ILLINOIS POLLUTION CONTROL BOARD
October 6, 1988

VILLAGE OF SAUGET,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 86-57
	)	PCB 86-62
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	(Consolidated)
	)	
Respondent.	)	
MONSANTO COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 86-58
	)	PCB 86-63
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	(Consolidated)
	)	
Respondent.	)	

ORDER OF THE BOARD (by J. Anderson):

This matter arises on the Board's own motion. At the previous Board meeting on September 22, 1988, the Board adopted an Order ruling on the Illinois Environmental Protection Agency's (Agency) motion to reverse ruling of Hearing Officer filed September 7, 1988. At that time, the Board recognized that the Village of Sauget's (Sauget) response to the Agency motion was not yet due; however, the Board stated that "delay could jeopardize the decision due date of December 1, 1988". The Board then proceeded to affirm the Hearing Officer's ruling, thereby denying the Agency's motion by implication, and to order an additional hearing for the presentation of additional evidence and exhibits relevant to documents and unwritten facts available to the Agency and in its possession prior to the issuance of the disputed permits.

On September 22, 1988, after the adjournment of the Board meeting, Sauget filed its Response to the Agency's motion to reverse ruling of Hearing Officer and Motion to reconsider. On October 3, the Agency filed a Response to the motion to reconsider accompanied by a motion for leave to file instanter, which motion is hereby granted. On October 5, Monsanto also

filed a Motion for Reconsideration of the Board's September 22 Order.

Based on these filings, the Board today, on its own motion, reconsiders the September 22, 1988, Order and affirms in part and reverses in part.

As a preliminary matter, the Board notes that the reason it opted to address the Agency's motion on September 22, 1988, before the response period had expired, was that if the Board were to ultimately determine that an additional hearing was necessary, the Board would have to order it, schedule it, and notice it consistent with a December 1, 1988 decision deadline. The September 22, 1988, Board meeting was the only regularly scheduled Board meeting date upon which the Board could satisfy this objective. The option of cancelling the hearing, if a hearing was ultimately determined to be unwarranted, was always available.

The Board affirms that portion of the September 22, 1988, Order which upholds the ruling of the Hearing Officer:

> "the Hearing Officer properly excluded testimony and exhibits proffered at least in large part to show what was known and thought by the U.S. Environmental Protection Agency (USEPA) at the time the Agency issued the permits on appeal. What information was in the possession of USEPA is irrelevant. This record should exclusively comprise those facts in the possession of the Agency on or before the date it issued the disputed permit...."

However, the Board reverses that portion of the September 22, 1988, Order that relates to the scheduling of an additional hearing. On September 22, 1988, the Board stated:

> "the Agency's offer of proof does include some facts which may have been available to the Agency at the time of the permit evaluation. This includes both documentary evidence .... and testimonial evidence of information conveyed by USEPA to the Agency during their discussions concerning the Agency adoption of the February 14, 1988 USEPA recommendations.
>
> The Hearing Officer shall promptly notice and conduct an additional hearing in this matter for the Agency presentation and petitioner's rebuttal of additional evidence and exhibits relevant to documentary and unwritten facts available to the

> Agency and in its possession prior to the issuance of the disputed permits."

In its offer of proof and in its Motion to overrule the Hearing Officer, the Agency requested the admission of certain documents relied upon by USEPA to support the imposition of the contested conditions. The Agency also requested the admission of testimony of witnesses external to the Agency to support the "genesis and evolution of necessary conditions for the Sauget Permit(s)". Agency motion at 11. It was within this context, i.e., within the offer of proof, that it became apparent to the Board that certain of the documents relied upon by USEPA may also have been in the possession of the Agency. Without knowing more and with a desire to obtain the "true" record, the Board ordered the additional hearing to address the documents described in the quoted passage above.

In its response, however, Sauget explained that the Agency was given ample opportunity to seek the admission of these documents independent of the offer of proof. In fact, after the Agency sought admission of these documents during the course of the offer of proof, Sauget specifically objected and advised the Agency that its offer of proof may have been overbroad. See, R. 916-917. Sauget states that it "purposefully and intentionally" called the Agency's attention to this point so that if the Agency deemed it appropriate, it could have sought the admission of evidence not subject to the hearing officer's ruling. (Sauget response at 4). The Agency, however, decided to do nothing with respect to this issue, apparently deciding to let its strategy stand or fall on review.

