

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
 by LISA MADIGAN, Attorney General of the)
 State of Illinois,)
)
 Complainant,)
 v.)
)
 THE BOARD OF TRUSTEES OF THE)
 UNIVERSITY OF ILLINOIS, a body corporate)
 and politic,)
)
 Respondent.)

PCB No. 13-036
(Enforcement – Air)

NOTICE OF APPEARANCE

PLEASE TAKE NOTICE THAT, pursuant to 35 Ill. Adm. Code Section 101.400(A)(4), the law firm of ICE MILLER, LLP hereby files its Appearance in this proceeding on behalf of respondent, THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS.

Respectfully submitted,

ICE MILLER, LLP

By: /s/ Thomas W. Dimond
One of its Attorneys

Date: February 27, 2013

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**RESPONDENT’S MOTION TO CONSOLIDATE RELATED PROCEEDINGS
AND TO STAY THE CONSOLIDATED PROCEEDINGS**

The Board of Trustees of the University of Illinois (the “University”), by its attorneys Ice Miller LLP and pursuant to 35 Ill. Adm. Code Sections 101.406 and 101.514, hereby moves the Illinois Pollution Control Board (the "Board") to consolidate the proceedings in PCB Nos. 13-035 and 13-036 and to stay the consolidated proceedings. In support, the University states the following:

I. INTRODUCTION

1. The proceedings in PCB Nos. 13-035 and 13-036 involve the same parties and identical issues as to the Board's jurisdiction. And the Board's jurisdiction over the claims in these two cases is directly at issue. On January 3, 2013, before the State initiated these proceedings, the University filed a declaratory judgment action in the Circuit Court of Cook County, No. 13 CH 00162, to resolve one legal question – What is the appropriate forum for lawsuits against the University of Illinois, an arm of the State, which allege claims seeking civil penalties and other relief for violations of the Illinois Environmental Protection Act and the Act's corresponding regulations? The answer to that question clearly impacts these proceedings.

2. The University believes that the proper forum for such lawsuits is the Illinois Court of Claims. The Attorney General's Office believes the proper forum is here. Depending on how the Circuit Court decides the question, these proceedings could become moot. Moreover, if the University's position is correct, continuing proceedings before the Board would force the University to defend itself in a forum that lacks jurisdiction, which is an injury in itself. This is precisely the situation in which a stay is justified.

II. BACKGROUND

A. The proceedings before the Board

3. On January 3, 2013, after the University initiated proceedings in the Circuit Court to resolve the jurisdictional issue, the State filed two suits against the University with the Board. The State directed one suit (PCB No. 13-035) at the University's East Campus power plant ("East Campus"), and the other suit (PCB No. 13-036) at the University's West Campus power plant ("West Campus").

4. PCB No. 13-035 concerns the University's alleged failure to timely renew its East Campus Clean Air Act Permit Program ("CAAPP") Permit. PCB No. 13-036 concerns the University's alleged failure to timely renew its West Campus CAAPP Permit and also alleges that the University constructed an air emission source (commonly referred to as Boiler #4) without a permit from December 2010 through February 2011 and without complying with new source review requirements. None of the alleged violations pose immediate threats to the environment.

5. In fact, the University applied to renew its CAAPP Permits (both East Campus and West Campus) in December 2006. The Illinois Environmental Protection Agency ("IEPA") has acknowledged receipt and administrative completeness of the applications, but it has not

issued, denied, or taken any other formal action on the University's renewal applications. (**Exhibit 1**, Jackson Aff. ¶ 5.) The University is also currently operating in general compliance with the terms of the CAAPP Permits previously issued for the East Campus and the West Campus. (*Id.* ¶ 7.) Specifically, the University has continued to track its emissions of air pollutants and to determine its compliance with any limits stated in the CAAPP Permits. (*Id.*) The University also has continued to maintain records required by the CAAPP Permits and has filed required reports with the IEPA. (*Id.*) With regard to the allegations concerning Boiler #4, it was operated only due to the failure of another boiler (Boiler #5) and was necessary to provide critically needed heat to the Rush University and University of Illinois hospitals providing patient services. (*Id.* ¶ 8.) And, the combined emissions from the two boilers over the 3 months alleged in the complaint were less than those allowed for Boiler #5 alone. (*Id.* ¶ 9.) At present, Boiler #4 is authorized to operate pursuant to a temporary construction permit issued by the IEPA in July 2012 and then revised in October 2012. (*Id.* ¶¶ 10-11.)

