ILLINOIS POLLUTION CONTROL BOARD
November 29, 1990

THE GRIGOLEIT COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 89-184
	)	(Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

GARY B. PASEK APPEARED ON BEHALF OF PETITIONER, AND

JAMES J. O'DONNELL, WILLIAM D. INGERSOLL, AND JULIE ARMITAGE APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J. Anderson):

This matter is before the Board on the November 13, 1989 filing of a "Petition for Permit Appeal" by The Grigoleit Company ("Grigoleit"). Grigoleit contests the Illinois Environmental Protection Agency's ("Agency") denial of its July 12, 1989 application for renewal of its air operating permit. Hearings were held on March 6, July 17, 18, and 19, and August 16 and 17, 1990. No members of the public testified at the hearings. Grigoleit's and the Agency's briefs were filed on October 1, 1990, and October 22, 1990, respectively. Grigoleit's reply brief was filed on November 7, 1990.

STATEMENT OF FACTS

Grigoleit owns and operates a decorative metal fabrication plant located in Decatur, Macon County, Illinois. On July 12, 1989, Grigoleit mailed an Application for Renewal of its 1984 Operating Permit to the Agency. (Pet. par. 1). The Agency denied the application via a permit denial letter dated October 11, 1989. (Id. par. 4). In its letter, the Agency gave the following three reasons for its denial of Grigoileit's request for permit renewal:

> 1. Pursuant to section 4(d)(1) of the Illinois Environmental Protection Act, the Agency shall have authority to enter at all reasonable times upon any private or public property for the purposes of inspecting and investigating to ascertain possible violations of the Act or regulations thereunder, or of permits or terms or conditions. Standard condition #4 of the operating permit previously issued to this facility allows the Agency to enter the

permittee's property where actual or potential emission sources are located or where any activity is to be conducted pursuant to the permit. Since you have not allowed the Agency access to the premises for inspection purposes, you have not fulfilled the requirements of standard condition 4. This is a violation of 35 Ill. Adm. Code 201.161 and Section 4 of the Act.

2. Your application fails to provide proof of compliance with 35 Ill. Adm. Code 215.204(h), (j) and 215.301. The following information is required to assess compliance with these rules:

   a. Provide usage and percentage by volume for each ingredient in ink and solvent used for each coating application.

   b. Provide the weight percentage of the volatile organic compound in the ink and solvent and the amount of ink and solvent used per hour.

3. You have been previously notified by the Agency's Division of Land Pollution Control of apparent violations of 35 Ill. Adm. Code Sections 722.111, 722.112, 722.134, 725.152, 725.116 and 725.273. Since these violations are still outstanding, pursuant to sections 21 and 39 of the Act, no permit may be granted.

PENDING MOTIONS

On November 13, 1989, Grigoleit filed an "Application for Non-Disclosure" with its "Petition for Permit Appeal". On November 15, 1989, the Board issued an Order stating that it would conditionally maintain as "Not Subject to Disclosure" the information attached to the Petition for Permit Appeal. Because the Board had several concerns regarding the request, it also directed the parties to file briefs, motions, or other appropriate pleadings regarding the issue on or before December 15, 1989. Grigoleit filed its response, entitled "Motion to Supplement its Application for Non-Disclosure and Statement of Intent", on December 15, 1989. The Agency, however, did not file a response regarding this matter. On January 1, 1990, the Board issued an Order granting Grigoleit's Motion to Supplement, but stated that it made no findings on the Application for Non-Disclosure.

On August 13, 1990, Grigoleit filed a "Motion for Sanctions, Contempt and Other Relief". On August 24, 1990, the Agency filed a "Response to Petitioner's Motion for Sanctions, Contempt and Other Relief and Motion to File Instanter". On September 4, 1990, Grigoleit filed a "Response to Motion to File Instanter and Motion to Strike the Respondent's Response to the Petitioner's Motion for Sanctions, Contempt and Other Relief and Request for Other Relief". On September 7, 1990, the Agency filed a "Response to Motion to Strike".

On August 30, 1990, the Board issued an Order requesting the Hearing Officer, Mr. Marvin Medintz, to provide the Board with any input he may have regarding the Motion for Sanctions. The Hearing Officer filed his September 12, 1990 response to the Board's Order on September 27, 1990. Grigoleit and the Agency filed their replies to the Hearing Officer's Response on September 20, and September 21, 1990, respectively.

A. Grigoleit's Application for Non-Disclosure

In its Application for Non-Disclosure, Grigoleit asks that certain exhibits be stamped "Not Subject to Disclosure" pursuant to 35 Ill. Adm. Code 101.161, and be kept confidential. In support of its request, Grigoleit states that the documents contain production processes, methods, descriptions (including materials), and applications that it considers proprietary and has kept confidential since the date of their creation, except to the extent needed to apply for operating permits. Grigoleit adds that only the following people have access to the information: four officers and two employees of the company who are responsible for the preparation of the applications for its operating permits, its attorney, and its engineers.

In its Motion to Supplement, Grigoleit, as requested by the Board, marked those pages or portions of the material that it did not want disclosed and stated that the material either constituted a trade secret, a secret manufacturing process which is considered proprietary and/or confidential information, or both. Grigoleit also noted that certain emission data could not be kept confidential.

The Board will maintain the documents as "Not Subject to Disclosure". Accordingly, such material will be governed by the procedures and protectons of 35 Ill. Adm. Code 120 Subpart C. (see 35 Ill. Adm. Code 101.160(d)).

B. Agency Motion to File Instanter

In its Motion to File Instanter, the Agency asks for leave to file its Response to Grigoleit's Motion for Sanctions instanter. In support of its motion, the Agency states that it

received Grigoleit's motion on August 13, 1990. (Motion par. 1). Although the Agency recognizes that its response was due to be filed on or before August 20, 1990, it notes that it received Grigoleit's motion three days before the final two days of hearing in this matter. (Id. pars. 1, 2). The Agency states that it spent most of the seven day response period preparing for and attending the hearings. The Agency adds that it was attempting to resolve certain issues raised in Grigoleit's Motion for Sanctions with Grigoleit's counsel from August 20, 1990, until August 24, 1990. (Id. par. 2). Finally, the Agency notes that the motion is not being filed for the purposes of delay, and that it will not prejudice Grigoleit or the Board because it is being filed in ample time for consideration at the Board's August 30, 1990 meeting. (Id. par. 3).

In its Response to the Agency's Motion to File Instanter Grigoleit requests the Board to deny the Agency's Motion to File Instanter. In support of its motion, Grigoleit states that the Agency's Motion to File Instanter is in reality a motion for an extension of time to file its response and is contrary to 35 Ill. Adm. Code 101.241.[1] (Response par. 1). Grigoleit argues that the Board cannot grant the Agency's motion because the requirements of the section are mandatory and not discretionary. (Id. par. 3). Grigoleit further argues that even if the Board could entertain the Agency's Motion to File Instanter, the motion should be denied because the Agency showed no good cause for the late filing and was aware of the filing deadline but chose to ignore the relevant filing requirements. (Id. par. 4).

Although 35 Ill. Adm. Code 101.241 sets a seven day time limit in which to file a response, we will grant the Agency's motion for leave to file its Response instanter. Although we are not pleased with the lateness of the filing and suggest that it would have been better if the Agency had filed a motion for extension of time to file its response, we note that our ruling is made in light of the fact that the Agency received Grigoleit's motion three days prior to hearing, and then attempted to negotiate a resolution to the matter with Grigoleit. We also wish to note that the Agency's response may contain information pertinent to a proper resolution of this matter. Moreover, it does not appear that the Agency's motion is meant for purposes of delay, or that Grigoleit will be prejudiced by our ruling.

C. Grigoleit's Motion to Strike the Agency's Response to Grigoleit's Motion for Sanctions

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[1]This section states that a party is deemed to have waived objection to the granting of a motion if no response to a motion is filed within seven days but such waiver does not bind the Board in its decision on the motion.

In its Motion to Strike, Grigoleit requests the Board to strike the Agency's Response, or give it leave to file a reply to the Agency's Response, if it does not deny the Agency's Motion to File Instanter. In support of its motion, Grigoleit states that it will suffer material prejudice for several reasons. First, Grigoleit argues that the Agency's attorney who prepared and verified the Agency's Response (Mr. William D. Ingersoll) took no part in the matters involved in the Motion for Sanctions and, therefore, lacks personal knowledge of the issues involved. (Motion par. 7(a)). Grigoleit adds that it is entitled to have the Agency's original attorney, Mr. James J. O'Donnell respond. (Id.). Second, Grigoleit states that there are gross mischaracterizations, misleading information, and conclusory statements in the Agency's Response. (Id. pars. 7(b)-(K)). The Board will not reiterate each alleged error in light of the fact that Grigoleit takes each paragraph of the Response and details the alleged errors contained therein.

In its response, the Agency objects to the Motion to Strike based on its belief that the motion is based upon Grigoleit's objection to the Agency's Motion to file Instanter. (Response par. 5). Accordingly, the Agency reiterates its reasons for its late filing. (Id. pars. 1, 2, 5). The Agency also asserts that Mr.Ingersoll's August 24, 1990 affidavit (attached to the Motion to File Instanter) supports only those facts in the Agency's Motion to file Instanter, and that its Response to Grigoleit's Motion for Sanctions was based on facts already in the record or otherwise supported by affidavit. (Id. apr. 5). Finally, the Agency asserts that it will not move to strike Grigoleit's request for leave to file a reply because Grigoleit has already used the Motion to Strike as a vehicle for its reply. (Id. par. 4).

As the Agency correctly points out, Mr. Ingersoll only verified those facts contained in the Agency's Motion to File Instanter. Moreover, the Agency's Response to Grigoleit's Motion to Strike is based on facts already in the record. The Board has no objection to Mr. Ingersoll's preparation of the Agency's Response because he filed his appearance in this matter on August 16, 1990 . In the legal profession, and in many cases before the Board, it is common for different attorneys in a firm to prepare the various pleadings and motions during the course of a case. Moreover, we note that the Agency's actions are understandable in light of the time constraints prior to hearing and that matters may have been further delayed if Mr. O'Donnell continued to be the only Agency attorney to handle all of the matters in this extremely litigious case. Thus, we will not grant the Motion to Strike simply because Mr. Ingersoll rather than Mr. O'Donnell prepared the Agency's Response.

