years. PartyLite appeals to the Board arguing that the Agency has not acted on the permit application in that timeframe. As discussed below, the Board agrees with PartyLite and pursuant to Section 40.2 of the Act (415 ILCS 5/40.2 (2006)) the Board directs the Agency to act on the permit within 120 days of the date of this order.

The opinion begins with a recitation of the procedural background, followed by the facts. Next the Board delineates the statutory background. The Board will then summarize the arguments of the parties and conclude with a discussion of those arguments.

PROCEDUREL BACKGROUND

On November 2, 2007, PartyLite timely filed a petition asking the Board to review the Agency's alleged failure to act on PartyLite's CAAPP permit application. *See* 415 ILCS 5/40.2(a) (2006); 35 Ill. Adm. Code 105.302(c), (e). The CAAPP permit application concerns PartyLite's candlemaking facility located at 601 Kingsland Drive in Batavia, Kane County. The Board accepted PartyLite's petition for hearing on November 15, 2007.

Pursuant to Section 105.300(f), the Agency "must file within 30 days. after service of the petition, an answer" which must include the entire Agency record. The Agency did not file an answer to the petition or the record; however, the Agency participated at hearing and filed a brief post hearing.

The Board held a hearing (Tr.) before Board hearing officer Bradley P. Halloran on January 29, 2008, in Elmhurst, DuPage County. At that hearing, the Agency stipulated to facts on the record and Robert M. Harrington, Director of Regulatory Safety and Analytical Sciences

for PartyLite, testified. Tr. at 6-11. On February 20, 2008, the parties simultaneously filed closing briefs¹.

FACTS

The parties have stipulated to certain facts regarding this permit appeal. Specifically, PartyLite submitted a CAAPP permit application on September 28, 2005 and received a notice of completeness pursuant to Section 39.5(5)(f) of the Act (415 ILCS 5/ Section 39.5(5)(f) (2006)) on November 3, 2005. Tr. at 7, 10; Pet. at 1. The Agency, as of this date, has not acted on the petition. Tr. at 7, 10.

STATUTORY BACKGROUND

Section 39.5 of the Environmental Protection Act (Act) (415 ILCS 5/39.5 (2006)) sets forth the CAAPP, reflecting the requirements of Title V of the federal Clean Air Act Amendments of 1990 (42 U.S.C. §§ 7661-7661f). Generally, a CAAPP permit is designed to be a single, comprehensive document of all air pollution obligations that apply to the facility. The Agency decides whether to approve CAAPP permit applications, and Agency decisions may be appealed to the Board by, among others, the permit applicant and persons who participated in the Agency's public comment process. *See* 415 ILCS 5/40.2(a) (2006); 35 Ill. Adm. Code 105.SubpartC.

Section 39.5(5)(j) provides:

The Agency shall issue or deny the CAAPP permit within 18 months after the date of receipt of the complete CAAPP application, with the following exceptions:

- (i) permits for affected sources for acid deposition shall be issued or denied within 6 months after receipt of a complete application in accordance with subsection 17 of this Section;
- (ii) the Agency shall act on initial CAAPP applications within 24 months after the date of receipt of the complete CAAPP application;
- (iii) the Agency shall act on complete applications containing early reduction demonstrations under Section 112(i)(5) of the Clean Air Act within 9 months of receipt of the complete CAAPP application.

Where the Agency does not take final action on the permit within the required time period, the permit shall not be deemed issued; rather, the failure to act shall be treated as a final permit action for purposes of judicial review pursuant to Sections 40.2 and 41 of this Act. 415 ILCS 5/30.5(5)(j) (2006).

¹ PartyLite's brief will be cited as "Br. at" and the Agency's brief will be cited as "Resp. at".

Section 40.2(a) of the Act provides:

Subsection (a) of Section 40 does not apply to any permit which is subject to Section 39.5. If the Agency refuses to grant or grants with conditions a CAAPP permit, makes a determination of incompleteness regarding a submitted CAAPP application, *or fails to act on an application for a CAAPP permit*, permit renewal, or permit revision *within the time specified in paragraph 5(j) of Section 39.5* of this Act, the applicant, any person who participated in the public comment process pursuant to subsection 8 of Section 39.5 of this Act, or any other person who could obtain judicial review pursuant to Section 41(a) of this Act, *may, within 35 days after final permit action, petition for a hearing before the Board to contest the decision of the Agency.* However, the 35-day period for petitioning for a hearing may be extended by the applicant for an additional period of time not to exceed 90 days by written notice provided to the Board from the applicant and the Agency within the initial appeal period. If another person with standing to appeal wishes to obtain an extension, there must be a written notice provided to the Board by that person, the Agency, and the applicant, within the initial appeal period. Notwithstanding the preceding requirements, petitions for a hearing before the Board under this subsection may be filed after the 35-day period, only if such petitions are based solely on grounds arising after the 35-day period expires. Such petitions shall be filed within 35 days after the new grounds for review arise. *If the final permit action being challenged is the Agency's failure to take final action, a petition for a hearing before the Board shall be filed before the Agency denies or issues the final permit.*

The Agency shall appear as respondent in such hearing. At such hearing the rules prescribed in Sections 32 and 33(a) of this Act shall apply, and the burden of proof shall be on the petitioner. [emphasis added] (415 ILCS 5/40.2(a) (2006)).