6. Thus, there are no ongoing pollution concerns at either the East Campus or West Campus locations. In fact, the State's claims against the University in these proceedings do not allege any imminent environmental harm; rather, the claims concern past alleged violations that the University has addressed to the extent it can, and a further resolution is now in the hands of the IEPA.

7. As to the procedural posture of these two cases, pursuant to the Hearing Officer's essentially identical orders after telephonic status conferences on January 24, 2013, the University was directed to file its answer or any motion to dismiss or strike or a motion to stay on or before March 8, 2013.

B. The proceedings in the Circuit Court of Cook County

8. The University's suit in the Circuit Court involves one count seeking a declaratory judgment. The University asserts based primarily on the Court of Claims Act, 705 ILCS 505/1 *et seq.*, that any legal action brought against the University for violations of the Illinois Environmental Protection Act and any regulations promulgated thereunder by the Board must be filed in the Illinois Court of Claims.

9. That action is proceeding to what should be a prompt conclusion. In response to the complaint, on February 4, 2013, the State filed a motion to dismiss the University's declaratory judgment action pursuant to 735 ILCS 5/2-619.1 and 5/2-615. A briefing schedule has been set on that motion and the court is scheduled to decide it on April 15, 2013. (Exhibit 2, Cir. Ct. Order, Feb. 13, 2013.)

10. Then, on February 8, 2013, shortly after the State filed the motion to dismiss, the University filed a motion for summary judgment. If the motion to dismiss does not resolve the action, the University's motion for summary judgment will.

11. Based on the foregoing, it is clear that the appropriate jurisdiction for these proceedings still is uncertain, although depending on how the Circuit Court rules, the proceedings before the Board could potentially become moot.

III. ARGUMENT

MOTION TO CONSOLIDATE

12. PCB Nos. 13-035 and 13-036 involve the same parties and some of the allegations are essentially identical, as well. Because they involve the same parties, the issue as to whether the University is subject to the jurisdiction of the Board in the two cases is also identical. Both are enforcement actions for alleged violations of the Environmental Protection Act and its

implementing regulations, so the burdens of proof in the two cases should be identical as well.

13. As reflected by the Hearing Officer's essentially identical orders dated January 24, 2013, the procedural aspects of the cases are also likely to be similar.

14. Consolidation of the proceedings will be in the interests of convenience by eliminating the need for duplicative hearing officer status conferences and orders and the need for duplicative filings on common matters involved in the two cases. To the extent the two cases involve distinct matters, they will be capable of being addressed just as efficiently in a consolidated case as in separate cases.

15. Accordingly, pursuant to Section 101.406 of the Board's procedural rules, the University moves the Board to consolidate PCB Nos. 13-035 and 13-036 into a single proceeding for hearing and decision.

MOTION TO STAY PROCEEDINGS¹

A. The Standard of Review requires the Board to consider whether a parallel suit could potentially moot out the proceedings before the Board.

16. Motions to stay must be accompanied by sufficient information detailing why a stay is needed. 35 Ill. Adm. Code 101.514(a). The decision to grant or deny a motion to stay is vested in the sound discretion of the Board. *Midwest Generation Eme, LLC v. Illinois EPA*, PCB 04-185, slip op. at 4 (Aug. 21, 2008). Typically, to determine whether a stay is justified the Board applies a four-factor test. *Id.* (considering comity; prevention of multiplicity, vexation, and harassment; the likelihood of obtaining complete relief in the foreign jurisdiction; and the *res judicata* effect of a foreign judgment in the Board proceeding).

