

ILLINOIS POLLUTION CONTROL BOARD
June 20, 1991

THE GRIGOLEIT COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 89-184
)	(Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

DISSENTING OPINION (by B. Forcade and J. D. Dumelle):

We respectfully dissent from today's action. We continue to believe that the original Agency permit decision should have been affirmed. Today's decision further compounds that error by imposing sanctions in a manner contrary to appellate case law.

The Board's November 29, 1990 Order remanded the matter to the Agency. That "Opinion and Order of the Board" contained the unqualified support of only three Board Members, with four Board Members either dissenting or specially concurring. As interpreted today, that Opinion attempts to allow Grigoleit on remand to supply additional information to the record for issues that were decided against Grigoleit, but claims to prevent the Agency from acquiring or submitting any additional information for issues that were decided against the Agency. If the original record contained inadequate information to demonstrate compliance with the Act, the permit denial should have been affirmed. If the matter is remanded to acquire additional information, both parties should be free to inject new information into the record. A Board order that allows only one party to supply additional information, and only allows information on the points which that party lost, would appear to be biased.

Further, the Board now attempts to enforce with sanctions its prior unappealable order of remand, a result contrary to existing case law. In Illinois Environmental Protection Agency v. Illinois Pollution Control Board and Centralia Environmental Services, No. 5-91-0099 (Order, June 14, 1991), the Agency attempted to appeal a Board decision where it prevailed in the outcome, but disagreed with many of the legal conclusions. The Court at page 6, held, "...[t]he Board's denial of some of the Agency's reasons for rejecting the permit application is not precedential or law of the case, and the Agency would not be estopped from using those reasons again..." That rule applied to this case would clearly allow the Agency to re-raise the issues decided against it in the November 29 Opinion. Today, the majority not only attempts to stop the Agency from raising those issues; they sanction the Agency for the attempt. The Board is

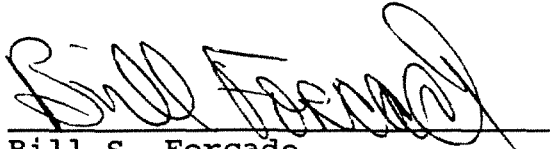
willing to sanction the Agency for adhering to a course of conduct approved by the courts, but the Board itself is unwilling to follow the case law mandates.

Today's holding is particularly troublesome because the majority appears to state that the Agency must issue a permit to two sources that have never been subjected to Agency review. Today's Order, at page 2, states:

First, with respect to 35 Ill. Adm. Code 215.301, the Agency went beyond the Board's mandate when it attempted to elicit information regarding additional operations at Grigoleit's facility. It appears that although Grigoleit informed the Agency of the existence of the additional operations in its July 12, 1989 permit application, the Agency chose not to express any concerns about the operations in its October 11, 1989 permit denial. Rather, the Agency waited until its January 10, 1991 letter and until after the Board's remand to express concern over the additional operations. (Emphasis Added)

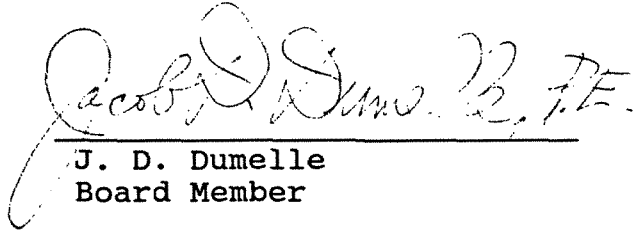
This statement is not precisely accurate. The Agency denial letter of October 11, 1989 denied the facility a permit because the application did not demonstrate compliance with 35 Ill. Adm. Code 215.301. That denial letter did not specifically ask for information on any particular emission source or exclude from consideration any particular emission source. The letter denied permit to all emission sources, including the two new sources. In its brief in that part of the proceeding, the Agency clearly argued that compliance had not been demonstrated for these two new sources (October 22, 1990 Brief, pp. 5-6), just as it argued compliance had not been demonstrated for the other sources. We simply cannot understand how the majority can conclude that the Agency waited until the January 1991 letter to "express any concern" about these two new sources. The January 10, 1991 letter asks for precisely the same information about the two new sources, i.e., the Lithographic Machine and Group H (at paragraph 1. a and b of that letter) as was asked about all emission sources in the October 11, 1989 letter (at paragraphs 2.a and b of that letter).

We cannot endorse an order that grants a permit to these two sources under these circumstances.



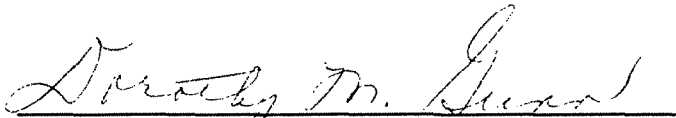
Bill S. Forcade
Board Member

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J. D. Dumelle
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was filed on the 21st day of June, 1991.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board