

ILLINOIS POLLUTION CONTROL BOARD  
July 14, 1983

CATERPILLAR TRACTOR CO., )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) PCB 79-180  
 )  
 ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, )  
 )  
 ) Respondent. )

ORDER OF THE BOARD (by J. Anderson):

On June 2, 1983 the Board issued an Interim Order in response to Caterpillar's May 6, 1983 motion to dismiss this NPDES permit appeal on the grounds that on April 18, 1983 the Agency had issued a permit resolving the issues here in dispute. In its Order, the Board found that the Agency had no jurisdiction to "issue" subsequent permits while a permit appeal for the same operation at the same facility was still pending, based on its holding in Alburn, Inc. v. IEPA, PCB 81-23, 24 (March 19 and May 1, 1981). The Order invited the parties to file supplementary arguments; Caterpillar filed a supplement June 21, as did the Agency June 22.

Caterpillar's primary argument is that the April 18, 1983 permit should be considered a voidable permit, rather than a void one. The argument is premised on the fact that since the Agency has the legal power to issue permit modifications according to Illinois contract law, any unauthorized use of that power by the Agency would result in a permit which could be voided or validated by the permittee, but which could not be repudiated by the Agency. See Litchfield v. Litchfield Water Supply Co., 95 Ill. App. 647 (1901), and Corbin on Contracts §6 (1952). Caterpillar argues that its Motion to Dismiss amounts to a satisfaction of the modified permit, which would be upheld by a Board Order dismissing the appeal.

The Agency argues that Alburn is distinguishable from this situation because the permittee has accepted the conditions of the instant permit, as Alburn did not, and because of the differences between the state's own air permitting program involved in Alburn, and the federally delegated NPDES permit program here involved.

The Agency notes that the August 30, 1979 NPDES permit here appealed expired by its terms June 30, 1981, pursuant to federal regulation. The pendency of this appeal continued the effect of this NPDES permit beyond its terms until final Board action in the matter, consistent with the determination in Borg-Warner Corp. v. Mauzy, 100 Ill. App. 3d 862, 427 N.E.2d 415 (1981) of the applicability of the Section 16(a) Illinois Administrative Procedures Act (APA) to NPDES permit appeals. However, prior to the rendering of that decision, Caterpillar filed an application for renewal of the contested permit 180 days before its expiration in 1981. The permit purportedly issued April 18, 1983 was in apparent response to this application. An effective date of May 18, 1983 was assigned to the permit.

The Agency therefore argues that the permit which is at issue here ceased to continue in force and effect on May 17, 1983, since the "issuance" of the April 18, 1983 permit constituted final Agency administrative action on the 1981 permit renewal application which served to extinguish the extended life of the 1979 permit pursuant to Section 16 of the APA. The Agency argues that if the April, 1983 permit is not given effect, that Caterpillar would be found to have been discharging without a permit since May.

The Agency additionally argues that the situation is complicated by the fact that USEPA has a right to object to State-proposed NPDES permits. In the Agency's words,

"Requiring dismissal of an NPDES permit review prior to issuance of a new NPDES permit could very well place the Agency and discharger in the untenable position of having to dismiss legal proceedings concerning interpretation of an existing permit at a point when the parties would not know whether USEPA would allow the new NPDES permit to be issued." (Supp. p. 5).

As to the Agency's assertion that the 1979 permit's APA-extended life was extinguished by the passing of the time for appeal of the permit "issued" April 18, 1983, Borg-Warner clearly states that

"A final [administrative] decision, ...will not be forthcoming...until the PCB rules on the permit application... Thus, until that time, under Section 16(b) [of the APA], the effectiveness of the renewed permit issued by the EPA is stayed."

While the Borg-Warner court was speaking of the effectiveness of the permit which was the subject of the appeal, the logic would apply to any later "issued" permit as well.

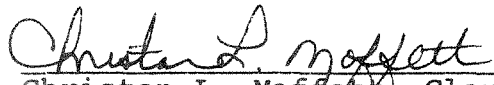
However, the Caterpillar "voidable but not void" permit argument, as buttressed by the Agency's "draft permit subject to USEPA review" argument, is persuasive. The Board finds that the

permit "issued" April 18, 1983 is a voidable permit, having no effect until the dismissal of the instant permit appeal. Caterpillar's May 6, 1983 motion to dismiss is hereby granted.

In reaching this result, the Board expresses no judgment on the conditions contained in the April 18, 1983 permit, which has not been submitted to it. The Board additionally comments that, had Caterpillar determined one or more conditions of that permit to be objectionable, no appeal of that permit could have been pursued until dismissal of this action. This is in line both with the Alburn holding and the ruling on the voidability question made here.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 14<sup>th</sup> day of July, 1983 by a vote of 40.

  
 Christan L. Moffett, Clerk  
 Illinois Pollution Control Board