17. The legal issue that the University raised in the Circuit Court does not touch upon

¹ If the Board denies the Motion to Consolidate, the University requests that the Board consider the Motion to Stay Proceedings as to each of PCB Nos. 13-035 and 13-036. In an abundance of caution, the University filed this Motion to Consolidate and to Stay in both proceedings.

the merits of these proceedings. Rather, the Circuit Court suit is an action to determine the appropriate jurisdiction for the State's claims under the Illinois Environmental Protection Act and the Act's corresponding regulations. The ruling in the Circuit Court, in effect, could moot these proceedings, and in such cases, the Board has found that a stay is justified. *See, e.g., Borg-Wagner Corp. v. Illinois EPA*, PCB 80-116, slip op. at 1 (Oct. 2, 1980); *U.S. Steel Corp. v. Illinois EPA*, PCB 10-23, slip op. at 12 (Feb. 2, 2012).

B. A stay is justified in this case because the decision of the Circuit Court could moot the proceedings before the Board.

18. Based on the foregoing principles, the Board should stay these proceedings at least until the Circuit Court has declared the appropriate forum in which to sue the University for alleged violations of the Illinois Environmental Protection Act. Again, should the Circuit Court agree with the University, then this case would become moot, which justifies a stay. In *Borg-Wagner*, the Board stayed proceedings until the Circuit Court ruled on the plaintiff's complaint due to the possibility that the "the case before the Board may become moot." *Borg-Wagner Corp.*, PCB 80-116, slip op. at 1. Similarly, in *U.S. Steel* the Board found that the "present uncertainty over the impact that the USEPA proceeding could have on this appeal supports a stay." *U.S. Steel Corp.*, PCB 10-23, slip op. at 12.

19. Here, the Circuit Court's decision on the proper construction of the intersection of the Court of Claims Act and the Environmental Protection Act will resolve, subject to appeals, the question of jurisdiction. Considerations of comity for the Circuit Court action as well as efficiency support issuance of a stay in these proceedings. Resolving the jurisdictional issue requires the interpretation of two Illinois statutes and is properly a subject for the Circuit Court. In that light, there is no need for the Board or the parties to allocate the time and resources in litigating these cases that could potentially become moot and may be filed in the wrong forum.

C. A stay is also justified because there are no imminent environmental harms that a stay would only make worse, and because neither the parties nor the Board would suffer any prejudice from a stay.

20. A stay is also justified because these proceedings do not involve the risk of ongoing environmental harm. In *Borg-Warner* a factor that "weigh[ed] heavily" in the Board's decision to stay the proceedings was "the fact that petitioner [was] presently operating under an existing permit issued by the United States Environmental Protection Agency which presumably offers protection from harm against the environment." *Borg-Wagner Corp.*, PCB 80-116, slip op. at 1. And, in *U.S. Steel*, the Board found that the defendant's representation that it was "currently operating under the terms and conditions of the revised CAAPP permit" supported a stay. *U.S. Steel Corp.*, PCB 10-23, slip op. at 12. The same holds true here. In this case the University continues to operate under the previously approved CAAPP Permits for the East and West Campuses and under the temporary construction permit issued by IEPA for Boiler #4 at the West Campus. This provides the Board with assurances that the University's ongoing operations pose no threat of environmental harm while the parties proceed in the Circuit Court. This also supports the issuance of a stay.

21. Finally, it bears noting that the parties will not suffer any prejudice if the Board stays these proceedings. In fact, just the opposite is true. First of all, a stay of these proceedings should be relatively short-lived. Either the State's motion to dismiss or the University's motion for summary judgment should resolve the jurisdictional issue. A hearing to decide the State's motion is already set for April 15, 2013, and if that is denied, the motion for summary judgment should be equally capable of prompt briefing and resolution. The parties are proceeding expeditiously in the Circuit Court, and the parties, if given the opportunity, can provide the Board with periodic updates as to the proceedings before the Circuit Court to keep the Board

apprised of the timeline that the parties envision.

22. Second, a stay of these proceedings would prevent the parties and the Board from needlessly expending resources in continuing to litigate these suits and would refrain from possibly subjecting the University to a forum without jurisdiction. If the Circuit Court finds in favor of the University, the Board would not have jurisdiction over these suits and they would become moot. In that light, the parties and the Board have a strong interest in avoiding the costs and expenses of proceeding in this case until after the Circuit Court decides the jurisdictional issue. A ruling by the Circuit Court in favor of the University would also mean that failure to grant a stay in these cases would injure the University by subjecting it to litigation in a forum without jurisdiction. That injury can be substantially mitigated by issuance of the requested stay.

