ILLINOIS POLLUTION CONTROL BOARD
October 12, 1984

ILLINOIS POWER COMPANY (VERMILLION UNITS 1 AND 2), Petitioner,	)	
v.	)	PCB 84-89
	)	PCB 84-90
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	(Consolidated)

DISSENTING OPINION (by J. Anderson and B. Forcade):

We disagree completely with the majority action and in part with the supporting opinion. We believe the Board should have issued an Opinion only, acknowledging the fundamental defect in this proceeding and allowing Illinois Power Company (IPC) to deem the conditions contested in the permit in PCB 84-89 deleted, and the permit denied in PCB 84-90 granted, all by operation of law. In so doing, however, we would have had the Board remind the parties that existence of those permits would insulate IPC only from enforcement based on allegations of operation without a permit. We would also have reminded them that an operation of law permit does not insulate IPC from full and total compliance with the Act and Board regulations, nor does it insulate IPC from enforcement actions claiming violatons of the Act or Board regulations: if any person believes IPC's operations cause or threaten pollution they may file an action seeking a Board Order to remedy the situation Landfill Inc. v. IPCB 387 N.E. 2d 258, 74 Ill. 2d 541 (1978).

While dicussed in the majority opinion, some recapitulation of the statutory requirements and factual events involved in this matter is in order. Section 40(a)(1) of the Act provides

> "If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the applicant may, within 35 days, petition for a hearing before the Board to contest the decision of the Agency. The Board shall give 21 day notice to any person in the county where is located the facility in issue who has requested notice of enforcement proceedings and to each member of the General Assembly in whose legislative district that installation or property is located; and shall publish that 21 day notice in a newspaper of

> general circulation in that county. The Agency shall appear as respondent in such hearing. At such hearing the rules prescribed in Sections 32 and 33(a) of this act shall apply, and the burden of proof shall be on the petitioner."

Section 40(a)(2) of the Act requires decision in these matters within 90 days of the date of filing. Computing the decision period pursuant to 35 Ill. Adm. Code 101.106, decision is due October 15. IPC has consistently declined to waive, or extend, the decision date (R. 18).

Based on a Monday October 15 due date, and allowing the Board only the weekend of October 12-13 to receive transcripts and evidence and review them, hearing would have to have been scheduled October 12. To give appropriate newspaper and other notice, assuming hand rather than even express mail delivery, the Board would have been required to dispatch such notices on Friday, September 21.

Due to administrative oversight no hearing officer was contacted by the Board until September 19 or 20, which was done by means of telephone (R. 13). The Board dispatched the filings in this case on September 21. These were received by Mr. Todd Parkhurst on September 24. Mr. Parkhurst formally accepted the case September 25 (H.O. Exh. 1). While questioning his ability to set a hearing because of statutory notice requirements (Ibid. and R. 27), Mr. Parkhurst did so at the direction of the Board. By Order of September 28, hearing was set for October 3, to allow the Board time to review the transcript. The parties stipulate that they received notice of hearing on September 28 (R. 8-9). No newspaper notice of this hearing was published, and no notice was mailed or otherwise given to legislators or other persons as specified in Section 40(a)(1) of the Act. [As noted at hearing, the providing of these notices is not a duty of the hearing officer (R. 19-20).] No members of the public appeared at hearing.

Even absent the administrative "slippage" which occurred here, the 90 day decision period of Section 40(a)(2) has proven uncomfortably tight in a number of circumstances (e.g., Waste Management Inc. v. IPCB, 83-45, 61, 68 (consolidated), October 1, 1984). As noted in the majority opinion, in one case overruling the Board and holding that the default provision existing at the time applied to NPDES permits, the Appellate Court found that "the 90 day requirement in Section 40(a) evinces legislative concern with bureaucratic delay. It was not the intent of the General Assembly to create a license to pollute." Illinois Power Co. v. IPCB, _____N.E. 2d_____, 112 Ill. App. 3d 457 (5th Dist. 1983). Recognizing, however, that such may be perceived as a practical effect of the default provision, the Board makes every effort to avoid default.

In this case, we must reluctantly agree with IPC that the Board's efforts to allow the Board to reach the merits of these appeals were insufficient. This is not a case where delay was attributable to petitioner, potentially excusing deficiencies [c.f. Marquette Cement Mfg. Co. v. IPCB, _____N.E. 2d _____, 84 Ill. App. 3d 434 (1980).] It is likewise not a case where the form of written notice to the public and legislators is at issue, and where the Board could find that statutory requirements had been met, see Hamman v. IEPA, PCB 80-153, 44 PCB 73 at p. 80, appealed sub. nom. Mathers, et al. v. IPCB, 438 N.E. 2d 213, 107 Ill. App. 3d 729 (1982).

Absent a showing of actual prejudice, we give little weight to IPC's arguments concerning Section 103.125 of the Board's procedural rules. However, given the complete lack of newspaper and other notice to the particular persons specified in Section 40(a)(1), we cannot find that the Board's belated scheduling of a hearing constitutes substantial compliance with the statute, and hence non-prejudicial error. The hearing was therefore fatally defective; even had IPC presented the merits of its case, which it did not, under these unique circumstances we believe the Board would lack statutory authority to adjudicate the merits of the controversy.

Finally, we wish to emphasize that this dissent should not be construed as inordinate criticism of the Board's administrative oversight. Even without such accidental oversight, the 90 day decision deadline is too short now for usually complex permit appeals. There is little room for any slippage. Also, we question whether the default mechanism may be an "overkill" remedy where there is no intent to delay. The Board notes that at USEPA insistence the default sanction no longer applies to RCRA, UIC and NPDES permits; the decision period now is 120 days, and the remedy for exceeding this deadline is an Appellate Court Order process (see Sec. 40 (a)(3) of the Act). We would prefer to see the same process applied to all permit appeals for consistency alone: since it can be an issue as to what kind of permit is required in a particular situation, the Board could have difficulty in determining beforehand whether a 90 day default, or instead a 120 day appellate action, statutory deadline applies. However, to achieve such results a legislative change would be necessary. We would rather see the legislature directly address these problems, than to see the Board strain to prevent a default.

For these reasons we dissent.

Joan G. Anderson

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Bill S. Forcade

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was filed the 17th day of October, 1984.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board