ILLINOIS POLLUTION CONTROL BOARD
November 4, 2004

NOVEON, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 91-17
	)	(Permit Appeal - Land)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by N.J. Melas):

On October 20, 2004, Noveon, Inc. (Noveon) filed motions for reconsideration of the Board's final opinion and order and for oral argument (Mot.). Noveon also requests that the Board rule on the motions contemporaneously with Noveon's pending petition for an adjusted standard (docketed as Petition of Noveon, Inc. for an Adjusted Standard from 35 Ill. Adm. Code 304.122, AS 02-5). The Environmental Protection Agency (Agency) responded in opposition to the motions on November 3, 2004 (Resp.). For the reasons set forth below, today's order denies both motions.

THE BOARD'S FINAL OPINION AND ORDER

On January 28, 1991, B.F. Goodrich Corporation, now Noveon, Inc. (Noveon), petitioned the Board for review of its National Pollutant Discharge Elimination System (NPDES) permit. Noveon appealed four issues concerning its discharge of ammonia into the Illinois River, including: (a) an effluent limit for ammonia based on Section 304.122(b) of the Board's rules; (b) the Agency's designation of two outfalls; (c) toxicity testing and biomonitoring requirements; and (d) the Agency's interpretation and application of the federal regulations governing discharges from Organic Chemicals, Plastics, and Synthetic Fiber (OCPSF) facilities. Noveon later withdrew its appeal of the fourth issue. The Agency included an ammonia effluent limit in Condition 4 of Noveon's permit, designated two outfalls in Conditions 5 and 7 of Noveon's permit, and required toxicity and biomonitoring in Condition 6 of Noveon's permit.

On September 16, 2004, after over 13 years and hearings held both in 1991 and 2004 in a proceeding that has a statutory decision deadline, the Board rejected Noveon's arguments on appeal (Board Op.). In its final opinion and order, the Board found Noveon failed to prove that the conditions of the NPDES permit, as issued, are unnecessary to accomplish the purposes of the Environmental Protection Act (Act) and Board regulations. Accordingly, the Board found the Agency properly issued the NPDES permit number IL0001892 to Noveon on December 28, 1990.

MOTION FOR RECONSIDERATION

A party may move the Board to reconsider and modify a decision within 35 days after receiving a final Board order. 35 Ill. Adm. Code 101.520(a). Noveon received the Board's final order on September 16, 2004. The motion for reconsideration, filed October 20, 2004, is therefore timely.

In its motion, Noveon moves the Board for reconsideration of its final opinion and order arguing that the Board "did not properly interpret or apply the law in this proceeding and accepted factual errors raised by the Illinois EPA." Mot. at 1.

In its response, the Agency asserts that Noveon has raised no new facts, new caselaw or statutory provisions that the Board overlooked or improperly interpreted in the final opinion and order. The Agency states that Noveon "simply attempts to readdress arguments already considered and rejected by the Board." Resp. at 2.

For the following reasons, the Board denies Noveon's motion for reconsideration. A motion to reconsider may be brought "to bring to the [Board's] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board's] previous application of existing law." Citizens Against Regional Landfill v. County Board of Whiteside County, PCB 92-156, slip op. at 2 (Mar. 11, 1993), citing Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1991); *see also* 35 Ill. Adm. Code 101.902. A motion to reconsider may specify "facts in the record which were overlooked." Wei Enterprises v. IEPA, PCB 04-23, slip op. at 5 (Feb. 19, 2004). "Reconsideration is not warranted unless the newly discovered evidence is of such conclusive or decisive character so as to make it probably that a different judgment would be reached." Patrick Media Group, Inc. v. City of Chicago, 255 Ill. App. 3d 1, 8, 626 N.E.2d 1066,1071 (1st Dist. 1993). Below the Board discusses each of these arguments, analyzes the arguments, and gives the Board's findings and reasons for those findings.

Improper Interpretation or Application of the Law

Burden of Proof and Standard of Review

Noveon states that the Board misapplied burden of proof and standard of review. Noveon states that the burden of proof requires Noveon to show that the Agency's decision is against the manifest weight of the evidence. Mot. at 2; citing 415 ILCS 5/40(a) and 41(a). The supreme court has specifically rejected the application of the manifest weight of the evidence standard in permit appeals. IEPA v. PCB, 104 Ill. Dec. 786, 503 N.E.2d 343 (1986). Rather, the petitioner has the burden to show, by the preponderance of the evidence, that the application as submitted to the Agency demonstrates that no violation of the Act or Board rules would occur if the permit were issued. Applying this standard, consideration of the record demonstrated that Noveon has not shown that compliance with the applicable ammonia effluent limits can be achieved without imposition of Condition 4. The same holds true, as discussed in the Board's final opinion and order, for Conditions 5, 6, and 7.