WHEREFORE the University requests that the Board enter an order (1) consolidating PCB Nos. 13-035 and 13-036 for hearing and decision, (2) staying these proceedings until a dispositive ruling by the Circuit Court in the University's suit, (3) providing that the time for the University to answer the complaint or to move to strike or dismiss or otherwise challenge the sufficiency of the complaint under Section 101.506 of the Board's rules is stayed until no less than 30 days following the lifting of the stay, and (4) granting such other relief that the Board deems just and proper.

Respectfully Submitted,

**THE BOARD OF TRUSTEES OF THE
UNIVERSITY OF ILLINOIS**

By: /s/ Thomas W. Dimond
One of Its Attorneys

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*Attorneys for The Board of Trustees
of the University of Illinois*

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on February 27, 2013, true and accurate copies of the foregoing were served upon the following counsel, at the address indicated below, by e-mail and/or U.S. Mail:

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/s/ Isaac J. Colunga

Isaac J. Colunga

COUNTY OF COOK)
)
STATE OF ILLINOIS)

AFFIDAVIT OF HEATHER JACKSON

Heather Jackson, being first duly sworn, on oath deposes and states that I have personal knowledge of the facts stated in this affidavit and that if sworn as a witness, I could competently testify to the following facts.

1. I am currently employed at the University of Illinois at Chicago (UIC) as the Assistant Director, Chemical Safety and Environmental Compliance. I have held that position since September of 2009. I have also coordinated the work of consultants with regard to UIC's air emission sources and assisted with UIC's response to recently alleged non-compliance related to those emission sources.

2. I have a Masters of Science degree in Environmental Science and Engineering. I also hold the CHMM[®] certification (certified hazardous materials manager) from the Institute of Hazardous Materials Management and a Certified Safety Professional (CSP) certification from the Board of Certified Safety Professionals (BCSP). I have worked in the general areas of environmental consulting and compliance for the past 15 years.

3. For purposes of applying for and obtaining permits for the operation of air emission sources, UIC's campus is further divided into the East Campus, the West Campus and the Medical/Research Facility. The air emission sources at the East Campus are primarily engines, generators and boilers that can produce heat and electricity for academic, residential and other campus buildings. The air emission sources at the West Campus are primarily boilers, engines, generators and turbines that can produce heat, steam and electricity for academic,

residential and other campus buildings and also for the University of Illinois Hospital and the Rush University Hospital.

4. On August 2, 2004, the Illinois Environmental Protection Agency (IEPA) revised UIC's Clean Air Act Permit Program (CAAPP) operating permit for the East Campus, Source I.D. No. 031600CEV, (East Campus CAAPP Permit). On April 14, 2005, the IEPA revised UIC's CAAPP operating permit for the West Campus, Source I.D. No. 031600CRS, (West Campus CAAPP Permit). Both of these permits were originally issued on June 20, 2002 and were scheduled to expire on June 19, 2007.

5. In December 2006, UIC submitted renewal applications to IEPA for the East Campus CAAPP Permit and the West Campus CAAPP Permit. Those renewal applications were reportedly received by the IEPA on January 2, 2007. The IEPA notified UIC by letters dated January 4, 2007 that each of the renewal applications were administratively complete. To date, IEPA has not issued, denied or taken any other formal action on the renewal applications for the East Campus CAAPP Permit or the West Campus CAAPP Permit.

6. Counsel for the University of Illinois provided me copies of the complaints filed by the State of Illinois against The Board of Trustees of the University of Illinois before the Illinois Pollution Control Board (Case Nos. PCB 13-035 and 13-036). I reviewed the two complaints. One complaint relates to the East Campus and alleges that UIC failed to timely submit an application for the renewal of its East Campus CAAPP Permit. The second complaint relates to the West Campus. The first two counts relate to the startup of Boiler #4 from December 2010 to February 2011 and allege violations of statutory and regulatory requirements or of conditions in the West Campus CAAPP Permit. The third count states that UIC failed to timely submit an application for the renewal of its West Campus CAAPP Permit.

7. Even if the East Campus CAAPP Permit and West Campus CAAPP Permit are deemed to have expired on June 19, 2007 because of the timing of the renewal applications, UIC currently operates the air emission sources at the East Campus and the West Campus as if both CAAPP Permits remain in force and effect. In general, UIC complies with the terms of both the CAAPP Permits. For example, UIC tracks its emissions of air pollutants and determines their compliance with any limits stated in the CAAPP Permits, maintains the records required by the CAAPP Permits and files required reports with the IEPA. In addition, when needed, UIC submits applications to the IEPA requesting changes to each of the CAAPP Permits for key personnel changes and other administrative changes. Until the IEPA requests additional information or takes some action, there is nothing more UIC can do to get new CAAPP Permits issued for the East Campus and the West Campus.

8. A condition of the West Campus CAAPP Permit required Boiler #4 (along with three other boilers designated Boiler #s 1, 2 and 3) to permanently cease operations when additional emission sources were made fully operational. The additional emission sources were authorized by a 1999 construction permit issued by the IEPA for the West Campus. Based on records of UIC, UIC ceased operation of Boiler #4, along with the other three boilers, in May 2002 in connection with the startup of the newly authorized emission sources. In December 2010, UIC's West Campus suffered a failure of another boiler, Boiler #5, that was still authorized to operate under the West Campus CAAPP Permit. In order to continue to supply critically needed heating to the University of Illinois Hospital and Rush University Hospital, UIC had to restart Boiler #4 to meet those needs.

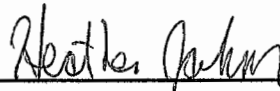
9. Consultants working for UIC under my supervision calculated the emissions of various air pollutants between December 2010 and February 2011 from both the temporary

operation of Boiler #4 and the operation of Boiler #5 as it was repaired and restarted. The combined emissions of Boiler #s 4 and 5 during that time period were less than allowed by the West Campus CAAPP Permit for Boiler #5 alone for all air pollutants.

10. In July 2012, UIC submitted a temporary construction permit application to the IEPA to temporarily restart West Campus Boiler #4 for testing. The IEPA issued that permit on July 19, 2012. After the testing, which was successful, UIC submitted two further applications to the IEPA regarding Boiler #4. One was an application to revise the July 19, 2012 temporary construction permit to allow the operation of Boiler #4 through the 2012-2013 winter heating season. The IEPA revised the temporary construction permit on October 25, 2012 so that the operation of Boiler #4 is authorized through April 30, 2013. Another was an application to permanently restart Boiler #4. That application remains pending action before the IEPA.


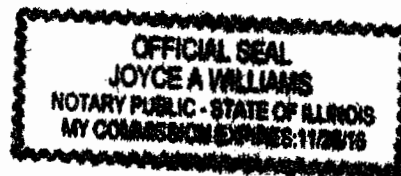
11. Given the permitting actions taken by UIC as described above, the current operation of Boiler #4 is authorized and further action to authorize the operation of Boiler #4 beyond April 30, 2013 depends on the IEPA taking formal action on the application to permanently restart Boiler #4.

Further affiant sayeth not.



Heather Jackson

Subscribed and sworn to before me
this 25 day of February 2013


Notary Public

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

[Faint handwritten text, possibly case name]
v.
Illinois Environmental
Protection Agency

No. 13 CH 162
Calendar 14

ORDER SETTING MOTION FOR HEARING

This cause coming to be heard on Plaintiff's/Defendant's motion for to dismiss and
Plaintiff's Motion for Summary Judgment IT IS HEREBY ORDERED:

- 1. The Motion is set for hearing on April 15, 2013 at 10:30 a.m./p.m.
- 2. The Movant's Brief in support shall be filed on or before February 4, 2013 4234
Respondent's Response Brief shall be filed on or before March 13, 2013 4234
Movant's Reply Brief shall be filed on or before April 8, 2013 4234
- 3. Movant shall furnish the Court (Chambers 2301) with courtesy copies of all briefs and relevant pleadings on or before April 8, 2013 (7 days before the hearing date). 4253
- 4. All filings are limited to no more than 15 pages.

The briefings on the motion for ~~summary~~ judgment are continued pending a ruling on the motion to dismiss.

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Atty Name: Alice Keane
Firm Name: OAG
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Telephone: 312-214-3711

ENTERED
JUDGE SOPHIA H. HALL-0162
FEB 13 2013
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK
Judge Sophia H. Hall

ENTERED: