

ILLINOIS POLLUTION CONTROL BOARD
June 20, 2013

PEOPLE OF THE STATE OF ILLINOIS,)	
by LISA MADIGAN, Attorney General of)	
State of Illinois,)	
)	
Complainant,)	
)	
v.)	PCB 07-95
)	(Enforcement - Land)
AET ENVIRONMENTAL, INC., a Colorado)	
corporation, and E.O.R. ENERGY LLC, a)	
Colorado limited liability company,)	
)	
Respondents.)	

ORDER OF THE BOARD (by D. Glosser)

This matter is before the Board on a jointly-filed motion by E.O.R. Energy, LLC (EOR) and AET Environmental, Inc. (AET) (collectively respondents) asking the Board to stay its September 6, 2012 order granting summary judgment against the respondents and assessing a civil penalty.

PROCEDURAL HISTORY

The People of the State of Illinois (People) filed a five-count complaint against AET and E.(EOR alleging violations of the Environmental Protection Act (Act) and the Board's regulations. The violations related to the transport, storage and disposal of a hazardous acid to and at EOR's two oil fields located near Pawnee. The first oil field is located north of 2050 N Road and 400 E Road, South Fork Township, Christian County. The second oil field is located along Township Road 4.25E South East of the junction with Township Road 13S, Pawnee, Cotton Hill Township, Sangamon County. The Board accepted the complaint on April 27, 2007 and the respondents separately filed answers on June 19, 2007. However, on October 18, 2007, respondents each re-filed an answer to the People's complaint through their attorney after a hearing officer required respondents to hire an attorney. *See* Hearing Officer Order 7/16/2007. On January 24, 2008, respondents' attorney withdrew from the case.

On March 24, 2008, the People filed a request to admit facts by AET. On April 22, 2008, Lori M. DeVito, a non-attorney, filed an appearance and a response to the People's request on behalf of AET.

On May 27, 2008, the People filed a request to admit facts by EOR. On January 23, 2009, the People again filed their request to admit facts by EOR after a January 20 hearing

officer order. *See* Hearing Officer Order 1/20/09. On February 20, 2009, EOR filed an unsigned and unsworn response to the People's request through a new attorney.

On August 17, 2010, the People simultaneously filed motions to deem facts admitted against AET (AET Mot.) and EOR (EOR Mot.). A hearing officer set a September 3, 2010 deadline for the respondent's to file a response. *See* Hearing Officer Order 8/31/10. Neither AET nor EOR had retained attorneys or timely filed responses when the Board's September 16, 2010 order granted the People's motions to deem facts admitted. People v. AET Environmental, Inc. and E.O.R. Energy, LLC, PCB 07-95, slip. op. at 2 (Sept. 16, 2010) (if no response is filed, the party will be deemed to have waived objection to the granting of the motion under Section 101.500(d) of the Board's Regulations (citation omitted). Thus any objection to granting the motion is waived.)

On June 27, 2012, the People simultaneously filed motions for summary judgment against AET and EOR. On September 6, 2012, the Board found that summary judgment was appropriate as to EOR and granted the People's motion for summary judgment as to EOR. The Board further found that based on the facts admitted, EOR violated Sections 12(g), 21(e) and (f)(1) and (2) of the Act (415 ILCS 5/12(g), 21(e) and (f)(1) and (2) (2010)) and multiple provisions of the Board's hazardous waste regulations and underground injection control (UIC) regulations, as alleged in the complaint. More specifically, the Board found that EOR violated Section 21(e) of Act (415 ILCS 21(e) (2010)) by transporting hazardous wastes into Illinois for storage and disposal at a site that does not meet the Act's requirements. In addition, EOR violated Sections 21(e) and (f)(1) of the Act (415 ILCS 21(e), (f)(1) (2010)) by storing, disposing, and/or abandoning hazardous wastes at a site that does not meet the Act's requirements, thereby conducting a hazardous-waste storage operation without a RCRA permit. Further, EOR violated 35 Ill. Adm. Code 703.121(a) and (b), 35 Ill. Adm. Code 703.150(a)(2), and Section 21(f)(2) of the Act (415 ILCS 21(f)(2) (2010)) by failing to apply for or acquire a RCRA permit before storing hazardous waste at its site.

