

ILLINOIS POLLUTION CONTROL BOARD
September 13, 1989

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

RICHARD A. JOCHUM, ESQ., APPEARED ON BEHALF OF PETITIONER; AND
KATHLEEN C. BASSI, ESQ., APPEARED ON BEHALF OF RESPONDENT.

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

This matter comes before the Board upon a June 6, 1988 petition for review filed by IBP, Inc. ("IBP"). That petition seeks review of several conditions imposed by the Illinois Environmental Protection Agency ("Agency") in IBP's NPDES permit issued by the Agency on May 5, 1988. Public hearing was held on July 18, 1989 in Rock Island, Illinois, and no member of the public was present. IBP filed a closing brief on August 3, 1989. The Agency filed a closing brief on August 22, 1989.

IBP owns and operates a beef slaughter and processing facility located at Joslin, Illinois. Prior to May 5, 1988, the facility operated a wastewater treatment plant ("WWTP") pursuant to an NPDES permit issued by the Agency. On April 1, 1987, IBP filed an application with the Agency for a revised NPDES permit based upon expansion of the facility to include operations of a tannery. On July 1, 1987, the Agency issued to IBP a construction permit for the tannery addition to the WWTP as requested by IBP and as needed to facilitate eventual introduction of the new waste stream flow to the WWTP. On May 5, 1988, the Agency issued a final NPDES permit No. IL0003913 to IBP.

In its petition, IBP requests that the Board review the following actions of the Agency in issuing its final permit:

- a) Placing a discharge concentration limit for chlorine residual at Outfall 001 of 0.75 mg/l as a 30-day average;
- b) Placing a discharge load limit for ammonia nitrogen at Outfall 003 of 2700 lbs/day as a daily maximum; and

- c) Special Condition No. 7 - the permittee shall conduct a mixing zone study of the receiving stream to assess compliance with water quality standards. Results of this study shall be submitted to the Agency by November 1, 1988. The Agency shall modify the permit in accordance with the results of the study.

No other portion of the NPDES permit is challenged.

IBP's brief of August 3, 1989 describes at great length events subsequent to the Agency's issuance of its permit on May 5, 1988. These events include settlement negotiations between IBP and the Agency, the Agency's subsequent issuance of a draft permit and the United States Environmental Protection Agency's ("USEPA") objection to that draft/proposed permit on April 14, 1989. At this point, IBP is requesting that the Board order the Agency to issue the "settlement permit" as a final permit. IBP also states that "since the relief requested by IBP embraces only the issuance of the settlement permit, it is not necessary to dwell on the process followed by IEPA in issuing the permit under appeal." IBP Brief at 7.

The Agency's brief of August 22, 1989 also for the most part addresses events subsequent to its issuance of a permit on May 5, 1988. The Agency asserts that it followed established procedures in its attempt to issue the "settlement permit." The Agency also discusses the validity of USEPA's objection to this settlement permit. Additionally, in its August 22nd brief the Agency states for the first time that it "has undertaken to begin writing another proposed settlement permit."

Although IBP's and the Agency's briefs have mostly discussed these subsequent events, the Board's scope of review in a permit appeal is limited to the record before the Agency at the time of the Agency's permitting decision. Citizens Utilities Co. v. IEPA, PCB 85-140, March 9, 1989; IEPA v. IPCB et al. (Waste Management, Inc), 104 Ill. Dec. 786, 503 N.E.2d 343 (Ill. 1986); and IEPA v. IPCB and Alburn, Inc., 455 N.E.2d 188 (1st Dist., 1983). Thus, IBP's assertion that the Board need not dwell on the process followed by IEPA in issuing the permit under appeal escapes the true import of the Board's review in this instance. It is precisely and solely the record before the Agency in issuing the permit under appeal that is being reviewed by the Board. Therefore, the issues discussed by IBP as to whether the "settlement permit" was a draft or proposed permit, whether USEPA's objection to that permit was valid and whether the Agency's failure to issue that permit entitles IBP to deem the permit issued as a matter of law, are not issues properly before the Board in this proceeding.