As for Grigoleit's analysis of the content of the Agency's Response, we note that such analysis is, in fact, a reply to the

Response. Accordingly, we will not grant the Motion to Strike on this basis, nor will we grant Grigoleit's motion for leave to file a reply. However, because we construe Grigoleit's comments as its reply and wish to have a complete debate on the issue of sanctions, we will summarize Grigoleit's comments below and consider them in our deliberations.

D. Grigoleit's Motion for Sanctions

In its Motion for Sanctions, Grigoleit asks the Board to allow oral argument on the motion, grant the relief requested in its permit appeal, award it attorney's fees and costs, and order the Agency's attorney to show cause why he should not be held in contempt for the Agency's failure to produce certain documents that were requested by Grigoleit. (Motion p. 7). Specifically, Grigoleit alleges that the Agency failed to provide the following documents: an inspection memorandum cover sheet dated May 14, 1985, permit reviewer notes listing certain pieces of equipment, a July 16, 1984 calculation sheet detailing permit reviewer notes, an April 9, 1973 permit reviewer notation sheet, a March 13, 1974 permit reviewer notation sheet, an October 11, 1979 calculation sheet, a March 16, 1976 calculation sheet detailing permit reviewer notes, and a December 2, 1975 permit reviewer notation sheet. (Id. Ex. A). Grigoleit also alleges that the Agency's failure was willful, deliberate, contumacious, and in violation of 35 Ill. Adm. Code 105.102 and Supreme Court Rule 7-102(a)(3).[2] (Id. pars. 10, 11, 12, 14).

In support of its allegation that the Agency failed to produce the above-mentioned documents, Grigoleit states that, on January 23, 1990, it requested the Agency to produce all documents contained in the "flag file", "ID file", and "permit file". (Id. pars. 1, 2). Grigoleit states that the Agency responded to its request on March 1, 1990, but did not provide the above-mentioned documents and did not object to the production of the documents or claim any privilege. (see Respondent's Response to Petitioner's Request for Production of Documents' dated February 28, 1990). (Id. pars. 3, 4). Grigoleit states that it learned of the omission via a June 21, 1990 Notice to Appear and Produce that directed the Agency to produce the files at the July 17, 1990 hearing, which it did. (Id. par. 7). Grigoleit adds that it also requested that the documents in several Notices of Depositions prior to hearing, and

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[2] 35 Ill. Adm. Code 105.102(a)(4) requires the Agency to file the entire Agency record of the permit application at issue including the application, correspondence with the applicant, and the denial. Supreme Court Rule 7-102(a)(3) states, "In his representation of a client, a lawyer shall not...conceal or knowingly fail to disclose that which he is required by law to reveal."

that the Agency failed to produce the above-mentioned documents at any of the depositions. (Id. par. 8).

In support of its allegation that the Agency's failure to produce was willful, deliberate, and contumacious, Grigoleit points to the Agency's February 28, 1990 Motion to Reverse the Hearing Officer's Order of February 23, 1990. (Id. par. 14(a)). In paragraph 32 of that motion, Mr. O'Donnell stated:

> All requested documents, except the following, have previously been provided to Petitioner or will be provided on March 1, 1990:
>
> 1) Portions of Mr. Shah's review notes which contain his recommendations to Mr. Sweitzer. (Portions of 1 page)
>
> 2) Memo regarding a management/technical review of the Grigoleit chrome contamination. (1 page)
>
> 3) Traveler sheet. (1 page)
>
> 4) Permit Manual.
>
> (Id. emphasis added).

Grigoleit also points to the following documents as evidence of the willful nature of the failure to produce: the Agency's March 1, 1990 document production statement made on the record during the depositions of Mr. Sashi Shah (the permit review in this matter) and Mr. Terry Sweitzer (manager of the air permit section), in which Mr. O'Donnell stated that everything in the ID, flag, and permit files was contained in the Agency Record with the exception of the above three documents, and paragraph 5 of the Agency's March 12, 1990 Response to Grigoleit's Motion for Sanctions which states, " On March 1, 1990, the Agency provided to Petitioner everything the Petitioner is legally entitled to in discovery". (Id. par. 14(b), (c), Ex. B). Finally, Grigoleit points to two affidavits made by Mr. O'Donnell as evidence of his perjury regarding this issue (see affidavit attached to Agency's March 12, 1990 Response to Grigoleit's Motion for Sanctions and the Agency's February 28, 1990 Motion to Reverse the Hearing Officer's Order of February 23, 1990). (Id. pars. 15, 16).

