ILLINOIS POLLUTION CONTROL BOARD
January 19, 1989

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

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

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

The Board issued its Opinion and Order in this matter on December 15, 1988. Pursuant to 35 Ill. Adm. Code 103.240, the 35 day time period for the filing of motions for reconsideration does not expire until after January 19, 1989.

On January 12, 1989 the Board received a carbon copy addressed to it of a letter written by USEPA to the Agency which, among other things, criticizes aspects of the Board's decision in this matter. There is no indication that this letter was sent to the other parties in this case.

As this letter can be viewed as an ex parte communication, in order to cure any potential taint in the record of this proceeding, the Board directs its Clerk to docket this letter and to place it in the record, and to serve a copy of the letter, along with this Order, to counsel for the parties in this case and USEPA. In accordance with the usual practice of dealing with communications of this type, the Board will disregard the substance of this communication in any further deliberations which may arise in this proceeding.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 19th day of January, 1989, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
230 SOUTH DEARBORN ST.
CHICAGO, ILLINOIS 60604

REPLY TO THE ATTENTION OF
5RA-TUB-8

10 JAN 1989

Bernard P. Killian, Director
Illinois Environmental Protection Agency
2200 Churchill Road
P.O. Box 19276
Springfield, Illinois 62794-9276

Dear Mr. Killian:

This letter is to inform you of the United States Environmental Protection Agency's (U.S. EPA) concerns with the Illinois Environmental Protection Agency's (IEPA) and the Illinois Pollution Control Board's (IPCB) administration of the Illinois National Pollutant Discharge Elimination System (NPDES) program. I am making these comments pursuant to U.S. EPA's oversight authorities under Section 402 of the Clean Water Act (CWA) and the Memorandum of Agreement between our two agencies. These concerns involve the IEPA's and IPCB's administration of individual permits and of the NPDES regulatory program in general. This letter expands upon the concerns enumerated in my May 12, 1987, letter to Governor Thompson.[1]

Many of the problems enumerated in my May 12, 1987, letter to Governor Thompson still remain unresolved. As demonstrated in the Sauget decision, the Illinois Pollution Control Board (IPCB or Board) still shows little concern for Federal requirements, leaving IEPA unable to implement fully the federally mandated programs.

Furthermore, IEPA had agreed to represent U.S. EPA's position on issues affecting the administration and implementation of the NPDES program to the Board in order to ensure that the IPCB does not take an action that U.S. EPA would later be forced to veto. Unfortunately, as was demonstrated in the Sauget hearing, IEPA has not followed through on that promise.

To reiterate U.S. EPA's recommendations in my May 12, 1987, letter:

1. The authority to issue administrative orders and such other equivalent enforcement actions, as set forth in Section 309 of the CWA, should be vested in the IEPA.

[1] "Final Report on Issues Concerning the State of Illinois' Administration of Federally Mandated Environmental Programs."

2. The IPCB should develop the necessary mechanisms to ensure consistency with Federal requirements in order to avoid conflicts with U.S. EPA.

3. Illinois must develop rules for streamlining its docket and commit to complete rulemaking actions within 12 months of initiation.

I have not seen significant progress in these areas, even though the necessary legislation enabling Recommendation No. 3 was passed last summer.

On the specific matter of Sauget, U.S. EPA has been, and remains, highly concerned with the effluent from the Village of Sauget, the most toxic discharge in the six State area. We have closely followed the permitting of discharges from the Village of Sauget. Outlined below are specific deficiencies in the Board's decision from our perspective. I believe the amount of time it has taken to resolve the Sauget permit appeal is inexcusable, as was also the time it took to reissue the permit for the Physical/Chemical (P/C) plant. Close to 3 years were needed in each instance, and now the permit may be modified based on the Board's decision. I urge the IEPA to use all available mechanisms, including requests for reconsideration, appeal rights, and remand authority, to correct these deficiencies.

1. The Board Decision

a. Effective dates

Of primary concern resulting from the recent Board decision is the vague character of all effective dates. With regard to the P/C plant, it is unclear if the P/C limits are voided ab initio, or are voided as of the date of the decision. Other effective dates, such as those for the limits on the discharge from the P/C plant to the American Bottoms (A/B) plant, are linked to attainment of operational levels.

U.S. EPA does not agree that compliance dates should be established for the convenience of the permittee. Nor do we believe this decision should excuse past non-compliance. Instead, compliance dates must be set at the earliest feasible date. The Board order should not excuse, nor relieve, a compliance date unless the condition was clearly impossible at the time and remains impossible today. IEPA is hereby on notice that U.S. EPA will review any proposed permit modification and intends to object to any change of effective dates for conditions that were attainable by the date in the original permit.