IBP's assertion that the Board enter an order effectuating the settlement permit is without merit for two additional reasons. First, the permit issuing function is delegated to the Agency under the Environmental Protection Act ("Act"). The Agency has not issued the settlement permit and the Board has no authority to issue it. The Board may not order the Agency to issue an unissued permit. Landfill Inc. v. Pollution Control Board, 387 N.E.2d 258, 262 (Ill. S. Ct. 1978). Indeed, if the Agency had issued the permit it would be considered a "voidable" permit until the original permit was dismissed. Joliet Sand and Gravel Co. v. IEPA, PCB 87-55, (June 10, 1987), citing Caterpillar Tractor Co. v. IEPA, PCB 79-180 (July 14, 1983). In any event, the unissued draft permit is not under review in this proceeding and the Board will not enter an order "effectuating" it.

Secondly, the Board points out that there are three potential permits mentioned in IBP's petition, IBP's brief and the Agency's brief. All three are for the same facility, the same operations and under the same regulatory framework. This is the potentially unending scenario depicted in the Board's previous opinion in Joliet Sand and Gravel Co. v. IEPA, PCB 87-55 (June 10, 1987). In Joliet Sand and Gravel, the Board stated that:

If each Agency decision were reviewable, an applicant could have many "permit decisions" under review by the Board, the appellate courts and the Supreme Court. This could encourage permit applicants to submit minimal information in the first application and provide more information in each subsequent permit application until the Agency granted a permit or a favorable decision was reached by one of the reviewing bodies on one of the many "permit decisions."

Id. at 5.

Thus, in Joliet Sand and Gravel, the Board held that it lacked jurisdiction to review any permit decisions rendered subsequent to the initial permit decision which was still under review. Id. In this case, for the reasons discussed, the Board also declines to review the settlement permit as requested by IBP and will only review the permit issued May 5, 1988 which is the only permit currently on appeal.

The issue before the Board is whether the petitioner can prove that the conditions in the permit issued by the Agency are not necessary to accomplish the purposes of the Act and therefore were imposed unreasonably. City of E. Moline v. IPCB, No. 3-88-0788 at 5 (3rd Dist. August 31, 1989); IEPA v. IPCB and Alburn

Inc., 118 Ill. App. 3d 772, 455 N.E.2d 188 (1st Dist., 1983). As stated above, IBP has objected to three conditions in the permit issued by the Agency - the discharge concentration limit for chlorine residual, the discharge load limit for ammonia nitrogen and the required mixing zone study. Pet. at par. 6. IBP's only argument against these conditions are that they are "inappropriate and unduly burdensome." IBP Brief at 3. Neither the Agency's brief nor testimony at the hearing shed any more light on the issue of the conditions in the first permit than IBP's brief does.

However, the burden of proof in a permit appeal rests squarely on the petitioner. Browning-Ferris Industries of Illinois, Inc. v. Pollution Control Board, 534 N.E.2d 616 (Ill. 1989). In this case, IBP's bald assertion that the conditions imposed by the Agency are "inappropriate and unduly burdensome" is not an adequate explanation as to why such conditions are not necessary to accomplish the purposes of the Act and therefore were imposed unreasonably. IBP has failed to carry its burden of proof that its permit application as submitted to the Agency establishes that the facility will not cause a violation of the Act, absent the contested conditions. The Board will affirm the Agency's conditions in its permit issued on May 5, 1988.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

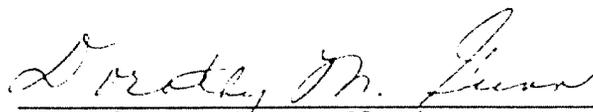
The conditions imposed by the Illinois Environmental Protection Agency in NPDES Permit No. IL0003913, as issued to IBP Inc. on May 5, 1988, are hereby affirmed.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1987, 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.

Board Member J. Anderson concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 13th day of September, 1989, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board