ILLINOIS POLLUTION CONTROL BOARD
July 11, 1986

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

ORDER OF THE BOARD (by J. Anderson):

PCB 86-57 is an appeal filed April 18, 1986 by the Village of Sauget of certain conditions of NPDES permit No. IL0021407 dated March 21, 1986 relating to Sauget's existing physical/ chemical wastewater treatment plant (P/C plant). PCB 86-62 is a third party appeal filed April 21, 1986 of the same conditions of the same permit filed by Monsanto Company, a discharger into that plant.

By Orders entered April 24, 1986, in each of the cases the Board, inter alia, asked the parties to address whether whether the Board had authority to entertain the Monsanto third-party appeals. Monsanto filed a response on on May 16. On May 19, 1986, the Agency filed a motion to dismiss Monsanto's third party appeals. Pursuant to leave of the Board, Monsanto filed a response on July 1, 1986.

There are two issues for Board consideration here. The first is whether 35 Ill. Adm. Code Section 105.102(b)(3) authorizing third party appeals of NPDES permits is invalid pursuant to the holding of Landfill, Inc. v. Pollution Control Board, 74 Ill. 2d. 541, 387 N.E. 2d 258 (1978). The second is whether, if the rule is valid, Monsanto has fulfilled the preconditions to acquire standing pursuant to the rule's terms. In summary, the Board finds that Section 105.102(b)(3) is valid,

that Monsanto has standing to appeal. The Agency's motion to dismiss is denied. Monsanto's appeal may therefore proceed, and is being consolidated with PCB 86-57.

The Board will, however, reaffirm its ruling in Village of Gilberts v. Holiday Park Corp. and IEPA, PCB 85-96, August 15, 1985, that the validity of Rule 105.102(b)(3) is not impaired by the Landfill decision. The Landfill case involved a challenge to two of the Board's procedural rules, Rule 205(K) which provided for appeals of issued permits by "any person adversely affected" and Rule 503(a) providing for the filing by any person of complaints to revoke a permit on the ground that "it was issued by the Agency in violation of the Act, or the Regulations or of a Board Order". The Illinois Supreme Court determined that these rules were "unauthorized administrative extensions" of the Board's authority to hear citizen complaints conferred by Section 31(b) since "prosecution under the Act...is against polluters, not the Agency", and as well as of its authority, conferred by Section 40 of the Act, to entertain appeals by the applicant of permit denials.

In reaching these conclusions, the Court noted that under the Act, the role of the Board is to determine, define and implement environmental control standards, the role of the Agency is, among other things, to administer permit systems, and that of private persons is to "effect the Act's purpose of restoring, protecting and enhancing the environment. An interaction of [these] roles...occurs in the enforcement provisions of the Act", rather than in the permitting provisions. 387 N.E. 2d at 263.

The Court further found that:

> "If the Board were to become involved as the overseer of the Agency's decision-making process through evaluation of challenges to permits, it would become the permit-granting authority, a function not delegated to the Board by the Act.
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> The one statutory exception to the Board's quasi-legislative role in relation to permits is in instances in which the Agency has denied a permit. Explicit procedural requisites are established for Board review of permit denials, and Agency appearance at such permit-denial hearings is mandated. The Agency is also required to transmit to the applicant a detailed statement as to the reasons the permit application was denied. There are no comparable statutory provisions for Board review on either substantive or technical grounds of the Agency's grant of a permit,*

> thus indicating a legislative intent not to provide for such a proceeding." (Citations and footnotes omitted). Id. at 264.

The Act does not explicitly provide for third party appeals of NPDES permits. However, as noted by the Board in Gilberts, Section 11(a) recites the legislative findings of the desirability of Illinois' securement of NPDES enforcement primacy. Section 11(b) "authorize(s), empower(s), and direct(s) the Board to adopt such regulations...as will enable the State to secure federal approval to issue NPDES permits...". The Board went on to state that:

> "The regulations at issue were adopted in Docket R73-11 and 12, In The Matter of: National Pollutant Discharge Elimination System Regulations Orders of August 29 and September 5, 1974, and Opinion of December 5, 1974. In summary, the Opinion does not note that the third party appeal is federally required, although it does note at some length that the opportunity for public hearings at the Agency level is required prior to issuance or denial of a permit. (See esp. pp. 1, 4-7). The Board has also reviewed the October 20, 1977, USEPA/Illinois Memorandum of Agreement giving the State NPDES enforcement primacy; it does not specifically reference permit appeal procedures, although these procedures were part of the package submitted to secure the NPDES program for the state.
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> 40 CFR Part 123 sets forth state program requirements for NPDES, RCRA and other programs, and Part 124, set out procedures for decision-making by USEPA. Section 124.91 provides that third parties may appeal NPDES permit decisions; this is not a requirement which has been made specifically applicable to State programs in Part 123.
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> However, it should also be noted that Section 124.19, giving third party appeal rights concerning RCRA and UIC permits, is also not specifically applicable to state programs pursuant to the terms of Part 123. Notwithstanding, USEPA interpreted third party

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* The Board has historically reviewed conditions of permits issued by the Agency, and Section 40(a)(1) has since been amended to so provide.

