

ILLINOIS POLLUTION CONTROL BOARD  
November 8, 1989

REICHHOLD CHEMICALS, INC., )  
 )  
Petitioner, )  
 )  
v. ) PCB 89-148  
 ) (Permit Appeal)  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
 )  
Respondent. )

ORDER OF THE BOARD (by B. Forcade):

On October 16, 1989, Reichhold Chemicals, Inc. ("Reichhold") filed a Motion for Sanctions asserting that the Illinois Environmental Protection Agency ("Agency") had failed to file the record in a timely matter. On October 23, 1989, the Agency filed a Response to the Motion, asserting that the late filing was due to staff shortages and not for the purposes of delay. On October 25, 1989, the Agency filed a Motion to Dismiss or Alternatively Stay Proceedings. On October 31, 1989, Reichhold filed an Opposition to the Motion. On November 7, 1989, Reichhold filed an emergency motion to the Board for rulings on discovery requests. The Board will first address the Motion to Dismiss.

In its motion to dismiss, the Agency asserts that the Board lacks jurisdiction over the instant proceeding. The Agency states that a previous permit decision involving the same facility and the same issues was appealed to this Board as Reichhold Chemicals v. EPA, PCB 89-94. On June 8, 1989, the Board dismissed that appeal because the matter was under reconsideration by the Agency at Reichhold's request. Reichhold appealed that dismissal to the Third District Appellate Court in the matter of Reichhold Chemicals, Inc. v. IPCB and IEPA, Case No. 3-89-0393. That matter is still pending. The Agency asserts that jurisdiction over this conflict now lies with the Third District, and that under the theory of Joliet Sand and Gravel Company v. EPA, PCB 87-55 (June 10, 1987), this matter must be dismissed.

Reichhold asserts that the Agency comes to the Board with unclean hands (since the record was filed late), and that counsel for the Agency has not demonstrated that he is entitled to represent respondent under the theory of People ex rel. Scott v. Briceland, 65 Ill. 2d 485, 359 N.E.2d 149 (1979). Further, Reichhold asserts that Joliet Sand and Gravel was improperly decided.

As a preliminary matter the Board must note that the Agency attacks this Board's jurisdiction to hear the case. Assuming,

for purposes of argument, that the Agency was guilty of unclean hands and that counsel was not authorized to represent the Agency, such facts would not confer jurisdiction to hear a case upon the Board. Therefore, the Board must still evaluate whether it has jurisdiction here. Since the Board finds that it lacks jurisdiction, all other matters need not be addressed in today's order.

Reichhold is attempting to secure an air operating permit for its batch polyester resin plant in Morris. To accomplish that purpose Reichhold submitted factual information to the Agency (Permit Application No. 86020013). After reviewing those facts and the relevant law, the Agency denied the permit on April 25, 1989. On May 30, 1989, Reichhold appealed that denial to this Board. On June 8, 1989, this Board dismissed the proceeding for lack of jurisdiction. Reichhold appealed that decision to the Third District in Case No. 3-89-0393. The question of how the laws of the State of Illinois should be applied to the facts of Application No. 86020013 now resides in the Third District.

Shortly after the Agency denied the permit on April 25, 1989, Reichhold requested reconsideration of Permit Application No. 86020013. On May 15, 1989, the Agency denied the permit and Reichhold appealed to this Board on September 19, 1989. In the present proceeding Reichhold asks the Board to apply the laws of the State of Illinois to the facts in Application No. 86020013. This is the same question that is pending in the Third District.

The Board notes that the Appellate Court could reach a conclusion that the Board decision was incorrect and remand the matter to the Board. In a similar manner, the Court might reach a conclusion that the Agency determination to deny the permit was correct or incorrect, and dispose of the ultimate issue. In short, the Appellate Court has jurisdiction over the question of how the laws apply to Application No. 86020013. Any action by this Board on that question could be viewed as an attempt to undermine the Court's authority; the Board will not pursue such a course of action. Reichhold has provided no law to support the proposition that this Board could act on a question pending in the Appellate Court.

The Board's most recent decision regarding multiple permit reviews was IBP, Inc. v. IEPA, PCB 88-98, September 13, 1989. There the Board stated:

Secondly, the Board points out that there are three potential permits mentioned in IBP's petition, IBP's brief and the Agency's brief. All three are for the same facility, the same operations and under the same regulatory framework. This is the potentially unending scenario depicted in the Board's previous opinion in Joliet Sand and Gravel Co. v. IEPA, PCB 87-55 (June 10, 1987).

IBP, Supra, at 3.

The Board will follow the same rationale adopted in Alburn, Inc. v. IEPA PCB 81-23, March 19, 1981; Caterpillar Tractor Company v. IEPA, PCB 79-180, July 14, 1983; Joliet Sand and Gravel v. IEPA, PCB 87-55, June 10, 1987; and IBP, Inc. v. IEPA, PCB 88-98, September 13, 1989. Those cases stand for the proposition that the Act does not allow a facility to seek multiple contemporaneous permit reviews before this Board and the Courts involving the same facility attempting to conduct the same operations under the same regulatory framework.

The Board notes that almost all of the permit appeals before this Board proceed in the normal manner. The permit applicant either appeals the original Agency permit decision or the applicant seeks reconsideration before the Agency and then appeals after the decision on reconsideration. Here, Reichhold is pursuing both courses of action at the same time, creating what the Agency accurately describes as a "procedural morass". A similar situation arose in Joliet Sand and Gravel, where the Appellate Court received two appeals (Nos. 3-87-0141 and 3-87-0398) involving the same facility attempting to conduct the same operations under the same regulatory framework. This leaves the Board in the uncomfortable position of either invading the Agency's prerogative to reconsider its decisions or usurping the Third District's jurisdiction. Petitioner has yet to explain in what manner the normal appeal procedures would infringe its rights.

In summary, the Board grants the motion to dismiss. The Board will not grant the motion to stay. The Petitioner is entitled under the Act to a final decision within 120 days, or the Petitioner prevails by default. Petitioner has not granted a waiver of that decision deadline. The Board will not construe any other action as equivalent to a waiver, for fear of injecting yet another procedural issue into what should have been a rather straightforward matter involving issues of air pollution control.

IT IS SO ORDERED

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 8<sup>th</sup> day of November, 1989, by a vote of 7-0.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board