The Agency makes several arguments in response to Grigoleit's allegations. First, the Agency states that, in its January 23, 1990 Second Request for Production of Documents, Grigoliet did not ask for "all documents contained in the "flag file", "ID file" and "permit file". (Response par. 2). Rather, the Agency notes that Grigoleit requested "documents contained in the "flag file", "ID file" and "permit file", identified and

referred to by Shashi Shah in his discovery deposition, which concerned the Grigoleit Company." (Id.). Thus, the Agency argues that the documents in Exhibit A were not within the scope of the request to produce, and that the Agency's interpretation of what documents were requested was reasonable. (Id. par. 3). Second, the Agency notes that there were only three documents at issue during the discovery process: Mr. Shah's permit review notes regarding the permit decision in this case, the "Permit Manual", and permit traveller sheets. (Id. par. 4). The Agency then states that, because none of the documents referenced in Grigoleit's motion were ever at issue during discovery, it gave little attention to the documents and only turned over those documents at issue (i.e. those documents referred to in the permitting analysis and decision) after ordered to do so by the Hearing Officer and Board. (Id. pars. 4, 5). Third, the Agency argues that Mr. Shah's testimony at deposition and at hearing reflects that, while the files were identified, the documents were neither referred to nor relied upon in the permit review because they related to permit applications from five to seventeen years ago. (Id. par. 6). Fourth, the Agency states that it had offered access to the files by letter dated April 11, 1990. (Id. par. 3). Fifth, the Agency argues that Grigoleit has not been prejudiced by not seeing the documents prior to July 17, 1990, because they were admitted into the record at hearing, Grigoleit had one month (i.e. until the last hearing) to evaluate their relevance to the permit decision but failed to do so, and because they are available to the Board for consideration when making its ruling. (Id. pars. 7, 8). Finally, with regard to Grigoleit's allegation that Mr. O'Donnell committed perjury, the Agency argues that Mr. O'Donnell's interpretation of what Grigoleit requested was reasonable considering the circumstances and, even if there was a mistake, it was unintentional. (Id. par. 11).

In reply, Grigoleit first states that its request refers to the particular files (i.e. flag, ID, and permit files) that were identified by Mr. Shah in his discovery deposition, rather than certain documents contained in each file. (Response par. 7(B)). Second, Grigoleit argues that the production request could not be misinterpreted because the request asked for "all documents" in the files. (Id. par. 7(C)). Third, in response to the Agency's argument that the documents were never at issue, Grigoleit notes that the reason that the documents were never at issue was because it did not know of the existence of the documents. (Id. par. 7(D)). Fourth, Grigoleit argues that the documents are not irrelevant or non-discoverable simply because the Agency did not rely on them in the decision process. (Id. par. 7(E)). Rather, Grigoleit argues that, because the documents were requested and discoverable, the Agency cannot refuse to produce them or disclosure their identity on the basis that it did not look at the documents. (Id.). Fifth, Grigoleit asserts that there is no evidence that the information contained the documents is

outdated, and adds that it was denied due process and prejudiced as a result of the Agency's actions. (Id. par. 7(G)). For example, Grigoleit points to the fact that one of the Agency's reasons for the permit denial was because Grigoleit's application did not provide sufficient information to show compliance with the coating regulations, but asserts that the documents at issue show that the Agency previously classified Grigoleit's operations as a painting operation. (Id.). Finally, as for the Agency's April 11, 1990 offer to produce the files, Grigoleit states that the letter was a tender of documents that were ordered produced by the Board and Hearing Officer and did not involve the documents at issue in its Motion for Sanctions. (Id. par. 7(C)).

The Board wishes to make two points before it begins its discussion of this issue. First, we note that much of the information contained in the Mr. Medintz's Response and the parties' replies thereto relates to the other discovery battles in this case, or is a repetition of information already presented and summarized above. As a result, we will not give a complete and separate summary of the content of the documents as we did above. We will, however, reiterate the relevant information contained in the documents, as necessary, during our discussion below. Second, we deny Grigoleit's request for oral argument. Although 35 Ill. Adm. Code 103.140(d) provides for oral argument on a motion, the Board believes that the issue of sanctions can be decided based on the documents before it and that oral argument will serve no useful purpose in this instance.

As for the matter at hand, as Mr. Medintz correctly points out, discovery in Illinois is designed to allow a broad and liberal transfer of information which may lead to the development of relevant evidence. Discoverable matters need not in themselves be relevant or have been relied on or considered by the Agency. Moreover, although the Agency is required to file the Agency Record in permit appeals, there is limited regulatory guidance regarding what constitutes the Record. As a result, there have been instances where a petitioner introduces evidence that was not included in the Agency's Record, even though the evidence was in the Agency's files. In order to guard against such mishaps and ensure that a complete hearing record is made, liberal discovery must be afforded and obeyed. Balanced against the above concerns is 35 Ill. Adm. Code 101.280, which allows sanctions for unreasonable refusals to comply with any provision of 35 Ill. Adm. Code 101 through 120. Thus, the question that the Board first must ask is whether the Agency's actions were unreasonable before it can determine if the Agency's actions are sanctionable.