Noveon states that the Board misapplied the burden of proof by requiring Noveon to prove that a permit condition would violate either the Act or Board regulations. Mot at 2. However, the Board states in the opinion that "'in granting permits, the Agency may impose such conditions as may be necessary to accomplish the purposes of this Act, and are not inconsistent with the regulations promulgated by the Board thereunder." Board Op. at 7; citing 415 ILCS 5/39(a) (2002). The Board further clarified the petitioner's burden by stating "the petitioner must prove that the conditions in the Agency-issued permit are not necessary to accomplish the purposes of the Act and Board regulations, and therefore, must be deleted from the permit." Board Op. at 7. Throughout the opinion, the Board made each finding in perspective of the burden of proof, finding that Noveon failed to prove that any of the contested conditions were arbitrary and unnecessary. Board Op. at 15, 17, and 19.

The Fourth District Appellate Court has held that "[t]o prevail on its claim, the petitioner must show the IEPA's imposed modifications 'were not necessary to accomplish the purposes of the Act, or, stated alternatively, [the petitioner] had to establish that its plan would not result in any future violation of the Act and the modifications, therefore, were arbitrary and unnecessary.'" IEPA v. Jersey Sanitation Corp., 271 Ill.Dec. 313, 321, 784 N.E. 2d 867, 875-76 (4th Dist. 2003); citing Browning-Ferris Ind. Of Illinois, Inc. v. PCB, 179 Ill. App. 3d 598, 603, 534 N.E.2d 616, 620 (2nd Dist. 1989). Accordingly, the Board finds that Noveon has not shown that the Board improperly applied the burden of proof.

Estoppel in Application of Ammonia Limit

Noveon contends the Board improperly applied the law in holding that estoppel does not apply to bar the Agency from including an ammonia limit in Noveon's NPDES permit. Mot. at 3. Noveon argues that the Agency took an affirmative action, constituting misrepresentation, in 1997 by issuing a draft permit with an ammonia limit and subsequently removing that limitation from the final permit. Noveon argues that, in addition, the Agency's "issuance of NPDES permits for a long span of years without an ammonia effluent limitation" constitutes a consistent position on the application of Section 304.122(b). Mot. at 3.

The Board considered the past history of NPDES permits at the Henry Plant. In accordance with precedent and the well-established principle that estoppel applies to public bodies only in rare and unusual circumstances, the Board concluded that the Agency did not take any affirmative action on which Noveon substantially relied. Board Op. at 12. Even assuming the Agency did take such an affirmative action, taking the ammonia limit out of Noveon's final permit does not constitute a knowing misrepresentation as required by Illinois courts. Recently the Board stated "[a] party seeking to estop the government also must show that the government made a misrepresentation with knowledge that the misrepresentation was untrue. People v. QC Finishers, Inc., PCB 01-7, slip op. at 27 (Jul. 8, 2004); citing Medical Disposal Sendees, Inc. v. IEPA, 286 Ill. App. 3d 562, 677 N.E.2d 428, 433 (1st Dist. 1997); People v. Chemetco, Inc., PCB 96-76, slip op. at 11; White & Brewer Trucking, PCB 96-250, slip op. at 10 (Mar. 20, 1997).

Finally, the Board restates here, as courts have stated in the past, that the Board will not invoke estoppel "where it would operate to defeat the effectiveness of a policy adopted to protect

the public." Board Op. at 12; citing Dean Foods Co. v. PCB, 143 Ill. App. 3d 322, 492 N.E.2d 1344 (2nd Dist. 1986); citing Tri-County Landfill Co. v. PCB, 41 Ill. App. 3d 249, 255, 353 N.E.2d 316 (1976).

