ILLINOIS POLLUTION CONTROL BOARD
July 23, 1981

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| CATERPILLAR TRACTOR CO., Petitioner | ) | |
| v. | ) | PCB 80-3 |
| ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent. | ) | |

CONCURRING OPINION (by J. Anderson):

I concur with the Board's decision of July 23, 1981 to clarify that it was not intending to direct the Agency to include verbatim a condition in an earlier Caterpillar permit. However, I believe the Board might have made clear that it was not, by implication, agreeing with the Agency's arguments (Motion to Reconsider and a supporting memorandum) filed on July 14, 1981.

As an overall statement, when the Board sustains a petitioner on a permit appeal, it inevitably causes an alteration of the permit, directly or indirectly, and thus quite lawfully "infringes upon" the Agency's discretion. It seems to me that the controlling issue is whether the Board, under Section 40, has directed the Agency to respond in a manner that is justified by the evidence. If precise words are really necessary for an adequate remedy, failure by the Board to directly so determine can lead to a costly, time wasting, "back and forth" situation, thus frustrating the appeal process itself. Neither the Board nor the Agency can construe their responsibilities in the Act in isolation from each other's provisions. While the Board might only rarely conclude that ordering precise alterations in a permit was necessary for a just remedy, I believe that both the Act and its Procedural Rules empower it to do so.

The Agency appears to argue that the Board is precluded from making a precise determination as to how a permit must be altered so as to comply with the Board's legal interpretation of its own rules. Instead, the Agency appears to assert that only the Agency has the power under the Act and Rule 502(b)(10) to interpret the Board's legal interpretation before the Agency alters a permit.

The Agency appears to accept the key language in Rule 502(b)(10) by quoting it as follows:

> "Clearly, the Board ... may remand the proceeding to the Agency for the taking of further evidence, or may direct the issuance of the permit in such form as it deems just, based upon the law and the evidence." (emphasis added)

However, the Agency then goes on to state, "an attempt by the Board to specify the form of the condition itself, i.e., to actually write or rewrite the condition,* would be tantamount to the Board's usurping "the authority of the Agency to exercise its decision making process" granted to it under the Act. (Memorandum p. 4). How can the Agency reason that the Board may direct the form of the whole permit issuance but not the form of a separable part of the permit?

The Agency relies primarily on Landfill, Inc. v. Pollution Control Board, 74 Ill.2d 541, 387 N.E.2d 258, (1978). I fail to understand the Agency's reasoning as to its applicability here. The Court, in Landfill, Inc., voided a Board rule that permitted affected citizens to file for permit revocation proceedings, because the statutes did not authorize third party appeals of such permits issued by the Agency. Here, however, we are dealing with a valid procedural rule, the statutorily proper parties are the permittee and the Agency, and the Board is exercising its power to provide relief to a permit applicant under Section 40 of the Act. Because the Court found that the Board, in authorizing third party permit appeals, was interfering with the Agency's power to administer permits, I feel it is incorrect reasoning to argue that it then follows that the Court was also stating that the Board itself cannot direct permit issuance in precisely altered form. Nowhere did the Court imply that the Agency's permit discretion was absolute and, indeed, it could not so state or there would be no meaningful appeals process at all.

Also, I cannot understand why the Agency feels "ministerial" in being directed to include a precise number or sentence and yet logically can accept the Board's power to direct that specific conditions be rejected outright (Memorandum p. 4). "Omission" has no rewriting effect but "commission" does?

Next, the Agency compares the Act's language concerning Board "conditions" in variances and the non-use of the word "conditions" in permit appeals, concluding that the legislature has failed "... to provide for Board authority to impose conditions in permit appeal proceedings..." (Memorandum, p.5) by negative inference. However, we are talking about apples and oranges here in a statutory context. The variance "conditions" language is necessary so the Board can use its regulatory powers to establish a special, short term, regulatory package as an alternative to regulations adopted under Title VII of the Act. Surely the Agency is not arguing that its permit "conditions" have the same statutory meaning in the Act. In a variance proceeding, the Board does not directly address the Agency's permits. In a permit appeal it does, conditions and all. Again, if the Board were not authorized to address the language of permit conditions, there would be no meaningful appeals process at all.

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*Actually, the condition at issue here was not written by the Board but, rather, by the USEPA when issuing an earlier permit.

Next, the Agency asserts that the Board addressed this issue in Illinois Power Company v. Environmental Protection Agency, PCB 79-243, December 18, 1980. (Memorandum p. 5) The Agency is focused on the wrong side of the coin. The Board was asserting its authority not to direct the Agency to use "verbatim" language.

Finally, the excerpt of the Board's December 19, 1980 discussion (Memorandum, p.7) was not reflected in the final opinion, except for affirming that the Agency issues permits.

Joan G. Anderson

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Concurring Opinion was filed on the 5th day of January, 1981.

Christan L. Moffett, Clerk
Illinois Pollution Control Board