With respect to the law regarding offers of proof, Sauget cites ample authority for the proposition that "if several facts are included in the offer, some admissible and other inadmissible, the whole (if properly objected to) is inadmissible; in other words, it is for the proponent to sever the good and bad parts". (1 Wigmore, Evidence, Section 17. (Tiller's rev. 1983) pp. 788-789, and see also Over v. Schiffling, 102 Ind. 191, 26 N.E. 91, 92 (1985)). Applying this proposition to the facts of this case, Sauget argues that the Agency took the risk in offering most of its case as an offer of proof. (Sauget response at 3).

In its October 3 response, the Agency does not address Sauget's offer of proof argument. The Agency instead offers a policy argument rather than a legal argument:

> When the Board sits in review of an Agency permit, it must consider whether the Agency's decision is correct based on the information submitted to the Agency. Included in that review is the correctness of the documents included in the record, not just

> in scope, but in the foundation for the material statements included in the documents.
>
> In the past, commentators, whether public or federal, have not been required to annotate their comments to the Agency. If the ruling of the Hearing Officer stands, then any submission to the Agency must stand on its own, without an opportunity to review the foundation of the comment.
>
> Of course, prior review could have been afforded if a hearing were requested by Petitioner between receipt of the comment letter and permit issuance. Agency Response, Para. 4-6.

The essence of the Agency's argument appears to be that the burden of insuring that the Agency compiles a complete record concerning conditions it may or may not choose to include in a permit based on written comments should be imposed on the permit applicant, who should request a hearing, according to the Agency's view, to avoid burdening the commenter with the requirement of explaining the basis for a comment. It would then logically follow that all permit applicants would need to request a pre-issuance hearing in every case to protect rights to appeal a hypothetically possible condition, a result which would increase the administrative burden on the Agency and the applicant alike.

The Agency further argues that

> Choice of special conditions by the Agency is founded upon more than the application, using data generated by its inspectors, analysis, professional publications and research, and most importantly comments submitted by the public or USEPA. The Agency's choice of which data is rely on or not rely on is based upon the reliability of the comment. Board review of the Agency's reliance can only be had if the Board makes a finding of reliability which would require scrutiny of the excluded basis documents and testimony. Agency Response, Para. 4-6,12.

The Board does not question that the choice of which data to rely on is based on the reliability of the comment, but a decision concerning the reliability of the comment cannot be later rationalized by introduction of information which was not in the Agency's possession at the time of its decision. See e.g. Waste Management v. IEPA, PCB 84-45,61,68 (consolidated), October 1 and November 26, 1984, aff'd. sub nom. IEPA v. IPCB 138 Ill. App. 3d 550, 486 N.E. 2d 293 (3rd Dist. 1985), 115 Ill. 2d 65,

503 N.E. 2d 343 (1986) and (excluding from the record a study produced after the Agency's permitting decision).

The Board notes that Monsanto (Motion, p. 3) has cited Waste Management as one standing "unequivocally for the proposition that the Board's review is limited to matters actually considered by the Agency and certified as part of the record" (emphasis added). This is not entirely correct; Board review is limited to information in the Agency's possession which it actually or reasonably should have considered (i.e., in that case, monitoring data in the Agency's possession contradicting earlier monitoring data which did not come to the attention of Agency decisionmakers).

The Board is persuaded that, based upon the facts of this case and upon the law regarding offers of proof, the documents relied upon by USEPA and sought to be admitted by the Agency in its offer of proof cannot be made part of the record by this method. Thus, because the Board's awareness of the existence of these documents is founded solely on the offer of proof, and because that offer of proof has been denied, the Board is precluded from ordering an additional hearing to address the relevance and availability of these documents. The Board, therefore, reverses that portion of the September 22, 1988, Order which relates to an additional hearing. The Hearing Officer is directed to cancel any hearing scheduled as a result of that order and is further directed to complete the briefing schedule process as originally scheduled or as he deems necessary.

IT IS SO ORDERED.

B. Forcade dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 6th day of October, 1988, by a vote of 6-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control