ILLINOIS POLLUTION CONTROL BOARD
December 15, 1988

VILLAGE OF SAUGET, Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	PCB 86-57 PCB 86-62 (Consolidated)

MONSANTO COMPANY, Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	PCB 86-58 PCB 86-63 (Consolidated)

DISSENTING OPINION (by B. Forcade):

I respectfully dissent from today's action. I believe several of the Agency imposed conditions should have been upheld. I also believe the majority opinion sets a tragic precedent for the future control of toxic chemicals in Illinois.

As a preliminary matter, I must note that the permit appeal opinion issued today is the culmination of a process that began in August, 1980. Since that date, Sauget and the Agency have been involved in negotiations and litigation on the limitations that should apply to the P/C plant. Since October 24, 1984, negotiations and litigation involving the AB Plant have been ongoing. These matters have been pending before this Board alone for nearly 2 1/2 years. I have little doubt that this matter will spend at least another year before the Illinois Judiciary. It is a very sad commentary on Illinois Government that it takes nearly a decade to get a finally effective permit issued to Sauget. During this unconscionable period of delay the environment has been denied whatever protection it was entitled to receive, and Sauget has been denied the right to a quick and final answer stating their permit obligations. Government alone must carry the blame for these delays.

My primary objection to the majority opinion relates to the discussion of whole-effluent toxicity limits on pages 17-18. There, the majority discusses the relative merits of the "direct" approach versus the "tiered" approach to whole-effluent toxicity limitations. The majority then finds favor with the

"tiered" approach. When the majority opinion is stripped of its obfuscating bureaucratic language, one finds that the "direct" approach means you can set an effluent limitation without scientific data to establish that the effluent is toxic (or data to establish how toxic it is). The "tiered" approach means that you need scientific data to establish how toxic an effluent is before you can place a legally valid limitation upon it. In short, is an effluent considered guilty until proven innocent, or innocent until proven guilty. The majority holds that an effluent cannot be held subject to whole-effluent toxic chemical controls until it is found by proper scientific evidence to be toxic; in other words, innocent until proven guilty. I am unable to support that position. Further, I believe the majority should have had the courage to state its holding in plain english.

I believe, based on the facts presented, that Sauget's effluent can legally be presumed guilty until proven innocent. I believe that the immediate imposition of a whole-effluent toxicity limit was appropriate.

Generally, the burden is upon the permit applicant to prove that the Environmental Protection Act and Board regulations will not be violated absent the contested condition. In short, the burden is upon the permit applicant to prove that their effluent is innocent. Here, the record shows that several flows influent to the A/B plant were either toxic or inadequately characterized: the P/C plant effluent demonstrated extreme toxicity and the Monsanto effluent had no analyses for organic chemicals. Here, there was no evaluation of the A/B plant effluent (since it was not then operational) to show that all traces of toxicity from the influent had been removed. In short, I believe the Agency was fully justified in questioning whether the A/B plant effluent would be toxic. and Sauget did not provide information to demonstrate that the effluent would not be toxic. Consequently, a whole-effluent toxicity limit seems appropriate. If today's factual scenario does not justify whole-effluent toxicity limit, I cannot imagine a situation that would.

I also disagree with the majority where it fails to resolve conflicts regarding past effluent concentrations. This Board's review of an NPDES permit constitutes more than a device to ensure future compliance with the law. Such a review also operates to determine whether a condition was valid when issued so that subsequent violation of that condition would constitute a violation of law. By failing to address that issue this Board is saying that it will not render a decision on whether Sauget was in compliance with the law from March 21, 1986 to December 15, 1988, because that will not affect future pollution control. I disagree.

I also disagree with the majority on the effective date for the A/B plant effluent limitations. Those dates came from Sauget in its permit application. If Sauget did not amend its permit application to reflect more reasonable dates, the Agency should not be penalized by having the permit effective dates stricken.

Lastly, I continue to dissent from the majority Order of October 6, 1988, which vacated an additional hearing to evaluate the admission of evidence offered by the Agency. It appears that this information pertained to the Sauget facility and its effluent toxicity, was in the possession of the Agency at the time it issued its permit decision, and would have had a direct bearing on the decisions rendered by this Board today. I would have proceeded to hold the additional hearing authorized by the September 22, 1988 Order and allowed the admission and cross examination of any evidence in the possession of the Agency at the time the permit was issued. Some of that evidence might have supported Board affirmance of conditions which the majority reversed.

For these reasons, I dissent.

Bill S. Forcade, Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was submitted on the 11th day of January, 1989.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board