For the following reasons, the Board concludes the Agency's actions were unreasonable and sanctionable. In its January 24, 1990 Second Request for Production of Documents, Grigoleit asked for, "All documents contained in the "flag file" which was

identified and referred to by Shashi Shah in his discovery deposition, which concerned The Grigoleit Company". (emphasis added). This same request was reiterated for all documents in the ID file and the permit file. Although the Agency claims that Grigoleit requested only those documents (in the flag file, ID file, and permit file) that were identified and referred to by Mr. Shah in his discovery deposition, such a reading is not correct from the face of the Request to Produce. The word "was" clearly refers to each file rather than documents in those files. Moreover, as Grigoleit correctly points out, and as the above emphasized language of the Request indicates, it was the flag, ID, and permit files that were identified by Mr. Shah in his discovery deposition rather than his identification of certain documents within those files. The Agency, however, failed to give Grigoleit the complete files.

Moreover, although Mr. Medintz notes that he has no knowledge as to what documents were produced or withheld by the Agency in this instance, he also notes that there have been numerous discovery battles in this case in which Grigoleit had not received the materials it requested, even as the hearings proceeded. For example, it refused to tender documents ordered produced pending appeal to the Board of the production order, in direct contravention of the Board's rules. Although we recognize that such instances are not directly related to the motion at hand, we do believe that they serve as an indication that the Agency has not followed the spirit of discovery in this case.

We must reiterate that it does not matter whether the documents at issue in this motion are relevant or whether the Agency relied on the documents. Nor does it matter whether the documents were ever at issue during the lengthy discovery battles. As Grigoleit correctly notes, the documents were never at issue because it did not know that they existed. As for the Agency's argument regarding its offer of access to the documents via the April 11, 1990 letter, the Board has reviewed several letters that are attached to Grigoleit's reply that indicate that the April 11, 1990 letter represented a tender of those documents that the Hearing Officer and Board ordered to be produced rather than the documents at issue in this motion.

Although we conclude that the Agency's interpretation of what Grigoleit requested was unreasonable, there is no proof that the Agency intentionally or knowingly kept the documents at issue from Grigoleit, or that Mr. O'Donnell committed perjury. Accordingly, although the Board is persuaded that the Agency should be sanctioned for its failure to identify documents as requested prior to hearing (and thus, its failure to comply with pre-hearing discovery), we do not believe that the Agency's actions are so unconscionable as to warrant Grigoleit's request for dismissal. Rather, we find that the appropriate sanction is for the Board to disregard any evidence presented by the Agency

on any matters pertaining to the type of information revealed in the withheld documents that may be favorable to the Agency.

BURDEN OF PROOF

Permits are granted by the Agency pursuant to Section 39(a) of the Act which sets forth the requirements for securing a permit as follows:

> When the Board has by regulation required a permit...it shall be the duty of the Agency to issue such a permit upon proof by the applicant that the facility... will not cause a violation of this Act or of regulations hereunder....

Section 40(a)(1) of the Act provides that an applicant who has been denied a permit may petition the Board for a hearing to contest the Agency's denial of the permit application. (Ill. Rev. Stat. 1989, ch. 111½, par. 1040(a)(1)). In such a permit appeal, the sole 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 occur if the permit was granted. Alton Packaging Corporation v. IEPA, PCB 85-145, 64 PCB 234, 236 (April 24, 1986) aff'd sub nom. Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 516 N.E.2d 275, 279 (5th Dist. 1987); Joliet Sand & Gravel Co. v. PCB, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (3d Dist. 1987); Wells Manufacturing Company v. IEPA, PCB 86-48, 76 PCB 324, 334-335 (March 19, 1987); EPA v. PCB, 118 Ill. App. 3d 722, 780, 445 N.E.2d 188, 194 (1st Dist. 1983); Oscar Mayer & Co. v. IEPA, PCB 78-14, 30 PCB 297, 398 (1978).

Thus, a petitioner bears the burden of proving that no violation of the Act or Board regulations would have occurred had the Agency approved the permit application. Browning-Ferris Industries of Illinois, Inc. v. PCB et al., 179 Ill. App. 3d 598, 601, 534 N.E.2d 616, 619 (2d Dist. 1989); Alton Packaging Corporation v. IEPA, 64 PCB at 236-37 and Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 516 N.E.2d at 279; EPA v. PCB, 118 Ill. App. 3d at 780, 445 N.E.2d at 194). Once a petitioner establishes a prima facie case, it becomes incumbent upon the Agency to refute the prima facie case. John Sexton Contractors Company v. IPCB and IEPA, No. 1-89-1393, slip op. at 15 (4th Dist. June 29, 1990).

DISCUSSION

Permit Denial Reason No. 1

On September 12, 1990, the Agency filed a "Notice to the Board" stipulating that reason #1 in the permit denial letter (regarding denial of access) should no longer be considered in

support of the permit denial. In its brief, the Agency adds that, because it previously provided notice that permit denial reason #1 should not be considered in the cause, the issue is moot and, in reality, a nonissue. (Agency Br. p. 23).

Grigoleit argues that, in the Notice, the Agency admitted that its position regarding reason #1 is not supported by the facts. (Reply Br. p. 1-2). It adds that an admission that reason #1 is not supported by the facts is different from concluding that the reason is moot or a nonissue, and thus, objects to the Agency's conclusion that the issue is moot. (Id.). Finally, Grigoleit argues that the evidence shows that it did not deny the Agency access to its facility, and accuses the Agency of bad faith in its imposition of this denial reason. (Id. pp. 2-5).

