ILLINOIS POLLUTION CONTROL BOARD
February 2, 1978

OWENS-ILLINOIS, INC.   )
)
                Petitioner,   )
)
        v.   )   PCB 77-288
)
ENVIRONMENTAL PROTECTION AGENCY,   )
)
                Respondent.   )

ORDER OF THE BOARD (by Mr. Young):

On January 27, 1978, Respondent Illinois Environmental
Protection Agency filed a Motion for Reconsideration, re-
questing the Board to reconsider its Order of January 19,
1978, which dismissed a counterclaim for permit revocation
filed on December 23, 1977. A Motion and Memorandum in
opposition to the Motion to Reconsider was filed by Peti-
tioner Owens-Illinois, Inc. on February 1, 1978.

The Environmental Protection Act through Title VIII,
Sections 31 and 33, gives the Board discretionary authority
to revoke a permit after finding a violation of the Act or
any rule or regulation thereunder or of any permit or term
or condition thereof, after the filing and hearing on a
complaint before the Board. As we stated in our dismissal
of January 19, 1978, the Procedural Rules of the Board pro-
vide that an action for revocation of a permit shall be
commenced by notice and formal complaint in accordance with
the requirement of Rules 304 and 305 and are thus consistent
with the authority and direction of the Act.

Since the Agency has filed and the Board has authorized
hearing on a Complaint (PCB 77-346) seeking revocation of
the permits, the identical relief sought in Respondent's
Counterclaim, the necessity for the Motion to Reconsider
the denial of the counterclaim is not clear since the same
relief can be obtained in PCB 77-346.

In the Motion to Reconsider, Respondent states that
the Board's decision of January 19, 1978, constitutes a
reversal of previous Board policy which allowed the pleading
of counterclaims, citing three early Board decisions. Nor-
folk & Western Railway Co. v. EPA, 1 PCB 281 (1971); EPA v.
Granite City Steel Co., 1 PCB 324 (1971); City of Arcola v.
EPA, 4 PCB 635 (1972).

The decision of January 19, 1978, to refuse the counter-claim is not a reversal of the earlier decisions; in each of those cases the counterclaim (or countercomplaint) arose after the initial filing of a variance petition and obviously to penalize the variance petitioner for violations during the period prior to the filing of the variance. For a number of reasons, most of which are detailed by Professor David P. Currie in a law review article, Enforcement Under the Illinois Pollution Law, 70 Northwestern L.R. 389-485 (1975), the practice of counterclaim or countercomplaint by way of variance recommendation was discontinued and then finally laid to rest by the decision of the Second District in Citizens Utilities Company v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, 289 N.E.2d 642, 9 Ill.App.3rd 158 (1972). The Court (at 289 N.E.2nd p648) stated:

> "The fact that the Act provides enforcement proceedings to ascertain, penalize, and deter violators, further detracts from the Board's conclusion that such powers are necessarily included in variance proceedings. If the Board wanted to impose penalties against Citizens for violations of effluent standards or for the deterioration of the lagoon, the Agency should have filed a complaint and followed proper enforcement procedures, per-haps in a consolidated proceeding."

It is noted that none of the cases cited in support of the Motion to Reconsider involve a counterclaim in a case arising out of Section 40 of the Act to contest the decision of the Agency to deny a permit. Since the Board had adopted a Procedural Rule 503 on October 16, 1970, which was sub-stantially the same as the existing Rule 503(b), we have no reason to believe that the instant matter has or would have been differently decided; the opinions in the cases cited in Respondent's Motion are not on point.

The Motion for Reconsideration is hereby denied.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Order was adopted on the 2ⁿᴰ day of February , 1978 by a vote of 5-0 .

Christan L. Moffett, Clerk
Illinois Pollution Control Board