> appeals as being an essential portion of the state RCRA authorization package, so the Board adopted rules giving such rights, see R84-10, In The Matter of RCRA and UIC Procedural Rules, Order of December 20, 1984, Opinion of January 10, 1985. On this basis, the Board believes USEPA, if asked, would conclude that third party appeal rights are an essential part of the NPDES package. If the Board does not allow appeals of NPDES permits to proceed, the State's NPDES primacy could be jeopardized."

In its motion to dismiss, the Agency comments on this ruling are first that it has no knowledge of any "USEPA intention to question the sufficiency of State NPDES primacy on this issue", but that if "USEPA does advance the proposition that 3rd party appeal rights have to be provided for in the Board Rules, such amendments to the Rules will have to be made in the context of a rulemaking proceeding." The thrust of these comments is misplaced. Rules authorizing third party appeals of NPDES permits are in place; it is repeal of these rules which would require a rulemaking proceeding, and it is repeal of these rules or a declaration of their invalidity which the Board believes could cause NPDES primacy problems.

Monsanto, in its May 16 brief, has aptly explained that the rationale behind the Landfill result does not apply in the NPDES situation, as the relationship between the Board, the Agency, and the public envisioned in the original Act has been in some respects altered consistent with the legislative determination that it is desirable for the State to obtain and maintain NPDES enforcement primacy. As Monsanto states:

> "The Court in Landfill, Inc. v. Pollution Control Board stated that 'The Act contemplates the participation of private persons to effect the Act's purpose of restoring, protecting and enhancing the quality of the environment (cites deleted). An interaction of the roles of the Board, the Agency, and private persons occurs in the enforcement provisions of the Act.' 74 Ill.2d 541, 555 (1978). As indicated above, this is not correct insofar as the Federal Clean Water Act (CWA) and NPDES permit program are concerned. The CWA and the NPDES permit [program] clearly require that the public be given an opportunity to become fully involved in the development of terms and conditions for NPDES permits."

Finally, the Board also notes that, in contrast to the situation in Landfill, in this case there are "provisions for Board review on...substantive or technical grounds of the Agency's grant of a permit" embodied in the NPDES regulations.

Having determined that Section 105.102(b)(3) is a valid rule, the Board must determine whether Monsanto has acquired standing pursuant to its terms, which are that:

> "Any person other than the applicant who has been a party to or participant at an Agency hearing with respect to the issuance or denial of an NPDES Permit by the Agency, or any person who requested such a hearing in accordance with applicable rules, may contest the [Agency's] final decision..."

Monsanto's July 1 memorandum is accompanied by the affidavit of its counsel who participated in review of the various draft permits for Sauget's facility issued by the Agency prior to issuance of the final permit. Monsanto asserts that no public hearing was held by the Agency, but fails to assert that it had requested such a hearing. Monsanto relates, however, that the draft permits issued by the Agency for Sauget's plant on May 8 and October 2, 1985, were reviewed by personnel from the Krummrich plant (which discharges into the plant) and from its corporate headquarters, that comments were prepared and discussed with Sauget, and that these Monsanto comments were included in those "official comments" submitted by Sauget to the Agency.

Monsanto asserts that receipt of a USEPA letter, dated February 14, 1986, or February, 1986 draft permit, and the permits issued March 21, 1986, caused Monsanto, Sauget and others to go "into high gear," because these contained unacceptable conditions not present in previous drafts, but which were included at USEPA's direction without "comments, discussion or input from the affected parties." Monsanto asserts that the permits were reviewed by its personnel, and were the subject of numerous meetings, including one with Sauget's attorneys to discuss appeal strategies.

Finally, Monsanto notes that its situation is not that of any ordinary contributor and ratepayer to a sewage treatment plant, in that it contributes and pays for treatment of 81% of the total flow to the Sauget plant. While not questioning the ability of counsel for Sauget to prosecute an appeal, Monsanto submits that the interests of Sauget and Monsanto are "diverse and not necessarily compatible in all instances," and gives two examples of this diversity. For these reasons, Monsanto requests that, if the Board should determine that Monsanto may not prosecute an appeal in its own right, that it be granted leave to intervene in the Sauget appeal.

Intervention is not an option available to Monsanto, as the Board adheres to its previous determination that Landfill, Inc., supra, bars intervention in permit appeal actions. Waste Management v. Illinois Environmental Protection Agency (cites), the Board cannot find that Monsanto has complied with the literal requirements of Section 105.102(b)(3), as no Agency hearing was held or requested by Monsanto. However, the Board finds that the purpose of these requirements is to prevent an appeal by a "stranger to the permit," that is, a person who has provided no input to the process prior to issuance of the final permit. The Board finds that the level of Monsanto's participation in the permitting process at the Agency level constitutes substantial compliance with the requirements of Section 105.102(b)(3). The Board will, accordingly, allow Monsanto's appeal to proceed.

Finally, as the Board indicated it would in its June 5, 1985, Order, the Board hereby consolidates this appeal with Sauget appeal of this permit in docket PCB 86-57 in the interests of administrative economy.

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 17th day of July, 1986, by a vote of 5-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board