

ILLINOIS POLLUTION CONTROL BOARD  
June 5, 1986

VILLAGE OF SAUGET, )  
)  
Petitioner, )  
)  
v. ) PCB 86-57  
)  
)  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, AND UNITED )  
STATES ENVIRONMENTAL )  
PROTECTION AGENCY, )  
)  
Respondents. )

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VILLAGE OF SAUGET, )  
)  
Petitioner, )  
)  
v. ) PCB 86-58  
)  
)  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, AND UNITED )  
STATES ENVIRONMENTAL )  
PROTECTION AGENCY, )  
)  
Respondents. )

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MONSANTO COMPANY, )  
)  
Petitioner, )  
)  
v. ) PCB 86-62  
)  
)  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, AND UNITED )  
STATES ENVIRONMENTAL )  
PROTECTION AGENCY, )  
)  
Respondents. )

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MONSANTO COMPANY, )  
)  
Petitioner, )  
)  
v. ) PCB 86-63  
)  
)  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, AND UNITED )  
STATES ENVIRONMENTAL )  
PROTECTION AGENCY, )  
)  
Respondents. ) NOT CONSOLIDATED

ORDER OF THE BOARD (by J. Anderson):

PCB 86-57 is an appeal filed April 18, 1986 by the Village of Sauget of certain conditions of NPDES permit No. ILO021407 dated March 21, 1986 relating to Sauget's existing physical/chemical wastewater treatment plant (P/C plant). PCB 86-62 is a third party appeal filed April 21, 1986 of the same conditions of the same permit filed by Monsanto Company, a discharger into that plant.

PCB 86-58 is an appeal filed April 18, 1986 by Sauget of certain conditions of NPDES Permit No. ILO065145 dated March 21, 1986 relating to the soon to be completed American Bottoms regional wastewater treatment plant (AB plant) which is intended to receive flows from the P/C plant as well as from the East St. Louis and Metro East Sanitary District (Cahokia) primary treatment plants. PCB 86-63 is an appeal filed April 18, 1986 by Monsanto of the same conditions of the same permit.

The April 21 motions of Ronald T. Allen for leave to appear on Monsanto's behalf in PCB 86-62 and PCB 86-63 are granted.

By Orders entered in each of the four cases the Board asked the parties to address whether 1) USEPA was a proper party in these appeals, 2) whether the P/C plant appeals should be consolidated with the AB plant appeals and 3) whether the Board had authority to entertain the Monsanto third-party appeals. USEPA and Sauget filed responses to these queries on May 15, as did Monsanto on May 16. Additional motions pending are 1) Sauget's motion of May 27 in the PCB 86-58 AB plant appeal for modification of the Board's April 24 scheduling Order, and 2) the Agency's May 19, 1986 motions to dismiss each of Monsanto's third party appeals.

Dismissal of USEPA From These Proceedings

Sauget (whose briefs Monsanto adopts by reference on this point) argues that USEPA is a necessary party in these appeals "based on the central role it played in drafting and requiring the inclusion of various objectionable conditions" in each of the NPDES permits at issue here. Sauget asserts that by requiring the Agency to include these conditions, that USEPA has "voluntarily submitted" to the Board's jurisdiction, and that for jurisdiction purposes the acts of the Agency must be imputed to USEPA, given the nature of the Memorandum of Agreement delegating NPDES enforcement program to Illinois. USEPA, however, "neither acknowledges nor agrees" that it is subject to the Board's jurisdiction, asserting that:

"Under the doctrine of sovereign immunity, as well as the jurisdictional provisions of the Federal Water Pollution Control Act, 33 U.S.C. §1369(b)(1)(D) and

(F), USEPA may not be joined as a party to Sauget's permit appeal before the Board. See Aminoil U.S.A., Inc. v. California State Water Resources Control Board, 674 F.2d 1227 (9th Cir.1982)."

In that case, Aminoil sought review in state court of a decision of the California State Water Resources Control Board (State Board) that the area in which Aminoil discharged its oil and gas drilling waste was a national wetlands and that Aminoil therefore needed an NPDES permit. Prior to the decision by the entire State Board, the Santa Ana Region (Regional Board) of the State Board had adopted the interpretation that the area was not a wetland, and no permit was needed.

