

ILLINOIS POLLUTION CONTROL BOARD
February 23, 1989

VILLAGE OF SAUGET,)
)
 Petitioner,)
)
 v.) PCB 86-57
) PCB 86-62
 ILLINOIS ENVIRONMENTAL) (Consolidated)
 PROTECTION AGENCY,)
)
 Respondent.)

MONSANTO COMPANY,)
)
 Petitioner,)
)
 v.) PCB 86-58
) PCB 86-63
 ILLINOIS ENVIRONMENTAL) (Consolidated)
 PROTECTION AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by R. C. Flemal):

This matter comes before the Board upon motions for reconsideration filed January 19, 1989 by the Village of Sauget ("Sauget"), Monsanto Company ("Monsanto"), and the Illinois Environmental Protection Agency ("Agency"). Sauget also moves the Board to grant a stay of the contested conditions of its AB plant permit. Replies to the motions were filed by Sauget, Monsanto, and the Agency on February 2, 1989.

The Board grants reconsideration as requested in the motions. Upon reconsideration, the Board finds some of the matters raised in the motions merit that changes be made in the Board's prior determination, and that some do not. The Board will first discuss the motions as they request changes to the due process and general merits section of the Opinion, and then those requests involving specific conditions.

Due Process

Both Sauget and Monsanto request reconsideration of the due process determinations, reiterating their main objection that

insufficient time for notice and hearing¹ were given by the Agency prior to permit issuance. In its Opinion of December 15, 1988, the Board addressed this objection by finding that due process can only be properly assessed in the context of the full administrative continuum involving the action before both the Agency and the Board, pursuant to the findings of the Third District Appellate Court as affirmed by the Illinois Supreme Court in Illinois Environmental Protection Agency v. Illinois Pollution Control Board et al. [115 Ill.2d 65, 503 N.E.2d 343 (1986); 138 Ill. App. 3d 550, 486 N.E.2d 293 (Third Dist. 1985)]. In IEPA v. IPCB, the court found, *inter alia*, that the safeguards of a due process hearing are absent until a hearing before the Board. The Board therefore found that whatever procedural deficiencies may arguably have existed at the Agency level were corrected by the proceeding before the Board. In so finding the Board had no intention of implying (as Sauget and Monsanto would apparently wish to read) an actual finding that actions at the Agency level had resulted in due process procedural deficiencies. Thus, the Board finds that neither Sauget or Monsanto have raised arguments which convince the Board to alter this previously articulated position.

The Board further notes that Sauget elected to exercise its right to appeal the Agency's permit decision immediately to the Board rather than object before the Agency to the conditions and the circumstances under which the conditions were placed in the permit. Sauget thereby chose to forego a refiling of the permit application and to initiate further informal dialogue with the Agency, electing to fall back on the due process safeguards provided in a hearing before the Board.

This notwithstanding, the Board does recognize, as Sauget must also, that the scope of hearing before the Board does have limitations. One limitation is that the hearing is confined to the record before the Agency at the time of the Agency's permit decision, which is a Board and court holding of long standing. This limitation has been recently restated by a number of courts and forcefully upheld by the 5th District Appellate Court in Alton Packaging Corp. v. IPCB and IEPA, 162 Ill. App. 3d 731, 516 N.E.2d 275 (1987), and the Board in City of East Moline v. IEPA (PCB 86-218, September 8, 1988). See also, Illinois Environmental Protection Agency v. Illinois Pollution Control Board et al., 118 Ill. App. 3d 772, 776-780 (1983); IEPA v. IPCB, 138 Ill. App. 3d 550, 486 N.E.2d 293 (1985); IEPA v. IPCB, 115

¹ The Board notes that the Agency is not required by either State or federal law to conduct a hearing prior to its determination on the issuance of an NPDES permit; such hearing is discretionary with the Agency (c.f., Borg-Warner Corporation v. Mauzy (1981), 100 Ill. App. 3d 862).

Ill. 2d 65, 503 N.E.2d 343 (1986); Joliet Sand & Gravel Co. v. IPCB, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, (1987). In choosing to appeal to the Board, Sauget therefore elected to effectively "freeze" the record as it existed before the Agency. Sauget itself acknowledges as much:

Sauget agrees that the Board's role in reviewing permit appeals is limited to the record before the Agency at the time of its permitting decision. (Sauget Response to the Agency's Motion for Reconsideration, p. 6).

Thus, Sauget cannot now argue that it was prejudiced before the Board by not being able to add new information to the record, an action which is precluded by the very act of filing an appeal.

As an additional "due process" matter, in its Reply to the Agency's Motion for Reconsideration, Sauget alleges² that the Agency has sent a proposed permit to USEPA without making changes as directed by the Board. In its reply, Monsanto also makes statements regarding Agency action subsequent to the Board's December 15, 1988 Order. This information was apparently presented to highlight alleged continued procedural deficiencies, perhaps to imply that the Agency is allegedly again not following proper procedures. The Board finds this information is irrelevant to the instant review. Any allegations regarding the Agency's alleged failure to comply with a Board Order are more properly brought in a separate action. The instant permit appeal concerns only the permit issued by the Agency on March 21, 1986. The Board notes that on February 14, 1989 Sauget filed a Motion to Vacate the proposed modified permit which was apparently filed since the Board's December 15, 1989 Order. The Agency's reply was filed on January 21, 1989. That motion will be considered in a future Board Order.

P/C Plant Permit

Both the Agency and Sauget request the Board to reconsider its determination to void the P/C Plant's NPDES permit No. IL0021407 because it contains provisions for the discharge of a combined sewer overflow. Both contend that the Board's directive to either extend the prior NPDES permit held by the P/C Plant or to issue a new permit with conditions commensurate with the prior permit until diversion to the AB Plant, would eliminate the ability of the P/C Plant to discharge its combined sewer overflows.

² The Board notes that neither Sauget's nor Monsanto's Replies alleging this new information was accompanied with an affidavit.

The Board believes this problem can be rectified by requiring that the combined overflow provisions for the P/C Plant discharge as contained in NPDES permit No. IL0021407 be incorporated into the AB Plant permit subsequent to diversion. The Board modifies its prior Opinion and Order and directs that such requirement be added to the AB Plant permit.

Internal Dates

The Agency objects to the Board's finding regarding the adjustment of internal dates. The internal dates which are of concern to the Agency are contained in Special Condition 8 of the AB Plant permit and involve a schedule of compliance with final effluent limitations. The Agency specifically states that in adjusting the internal dates for construction and operation of the AB Plant pursuant to the Board's directive, it is constrained by information available to it at the time of permit issuance. The Agency further states that the purpose of the compliance or implementation schedule is to define when compliance is required, and the earliest date supported by the record before the Agency must be used.

Upon reconsideration, the Board finds that clarification of its directive on the adjustment of internal dates regarding Special Condition 8 of the AB Plant (Schedule of Compliance with Final Effluent Limitations) is necessary here, and in so doing modifies in part its previous directive.

In its September 26, 1988 brief, Sauget asserts that the compliance schedule³ contained in Special Condition 8 was based upon a January 20, 1986 completion of construction date. Sauget further asserts that at the time of permit issuance (March 26, 1986), the Agency knew that construction completion was unattainable by January 20, 1986. An updated construction schedule was presented by Sauget at its March 10, 1986 meeting with the Agency, and was considered by the Agency along with dates presented in USEPA comments (R. 140-150; 685-690; Sauget Ex. 13).

The dates presented by Sauget (as contained in Sauget Exhibit 13 as well as any other information discussed on March 10, 1986) was therefore "information that was available to the Agency at the time of permit issuance". This leaves the question

³ Board Note: The Schedule of Compliance with Final Effluent Limitations contained in Special Condition 8 contains a construction and operation schedule for the AB Plant. This schedule is sometimes referred to in the record and briefs as "the construction and operation schedule", and also as the "implementation schedule" in the permit application.

of whether Sauget has met its burden of proof that the dates contained in the permit were dates which were unreasonable and inconsistent with the purpose of the compliance schedule under the Act and Board regulations.

The Agency apparently based its determination of the compliance schedule, at least in part, upon the construction schedule contained in Sauget's permit application for the AB Plant⁴. The permit application for the AB Plant contained the following "implementation schedule":

End Construction.....	12/31/85
Begin Discharge.....	12/31/85
Operational Level Attained.....	4/30/86

(Resp. Grp Ex. 1, ex. 24).

Special Condition 8 contains the following schedule items:

Complete Construction.....	1/20/86
Attain Operational Level*.....	4/30/86
Complete diversion of all flows to the AB Plant.....	7/20/86
Attain full operational level.....	1/20/87

*Operational level means compliance with limitations on Page 2 of this permit [Effluent Limits, Monitoring and Reporting]. Full operational level means compliance with the terms of this permit.

(Resp. Grp. Ex. 1, Ex. 1).

The schedule of compliance in the October 5, 1985 draft permit contained a one year and four month interval between the completion of construction and the attainment of operational level (January 20, 1986 to April 1, 1987). It is worth noting that neither the permit application form nor the October 5, 1985 draft permit contained any distinction between "operational level" and "full operational level".

⁴ The Agency implies in its Motion for Reconsideration (par. 13) that it also placed some weight on the finding of the Board in an old variance proceeding (PCB 83-146, December 15, 1983; Resp. Grp Ex. 1, ex. 36) that only a one year period of time was necessary between the start of discharge to attainment of operational levels at the AB Plant. However, because this variance finding substantially predates revised estimates provided by Sauget in its permit application and subsequent representations to the Agency, the Board finds that it is improper to place significant weight on this old variance finding.