The Board is puzzled by the Agency's filing of a "Notice" in light of the fact that our procedural rules do not provide for such a pleading. We do not understand why the Agency simply did not admit that there was no factual support for the denial reason and make a motion to withdraw the reason from the permit denial letter. In any event, the Agency cannot claim that a denial reason should not be considered in the cause, and then argue that it is moot or a nonissue. In other words, the Agency cannot unilaterally retract a denial reason any more than it can add one at this juncture. Rather, it is the Board that must make a finding with regard to that denial reason. Accordingly, we will construe the "Notice" as a motion to withdraw and grant the motion.

Permit Denial Reason No. 2

Grigoleit argues that the Agency's denial of its permit application based upon denial reason #2 is improper for several reasons. First, Grigoleit claims that the Agency had all the information in its files and in the permit application which demonstrated that it was exempt from 35 Ill. Adm. Code 215.204(h) and (j) pursuant to 35 Ill. Adm. Code 215.206, and that it was in compliance with 35 Ill. Adm. Code 215.301. (Pet. Br. pp. 12-19). Second, Grigoleit propounds the alternative argument that it is subject to 35 Ill. Adm. Code 215.301 rather than 35 Ill. Adm. Code 215.204 because it is a printing operation rather than a coating operation. (Id. pp. 19-21). Finally, Grigoleit argues that the Agency denial of its permit application was contrary to law because the Agency lacked any evidence that its operation violated any emission standard. (Id. pp. 22-23).

In response, the Agency argues that Grigoleit's permit application did not demonstrate compliance with the Act and the regulations. (Agency Br. pp. 2-12). Specifically, the Agency notes that Grigoleit failed to provide the information necessary to prove compliance with 35 Ill. Adm. Code 215.204(h), (j), or

215.301. (Id.). Thus, the Agency states that, based on its review of Grigoleit's permit application, it was unable to determine the company's compliance with the applicable emission limitations. (Id.).

It appears from the record that Grigoleit's previous permit was issued on the basis that it was not subject to 35 Ill. Adm. Code 215.204 based on the exemption in 35 Ill. Adm. Code 215.206, and in compliance with, 35 Ill. Adm. Code 215.301. The Agency appears to have denied Grigoleit's 1989 permit application, however, based on the conclusion that the company no longer met the 25 tons per year ("T/yr") emission limit contained in 35 Ill. Adm. Code 215.206 and, therefore, was not in compliance with 35 Ill. Adm. Code 215.204(h), (j), and 215.301. There is no indication, however, that Grigoleit was ever apprised of this fact prior to the permit denial.

The similarity of this fact situation to Wells Manufacturing Company v. IEPA, 195 Ill. App. 3d 593, 552 N.E.2d 1074 (1st Dist. 1990) leads us to believe that Wells is on point in this situation. In Wells the Appellate Court held that the Agency violated due process when it denied a foundry operator's application for renewal of an air operating permit on the basis of alleged air pollution because it did not give the applicant an opportunity to submit evidence during the application process that it was not polluting the air. Martell v. Mauzy, 511 F. Supp. 729, (N.D. Ill. 1981) is another case that appears to be analagous to the situation at hand. In that case, the District Court held that the Agency's denial, without prior hearing, of an operating permit for a sanitary landfill (after granting a developmental and construction permit) on the basis of unadjudicated charges of previous misconduct violated the landfill operators' due process rights. In light of the above cases, the Board finds that the Agency violated Grigoleit's due process rights in this case because it did not give the company an opportunity to submit evidence in rebuttal of the denial reasons during the application process.

Moreover, even if we were not to rely on the above cases, we note that we have difficulty in ruling fully on the merits of this denial reason because there was insufficient information submitted as regards Grigoleit's compliance with 35 Ill. Adm. Code 215.301, and because we are restricted to a review of the information that was before the Agency during its permit review.

The Agency, in denial reason #2, states that the application fails to provide proof of compliance with 35 Ill. Adm. Code 215.204 (h), (j), and 35 Ill. Adm. Code 215.301. While the Agency's statement with regard to 215.204 may be technically correct (i.e. that the volatile organic material ("VOM") content of some of the coating materials used at the plant exceed the specific limitations specified in 35 Ill. Adm. Copde 215.204(h)

and (j)) it also implies that the emissions of VOM do not meet the requirements for exemption from 35 Ill. Adm. Code 215.204, as specified in 35 Ill. Adm. Code 215.206. However, a review of the information in the application indicates that Grigoleit qualifies for the exemption. The total plant usage of organic based material (consisting of printing ink, thinners, and solvents) was stated to be 11,988 gallons per year ("gal/yr"). (Agency Record Ex. 1). A break-down of this total is as follows:

Group A1-A6: 6,768 gal/yr (inks & solvents used in the silk screen, lithograph, and wash line operations).

