

ILLINOIS POLLUTION CONTROL BOARD
February 17, 1977

ASHLAND CHEMICAL COMPANY,)
)
 Petitioner,)
)
 v.) PCB 76-186
)
 ENVIRONMENTAL PROTECTION AGENCY,)
)
 Respondent.)

CONCURRING OPINION (by Mr. Zeitlin):

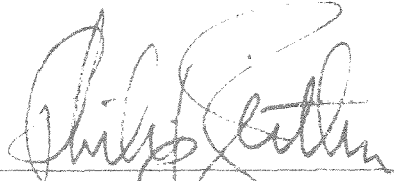
While I concur in the decision of the majority in this case, denying Petitioner's Permit Appeal, I must respectfully disagree with certain elements of the majority Opinion's rationale.

I feel that the majority Opinion fails to give adequate weight to our earlier Opinion and Order in Ashland v. EPA, PCB 75-174. Although the majority is correct in stating that res judicata cannot be the basis of our finding in this case, its conclusion that the doctrine is wholly inapplicable seems incorrect. Petitioner has simply failed to show that all the elements in PCB 75-174 are present in the instant matter, unchanged.

The majority's decision on the matter of the Agency's motives (i.e., 'they are not an issue'), raises serious questions. The dates involved in the Agency's denial of Ashland's permit with regard to the expiration of the Variance in PCB 75-174, and certain testimony at hearing (e.g., R. 34), indicate that the Agency may be using the permit system to circumvent our adjudicative decisions. The Agency's Brief makes the issue clear: "Surely it does not follow the course of good administrative logic when a quasi-judicial Board requires a technical administrative agency to be bound by that Board's decision with regard to a technical issue." (Brief of Jan. 20, 1977, pages unnumbered.) It is clear at least to me that the scheme set up under the Environmental Protection Act envisions just such a binding effect for our decisions.

It is often said that hard cases make bad law. That need not be the case here. Our decision should have been limited to a narrow holding that res judicata or some theory of estoppel has not been adequately raised by Petitioner, by an adequate showing that the facts are the same. We should have gone no further, and thus avoided other issues which are left open under the majority's rationale.

With these reservations, I concur in the result in this case.



PHILIP ZEITLIN
Member of the Board

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Concurring Opinion was submitted on the 8th day of March, 1977.



Christan L. Moffett, Clerk
Illinois Pollution Control Board