Conditions 5 and 7

Noveon asserts that the Board's finding on Conditions 5 and 7, requiring the separation of outfalls, should be reconsidered because the Board's opinion regarding the applicability of these two conditions is against the manifest weight of the evidence. Noveon claims that the Board's opinion stated that Section 304.102 of the Board's regulations regarding dilution gives the Agency discretion to determine whether separation of waste streams is appropriate and whether the applicant is providing the best degree of treatment. Mot. at 9; citing Board Op. at 16. Noveon actually cites to a paraphrase of an Agency argument, not a Board finding, and therefore, does not raise an issue of the Board's interpretation of the regulations. As previously stated, Noveon's interpretation of its burden of proof and standard of review in permit appeals is incorrect.

Nonetheless, the Board's effluent limit regulations state that in order to determine compliance with the effluent standards, measurements should be taken "at the point immediately following the final treatment process and before mixture with other waters." 35 Ill. Adm. Code 304.102(b). The facts show that final treatment for each of the wastestreams occurs before mixing into Outfall 001. Therefore, Noveon has not shown that the Board improperly interpreted or misapplied the Board's effluent regulations in its findings on Conditions 5 and 7.

Factual Errors

Applicability of the Board's Ammonia Effluent Limits

Noveon states that the Board accepted factual errors raised by the Agency in finding that Section 304.122(b) applies to Noveon's discharge. Mot. at 5. Specifically, Noveon states that the Board ignored a memorandum by Agency field inspector, James Kamueller, that refutes the Agency's conclusions that Section 304.122(b) must be incorporated into Noveon's permit. Mot. at 6. In its review of the record, the Board considered Mr. Kamueller's memo and found it unpersuasive. The memo, addressed to Mr. Frevert, while assuming that Section 304.122(a) applied to Noveon's discharge, also stated that *an ammonia limit should be included in Noveon's permit* because the facility appears to have a population equivalent of greater than 50,000. R. at 20. Mr. Frevert replied to Mr. Kamueller on April 5, 1989, stating that the applicable regulation is in fact Section 304.122(b). Tr. at 57.

Foundation for the Board's Ammonia Effluent Limits

Noveon states that the Board ignored "the abandonment of the scientific study that was the basis for the adoption of the ammonia effluent limitation by the study's authors." Mot. at 8 (referring to a studies by T.A. Butts, R.L. Evans). In the Board opinion to which Noveon cites, the Board ultimately *denied* The Greater Peoria Sanitary District's request for a site-specific exception to the Board's ammonia effluent limit at Section 304.122(a). Site Specific Exception

to Effluent Standards for the Greater Peoria Sanitary District and Sewage Disposal District, R87-21 (Oct. 6, 1988) (affirmed by the Third District on June 16, 1989). In denying the sanitary district's requested relief, the Board emphasized that "the mandate of the Act to restore, maintain and enhance water quality requires that Illinois strive to go beyond the minimum cleanup goal of polluted waters, as well as to resist the temptation to pollute higher quality waters up to the maximum allowable limits." The Board made no finding on the conclusiveness of Mr. Butts and Mr. Evans' claims in R87-21, and the Board did not amend either the Board's effluent or water quality limits in response.

Board Conclusion

As explained above, the Board finds that Noveon has not met any of the criteria for reconsideration. The Board finds that Noveon has not presented any new basis for a review of the necessity of the permit conditions. The motion is denied.

MOTION FOR ORAL ARGUMENT

Noveon requests an oral argument "[t]o assist the Board in understanding the extensive record and Noveon's positions in the Permit Appeal." Mot. at 1. Pursuant to Section 101.700 of the Board's procedural rules, "oral argument is to address legal questions . . . [it] is not intended to address new facts." 35 Ill. Adm. Code 101.700(a). Therefore, any analysis or argument based on based on new facts will not be considered by the Board during oral argument and is not properly within the scope of the Board's review of this case.

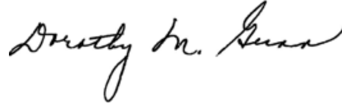
The Agency responded to Noveon's motion for oral argument by stating that oral argument is rarely granted by the Board and has never been granted after the Board has issued a final opinion and order in a permit appeal. The Agency continues that all arguments raised in Noveon's motion were thoroughly addressed thoughout this proceeding and an oral argument is not warranted at this time. Resp. at 2-3.

The Board finds that the issues presented by the parties at hearing and in their closing memoranda do not require additional argument. Accordingly, Noveon's motion for oral argument is denied.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2002); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 4, 2004, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board