DISCUSSION

The following discussion will begin with a summary of PartyLite's arguments. Next the Board will summarize the Agency's position. The Board will then delineate the Board's findings and reasons for those findings.

PartyLite Arguments

PartyLite seeks an order from the Board requiring the Agency to issue PartyLite's requested permit within 90 days of the Board's order. Br. at 1. PartyLite argues that the Agency has stipulated to the pertinent facts and that the Agency has presented no testimony or evidence that would justify a denial of the requested permit. Br. at 2. PartyLite points out that Section 39.5(5)(j) of the Act (415 ILCS 5/39.5(5)(j) (2006)) requires the Agency to act within two years after a completed permit application is filed. Br. at 3. PartyLite maintains that the completed application was submitted on September 28, 2005 and more than two years have elapsed. *Id.*

PartyLite further points out that the failure to act is treated as a final permit action for purposes of judicial review pursuant to Sections 40.2 and 41 of the Act (415 ILCS 5/40.2, 41 (2006)). Br. at 3. PartyLite asserts that the Board has before it all the facts and information necessary to reach a determination regarding the Agency's inaction. *Id.* PartyLite asserts that the delay has prejudiced PartyLite and further delay will cause additional prejudice. *Id.* PartyLite argues that 90 days offers the Agency sufficient time to review the permit application and fulfill public comment and notice obligations. *Id.* PartyLite cites to Waste Management of Illinois v. IEPA, PCB 84-61, 84-68 (conslid.) (Nov. 26, 1984) to support the request for a 90 day timeframe.

Agency Arguments

The Agency asserts that the CAAPP permit process is an involved and complicated process and that PartyLite seeks an order that would require the Agency to "run roughshod over" the process. Resp. at 2-3. The Agency opines that for the Board to grant such relief would be contrary to the stated purposes of the Act. Resp. at 3. The Agency maintains that there would be no prejudice to PartyLite in allowing the Agency the opportunity to fully and completely review the permit application. Resp. at 4. The Agency points out that PartyLite has continued operation throughout the permit process. Resp. at 4. The Agency argues that a reasonable timeframe would be to allow the Agency until September 20, 2008, to complete the application process. Resp. at 5.

Board Discussion

Before proceeding with a discussion of the merits of this case the Board first will address how the Board will review this appeal as this is the first time the Board has been asked to review the Agency's activities under Section 39.5(5)(j) of the Act (415 ILCS 5/39.5(5)(j)). Next the Board will explain the reasons for the Board's decision.

Standard of Review

When reviewing a permit decision by the Agency to grant, grant with conditions or deny a permit under Section 39 of the Act (415 ILCS 5/39 (2006)), the Board's review is pursuant to Section 40 of the Act (415 ILCS 5/40 (2006)). Under those statutory provisions the law is well settled that the question before the Board is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Act would have occurred if the requested permit had been issued. ESG Watts v. IEPA, PCB 01-63, 64 (conslid.) (Apr. 4, 2002); Joliet Sand & Gravel Co. v. PCB, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (3rd Dist. 1987), citing IEPA v. PCB, 118 Ill. App. 3d 772, 455 N.E. 2d 189 (1st Dist. 1983). Further under Section 40 of the Act (415 ILCS 5/40 (2006)), the Agency's denial letter frames the issues on appeal and the burden of proof is on the petitioner. ESG Watts, Inc. v. PCB, 286 Ill. App. 3d 325, 676 N.E.2d 299 (3rd Dist. 1997). And under Section 40 of the Act (415 ILCS 5/40 (2006)), the Board's review of permit appeals is limited to information before the Agency during the Agency's statutory review period, and is not based on information developed by the permit applicant, or the Agency, after the Agency's decision. Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987).

