ILLINOIS POLLUTION CONTROL BOARD
February 17, 1982

OLIN CORPORATION (EAST ALTON),	)	
Petitioner,	)	
v.	)	PCB 80-126
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

MSSRS. RANDALL ROBERTSON AND ERIC ROBERTSON, LUEDERS, ROBERTSON, AND KONZEN, AND NICHOLAS C. GLADDING, ATTORNEY AT LAW, APPEARED ON BEHALF OF PETITIONER;

MSSRS. STEVE EWART AND GARY P. KING, ATTORNEYS AT LAW, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by D. Anderson):

This matter comes before the Board upon a petition and amended petition for review of conditions of an NPDES permit filed by Olin Corporation (Olin) on July 3, 1980 and April 29, 1981. The Illinois Environmental Protection Agency (Agency) filed the Agency Record on August 8, 1980, and an amended summary on August 17, 1981. Five public hearings were held at Edwardsville on April 24, August 10, August 11, August 12 and August 20, 1981. There is no indication of any public participation.

This matter concerns NPDES Permit No. IL0000230, issued by the Agency to Olin on June 4, 1980. The permit authorizes discharges from Olin's East Alton facility to Wood River Creek, a tributary of the Mississippi River. The Board has recently granted a variance which was related to an issue originally subject to this appeal (Olin v. IEPA, PCB 80-170, December 18, 1980, May 1, 1981). The facility is described in the December 18, 1980 Opinion. Among other things, it manufactures ammunition from brass and copper.

Also related to the original issues is a proposal for a site specific copper water quality rule for this facility (R81-24).

The original petition objected to several conditions of the permit. These have been resolved by the variance and agreement of the parties. The permit in question expired June 30, 1981.

The remaining issue concerns the facility process evaluation (FPE) condition, Special Condition 5, Attachment G. This condition required Olin to evaluate its process areas to determine the presence or absence of any of 129 toxic pollutants. Olin was to identify: those it knew to be present; those it knew, or had a strong reason to believe, to be absent; and, those it was unsure of. Olin was to perform sampling and analysis only for those it was unsure of. This was to consist of three composite samples of influent and effluent to the Zone 6 treatment plant. Olin was then to identify the source of toxics found to be present.

The Agency has presented evidence in this case of the presence of the following materials in Olin's wastestream:

copper
lead
chloroform
1,1,1-trichloroethane
dichlorobromomethane
trichloroethene
trinitroresorcinol

The first six are listed in Attachment G of the permit. Trinitroresorcinol is the nitration product of resorcinol, which is a hazardous waste listed for toxicity (§721.133).

Monitoring is required for copper and lead. It is clear that the Agency has sufficient reason to require monitoring of the remaining material in the list. However, the FPE condition potentially required monitoring of 123 additional materials. There is no satisfactory explanation of why the presence of seven materials gives the Agency reason to suspect the presence of 123 with sufficient certainty to impose monitoring.

Rule 905 of Chapter 3 provides in part as follows:

> Following receipt of the complete application for an NPDES permit, the Agency shall prepare a tentative determination. Such determination shall include at least the following:
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> (b) If the determination is to issue the permit, a draft permit containing:
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> ***
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> (3) A brief description of any other proposed conditions which will have a significant impact upon the discharge;

(c) A statement of the basis for each of the permit conditions listed in Rule 905(b).

The Agency issued a draft permit with the FPE condition. However, at no time did it prepare or transmit to Olin a statement of the basis of the FPE condition. The Agency instead contends that the entire Agency record was the basis of the condition and that the rule required only that it be "prepared", not transmitted to the applicant.

The Agency has not argued that the conditions will not "have a significant impact upon the discharge."

The Board adopted Rule 905 with the NPDES regulations (R73-11, R73-12, 14 PCB 661,672, December 5, 1974). Writing for the Board, Mr. Dumelle stated:

> Rule 905, Tentative Determination in Draft Permit, was enacted to be consistent with the Federal Requirement set forth in 40 CFR 124.31 and Section 39(a) of the Act. Rule 905(c) requires the Agency to prepare a statement which substantiates the basis for the conditions imposed in an NPDES Permit. This statement will provide a useful reference in the event a permit condition is challenged. Rule 905(d) was included to comply with §39(a) of the Act.

It is clear from the adopting Opinion that the statement of basis is a separate document which must be prepared by the Agency.* It is not altogether certain whether the statement

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*The comparable federal regulations are now found at 40 CFR §124.7 and §124.8(b)(4). The Agency has proposed that the Board adopt these in connection with the UIC permit program (R81-32, 6 Ill. Reg. 1011, January 29, 1982). 40 CFR §124.8(b)(4) provides as follows:

> The fact sheet shall include, when applicable:
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> ...(4) A brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions and appropriate supporting references to the Administrative record.

The comparable federal regulations also specifically require the statement of basis to be sent to the applicant. There is no language whatsoever limiting the conditions to those having a significant impact. Although these federal regulations do not control Illinois NPDES permits, they serve as a useful guide in interpreting state regulations which were intended to follow the comparable federal rules.

of basis must be transmitted to the applicant, although it is difficult to see how the rule could accomplish the stated result if the statement of basis were not transmitted to the applicant.

Olin contends that it is entitled to a hearing de novo to present evidence to the Board attacking the basis of the condition. The Agency contends that the information is inadmissible unless it was presented to the Agency as a part of the application. Olin contends that its difficulty stems from the fact that it could not discern the basis of the condition until after the appeal was filed, affording it access to the Agency record and discovery.

Procedural Rule 502(b)(8) provides as follows:

> The hearings before the Board shall extend to all questions of law and fact presented by the entire record. The Agency's findings shall be prima facie true and correct. If the Agency's conclusions of fact are disputed by the party or if issues of fact are raised in the review proceeding, the Board shall make its own determination of fact based on the record. If any party desires to introduce evid-nce before the Board with respect to any disputed issue of fact, the Board shall conduct a de novo hearing with respect to such issue of fact.

The third and fourth sentences relate to findings of fact by the Board. The third sentence refers to a Board "determination of fact based on the record." This authorizes the Board to make its own findings based on the Agency record.

The fourth sentence specifically refers to a "de novo hearing with respect to such issue of fact." This sentence governs factual issues at Board hearings.

The hearing de novo provisions must be construed narrowly; otherwise permit applicants will be tempted to withhold facts at the Agency level in hopes of a more friendly reception before the Board. This would encourage appeals and would place the Board in a position of being the first agency to evaluate the factual submissions. This would distort the separation of functions in the Act.

The fourth sentence allows a hearing de novo only with respect to "any disputed issue of fact." This refers only to an Agency factual determination which was disputed before the Agency.

Olin did not dispute these facts at the Agency level. However, the cause of Olin's failure was the absence of any Agency factual determinations to dispute.

Had the Agency included a statement of the basis of the special conditions with the draft permit, Olin could have refuted the basis in its comments on the draft. A proper record for Board review would have resulted. The Board holds that Rule 905(c) required a statement of basis of the FPE condition in this draft permit. Accordingly, the Board will reverse the Agency concerning inclusion of Special Condition 5. The permit will be remanded to the Agency for further action.

Olin sought to introduce at the hearing exhibits which were before the Board in PCB 73-509, 510, in which Olin sought an adjudication that Wood River Creek was a secondary contact water (Rule 205 and 302). This was resolved adversely to Olin on procedural grounds. The intent of these exhibits was to demonstrate that Olin's discharge had no effect on the receiving stream. The Agency objected to admission on the grounds that these exhibits were not a part of the Agency record. Although the Agency would ordinarily take notice of previous permit applications and Board Orders affecting the facility, this information was not a part of any permit application and the Board action was terminated without an adjudication of the facts. The Board holds that the Agency was under no obligation to take notice of these exhibits. Had Olin wanted this material in the Agency record, it should have referenced it in the application or its comments on the draft permit.

The motions concerning admission of these exhibits were outlined in an Order entered November 5, 1981, at which time the Board reserved ruling. Olin's motions to admit into the record of August 14 and October 15, 1981 are denied. The Agency's August 17 motion to admit its brief in PCB 73-509, 510 is denied. Olin's August 27 motion to admit its earlier brief is denied. Olin's October 15 motion for oral argument is denied.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

The permit is remanded to the Illinois Environmental Protection Agency for further action consistent with this Opinion.

IT IS SO ORDERED.

Mr. Goodman concurred.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order were adopted on the 17th day of February, 1982 by a vote of 4-0.

Christan L. Moffett

Christan L. Moffett, Clerk
Illinois Pollution Control Board