ILLINOIS POLLUTION CONTROL BOARD
February 27, 1992

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| Complainant, | ) | |
| v. | ) | PCB 91-157 (Enforcement) |
| THE GRIGOLEIT COMPANY, | ) | |
| Respondent. | ) | |

ORDER OF THE BOARD (by J. Anderson):

On February 5, 1992, the Grigoleit Company ("Grigoleit") filed a motion for leave to file an interlocutory appeal of the Board's November 7, 1991 Order in this matter. On November 7, 1991, the Board denied Grigoleit's October 8, 1991 motion to file instanter its October 8, 1991 motion to dismiss and strike the complaint in this matter because Grigoleit had "not provided the Board with any extenuating circumstances that persuade the Board to grant their motion to file instanter". Grigoleit asserts that the November 7, 1991 Order violated its due process rights and raises the following issues:

1. After the Board used a "good cause" standard in PCB 89-184 for ruling upon motions to file instanter, may the Board change that standard, without any prior notice, to a standard of "extenuating circumstances",

2. Whether the Board can apply a "good cause" standard to the Agency motions but an "extenuating circumstances" standard to Grigoleit when ruling upon motions to file instanter,

3. Whether the Board can create and apply to prior actions, without any notice preceding such action, an "extenuating circumstances" standard or any standard other than "good cause" when ruling upon motions to file instanter, and

4. Whether the Board has the authority to create and apply an "extenuating circumstances" standard in an administrative proceeding which is a more stringent standard that the standard of "good cause" as set forth in Section 2-1007 of the Code of Civil

> Procedure, Ill. Rev. Stat. 1991, ch. 110, par. 2-1007, as applied by Illinois courts when assessing the merits of requests for extensions of time or continuances.

In addition to the above, Grigoleit asserts that its motion may materially advance the ultimate termination of the litigation because its October 8, 1991 motion to dismiss presented arguments on the issues of double jeopardy, res judicata, and the issue of the complainant's failure to state a cause of action. On February 10, 1992, the Attorney General, on behalf of the People of the State of Illinois ("AG"), filed a memorandum of law in response to Grigoleit's motion.

Supreme Court Rule 308(a), Ill. Rev. Stat. 1991, ch. 110A, par. 308(a), provides as follows:

> When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. Such a statement may be made at the time of the entry of the order or thereafter on the court's own motion or on motion of any party. The Appellate court may thereupon in its discretion allow an appeal from the order.

The Board, through its own procedural rules and judicial interpretation, has authority to issue the requested certification for appeal. (See 35 Ill. Adm. Code 101.304; People v. PCB, 129 Ill. App. 3d 985 (1st Dist. 1985); and Getty Synthetic Fuel v. PCB, 104 Ill. App. 3d 285 (1st Dist. 1982)). To do so, the Board must find that a two pronged test has been satisfied: a) that its decision involved a question of law involving a substantial ground for difference of opinion, and b) that immediate appeal may materially advance the ultimate termination of the litigation.

As to the first prong of the test, a review of our orders in PCB 89-184 indicates that the Board never employed a good cause standard. Rather, the Board based its other decisions to grant or deny motions to file instanter upon an evaluation of the circumstances offered as lessening the seriousness or magnitude of the delay in filing (i.e., prejudice justification for the delay, length of delay, etc.). Moreover, even if the Board did apply a different standard in its earlier orders, we note that Section 5(d) of the Environmental Protection Act, Ill. Rev. Stat. 1991, ch. 111½ par. 1005(d), states that the Board may promulgate such procedural rules as it deems necessary. As a result, it is

