

ILLINOIS POLLUTION CONTROL BOARD
March 27, 1986

ILLINOIS POWER COMPANY)
(Hennepin Power Plant),)
)
 Petitioner,)
)
 v.) PCB 85-119
)
ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

MR. SHELDON A. ZABEL AND MS. MARILI MCFAWN, SHIFF HARDIN & WAITE, APPEARED ON BEHALF OF ILLINOIS POWER COMPANY.

MR. THOMAS DAVIS, ATTORNEY AT LAW, APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

OPINION AND ORDER OF THE BOARD (by J. D. Dumelle):

This matter comes before the Board upon an August 13, 1985 petition for review of NPDES Permit No. IL 0001554 filed on behalf of the Illinois Power Company (IPC). In its petition IPC contested twelve conditions of the permit which was issued on July 15, 1985. IPC filed a motion for summary judgment on October 18, 1985 which was denied by Board Order of November 7, 1985. Hearing was held on November 21, 1985 at which the parties, but no members of the public, appeared.

IPC continues to urge the Board to remand this matter to the Illinois Environmental Protection Agency (Agency) "based on IEPA's blatant refusal to obey state and federal law" through its failure to adequately respond to IPC's comments during the permitting process. (IPC Brief, p. 4). In this regard IPC reiterates the arguments it presented in its motion for summary judgment. Since the board did not decide the merits of those arguments in denying the motion, it is appropriate to do so at this time.* While the Agency has argued that IPC waived these arguments through its failure to allege them in its petition for review, the Board finds that they were raised in the motion for summary judgment and were properly the subject for hearing. As the Board stated in its October 10, 1985 Order affirming its September 20, 1985 denial of summary judgment, "since those

* The motion was decided on the basis that no decision could be reached in this matter absent hearing.

issues present questions of both law and fact, they are best decided after hearing."

The sequence of events regarding response to comments on the permit began on March 26, 1985, when IPC received pre-public notice of a draft permit. (Rec. no. 6). IPC prepared written comments on that draft permit which were received by the Agency on April 12, 1985. (Rec. no. 5). The Agency prepared notes responding to those comments. (Rec. no. 4). The Agency then issued a public-notice draft permit, and IPC prepared written comments on that draft permit which were received by the Agency on July 1, 1985. (Rec. no. 3). The Agency again prepared notes in response. (Rec. no. 2). The Agency's notes were in both cases handwritten and were not given to IPC at any time during the permitting process. However, following the Agency's receipt of both sets of comments phone conversations were held between representative of the Agency and IPC during which the substance of the Agency's handwritten notes were summarized. (R. 56, 59-60, 64, and 70). On July 15, 1985, the Agency issued the permit at issue here without any additional response to IPC's comments. (Rec. no. 1).

IPC argues that this course of conduct demonstrates the Agency's "blatant refusal to obey state and federal law." (Brief p. 4). IPC contends that Board rules (particularly 35 Ill. Adm. Code 309.112 and 309.108), the Administrative Procedure Act [APA; especially Section 16(c)], and Board precedent (IPC v. IEPA, PCB 79-243, 39 PCB 508, October 2, 1980), combine to require the Agency to provide written responses to comments of the permit applicant during the permitting process, and that the Agency has failed to do so. The Agency contends, however, that a later-decided case (IPC v. IEPA, PCB 79-61, 45 PCB 89, January 21, 1982) was decided to the contrary and only required "that the Agency evaluate the comments and either issue or deny the permit. There is no mandate that the Agency respond to comments in writing or otherwise." (ID. at p. 5, 45 PCB 93). (Response, p. 2).

As the permitting (or licensing) authority for the Illinois NPDES program, the Agency must comply with the APA. [Borg-warner corp. v. Mauzy, 100 Ill. App. 3d 862, 427 N.E.2d 415 (3d Dist. 1981)]. Section 16(c) of the APA provides that:

No agency shall revoke, suspend, annul, withdraw, amend materially or refuse to renew any valid license without first giving written notice to the licensee of the facts or conduct upon which the Agency will rely to support its proposed action. (emphasis added).

IPC correctly points out that the NPDES permit at issue here contains material amendments to the permit last issued for the Hennepin facility on October 23, 1979, which was the subject of

IPC v. IEPA, PCB 79-243, 39 PCB 508 and IPC v. IPCB, 100 Ill. App. 3d 528, 462 N.E.2d 1258 (3d Dist. 1981). The only conditions contested here which appeared in the prior permit and were not appealed are those pertaining to the TSS and oil and grease limitations on the internal waste streams at Outfalls 001(a) and 001(c). Since the remaining conditions constitute material amendments, Section 16(c) of the APA requires the Agency to give written notice to IPC of the facts or conduct supporting these changes, before reissuance of the permit. The only relevant documents given to IPC prior to that time, however, were the proposed and draft permits and the two identical Fact Sheets issued in conjunction with those draft permits. (See Attachments to IPC Motion to Supplement). The draft permits set forth only the "material amendments," and contain no supporting facts or description of conduct by IPC upon which the Agency relied in proposing the contested changes. Telephone conversations, of course, do not fulfill the "written notice" requirement.