At hearing, Mr. George Schillinger, the AB Plant Manager and Certified Class A Operator, testified that he attended the meeting with the Agency on March 10, 1986 where he and others presented several plans to the Agency regarding the start-up of the facility (See Sauget Ex. 13). He stated that it would take at least until June [1986] to have the plant operating with primary treatment, and he described characteristics of the facility which support his conclusions (R. at 141; 145-148). Mr. Schillinger also testified that with starting the equipment on March 21, 1986, he was confident that the effluent limitations on page two of the permit could be met in 18 months to two years [attainment of operational level] (R. at 149).

As noted above, the above schedules and discussion consist of information available to the Agency at the time of permit issuance. The Board believes that it is reasonable for a treatment plant of the size and complexity of the AB Plant to experience construction and other operational delays subsequent to the time of application for a permit. The Agency gave no technical reasons for the compliance dates contained in the permit and its reliance on the dates contained in the application is misplaced in light of the fact that the time intervals are not consistent. The Board modifies its prior directive regarding internal dates. The Board directs the Agency to modify Special Condition 8 of NPDES Permit No. IL0065145 to contain the following compliance schedule dates related to completion of construction and attainment of operational level, which are supported by information available to the Agency prior to permit issuance:

Complete Construction.....1/20/86
 Attain Operational Level.....9/20/87

The Board further directs that any other internal dates contained in Special Condition 8 be adjusted to avoid inconsistencies. Other internal dates not related to operational levels or construction are to continue according to Board directives contained in the December 15, 1988 Opinion and Order.

Mercury

Monsanto requested that the Board reconsider its ruling on the applicability of 35 Ill. Adm. Code 304.202 to the Monsanto facility. The Board believes that its interpretation of Section 304.202 and its disposition of the issues involving the contested mercury condition in its Opinion is correct and declines to change its determination. The Board notes, however, that although Monsanto and Sauget highlight the fact that there is no information in the record regarding the length of time necessary for residual mercury to flush from the pretreatment system, it hopefully cannot be expected that flushing would be required in

perpetuity. The Board emphasizes, as was stated in its Opinion, that there is also no evidence that such flushing would take an extraordinary time. Therefore it is reasonable for the Agency, and this Board upon review, to conclude that the mercury would be flushed within the time provided for diversion from the P/C to the AB Plant, and to impose limits as required by applicable regulations.

pH Sampling and Internal Discharge Limits

The Agency requests the Board to reconsider its determination regarding the requirement of twice weekly pH sampling. The Board finds that the Agency has presented nothing which would necessitate changing its determination as stated in its Opinion. In fact, the Agency does not even address the inconsistencies between the daily requirement contained in the P/C permit and the twice weekly requirement contained in the AB Plant permit for the same waste stream (discharge from P/C which is influent to AB).

Sauget requests reconsideration of the pH sampling requirement as an internal discharge limit and to the placement of internal discharge limits in the AB Permit in general. Sauget has presented nothing which would convince the Board to change its prior determination. However, the Board amends the citation from 35 Ill. Adm. Code 307.102 to 307.1101 to reflect the recent renumbering of that Section.

Total Organic Carbon (TOC)

The Agency requests that the Board modify its Opinion because, as written, the Opinion goes beyond the Board's obligation to decide the utility of the continuous TOC monitoring limit in this particular case, and that this may become an adverse precedent for cases where indicators exist which would show that continuous TOC monitoring is desirable or necessary to prevent violations of the Act or Regulations. Sauget states in its Reply that it would not object to the Board limiting its holding to the facts as they exist at the AB Plant.

In an appeal of conditions to a permit, it is the Board's obligation to determine whether the conditions imposed are necessary to ensure compliance with the Act and Board regulations. The Board accordingly reviewed the continuous TOC monitoring condition for the AB permit and found that the requirement is not necessary to ensure compliance with the Act and Board regulations. It was not the Board's intent to find that there are no situations in which a continuous TOC monitoring requirement would be necessary. The Board limits the holding as stated in its Opinion and Order of December 15, 1989 to the facts as they exist at the AB Plant.

Chemical Monitoring and Identification

The Agency asks the Board to make a distinction between priority and extra-priority pollutants in its directive regarding modification of Condition 20, which requires chemical monitoring of both priority and extra-priority pollutants. The Agency is correct that Sauget has not objected to the testing for priority pollutants or disputed its ability to chemically identify priority pollutants. The Board agrees that Sauget's obligation to test and report for priority pollutants as stated in Special Condition 20⁵ should remain unchanged.

Request for Stay


As a final matter, Sauget requests that the Board "clarify the status of the contested conditions from January 21, 1987 until the issuance of the modified permit." Sauget suggests that the "status of the conditions" would be clarified if the Board were to extend the stay previously granted for the AB permit which the Board declined to extend in its June 2, 1988 Order.

The Board will address the matter of the stay in the Board's future Order along with the Motion to Vacate.

IT IS SO ORDERED.

B. Forcade dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 23rd day of February, 1989, by a vote of 6-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

⁵ The Board notes that its Opinion of December 15, 1983 at page 20 incorrectly referenced its directive on this issue as pertaining to Special Condition 19. That error is hereby corrected.