within the Board's power to rule on motions for leave to file instanter and to set the standard for granting such motions though adjudication rather than by rule. (see also City of Springfield v. Carter, 184 Ill. App. 3d 1, 540 N.E.2d 546 (1989) cited in Illinois Federation of Teachers v. Board of Trustees, 191 Ill. App. 3d 767, 548 N.E.2d 64, 66-67 (4th Dist. 1989); Securities & Exchange Community v. Chenery Corp., 332 U.S. 194, 202-03 (1049), United States v. Markgraf, 736 F.2d 1179, 1185 (7th Cir. 1984), cert. dismissed 469 U.S. 1199 (1985), and City of Chicago v. Illinois Commerce Commission, 133 Ill. App. 3d 435, 447-48, 478 N.E.2d 1369 (1985) cited in Boffa v. Illinois Department of Public Aid, 168 Ill. App. 3d 139, 522 N.E.2d 644, 648 (1st Dist. 1988); Ron Smith Trucking, Inc. v. Jackson, 196 Ill. App. 3d 59, 552 N.E.2d 1271, 1276 (4th Dist. 1990)). The Board also notes that it is not bound by the Code of Civil Procedure and thus, is not obligated to apply the "good cause" standard articulated therein. (see EPA v. Celotex, PCB 79-145, 50 PCB 23 (December 2, 1982); Village of South Elgin v. Waste Management of Illinois, Inc.. 64 Ill. App. 3d 565, 381 N.E.2d 778, 782 (2nd Dist. 1978), DeSai v. Metropolitan Sanitary District of Greater Chicago, 125 Ill. App. 3d 1031, 466 N.E.2d 1045, 1047 (1st Dist. 1984).

In addition, the Board has strictly enforced the time limit for filing motions to dismiss as well as the time requirements for raising a res judicata issue. (see EPA v. Village of Pawnee, PCB 81-183, 45 PCB 289 (February 4, 1982); EPA v. Marathon Oil Company, PCB 81-144, 47 PCB 403 (July 21, 1982); EPA v. Peterson/Puritan, Inc., PCB 78-278, 39 PCB 409, 410 (September 4, 1986)). Finally, even if the Board had erred in denying the motion to file instanter, such error does not rise to the level of a due process violation. (see Benton v. Marr, 364 Ill. 628, 5 N.E.2d 466, 467 (1936); Moore v. McDanield, 48 Ill. App. 3d 152, 362 N.E.2d 382, 392 (5th Dist. 1977); City of Chicago v. Southgate Corp., 86 Ill. App. 3d 56, 407 N.E.2d 881, 884 (1st Dist. 1980).

As to the second prong of the test, granting the motion for interlocutory appeal would not materially advance the ultimate termination of the litigation because the arguments made in Grigoleit's October 8, 1991 motion to dismiss were not persuasive on the issue as to whether the complaint in PCB 91-157 should have been dismissed.[1] For example, in its motion to dismiss, Grigoleit asserted, in part, that the Board's November 29, 1991 Order in PCB 89-184 barred prosecution of PCB 91-157 on the grounds of res judicata and double jeopardy and that the statute of limitations barred certain portions of the complaint.

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[1]The Board will not summarize all of the arguments presented in Grigoleit's October 8, 1991 motion to dismiss.

The Board rejects Grigoleit's assertion that the Board's November 29, 1991 Opinion and Order in PCB 89-184 bars prosecution of PCB 91-157 on the grounds of res judicata and double jeopardy. In our November 29, 1991 Opinion and Order, the Board made no finding regarding the validity of certain alleged land violations cited within Agency's denial of Grigoleit's air permit. Rather, the Board struck the denial reasons relating to the alleged land violations because the land concerns were not related to the issue of whether the grant of Grigoleit's air permit would violate the Act or regulations. The issue in PCB 91-157, on the other hand, is whether Grigoleit is violating the Act and land regulations. The Board also rejects Grigoleit's statute of limitations argument because there is no statute of limitations in the Act. (IEPA v. Cabot Corporation, PCB 81-27, 41 PCB 285 (April 16, 1981), Pielet Brothers Trading, Inc. v. PCB, 110 Ill. App. 3d 752, 442 N.E.2d 1374, 1379 (5th Dist. 1982)).

For the foregoing reasons, the Board finds that Grigoleit has not shown that interlocutory appeal would satisfy the requirements of Supreme Court Rule 308(a). Accordingly, the Board hereby denies Grigoleit's motion.

IT IS SO ORDERED.

I, Dorothy M. Gun, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 5th day of February, 1992, by a vote of 7-0.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board