

ILLINOIS POLLUTION CONTROL BOARD
July 11, 1986

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

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

This matter comes before the Board upon motions for reconsideration filed on behalf of both the Illinois Power Company (IPC) and the Illinois Environmental Protection Agency (Agency) on April 30, 1986, and various subsequent filings. On May 9, 1986, the Board granted reconsideration and established an additional briefing schedule. That order was clarified and upheld by order of June 5, 1986.

Upon reconsideration, the Board affirms its Opinion and Order of March 27, 1986, except that the Order is hereby modified to vacate the reissuance of NPDES Permit No. IL0001554 only insofar as it includes the conditions contested in IPC's Petition for Review in this matter.

The Board understands that it has never before held that the Agency must respond in writing to comments of the permit applicant during the permitting process. For the most part, the Board has in such cases proceeded to reach a decision on the merits of the permit appeal based upon any prejudice to the applicant having been cured by the appeal process before the Board and administrative efficiency. On the other hand, the Board is aware of no case in which it has held that such responses were not required, despite some comments, in dicta, which indicate the contrary.

If the Board were to continue to reach the merits of cases such as this, there would be little impetus for the Agency to correct its procedures to fully comply with state and federal law. The Board has decided that it is time to provide that impetus. The Board realizes that for a time there will be some administrative inconvenience as a result of this holding. However, in the long run, the elimination of this procedural issue should more than offset that inconvenience. Furthermore, now that the Board has held that the failure to provide written


responses is reversible error, permit applicants may not find it necessary to raise this issue in other pending cases due to the inconvenience to them of remandment to the Agency in the belief that the Agency will provide such comments in the future.

The Board offers the following responses to requests of IPC and the Agency.

1. The Board has not granted summary judgment: it has made a ruling after hearing that procedural errors by the Agency constitute reversible error.
2. The Board does not believe that it is appropriate, given the procedural errors, to resolve the substantive issues. If the Board were to proceed to consider the substantive issues, it would undercut the force and effect of the March 27, 1986, Order, once again relegating the holding to the level of dicta. IPC cannot "have its cake and eat it too." It elected to take a procedural stand and must abide by the result of that stand, as must the Agency.
3. The question of whether there was procedural error regarding the internal wastestreams is predicated upon a substantive determination that the wastestreams at issue are internal, and, therefore, given the Board's procedural ruling that issue will not be resolved at this time.
4. IPC was not required to raise the procedural issues in its petition for review and those issues were appropriately raised in the motion for summary judgment and addressed at hearing. Therefore, those issues were not waived.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 17th day of July, 1986, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board