ILLINOIS POLLUTION CONTROL BOARD
September 11, 1986

FRITZ ENTERPRISES, INC,	)	
	)	
Petitioner	)	
	)	PCB 86-76
vs.	)	
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY	)	
	)	
	)	
Respondent	)	

DISSENTING OPINION (by R. C. Flemal):

I dissent for reasons that the facts in this matter require an outcome different from that ordered by the majority.

Although the Board has reached its conclusion based on the argument that the alleged opacity violation is an improper basis for permit denial, I believe that the fundamental issue in this matter is what would or would not have been shown by a mass emissions test.

The central matter is that Petitioner has a right to assert an affirmative defense to an alleged opacity violation by showing that mass emission limitations are met. Petitioner was not afforded this right. It would appear that the principal control is the Agency's inability within statuatory deadlines to gather, review, and otherwise process the extensive information which is necesary to review a permit application and also have sufficient time left over to allow Petitioner to prepare and present its affirmative defense. Given its time limitations, the Agency therefore did what it had to do. It acted on the information it had available, which in this case caused it to deny the permit at issue. This action was entirely appropriate.

However, Petitioner also rightly identifies that it could not defend itself under these circumstances: Petitioner was not able to present its defense to the Agency*, nor was it able to

* It might be argued that Petitioner could have foreseen the possibility of a denial, and therefore prepared its affirmative defense during the time of the permit review and in advance of the Agency's action. However, given the expense associated with a mass emissions test and the fact that Petitioner had previously been awarded a similar permit, it is unreasonable to expect Petitioner to have taken this action. Also, Petitioner was not aware, prior to the Agency site inspection related to the permit application, that the Agency was even going to conduct an opacity test at the facility.

present its defense to the Board because the Board can review only information available to the Agency. This is an obviously absurd situation in which statutory time limits and conditions of review conflict with a statutory right.

Further, I imagine the following scenario. Consider that I am an egregious polluter*. I apply to the Agency for a permit. The Agency acts timely, gathers information including an opacity test, and, recognizing me thereby for what I am, denies me a permit. I, however, have not been presented a reasonable opportunity to assert my right to an affirmative defense. The Board must agree with me in this matter, and thereby orders the Agency to issue a permit to me. I, for all my polluting ways, thereby get my permit. This is a further absurdity.

There are at least two possible resolutions to these absurdities. The most appropriate would seem to be a revision of the time limits imposed upon the Agency such as to allow sufficient time to review a permit application and, in the event that this indicates grounds for a denial, also sufficient time for the petitioner to prepare and present its affirmative defense to the Agency.

While revision of the time limits is the best remedy in the long run, in the instant matter I believe that the Board could have exercised another option. It could have returned the permit to the Agency to review its determination in light of such affirmation defense as Petitioner might present.

The majority of the Board would appear to believe that there are only two possible outcomes that can be ordered by the Board in a permit appeal: affirmation of the Agency or ordering that the permit be issued. I am not willing to accept this narrow all-or-nothing interpretation, nor can I believe that it serves either justice or environmental protection.

The position of the majority is at least in part based on an interpretation of the Illinois Appelate Court, Third District's Opinion in Ill. Power Co. v. Ill. Pollution Control Bd, Ill. App. 426 N.E.2d 1258. In IPC a permit appeal proceeding was remanded to the Board because, inter alia, the Board left to the Agency's discretion a determination of appropriate monitoring standards. The Court held that the Board can not so delegate its responsibility for making a final determination in a permit appeal. From this the Board has appeared to conclude that the only determination which can be made in a permit appeal is a final determination. However, I do not see any reading of IPC which so requires. I believe that there is latitude for the

* This is an entirely hypothetical situation, and is not meant in any way to characterize the specific circumstances of Fritz Enterprises.

Board to make what in effect is an interim determination by sending the matter back to tne Agency as suggested above. Should the Agency decide that the new information does not offer reason to issue the permit, the Board would still have jurisdiction to make a final determination. Alternatively, should the Agency decide that the new information warrants issuance of the permit, the petition could be withdrawn or dismissed as moot.

The problem that I myself see in the Board adopting a posture of allowing interim determinations in permit appeals is that the Board also has deadlines for making its determination. I do not know quite how this might be resolved, but I do believe that it should be explored in depth because of the substantial good that would result in the Board being able to make interim determinations.

In summary, I believe that the instant matter has revealed a fault in the system by which some permit reviews and appeals proceed. I believe that these faults are rectifiable, and could have been addressed in the instant matter. I therefore can not agree with the Order of the majority.

Ronald C. Flemal
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was submitted on the 16th day of September, 1986.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board