

ILLINOIS POLLUTION CONTROL BOARD
April 23, 1992

IBP, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 88-98
)	(Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

RICHARD A. JOCHUM, APPEARED ON BEHALF OF PETITIONER;

BOBELLA GLATZ, APPEARED ON BEHALF OF RESPONDENT.

OPINION & ORDER OF THE BOARD (by B. Forcade):

This matter comes before the Board on remand from the Illinois Appellate Court. IBP Inc. v. Illinois Pollution Control Board (1990), 204 Ill. App. 3d 797, 563 N.E.2d 72. In its opinion, modified November 30, 1990, the third district appellate court reversed and remanded the Board's order of September 3, 1989, which affirmed the conditions of the permit as issued by the Agency. The appellate court held that the Board should have considered the stipulation of facts submitted by the parties at the July 18, 1989 hearing, in reviewing the permit conditions. The court further instructed the Board to hold a de novo hearing on the issue of whether the conditions of the final permit issued to IBP on May 5, 1988, are necessary to accomplish the purpose of the Environmental Protection Act (Act).

In its order of February 27, 1991, the Board instructed the parties to conduct a hearing limited to the stipulation. This hearing was to be completed by August 2, 1991. On September 25, 1991, the parties filed a joint motion for continuance. The parties sought a continuance due to ongoing negotiations between IBP, USEPA and the Agency involving among other things, the conditions of the NPDES permit. IBP, IEPA and USEPA have primarily resolved the NPDES permit issues but the settlement has not been finalized and no timetable for completion has been presented to the Board. On September 26, 1991, the Board denied the parties motion for continuance and ordered the parties to proceed with a hearing to be completed by November 15, 1991, or the matter would be subject to dismissal for want of prosecution.

A hearing was held on November 6, 1991, in Rock Island, Illinois. At hearing, IBP argued that the stipulation and the draft permit demonstrate that the conditions of the NPDES permit were more stringent than necessary to meet state and federal requirements. IBP seeks an order from the Board instructing the

Agency to issue a new permit with conditions consistent with the agreement reached between the parties. (Tr. at 3.)

At hearing, the Agency did not present any witnesses or tender any evidence. Despite previous denials, the Agency simply repeated its request that the Board take no action until the negotiations between the parties on the federal level have been completed. (Tr. at 11.) Petitioner filed a post hearing brief on December 6, 1991. The Agency did not file a post hearing brief. In short, the Agency failed to present any case whatsoever.

IBP initially sought review of the chlorine residual limit, the ammonia nitrogen load limit and the imposition of a special condition that required IBP to conduct mixing zones study of the receiving stream to assess compliance with water quality standards. IBP contends that the only issue remaining before the Board is the imposition of a discharge load limit for ammonia nitrogen of 2700 lbs/day. (Pet. Brief 2.) IBP has the burden of proving by a preponderance of the evidence that no violation of the Act would occur if the permit was issued without the conditions imposed by the Agency. (Ill. Rev. Stat. 1991, ch. 111-1/2, par. 39(a)).

IBP argues that the Agency by the stipulation and by issuing subsequent draft permits to IBP with less stringent levels of ammonia nitrogen demonstrates that the ammonia nitrogen discharge condition of IBP's permit is more stringent than necessary to satisfy the requirements of the Act. In the stipulation, the Agency acknowledges that less stringent conditions may be imposed upon IBP which in all respects, complies with Federal and State water pollution standards. Paragraph 6 of the stipulation reads as follows:

The draft permit contains effluent limits based upon federal categorical standards as well as Illinois Water Quality Standards and in all respects is at least as stringent as required by 35 Illinois Administrative Code Section 309 for the combined meat processing and tanning facility.

The permit issued to IBP on May 5, 1988, contained a year-round ammonia nitrogen effluent limit of 2700 lbs/day. The modified settlement draft permits of December of 1988 and August of 1990 contained the following limitation on ammonia nitrogen:

The combined effluent from Outfalls 001 and 002 shall not exceed the following daily maximum load limits for ammonia nitrogen:

- A. When daily river flow is less than or equal to 1306 cfs, the load limit shall be 2340 lbs/day.

- B. When daily river flow (Q_R) is greater than 1306 cfs but less than 1906 cfs, the load limit shall be computed as follows:

$$\text{NH}_3 - \text{N (lbs/day)} = 2340 + 1.79 (Q_R - 1306)$$

Where Q_R = daily flow of Rock River in cfs.

- C. When daily river flow (Q_R) is greater than or equal to 1906 cfs, the load limit shall be 3414 lbs/day.

(Ex. 1 at 10)

The Agency has raised no objections to the stipulation or the permit conditions of the draft permit. The Agency presented no argument to discredit IBP's interpretation of the stipulation and subsequent draft permit conditions. The Agency appeared at the hearing but failed to present any evidence. At the hearing, the Agency chose to readdress the prior motions for continuance which the Board had previously denied. The Agency's failure to proceed to hearing as instructed by the Board, results in a default finding pursuant to Section 103.220 of the Board's procedural rules. Section 103.220 reads:

Failure of a party to appear on the date set for hearing or failure to proceed as ordered by the Board shall constitute a default. The Board shall thereafter enter such order as appropriate, as limited by the pleadings and based upon the evidence introduced at hearing.

(See also Brian J. Peter v. Geneva Meat and Fish Market, et.al. (March 22, 1990), PCB 89-151, 109 PCB 531.)

The only evidence before the Board concerning the stipulation is the evidence presented at hearing by IBP. Because the Agency did not present any adverse evidence, IBP has satisfied its burden of proof by a preponderance of the evidence. The stipulation of facts between the Agency and IBP shows that the Act will not be violated if the permit is issued with the conditions imposed by the draft permit. Therefore, the requested modifications to the permit will issue by default.

The Board notes the Agency's assertion that if the Board orders the Agency to issue a new permit, the USEPA may not consider the permit valid and may assume authority to issue IBP's NPDES permit. (Tr. 11.) The Board is acting in direct response to an Illinois Appellate Court mandate issued to the Board in September of 1990. The Agency's failure to follow Board orders and proceed to hearing has unduly prolonged disposition of this matter. Many of the unresolved issues between the USEPA and IBP are unrelated to this permit and outside the jurisdiction of the

Board. The Board notes that the initial permit was issued in May of 1988 and will expire in January of 1993. As a result of the delays in proceeding on the review of this permit, a final permit pursuant to the Court Order has not been issued to IBP.

This opinion constitutes the Board's findings of facts and conclusions of law in this matter.

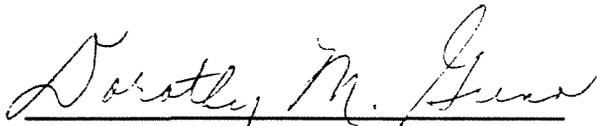
ORDER

This matter is remanded to the Agency with directions to reissue IBP's NPDES permit, modifying the effluent discharge limit for ammonia nitrogen as per the stipulation of the parties and as contained in the draft permits of December 1988 and August 1990.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1991 ch. 111 1/2 par. 1041, provides for appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 23rd day of April, 1992, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board