

ILLINOIS POLLUTION CONTROL BOARD
February 6, 1986

OLIN CORPORATION,)
)
 Petitioner,)
)
 v.) PCB 84-77
)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by B. Forcade):

On December 5, 1985, the Illinois Environmental Protection Agency ("Agency") and Olin Corporation ("Olin") filed a "Stipulation of Fact and Recommended Settlement". That document recites certain factual and procedural matters and prays "that this Board adopt and accept the foregoing Stipulation and Settlement as written and order the Agency to act in accordance with the settlement terms contained herein." The Board hereby rejects the settlement.

The Board has previously rejected settlement agreements in permit appeals. The rationale and history was recently articulated in Electric Energy v. IEPA, PCB 85-14 (June 13, 1985):

The Board has had difficulty in dealing with settlements in permit appeal cases which involve Agency issuance of negotiated permits containing conditions for which no record exists "setting out sufficient technical facts and legal assertions to allow the Board to exercise its independent judgment and to make proper findings of fact and conclusions of law." Caterpillar Tractor Co. v. IEPA, PCB 79-180, Interim Order, June 2, 1983, p. 1-2. The Board has not issued Orders incorporating the terms of such stipulations as the Board does in enforcement cases. The Board has issued Orders dismissing the appeal and allowing ratification of a "voidable permit"; e.g., Caterpillar, supra, Final Order, June 14, 1982; an Order simply dismissing the appeal, Village of Sauget v. IEPA, PCB 79-87, July 19, 1984; and an Order remanding the permit to the Agency, Caterpillar Tractor Co. v. IEPA, PCB 83-58, March 7, 1985.

Additionally, the Board has legal concerns with disposing of permit appeals by settlement. In many cases, including the instant case, the parties request that the Board "order" the Agency to issue a new permit containing agreed conditions and terms. In addition to the problems associated with having an inadequate factual basis for "issuing" a permit, this approach seems to violate the principles of Landfill, Inc. v. PCB et al., 387 N.E.2d 258, 262 (Ill. S. Ct. 1978).

The Issue for Board resolution in a permit appeal is a matter of well-settled state law. In IEPA v. PCB and Alburn, Inc., 455 N.E.2d 188 (1st Dist., 1983), the court stated:

" The sole question before the Board in a review of the Agency's denial of a permit is whether the petitioner can prove that its permit application as submitted to the Agency establishes that the facility will not cause a violation of the Act. (Ill.Rev.Stat. 1979, ch 111-1/2, par. 1040.) If the Agency has granted the permit with conditions to which the petitioner objects, the petitioner must prove that the conditions are not necessary to accomplish the purposes of the Act and therefore were imposed unreasonably. The Board may not be persuaded by new material not before the Agency that the permit should be granted. (Soil Enrichment Materials Corp. v. Environmental Protection Agency (1972), 5 Ill.P.C.B.Op. 715.) When reviewing the Agency's denial of a permit or imposition of any conditions, "the decision of the Board shall be based exclusively on the record before the Agency including the record of the hearing, if any ***." Ill.Rev.Stat. 1979, ch. 111-1/2, par. 1040; Peabody Coal Co. v. Environmental Protection Agency (1979), 35 Ill.P.C.B.Op. 380." Id. at 194.

The parties, by their proposed settlement, request that the Board resolve the conflict by inappropriately applying the law. As previously noted, parties are at liberty to settle conflicts by the petitioner voluntarily dismissing the permit appeal and the Agency issuing the agreed permit.

The Board notes that the hearing record indicates the parties' intention to proceed in the following manner:

So, we ask that the Board take that -- make note of that, and the way that the Agency and Olin intend to proceed, as I previously stated, is that the Agency will issue a permit to Olin, effective upon dismissal of the appeal, and that if the conditions of that permit are

acceptable to Olin in all respects, they will then so notify the hearing officer and the Board, and ask that the appeal be dismissed. (R. 18-19)

As no motion to dismiss has been filed, the Board must order this matter expeditiously to hearing on the merits. Hearing must be scheduled within 14 days of the date of this Order and completed within 60 days of the date of this Order. The hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 40 days in advance of hearing so that public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, written schedule for submission of briefs if any and all actual exhibits to the Board within 5 days of the hearing. Any briefing schedule shall provide for final filings as expeditiously as possible and in no event later than 70 days from the date of this Order.

If after appropriate consultation with the parties, the parties fail to provide an acceptable hearing date or if after an attempt the hearing officer is unable to consult with the parties, the hearing officer shall unilaterally set a hearing date in conformance with the schedule above. This schedule will only provide the Board a very short time period to deliberate and reach a decision before the due date. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible.

The hearing officer may extend this schedule only on a waiver of the decision deadline by the petitioner and only for the equivalent or fewer number of days that the decision deadline is waived. Such waivers must be provided in writing to the Clerk of the Board. Any waiver must be an "open waiver" or a waiver of decision until a date certain.

Because of requirements regarding the publication of notice of hearing, no scheduled hearing may be canceled unless the petitioner provides an open waiver or a waiver to a date at least 75 days beyond the date of the motion to cancel hearing. This should allow ample time for the Board to republish notice of hearing and receive transcripts from the hearing before the due date. Any order by the hearing officer granting cancellation of hearing shall include a new hearing date at least 40 days in the future and at least 30 days prior to the new due date and the Clerk of the Board shall be promptly informed of the new schedule.

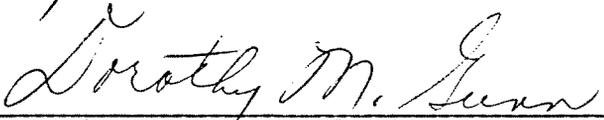
Because this proceeding is the type for which the Illinois Environmental Protection Act sets a very short statutory deadline for decisionmaking, absent a waiver, the Board will grant extensions or modifications only in unusual circumstances. Any such motion must set forth an alternative schedule for notice, hearing, and final submissions, as well as the deadline for decision, including response time to such a motion. However, no

such motion shall negate the obligation of the hearing officer to set a date pursuant to this Order.

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 Order was adopted on the 6th day of February, 1986, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board