ILLINOIS POLLUTION CONTROL BOARD
June 10, 1987

JOLIET SAND AND GRAVEL COMPANY, Petitioner,	)	
v.	)	PCB 87-55
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

DISSENTING OPINION (by J. Anderson):

The Order of the majority of the Board dismissed this appeal of the denial of a permit. The grounds were that, since the Third District Appellate Court is considering an appeal of a prior (August 26, 1986) Illinois Environmental Protection Agency ("Agency) denial of an operating permit for the same operation at Joliet's facility, the Board lacks jurisdiction to consider issues arising from the Agency's later March 26, 1987, decision to deny.

While both the March, 1987 denial letter and the August, 1986 denial letter were essentially based on the fact that the respective applications as submitted contained inadequate information, the March, 1987 letter does not just repeat the permit denial reasons of the August, 1986 letter. None of the four reasons in the earlier letter is repeated in the latter letter; and none of the reasons in the later letter appears in the earlier letter.

I dissent from the majority Order because I believe that the petitioner's statutory and due process rights are being constrained because, in order to prevent multiple appeals, the Board decision in essence requires the petitioner to abandon certain rights in order to preserve others. I also believe that the Board's reliance on the Board's holdings in Alburn, Inc. v. IEPA, PCB 81-23, March 19, 1981 and Caterpillar Tractor Co. v. IEPA, PCB 79-180, July 14, 1983 is misplaced. Each of these cases involved purported Agency issuance of a second permit while appeal of condition of a prior issued permit was pending before the Board; the policy and practical considerations involved in this case involving two permit denials are dissimilar. And I further believe that the Board's decision is not beneficial to the environment.

As background for my dissent, there are several observations drawn from my experience as a member of this Board that might

serve to place the issues in perspective. It is beneficial to the environment as well as to a facility operator to have operating permits renewed as quickly as possible. The benefit to the environment is that the renewal permit contains conditions for the facility's operation which are based on current data. The benefit to the operator is that the facility is insulated from enforcement for failure to have a valid permit. Where the Agency has either denied a permit or where the permit has been issued with conditions which are deemed objectionable, it is not uncommon for the applicant to reapply to the Agency as well as to file an appeal with the Board. In addition to preserving the right of review of substantive disagreements, the appeal to the Board may also protect the facility's operating status. