

ILLINOIS POLLUTION CONTROL BOARD  
September 17, 1992

|                            |   |                           |
|----------------------------|---|---------------------------|
| REICHHOLD CHEMICALS, INC., | ) |                           |
|                            | ) |                           |
| Petitioner,                | ) |                           |
|                            | ) |                           |
| v.                         | ) | PCB 92-98                 |
|                            | ) | (Underground Storage Tank |
| ILLINOIS ENVIRONMENTAL     | ) | Fund Determination)       |
| PROTECTION AGENCY,         | ) |                           |
|                            | ) |                           |
| Respondent.                | ) |                           |

ORDER OF THE BOARD (by J. Anderson):

Currently before the Board are the following motions: 1) an August 25, 1992 motion for leave to file a motion to strike filed by Reichhold Chemicals, Inc. (Reichhold); 2) an August 25, 1992 motion to strike affirmative defense filed by Reichhold; and 3) an August 26, 1992 motion for leave to supplement the record on appeal filed by Reichhold. The Illinois Environmental Protection Agency (Agency) filed a response to Reichhold's motion for leave to file on September 3, 1992.

Reichhold's Motion for Leave to File

In its motion for leave to file, Reichhold asks that the Board grant it a one day extension, until August 25, 1992, in which to file its motion to strike the Agency's affirmative defense. In support of its motion, Reichhold states that, on July 29, 1992, the Agency filed, and mailed to Reichhold's attorney, its answer and affirmative defense in this case. Reichhold adds that, because 35 Ill. Adm. Code 101.144 provides that service by mail is presumed to be complete four days after mailing, Reichhold's motion to strike should have been filed by August 24, 1992. Reichhold also asserts that the Agency will not be prejudiced by the one day extension, but that the parties and the Board will be prejudiced if the motion is not granted.

In response, the Agency argues that Reichhold's motion should be denied as being untimely filed. The Agency adds that no material prejudice will result if the motion is denied because Reichhold will have the opportunity to fully argue and present evidence on all of the issues raised by the Agency's answer and affirmative defense at the September 23, 1992 hearing. In the alternative, the Agency asks that it be given the opportunity to respond to Reichhold's motion to strike if the Board grants the motion for leave to file.

The Board hereby grants Reichhold's motion for leave to file. However, because the Agency had adequate time to file a response to the motion but chose not to do so, and because the hearing in this matter is six days away, the Board will not give

0136-0063

the Agency additional time to respond to the motion.

We do not believe that Reichhold's request for a one-day extension is unreasonable in light of the fact that Reichhold's motion to strike was accompanied by the motion for leave to file. Moreover, ~~it appears that Reichhold may indeed be prejudiced if~~ the Board were to deny the motion and order the parties to spend additional time and money at and after hearing arguing an issue that the Board may be able to resolve at this time.

#### Reichhold's Motion to Strike Affirmative Defenses

In its motion, Reichhold asks that the Board strike the Agency's affirmative defense that the tanks which are the subject of this appeal are or may be "improperly registered for purposes of the underground storage tank program and are not eligible to access the fund." (Affirmative Defense, par. 5.) Reichhold argues that the Board should strike the defense because the Agency did not raise the issue of improper registration in its May 26, 1992 denial letter. Rather, Reichhold notes that the Agency's defense is based on a June 26, 1992 letter that Reichhold submitted to the Agency thirty days after the record closed in this matter.

The Board hereby grants Reichhold's motion to strike. A review of the Agency's May 26, 1992 denial letter confirms that the Agency did not raise the issue of improper registration in the letter. Moreover, a review of the Agency's affirmative defense confirms that the defense is based on Reichhold's June 26, 1992 letter to the Agency. The Agency, however, cannot raise on appeal a reason for denial that it failed to cite in its denial letter. Pulitzer Community Newspapers, Inc. v. IEPA (December 20, 1990), PCB 90-142; Galesburg Cottage Hospital v. IEPA (August 13, 1992), PCB 92-62. (see also Clinton County Oil Co. v. IEPA (March 26, 1992), PCB 91-163; Burwell Oil Services, Inc. v. IEPA (July 9, 1992), PCB 92-42.)

#### Reichhold's Motion to Supplement the Record

In its motion, Reichhold requests that the Board admit a "45-Day Report", dated May 22, 1992, into the record. In support of its motion, Reichhold states that the Agency sent Reichhold the report on May 22, 1992, and that the report contains significant information pertaining to the issue in this case (i.e., the contents of its underground storage tanks).

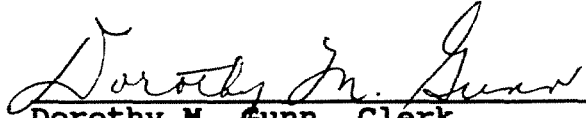
Because the Agency has not responded to Reichhold's motion, it can be deemed to have waived any objection to the motion. 35 Ill. Adm. Code 103.140(c). Accordingly, the Board hereby grants Reichhold's motion.

IT IS SO ORDERED.

0136-0064

Board Members R. Flemal, B. Forcade, and M. Nardulli  
dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control  
Board, hereby certify that the above order was adopted on the  
17<sup>th</sup> day of September, 1992, by a vote of 4-3.

  
\_\_\_\_\_  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board