

ILLINOIS POLLUTION CONTROL BOARD
October 20, 1988

JEFFERSON SMURFIT CORPORATION,)
)
 Petitioner,)
)
 v.) PCB 88-112
)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by J. Anderson):

On August 19, 1988, the Illinois Environmental Protection Agency ("Agency") filed a motion to strike. Petitioner, Jefferson Smurfit Corporation ("Smurfit") filed no response in opposition to the Agency's motion. On September 8, 1988, the Board in this proceeding and in proceedings under docket PCB 87-84, ordered that the parties simultaneously brief the following issues in this matter:

1. Whether the proceeding Alton Packaging Corporation v. IEPA, PCB 85-146, ["Alton case"] currently pending in the United States Supreme Court, has sufficient nexus with the instant proceeding to remove the Board's jurisdiction to act here?; and
2. If the Board does have jurisdiction to act, whether the theory articulated in Caterpillar Tractor Co. v. IEPA, PCB 79-180, July 14, 1983 [citing Alburn, Inc. v. IEPA, PCB 81-23] requires the Board to dismiss the permit appeal filed in PCB 88-112?

On September 22, 1988, in docket PCB 87-84, the Agency filed its "Response To Board Order" contending, in effect, that the Board's September 8 Order requiring briefs is not necessary under its view of the case and that the Agency's Motion to Dismiss in docket PCB 87-84 is not factually related to the issues for which briefing was ordered. The Agency's response did not, therefore, attempt to respond to the Board's Order in the form of a brief of the respective issues. However, on October 11, 1988, in this Docket, the Agency filed its Brief in Response to Board Order. In its brief, the Agency contends that the Board does not have jurisdiction, citing the Board's decision in Joliet Sand and Gravel Co. v. IEPA (PCB 87-55) and the then-currently-pending Alton case.

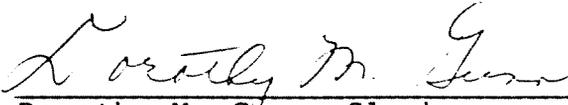
On October 17, 1988, Smurfit filed a Motion to Suspend Further Briefing on Jurisdiction in both dockets PCB 87-84 and PCB 88-112; Smurfit essentially argues that the issues raised in the Board's September 8 Order are now moot, insofar as the United States Supreme court on October 11, 1988 (the same day that the Agency filed its brief), denied Smurfit's petition for a writ of certiorari from the Board's decision in Alton Packaging Corporation v. Environmental Protection Agency, PCB 85-145 ("Alton case").

The Board notes that the denial of the writ of Certiorari in the Alton case appears, indeed, to remove the need for briefing of the first enumerated issue identified in the Board's September 8 Order. It is not clear, however, that, as Smurfit contends, the denial of the petition for writ of certiorari necessarily renders briefing of the Board's second enumerated issue a "wasted" effort. Even Smurfit acknowledges (at page 4) that "a full examination of these issues would take considerable time and resources". This being the case, it can hardly be argued that resolution of the issues are either self-evident or are adequately addressed by a single page (page 3) of the Petitioner's October 17, Motion, particularly where the Agency has not directly addressed the issue at all in Docket PCB87-84 and where the Agency's brief in this docket could not and did not anticipate denial of certiorari in the Alton case.

For the reasons stated above, the Motion by Smurfit is granted in part and denied in part: the Board's Order of September 8, 1988 is hereby amended to delete reference to the first enumerated issue. The parties are directed to file their respective briefs not later than November 14, 1988. Any reply shall be filed not later than November 28, 1988. Today's Order is not intended to impair the obligations for expeditious hearing in any way. The Board notes that no hearing date has been set by the Hearing Officer in Docket 87-84 although a hearing has been scheduled for December 7, 1988, in Docket 88-112. The Board will rule on the Agency's Motion to Strike by separate Order at a later date.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 20th day of October, 1988, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board