ILLINOIS POLLUTION CONTROL BOARD
November 29, 1990

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 believe the Agency's denial should have been affirmed. Additionally, we note that the "Opinion and Order of the Board" contains the unqualified support of only three Board Members, with four Board Members either dissenting or specially concurring. We are therefore uncertain what, if any, precedent attaches to that Opinion's language.

Today's decision by the purported majority represents a significant departure from prior Board holdings. In our opinion this new holding eliminates the Agency's ability to deny a permit because the applicant fails to demonstrate compliance with the Environmental Protection Act ("Act") and Board regulations. Now, the Agency could only deny where the information clearly shows a violation will occur. Under this new rule the Agency must somehow give the applicant a draft denial letter and allow the applicant an opportunity to rebut the Agency's proposed denial reasons; otherwise, this Board will remand. We are curious as to how this Board would react if the appellate courts required us to give permit denial appellants a draft opinion and order affirming denial prior to issuing a final sustainable denial opinion. We seriously doubt this Board could manage such activities within the tight timeframes mandated by the Act, yet the prevailing opinion has no difficulty placing such a burden on the Agency.

Our first objection to the prevailing opinion is that it is unduly critical of Agency conduct. For example, the prevailing opinion finds fault with the Agency for providing a "Notice to the Board" that it could not support denial reason #1. Without citation of authority the purported majority concludes that, "the Agency cannot unilaterally retract a denial reason.." We thought any litigant could confess error of fact or law during a proceeding. To complain that this action flows from a Notice to the Board rather than from a Motion seems overly pedantic. As a further example, the prevailing opinion complains about the Agency's use of CROPA to process permits. Quite frankly, how the Agency chooses to internally process permits should be of no

concern to either this Board or Grigoleit. No one has argued that CROPA sets any substantive pollution control standard which Grigoleit was required to meet; the question of who in the Agency looks at permit application information seems irrelevant to the permit appeal. The prevailing opinion's innuendo that these "rules" need to be promulgated, seems an unjustified invasion of internal Agency procedures. Overall, the purported majority language has a tone of "Agency bashing" that clearly seems one sided and out of place.

If the Board is going to get indignant about improper conduct in this proceeding, then more attention to Grigoleit seems appropriate. The Agency has correctly noted that Grigoleit's application was internally inconsistent and simply could not be accurate :

> Petitioner has alleged that the Agency has all of the information necessary to determine compliance, since [Grigoleit] certified "that all previously submitted information referenced in this application remains true, correct, and current". The increase in usage of raw materials, the switch to electric infrared dryers, the addition of the lithograph machine and the paint mixing/cleaning room are all changes to Petitioner's previously submitted information. (Respondent's Brief, p.11)

A less charitable person could conclude that Grigoleit's permit application information contained outright lies. Certainly, the prevailing opinion's absolute silence on this issue raises questions of bias. Grigoleit's subsequent histrionics in the reply brief (p. 2) claiming Agency perjured testimony, dishonesty and arrogance seems to be a diversionary smoke screen in light of Grigoleit's conduct, yet no criticism is present in the prevailing opinion. In our view, the prevailing opinion chooses to only see half of the misconduct that could be described in this proceeding - the Agency's half.

Our second, and most important, objection is that the Agency permit denial for failure to show compliance with 215.301 must be affirmed unless two facts are clearly evident in the record. The first fact is adequate information to prove that Grigoleit emits less than 25 tons per year so that only the provisions of 35 Ill. Adm. Code 215.301 apply. The second fact is that Grigoleit show that they comply with the 8 pound per hour limit of that section. Grigoleit's arguments for emitting less than 25 tons relies on the Agency knowing which part of the admittedly false application data is in fact true. However, as regards the 8 pounds per hour data, Grigoleit's arguments are totally specious: (1) the calculations are presented for the first time in the company's

briefs, not in information that was before the Agency, (2) the calculations use the 6,000 gallon figure for VOLATILE organic material, not the presumable 11,988 gallon figure for ORGANIC MATERIAL, and (3) assuming the 2080 hours of operation was legally enforceable, it only shows that the annual average hourly emission rate is not above 8.0 pounds per hour. Our regulations are never to exceed values, not annual averages. Unless this Board can show a calculation that proves Grigoleit never emits more than 8 lbs per hour of organic material, we cannot conclude Grigoleit demonstrated compliance. No such showing can be made.

The prevailing viewpoint candidly admits that Grigoleit failed to submit adequate information to demonstrate compliance:

> Moreover, even if we were not to rely on the above cases, we note that we have difficulty in ruling fully on the merits of this denial reason because there was insufficient information submitted as regards Grigoleit's compliance with 35 Ill. Adm. Code 215.301, and because we are restricted to a review of the information that was before the Agency during its permit review.
> (Opinion, p. 13)

Historically, when the applicant provided insufficient information to demonstrate compliance with Board regulations, the permit denial was affirmed. For whatever precedential value it may have, the prevailing opinion today creates a new rule.

The prevailing opinion relies on Wells Manufacturing Company v. IEPA, 195 Ill. App. 3d 593, 552 N.E.2d 1074 (1st Dist. 1990), to support its conclusion. We find this to be a substantial and totally unwarranted extension of the holding in Wells. The Wells court was faced with a situation where an existing facility sought renewal of an existing permit by filling out a two page certification that the operations at the facility had not changed:

> In December 1985, the Agency sent a two-page renewal form to Wells in which Wells was required to certify that its equipment remained unchanged or, if changed, to explain those changes. Wells executed the form certifying that no changes had been made and returned it to the Agency on December 5. The next communication received by Wells from the Agency was dated February 28, 1986, and was notification that Wells application to renew its operating permit was denied.
> Supra, at 335.

Wells' permit renewal was not denied for failing to demonstrate compliance with the specific numerical emissions limitations under which Wells was seeking a permit, but for possible violations of a totally unrelated statutory narrative standard about unreasonable interference with the enjoyment of life or property. The court noted that an actual enforcement action charging unreasonable interference would invoke the factors in Section 33 (c) of the Act, factors which were not considered in the Wells permit decision. Certainly, Wells controls regarding Agency permit renewal denials where "unreasonable interference" forms the basis for denial. However, to extend the Wells holding to cover situations where (1) there have been substantial changes to the facility and its operations, and (2) the applicant simply fails to demonstrate compliance with the specific numerical emission limitation under which a permit is sought represents an unwarranted and irrational extension.

The Environmental Protection Act, at Section 39 (a), requires the Agency to issue a permit, "upon proof by the applicant that the facility...will not cause a violation of this Act or of regulations hereunder." Today's prevailing opinion changes that language to require a permit be issued unless the facts prove a violation will occur. We do not agree, therefore, we dissent.

One additional factor about the prevailing opinion must also be mentioned. Grigoleit has added two new emission sources that were never previously permitted: the Lithograph machine, and a new Systems Group H. The prevailing opinion does not discuss these new sources in any manner. We presume the Agency is free under today's decision to address these new sources in any appropriate manner.

Bill S. Forcade
Board Member

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 13th day of December, 1990.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board