

ILLINOIS POLLUTION CONTROL BOARD
January 8, 1987

ILLINOIS POWER COMPANY)
(Vermilion Power Plant),)
)
Petitioner,)
)
v.) PCB 86-12
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

ORDER OF THE BOARD (by R. C. Flemal):

This matter comes again before the Board upon a December 10, 1986, Motion for Reconsideration filed on behalf of the Illinois Power Company ("IPC"), to which the Illinois Environmental Protection Agency ("Agency") responded on December 22, 1986. IPC requests that the Board reconsider its final Opinion and Order in this cause as issued on November 6, 1986. The Agency opposes reconsideration.

In its original petition, as filed on January 21, 1986, IPC contested fifteen conditions of a reissued NPDES permit. IPC contended that there were both procedural and "factual" flaws associated with reissuance of the permit. For this reason, IPC requested, among other matters, that the permit be remanded to the Agency. IPC specifically noted at hearing:

These procedural errors alone as affirmed by the Board's recent decision in a parallel case -- that is the Illinois Power Company versus I.E.P.A.¹ for its Hennepin power plant -- are sufficient for each contested condition to be set aside and remanded to the Agency with instruction that it comply with the applicable State and Federal Permitting requirements. (PCB 86-12 Board Hearing Transcript, p. 5-6)

¹ The Board notes that the referenced appeal is Illinois Power Company v. Illinois Environmental Protection Agency, PCB 85-119, decided March 27, 1986. This appeal dealt with IPC's Hennepin Power Plant. It is generally referred to within later pleadings, and is so referred to herein, as Hennepin II to distinguish it from an earlier appeal also dealing with IPC's Hennepin facility.

In the same hearing the Agency admitted to procedural errors, and on this basis likewise requested remand. The Agency stipulated:

Specifically Illinois Power has raised three procedural errors regarding this particular permit. The first one is that E.P.A. failed to issue written responses with the final permit. This is true. We did not. The second procedural error that Illinois Power raises is that the fact sheets that accompany the draft permits did not contain explanations of exceptional circumstances which would allow E.P.A. to monitor or to require monitoring of internal wastestreams. We have just stipulated that 001(b) could be interpreted as an internal wastestream, and it is true that the fact sheet did not contain an explanation of the exceptional circumstances. And the third procedural error that Illinois Power raised was that there was a limitation or a condition included in the final permit that had not appeared in the previous draft permits, and that this was not explained pursuant to 40 CFR 124.17, which is also true. (Hearing Transcript, p. 14).

In consideration of the common desire of Petitioner and Respondent that this matter be remanded back to the Agency, the Board so ordered on November 6, 1986.

In addition to simply requesting remand of this matter, however, IPC also requested that the Board rule on certain "factual" issues contested by IPC. Among others, IPC desired that the Board rule on the question of whether certain of the Vermilion plant's wastestreams are actually "internal" in character. The Board declined to do so, noting in its November 6, 1986, Opinion and Order "that rectification of the procedural errors is a necessary prelude in this instance to consideration of any of the other matters of possible dispute". IPC now claims that in so doing the Board expressed "a total abdication...of its statutory responsibilities and a complete failure...to adjudicate the dispute before it", and contends that failure of the Board to make findings on these factual questions will cause Petitioner to incur unnecessary costs. Additionally, IPC contends that the Board's decision is contrary to the goal of achieving administrative efficiency.

The Agency counters that "the Board has not foresworn its duties and responsibilities by so ruling", and cites case precedent in support of the consistency of the position adopted by the Board. Furthermore, the Agency repeats its contention as originally raised in this cause that questions of factual characterization of a complainant's facility or process are not ripe for decision until after a permit has been remanded, and

then reissued with the Agency's justifications for the inclusion of any special conditions (e.g., those relating to the monitoring of alleged "internal" wastestreams).

The Board continues to find merit in the Agency's position. In Hennepin II the Board found, in IPC's favor, that the Agency was in error in not responding in writing to comments submitted on a draft permit by IPC. The clear purpose of such written communication is to assure that a permit applicant has full opportunity to address its concerns with the permitting Agency prior to issuance of the permit. Administrative efficiency is obviously served when the potential permittee and the permitter have available and avail themselves of the opportunity to completely communicate and potentially resolve any differences.

This is also precisely the situation which exists in the instant cause, where the Agency has admitted to failure to communicate in a procedurally proper manner with IPC and has subsequently requested the opportunity to do so. There is some indication in this record that future communication between IPC and the Agency may bear fruit by helping to resolve their differences. The Agency, for example, stipulated at hearing in this matter that IPC's outfall 001(b) could be interpreted as an "internal" wastestream (Hearing Transcript, p. 13-14). This action by the Agency indicates that on remand there may be some modification of its views concerning the substantive issues which IPC has contested in this proceeding. Should this scenario materialize, IPC may not find it necessary to appeal the reissued permit, or may undertake an appeal based on a lesser number of substantive issues. In either of those events, the Board would not in the future have to reach findings on some or all of the issues which IPC now seeks the Board to adjudicate. The Board will, therefore, today refrain from reaching findings on these factual issues, believing such judicial parsimony to be prudent at this time. The Board's reluctance to use its adjudicative power to decide issues that it eventually might not otherwise have to decide has previously been upheld. See County of La Salle ex rel. Peterlin v. Illinois Pollution Control Board, 146 Ill. App. 3d 603 (1986).

IPC's assertion that it will incur unnecessary costs if the substantive issues are not now addressed is of dubious merit. IPC is, in effect, again arguing that these issues are ripe for decision. For the reasons already stated, the Board rejects this argument.

At least some of IPC's reluctance to rely on negotiation opportunities available to it at the Agency level appears to stem from its speculation that it will not achieve its desired outcome at that level. This is an irrelevant issue to the cause as it now stands. This Board has already done everything asked of it

by IPC via the Hennepin II Opinion and Order to assure that IPC and all like applicants have the opportunity for full interaction at the Agency level.


The Board has noted for the benefit of both IPC and the Agency its hope that "the parties will take appropriate actions to minimize the administrative inefficiencies" (Hennepin II, p. 5) caused by remand to the Agency. Though IPC has clearly chosen to do otherwise in this matter, the Board nevertheless continues to hope that such actions will occur in this and other parallel cases pending.

For the reasons given above, the motion for reconsideration is denied.

As a final matter, in the last sentence of its Motion for Reconsideration, IPC additionally "requests oral arguement" to "further support and articulate for the Board the relief requested herein". Although not so characterized in the Notice of Filing or within the body of the Motion for Reconsideration, the Board construes this sentence to constitute an additional Motion for Oral Argument. Counsel for IPC is well aware that the Board, as a matter of practicability, is unable to allow oral argument in all but the most extraordinary situation. IPC has not demonstrated that the instant matter is such a situation. Moreover, IPC has had abundant opportunity to present its position, as the voluminous filings of Petitioner attest. The motion for oral argument is denied.

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 8th day of January, 1987, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board