Irrespective of this determination, USEPA sent Aminoil a "finding of violation" of prohibitions against discharging into a wetlands without an NPDES permit, and notified the State Board that USEPA would take action if the State Board did not enforce within 30 days. The State Board thereafter sent USEPA a draft Order which it proposed to issue reversing the Regional Board; the reversal order was based on the identical record upon which the Regional Board had made its decision. Three days after its receipt from USEPA of a letter which "urged" the adoption of the proposed order, the State Board did so. For this reason, Aminoil joined the USEPA Administrator as a "real party in interest" to the state court suit for review of the State Board action. The Administrator removed the suit to the federal district court. The district court granted a motion to dismiss on the grounds that sovereign immunity barred the action in state court. The 9th Circuit Court of Appeals affirmed the dismissal over Aminoil's argument that it was seeking, in a single proceeding, a determination that would be binding on both the State Board and the USEPA. The Court stated that:

"The doctrine of sovereign immunity and the allocation of judicial authority implicit in the structure of the [Clean Water] Act preclude the states from exercising jurisdiction over the [US] EPA. This allocation of federal-state jurisdiction follows logically from the framework of cooperative federalism created by the Act.\*\*\*It is not for us to revise that congressional judgment merely because it may place private litigants to the unenviable and burdensome position of being required to litigate their liability under the Act in two separate judicial system.\*\*\*It is the responsibility of Congress to correct any such inconsistency by amending the Act to allow the [US] EPA to be joined in state court actions for review of state agency NPDES permit decision.

We recognize...that our holding does not comport well with traditional motions of judicial economy and the

principle that needlessly duplicative litigation should be avoid. We emphasize, therefore, that we hold only that...nonfinal [US] EPA action is not reviewable in the federal courts by means of joining the [US] EPA as a party to a state court action seeking review of a state NPDES permit decision. Under both the Act and Section 10 of the Administrative Procedure Act, 5 U.S.C. §704, review of EPA action must await final Agency action and must be initiative in federal court" (citations and footnotes omitted) 674 F.2d at 1237.

The Aminoil fact situation is virtually identical to that presented to the Board in these four appeals. As the Clean Water Act has not been amended since that decision, the Board is compelled to follow that precedent and to find that the Board may not lawfully exercise jurisdiction over USEPA, and dismisses it as a party from all of the instant appeals. In so doing, the Board shares the view of the Aminoil court that this leaves the petitioners in an "unenviable and burdensome position", but this is a position which the Board, like the Court, has no power to correct.

#### Monsanto's Third Party NPDES Permit Appeals

There are two issues for Board consideration here. The first is whether 35 Ill. Adm. Code Section 105.102(b)(3) authorizing third party appeals of NPDES permits is invalid pursuant to the holding of Landfill, Inc. v. Pollution Control Board, 74 Ill. 2d. 541, 387 N.E. 2d 258 (1978). The second is whether, if the rule is valid, Monsanto has fulfilled the preconditions to acquire standing pursuant to the rule's terms. This latter issue is brought up, for the first time, in the Agency's May 19 motion to dismiss. As Monsanto has not as yet addressed this issue, the Board will not rule on either issue today. Monsanto is directed to file a response, including a description of its participation, if any, in the permitting process at the Agency level, on or before June 16, 1986.

#### Consolidation

The parties have persuaded the Board that it would not be wise to consolidate the P/C permit appeal with the AB appeal. However, the Board notes its intention to consolidate the Monsanto appeals with the respective Sauget appeals in the event that the Monsanto is found to have standing to appeal.

#### Sauget Motion To Modify

On May 27, 1986, Sauget filed a motion to modify the Board's April 24, 1986, Order setting this matter for hearing. Sauget

seeks to have the prior Order modified to allow full and complete discovery. The motion is denied as unnecessary.

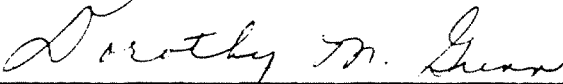
The Board's April 24 Order required that hearing be completed within 60 days, absent a waiver. Sauget provided a waiver until January 21, 1987. Consequently, under the terms of the April 24 Order, the hearing officer is free to establish a scheduling order that allows ample time to complete discovery, hold the necessary hearings, and allow final briefs to be filed for a Board decision in January, 1987. The hearing officer's letter filed May 19, 1986, indicates he is aware of the waiver until January 21, 1987, and that he intends to set a scheduling order to meet that date. Therefore, the Board sees no reason to modify the April 24 Order and denies Sauget's motion.

The Board notes that the prior Sauget NPDES permit appeal (PCB 79-87) was filed on April 17, 1979 and finally disposed of on July 19, 1984, a period of over five years. It is the Board's firm intention to see the present proceeding resolved more quickly. The Board sees no reason why the present proceeding cannot be concluded in time for a Board decision in January, 1987, and anticipates that the hearing officer scheduling order will so provide.

IT IS SO ORDERED.

J. D. Dumelle concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 5<sup>th</sup> day of June, 1986, by a vote of 7-0.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board