Groups
B, B2, and B5: 360 gal/yr (water soluble cutting oil used by B2)
1,400 gal/yr (1,1,1-Trichloroethane used by B2)

240 gal/yr (water soluble cutting oil used by punch press).
3,220 gal/yr (1,1,1-Trichloroethane used by punch press).

In order to qualify for exemption from 35 Ill Adm. Code Subpart F: Coating Operations (which includes 35 Ill. Adm. Code 215.204(h) and(j)), plant emissions of VOM should not exceed 25 T/yr in the absence of air pollution control equipment. Grigoleit assumes that only 6,768 gal/yr should be used in the calculation because the water soluble cutting oil and the 1,1,1-Trichloroethane do not contain or are not VOMs. Using the definition of VOM in 35 Ill. Adm. Code 211, 1,1,1-Trichloroethane is not a VOM. Information on the cutting oil is not provided to determine if it is a VOM or not. For purposes of this discussion, even if we assume that all of the organic based material used other than 1,1,1-Trichloroethane [11,988 gal/yr - (1,400 gal/yr + 3,220 gal/yr) = 7,368 gal/yr] is necessary for calculating the exemption, the VOM emissions equal 22.1 T/yr [(7,368 gal/yr x 6 lb VOM/gal)/2000 pounds per ton ("lb/T")]. Thus, it is clear that there was sufficient information in the permit application for the Agency to determine that Grigoleit's emissions meet the criterion for exemption from the limitations of 35 Ill. Adm. Code 215.204 and, therefore, are not in violation of 35 Ill.Adm. Code 215.204(h) and (j).

On the other hand, determination of compliance with 35 Ill. Adm. Code 215.301 requires a determination that the discharge of organic material that is also photochemically reactive material from any emission source be no more than 8 pounds per hour ("lb/hr"). The Agency, therefore, is correct in asking for information specified in denial reason #2(a) and (b) because such information is necessary in order to prove compliance with the regulation.

Thus, based on the above, we conclude that denial reason #2 is an insufficient basis for permit denial, and will remand this matter to the Agency for the sole purpose of eliciting the information requested in subparagraphs (a) and (b) of denial reason #2 and then determining whether Grigoleit is in compliance with 35 Ill. Adm. Code 215.301.

Permit Denial Reason No. 3

Grigoleit argues that the Agency's denial of its permit because of alleged land violations is improper for several reasons. First, Grigoleit argues that the Agency's conclusion that there are land violations is based upon invalid information that was given to the Air Division by the Land Division and that the land violations have been resolved. (Pet. Br. pp. 24-37). Second, Grigoleit argues that the denial of its operating permit for unadjudicated land violations is contrary to Section 39(a) of the Act because the Agency must issue a permit upon proof that its facility will not violate the applicable air emissions standards. (Id. pp. 37-38). Third, Grigoleit argues that the Agency's denial of its permit for alleged land violations is contrary to Sections 30 and 31 of the Act, and violated Grigoleit's due process rights. (Id. pp. 38-42). Specifically, Grigoleit notes that these sections require the Agency to issue and serve it with a written notice and formal complaint for the alleged violations, and that the Agency has no authority to cite alleged land violations as a basis for its denial of an air permit application. (Id.). Finally, Grigoleit argues that it was unlawful for the Agency to apply Coordinated Review of Permit Applications ("CROPA") rules to its permit application. (Id. pp. 42-43).

For its part, the Agency states that denial reason #3 is valid because the alleged land violations were still outstanding and remained unresolved at the time of the permit denial (i.e. October 11, 1989). (Agency Br. p. 12-20). The Agency adds that neither the Act nor case law supports the proposition that the Agency's Air Division can only examine air emission violations when deciding whether to issue an air permit, and that such an assumption would be contrary to the Agency's mandate to protect the environment and enforce the regulations adopted by the Board. (Id. p. 18). With regard to CROPA, the Agency argues that it is not an improper use of unpromulgated regulations because it is not a set of substantive regulations. (Id. p. 21-22). Rather, the Agency argues that it is only a means of processing permit applications in order to facilitate communication among the various divisions of the Agency so that one division does not issue a permit for equipment that may be causing violations in other environmental media. (Id.).

The Board has no quarrel with the Agency's desire to protect

the environment, nor are we willing to state that the Agency can not examine, for example, water or land violations in its review of an air permit when the grant of that air permit would cause a violation of the Act or water pollution or waste disposal regulations. That is not the situation in this case, however.

We are troubled by the situation at hand, moreover, for several reasons. First, we are troubled by the fact that Grigoleit had no knowledge or notice of the fact that the Agency was denying its permit on the basis of possible land violations, and was not given an opportunity to provide any information with regard to the alleged land violations prior to the permit denial. As a result, it appears that Grigoleit's due process rights have been violated. (see the Wells and Martell cases cited above).