In this case, the Agency's decision is made pursuant to 39.5 of the Act (415 ILCS 5/39.5 (2006)) and the Board is authorized to review the Agency's decision under the provisions of Section 40.2 of the Act (415 ILCS 5/40.2 (2006)), which specifically states that Section 40(a) of the Act (415 ILCS 5/40(a) (2006)) does not apply. For many of the Agency's actions under Section 39.5 of the Act (415 ILCS 5/39.5 (2006)), the standard of review followed by the Board need not change and the Board can follow the well-settled precedent. However, when reviewing the Agency's inaction under Section 39.5(5)(j) of the Act (415 ILCS 5/39.5(5)(j) (2006)), there is no denial letter and no actual decision by the Agency on the permit. In fact Section 39.5(5)(j) of the Act (415 ILCS 5/39.5(5)(j) (2006)) specifically states that "the permit shall not be deemed issued" by the Agency's failure to act. Thus, the well-settled law can offer only guidance in the Board's review of the Agency's inaction under Section 39.5(5)(j) of the Act (415 ILCS 5/39.5(5)(j) (2006)).

The Board notes that the burden of proof remains on the applicant pursuant to Section 40.2 of the Act (415 ILCS 5/40.2 (2006)). In this case, the Board will look to the provisions of the Act and the arguments of the parties to determine if PartyLite has demonstrated that the Agency failed to take action and, if so, what relief is appropriate. The Board cannot examine the record as the Agency has failed to file the permit record as required by Section 105.302(f) of the Board regulations (35 Ill. Adm. Code 105.302(f)). Thus, the Board's decision will be based on the evidence as presented at hearing and the arguments in the briefs.

Board's Findings

Section 39.5(5)(j) of the Act (415 ILCS 5/39.5(5)(j) (2006)) unequivocally requires the Agency to act on initial CAAPP permit applications within 24 months. The failure to take such action can be appealed to the Board pursuant to Section 40.2 of the Act (415 ILCS 5/40.2 (2006)). The facts before the Board clearly establish that the Agency has not acted on PartyLite's application within 24 months or two years. Thus, PartyLite is entitled to a review of the Agency inaction.

The Board can only review the record placed before the Board and in this case the record is limited. The Agency has failed to file the permit record as required by Section 105.302(f) of the Board regulations (35 Ill. Adm. Code 105.302(f)). Further, the Agency has offered no explanation of the failure to act on the permit application. Therefore, the record before the Board simply indicates that a complete application was filed on September 28, 2005 and was deemed complete by the Agency on November 3, 2005. Thus, pursuant to the statutory provisions of Section 39.5(5)(j) of the Act (415 ILCS 5/39.5(5)(j) (2006)), PartyLite was entitled to action by the Agency.

PartyLite seeks an order requiring action within 90 days of the date of this order. The Agency seeks an additional six months, until September 20, 2008, to complete the review process. PartyLite asserts that prejudice has occurred and will continue if action is not taken within 90 days. The Board disagrees that PartyLite will be prejudiced if action is not taken on the permit in 90 days. PartyLite's own witnesses testified that the facility is operating and offered no testimony that would support the claimed prejudice. Therefore the Board finds that

PartyLite has not established that PartyLite will be prejudiced if the decision on the permit is not made in 90 days.

However, the Board is equally unconvinced that the Agency is entitled to an additional six months. The Agency has had a complete application since November 3, 2005 and the statute allows the Agency 24 months to review an initial CAAPP permit. The statute does not give the Agency nearly 35 months. The Agency has offered broad policy arguments to support the request for an additional six months, but no evidence as to why that much time is needed.

As stated PartyLite has not demonstrated that 90 days is required and the Board believes that timeframe is too short given public notice and comment requirements. Therefore, to ensure that sufficient time is available for public notice and comment, the Board directs the Agency to take action on the PartyLite permit application within 120 days of this order. The Board notes that a 120 day decision deadline is the time imposed on the Board in Section 40.2(c) of the Act (415 ILCS 5/40.2(c) (2006)) and longer than the 90 days imposed on the Agency under Section 39(a) of the Act (415 ILCS 5/39(a) (2006)). Thus, the Agency must take action by July 18, 2008.

CONCLUSION

The Board finds that the Agency failed to take action on PartyLite's completed application for a CAAPP permit as required by Section 39.5(5)(j) of the Act (415 ILCS 5/39.5(5)(j) (2006)). Therefore, PartyLite is entitled to a review of that inaction. The Board further finds that an additional 120 days is sufficient to allow the Agency to fulfill the public notice and comment requirements for CAAPP permits and for the Agency to complete the review of the permit. The Board directs the Agency to take action on the permit by July 18, 2008, which is within 120 days of this order.

ORDER

The Illinois Environmental Protection Agency is directed to take action on PartyLite Worldwide, Inc's application for a clean air act permit program permit by July 18, 2008.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2006); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on March 20, 2008, by a vote of 4-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish at the end.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board