U.S. EPA further considers the Board's direction, that the dates be "related" to attainment of operational levels, to be effective on a parameter by parameter and condition by condition basis. In other words, since some conditions were technically attainable before others, the earliest effective date for each condition should apply. IEPA should consider July 2, 1986, the date the A/B plant attained secondary treatment levels as controlling.

b. Whole Effluent Toxicity

Being "persuaded" that the tiered approach to toxicity limits should be used at Sauget, the Board set aside the whole effluent toxicity limit. The Board did not base its decision on the manifest weight of the evidence, nor did it base its reasoning on considerations of arbitrariness. It appears to merely reflect a preference on the part of the Board that hardly warrants changing the permit.

Furthermore, the Board's decision was based on an improper interpretation of U.S. EPA policy.[2] Under U.S. EPA policy, the tiered approach is applicable to situations where there is reasonable doubt as to the toxicity of the discharge. In situations in which toxicity is known and anticipated to continue, the whole effluent limit, not the tiered approach, is the required approach under U.S. EPA's interpretation of Section 301 of the CWA when dealing with complex toxic effluents.

Test results demonstrating the high toxicity levels of the Sauget effluent were excluded from evidence at the hearing. Although the Board did not hear all the evidence, U.S. EPA notes that the tests required by the tiered approach have already been completed. Since the Board expressly found that IEPA has authority to impose a whole effluent toxicity limit,[3] and since the Board upheld the reopener clauses which allows for permit changes based on this evidence, U.S. EPA does not read the Board decision to forbid retaining the same or imposing an even more stringent whole effluent toxicity limit.

[2] "Based on overwhelming testimony in support of the tiered approach... plus the USEPA's own analysis of the advantages and disadvantages of the two approaches, the Board is persuaded that the tiered approach is best applied in the instant matter." (emphasis added) Board decision at 18.

[3] "These two sections, when taken together, provide clear authority for the imposition of an effluent toxicity limit whenever such limit is necessary to ensure compliance with the Board's water quality standard for toxicity." Board decision at 18.

Due to the known toxicity of Sauget's effluent, U.S. EPA will object to any modified permit for Sauget that does not contain a whole effluent toxicity limit. Furthermore, this subsequent testing fully supports the need for a whole effluent toxicity limit in the permit more than ever before. As a result, U.S. EPA believes that IEPA should address this issue by continuing the present acute limit in full force and effect. I also believe that such a decision not to modify the permit with regard to the whole effluent toxicity limit is fully consistent with the Board order. Additionally, based on the results of the above tests, a chronic whole effluent toxicity limit should be added.

c. Biomonitoring, Mixing Zone Studies, Chemical Monitoring and Identification

The Board upheld the biomonitoring requirement, but ordered the permit to be re-written to reflect more explicit directions contained in the opinion. Formal permit conditions are not the proper forum to resolve such technical disagreements. A letter from IEPA to Sauget explaining the Agency's willingness to be flexible on the specifics of plan development, rather than permit re-writing, is all that is necessary here. A similar clarification of intent applies to the mixing zone condition and the chemical monitoring and identification conditions.

2. Hearing Preparation and Follow-up

U.S. EPA went to considerable time and expense to provide witnesses for the public hearing on the Sauget permits. The failure to file prehearing statements that our witnesses agreed to prepare, as well as an unwillingness to push the Board to consider the true facts in the case, resulted in the exclusion of U.S. EPA witnesses and their testimony, which would have supported IEPA's defense of its own permit. I believe proper prehearing preparation would have avoided this outcome and that U.S. EPA's testimony would have given the Board a better understanding of the rationale behind several of the critical permitting decisions the State made.

Instead, IEPA identified only two witnesses in support of the permit. One of the two was unavailable during the hearing and his deposition was all that was entered in support of the critical issues of whole effluent toxicity limits, and biomonitoring. This witness' personal absence made rebuttal testimony impossible, thus discounting its affect before the Board. The other IEPA staff member testified on behalf of Sauget. Furthermore, IEPA's discovery in preparation for hearing was served too late to allow for deposition of Sauget's numerous expert witnesses. Such lack of hearing support and inadequate legal preparation are indicative of a program which fails to comply with the most basic requirements.

Finally, I believe this unfortunate series of events could have been avoided if the State had lived up to its promise to fully represent U.S. EPA's position in Board proceedings. Furthermore, I believe that the Board has been slow to respond to the concerns I outlined in my May 12, 1987, letter.

In conclusion, I recommend that IEPA utilize its own process to correct the deficiencies in the permit, and in the process, cited above. IEPA may choose to petition for reconsideration, appeal, or re-write the Sauget permit. Be advised that U.S. EPA intends to object to any permit conditions for Sauget's highly toxic effluent that do not meet U.S. EPA's standards. U.S. EPA will continue to oversee IEPA's administration of its NPDES duties.

Sincerely yours,

Valdas V. Adamkus
Regional Administrator

cc: John Marlin, Chairman, Illinois Pollution Control Board
Honorable James R. Thompson, Governor of Illinois