Moreover, as Grigoleit correctly points out, Sections 30 and 31 of the Act require the Agency to file complaints against companies for alleged violations. The Board has repeatedly stated that permit denial cannot take the place of an enforcement action. Centralia Environmental Services v. IEPA, PCB 89-170 pp.10-11 (October 25, 1990); Waste Management v. IEPA, PCB 84-45, 61, 68, 60 PCB 173, 208-210 (October 1, 1984), aff'd sub nom. IEPA v. IPCB, 138 Ill. App. 3d 550, 486 N.E.2d 293 (3d Dist. 1985), aff'd 115 Ill.2d 65, 503 N.E.2d 343 (1986); Frink's Industrial Waste, Inc. v. IEPA, PCB 83-10, 52 PCB 447 (June 30, 1983), aff'd sub nom. The City of Rockford v. PCB, 125 Ill. App. 3d 384, 465 N.E.2d 996 (2d Dist. 1984). Thus, if the Agency has waste concerns, the proper mechanism to address those concerns is an enforcement action rather than the denial of an air permit. In this case, however, it appears that the Agency has acted in contravention of this holding.

Finally, we are troubled by the Agency's application of CROPA in this situation. While the Agency argues that CROPA is not a set of substantive rules that need to be promulgated pursuant to the Illinois Administrative Procedures Act ("IAPA"), it admits that CROPA is used as a means of processing permit applciaitons within the Agency. Even if we were not to question the Agency's assertion that the CROPA "rules" need not be promulgated, this record shows that the CROPA "rules" were not made available to Grigoleit during the permitting process. Moreover, even if the "rules" had been made available to Grigoleit, it still would be unreasonable to expect Grigoleit to have anticipated their application to the situation at hand because Grigoleit had only the one air permit and the CROPA rules, on their face, apply to multiple permitting situations. (see the Wells and Martell cases above).

Thus, based on the above, the Board finds that the reason #3 is an inappropriate basis for permit denial. Accordingly, we need not deal with the issue of the accuracy of the information that the Agency relied on as support for the denial reason.

However, we do note that Grigoleit has presented unrebutted evidence showing that the Air Division relied on outdated and imprecise information from the Land Division in denying the permit.

Additional Matters

Grigoleit continues to contend that the Agency violated Section 39 of the Act in that it failed to act upon its permit application within the 90 days from the date the application was filed (i.e. mailed). (Pet. Br. pp. 44-45). Grigoleit argues that, as a result, its permit issued as a matter of law. (Pet. Br. p. 50; Reply Br. p. 41). In response, the Agency states that it received the permit application on July 13, 1989 and issued its denial on October 11, 1989 (i.e. 90 days after its receipt of the application). (Agency Br. pp. 20-21).

The Board notes that it already has issued two Orders in this case finding that the Agency acted in a timely manner (see the Board's March 22 and May 10, 1990 Orders). Grigoleit has not presented any new information that persuades us that our decision was incorrect.

Grigoleit next contends that the denial letter lacked the specificity required by Section 39 of the Act and that, as a result, the Agency's permit denial was improper. (Pet. Br. pp. 45-47; Reply Br. p. 41-42). Specifically, Grigoleit argues that the letter is deficient in that it does not contain a statement of specific reasons why the cited sections of the Act and regulations might not be met if the permit were granted. (Id.). The Agency did not rebut this argument.

Section 39(a) of the Act requires that the Agency provide the applicant with a detailed statement of the reasons for denying the permit application. That Section also states that such statement shall include, but not be limited to, the following: 1) the sections of the Act which may be violated if the permit were granted; 2) the provisions of the regulations, promulgated under the Act, which may be violated if the permit were granted; 3) the specific type of information which the Agency deems the applicant failed to provide; and 4) a statement of specific reasons why the Act and the regulations might not be met if the permit were granted.

The intent of Section 39(a) is to require the Agency to issue its decision in a timely manner with information sufficient for the applicant to determine the bases for the Agency's determination. City of Metropolis v. IEPA, PCB 90-8 (February 22, 1990). After reviewing the denial letter and Grigoleit's specified objections thereto, the Board finds that the three reasons articulated in the denial statement coupled with the cited sections of the regulations sufficiently sets forth the

reasons why the regulations might not be met if the permit was granted. (see Centralia Environmental Services, Inc. v. IEPA, PCB 89-170 (October 25, 1990)). Thus, we will not overturn the Agency's denial based on this argument.

Finally, because we are not finding in favor of the Agency on any of the denial reasons, we will not rule on Grigoleit's argument that an entire permit denial is improper once the Board finds that one of the Agency's denial reasons is improper. Moreover, we wish to leave no implication that we have held that Grigoleit is necessarily in compliance with the Act or regulations, that this Order is a relaxation of Grigoleit's obligation to comply with the Act and Board regulations, or that this Order frees it from the possibility of enforcement for any noncompliance other than for operating without a permit.

The above Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

For the foregoing reasons, the Board finds that denial reasons #1 and #3 are inappropriate, and remands this matter for reconsideration of denial reason #2 consistent with this Opinion.

Section 41 of the Environmental Protection Act. Ill. Rev. Stat. 1989, ch. 111½, par. 1041, provides for appeal of final Orders of the Board within 35 days. the rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

Board Members J. Theodore Meyer and R. Flemal concurred, and Board Members J. Dumelle and B. Forcade dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 29th day of November, 1990, by a vote of 5-2.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board