The Board also found that EOR violated 35 Ill. Adm. Code 725.111, 725.113, 725.114, 725.115(a), 725.116, 725.117, 725.131, 725.132, 725.137, 725.151(a), 725.155, 725.171(c), 725.173, 725.175, 725.212(a), 725.242(a), 725.243(a), 725.274, and 725.278, thereby violating Section 21(f)(2) of the Act. 415 ILCS 5/21(f)(2) (2010). EOR violated these provisions by failing to follow proper procedures, to take all necessary precautions, and to keep and maintain all appropriate records regarding the management of the hazardous waste acid. EOR violated 35 Ill. Adm. Code 704.121 and 704.203, thereby violating Section 12(g) of the Act (415 ILCS 5/12(g) (2010)), by injecting hazardous waste acid into wells without having an underground injection control (UIC) permit and failing to comply with the listed requirements of Section 704.203. Having found that EOR violated the Act and Board regulations, the Board assessed a civil penalty of \$200,000 and directed EOR to pay that civil penalty.

On October 18, 2012, after obtaining a new attorney, EOR filed a motion for reconsideration of the Board's September 6, 2012 order that granted summary judgment against EOR. EOR unsuccessfully argued that the Board lacked subject matter jurisdiction and on January 10, 2012, the Board affirmed its September 16, 2012 order, but adjusted the penalty payment schedule to reflect the filing of the motion for reconsideration.

On January 24, 2013, the Board granted summary judgment against AET, finding that AET violated Section 21(e) of the Act (415 ILCS 5/21(e) (2010)) by transporting waste into Illinois for improper storage and disposal. Having found a violation of Section 21(e) of the Act, the Board imposed a civil penalty of \$60,000.

On February 19, 2013, EOR filed a motion for reconsideration of the Board's January 10, 2013 order. On March 22, 2013, AET similarly filed a motion for reconsideration of the Board's January 24, 2013 order. The People responded to EOR with a Motion to Strike EOR's Motion for Reconsideration (Mot. to Strike) pursuant to Section 101.520 of the Board's regulations, Ill. Adm. Code 101.520 (2010), and Supreme Court Rule 274 (134 Ill. 2d R. 274) . On April 18, 2013, the Board denied the People's Motion to Strike and both AET's and EOR's motions for reconsideration.

On June 3, 2013, the Board received notice that both AET and EOR petitioned the Appellate Court, Fourth District for review of the Board's decisions. And, finally, on May 24, 2013, EOR and AET jointly filed a Motion to Stay the Board's final order.

The People have not responded to the motion to stay. Pursuant to Section 101.500(d) (35 Ill. Adm. Code 101.500(d)) if no response is filed, the party will be deemed to have waived objection to the granting of the motion. Thus any objection to granting the motion is waived.

STATUTORY PROVISIONS

Section 101.906(c) of the Board's Rules (35 Ill. Adm. Code 101.906(c)) provides that stays pending appeal are governed by the Illinois Supreme Court Rule 335. Rule 335(g) states that a stay pending appeal shall ordinarily be sought in the first instance from the administrative agency. The decision to grant a motion for a stay is discretionary. Illinois Supreme Court Rule 335(g) provides in its entirety:

Application for a stay of a decision or order of an agency pending direct review in the Appellate Court shall ordinarily be made in the first instance to the agency. A motion for stay may be made to the Appellate Court or to a judge thereof, but the motion shall show that application has been made to the agency and denied; with the reasons, if any, given by it for denial, or that the application to the agency for the relief sought was not practicable. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavit. With the motion shall be filed such parts of the record as are relevant to the relief sought. Reasonable notice of the motion shall be given to all parties to the proceeding in the Appellate Court. The court may condition relief under this rule upon the filing of a bond or other appropriate surety. Illinois Supreme Court Rule 335(g) (134 Ill. 2d R. 335(g)).

In deciding whether to grant a discretionary stay, the Board may consider various factors, such as the avoidance of irreparable harm to the petitioner, as well as “the likelihood of environmental harm if a stay is granted.” Community Landfill, PCB 01-48, PCB 01-49 (consol.), slip op. at 4, citing Motor Oils Refining Co. v. IEPA, PCB 89-116, slip op. at 2 (Aug. 31, 1989).

MOTION TO STAY

On May 24, 2013, EOR and AET filed a joint motion, pursuant to Illinois Supreme Court Rule 335(g) and the Board’s procedural rule at 35 Ill. Adm. Code 101.906(c) requesting the Board to stay its order to pay the penalty and cease and desist from “harmful behavior” pending appeal.

DECISION

Although the Appellate Court acquired jurisdiction over this case once both parties filed a notice of appeal with court, the Board retains jurisdiction to determine “matters collateral or incidental to the judgment...A stay of judgment is a matter that is collateral to the judgment because it neither affects nor alters the issues on appeal.” Sears Holdings Corp. v. Maria Pappas, 391 Ill. App. 3d 147, 158-59, 908 N. E. 2d 556, 567 (1st Dist. 2009) (citations omitted). In deciding whether to grant a discretionary stay, the Board may consider various factors, such as the avoidance of irreparable harm to the petitioner, as well as “the likelihood of environmental harm if a stay is granted.” Community Landfill, PCB 01-48, PCB 01-49 (consol.), slip op. at 4, citing Motor Oils Refining Co. v. IEPA, PCB 89-116, slip op. at 2 (Aug. 31, 1989). The Board takes into account the representations of the respondents described above, and the absence of any response by the People to the motion. Consistent with the Board’s ruling in Community Landfill, the Board, in exercising its discretion, denies respondents’ motion to stay.

The Illinois Supreme Court has addressed factors that should be considered in ruling on a motion for stay pending appeal. Stacke v. Bates, 138 Ill. 2d 295, 304-05, 562 N.E.2d 192, 196 (1990). One consideration is “whether a stay is necessary to secure the fruits of the appeal in the event that the movant is successful.” Stacke, 138 Ill. 2d at 305, 562 N.E.2d at 196. Other equitable factors should be balanced, those factors include: 1) whether the status quo should be preserved, 2) the respective rights of the litigants, and 3) whether hardship on other parties would be imposed. Stacke, 138 Ill. 2d at 305-06, 309, 562 N.E.2d at 196, 198. Another consideration is whether there is a “substantial case on the merits” (not likelihood of success on the merits), but this should not be the sole factor.” Stacke, 138 Ill. 2d at 309, 562 N.E.2d at 198. People v. Community Landfill Company Inc. et. al., PCB 03-191, slip op. at 3. Here, the Board’s refusal to stay the civil penalty levied against the respondents does not affect respondents’ right to appeal.

The Stacke court explained:

The granting of a stay pending appeal is preventive or protective and seeks to maintain the status quo pending appeal. We believe that in all cases, the movant although not required to show a probability of success on the merits, must,

nonetheless, present a substantial case on the merits and show that the balance of the equitable factors weighs in favor of granting the stay. If the balance of the equitable factors does not strongly favor movant, then there must be a more substantial showing on the merits. Thus, a strong showing of the likelihood of success on the merits may offset other equitable factors favoring the other party. Stacke, 138 Ill. 2d at 309, 562 N.E.2d at 198.

Here, the Board does not find that either AET or EOR has a “substantial case on the merits”. In fact, the respondents’ motion to stay contains only the statutory basis for the Board’s authority to grant a stay and is unaccompanied by any meaningful attempt to explain the respondents’ position. Further, the Board finds that respondents have failed to persuade the Board that “the balance of the [Stacke] equitable factors weighs in favor of granting the stay.” People v. Toyal, Inc., PCB 00-211 slip op. at 6; People v. Community Landfill Company, Inc. and City of Morris, PCB 97-193 and PCB 04-207(cons.) slip op. at 3 (Dec. 17, 2009). Therefore, the Board denies the request for stay. If the respondents continue to believe a stay is warranted, they should request one from the appellate court.

IT IS SO ORDERED

I, John T. Therriault, Assistance Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 20, 2013, by a vote of 5-0.



John T. Therriault, Clerk
Illinois Pollution Control Board