Federal regulations also require a written response to comments. 40 CFR 124.17 (which is specifically made applicable to states such as Illinois which have permitting authority under the NPDES program pursuant to 40 CFR 123.25) provides that:

(a) ...States are only required to issue a response to comments when a final permit is issued. This response shall:

* * *

(2) briefly describe and respond to all significant comments on the draft permit ... raised during the public comment period, or during any hearing.

* * *

(c) ...The response to comments shall be available to the public.

The use of the word "issue" in connection with "response" under Section 124.17(a) as well as the requirement of Section 124.17(c) that the response be available to the public indicate that such response is to be in writing.

The Agency has admitted that no written document containing responses to IPC's comments was issued to IPC prior to reissuance. (R. 56, 64 and 70). Some personal notes were prepared by Mr. Gary Cima, the primary author of the Permit, but Mr. Cima stated that he did not communicate the totality of his written notes to IPC's representative other by sending a copy of the notes or reading them over the telephone. (R. 94). Making notes and summarizing them by telephone to IPC's representative does not satisfy the requirements of Section 124.17(a) and (c).

Finally, 35 Ill. Adm. Code 309.108 requires written notification by the Agency of the basis for certain permit conditions. Section 309.108 states:

Following the receipt of a complete application for an NPDES Permit, the Agency shall prepare a tentative determination. Such determination shall include at least the following:

- * * *
- b) If the determination is to issue the permit, a draft permit containing:
 - 1) Proposed effluent limitations, consistent with federal and state requirements;
 - 2) A proposed schedule of compliance, if the applicant is not in compliance with applicable requirements, including interim dates and requirements consistent with the CWA and applicable regulations, for meeting the proposed effluent limitations;
 - 3) A brief description of any other proposed special conditions which will have a significant impact upon the discharge.
 - c) A statement of the basis for each of the permit conditions listed in Section 309.108(b).
 - d) Upon tentative determination to issue or deny an NPDES Permit:
 - 1) If the determination is to issue the permit the Agency shall notify the applicant in writing of the content of the tentative determination and draft permit and of its intent to circulate public notice of issuance in accordance with Sections 309.108 through 309.112; (emphasis added).

Pursuant to this rule the Agency was required to notify IPC in writing of the basis for certain of the permit conditions. However, in this case the Agency gave IPC written notification only of its intention to grant the permit and draft permit (see

Attachments to Motion to Supplement) and failed to provide any written basis for any of the conditions.

For all of these reasons the Board finds that the Agency has a duty to respond in writing to comments by the permit applicant which are submitted in response to a draft permit and that such response should be made prior to permit issuance. Further, the Agency is required to prepare a written statement of the basis for each permit condition listed in Section 309.108(b). The Board further finds that the Agency has failed to meet those requirements in the instant case. These findings are consistent with the Board's decision in IPC v EPA, PCB 79-243, above, where the Board found that federal regulations and Board rules "require a written response to comments." (39 PCB 515). Further, these findings are not necessarily inconsistent with IPC v. IEPA, PCB 79-61, where the board found simply that Rule 906(f) (now 35 Ill. Adm. Code 309.112) "demands only the Agency evaluate the comments and either issue or deny the permit. There is no mandate that the Agency respond to the comments in writing or otherwise." (45 PCB 93). To the extent that such finding is limited to an analysis of Section 309.112, it is correct. To the extent that it may be read to indicate that no state or federal laws require a written response to comments, it is not.

The question then becomes one of the proper remedy for the Agency's failure to comply with state and federal permitting requirements. In the Illinois Power case cited above (PCB 79-243), the Board considered the merits of the substantive issues despite the procedural defects, in that IPC conceded that there was no appropriate remedy at that stage of the proceeding. IPC now requests, however, that the Board remand this proceeding to the Agency without consideration of the substantive issues, requiring proper procedures to be followed.

In this case there would be no reason to remand if that decision were to be based solely on the fact that the substantive issues have been fully argued and are ready to be decided. However, the Board believes that deciding the substantive issues on their merits would be inappropriate. The requirement of written responses to comments can serve to expedite the hearing process and could provide the basis for meaningful discussions between the Agency and the applicant prior to final Agency action which could lead to the issuance of a mutually agreeable permit and avoid appeal. Such action should be strongly encouraged. The Board, therefore, concludes that NPDES permitting requirements which the Agency has failed to meet in this matter are mandatory, that the permit was improperly issued and that it should be remanded to the Agency for further action consistent with this Opinion.

The Board notes that there are other cases presently pending which may be impacted considerably by this ruling. The Board presumes that the parties will take appropriate actions to minimize the administrative inefficiencies which could result from this ruling.

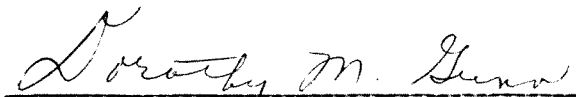
minimize the administrative inefficiencies which could result from this ruling.

ORDER

The Illinois Environmental Protection Agency's (Agency) July 15, 1985, reissuance of NPDES permit no. OL0001554 is hereby vacated and this matter is remand to the Agency for further action consistent with this Opinion and Order.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 27th day of March, 1986 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board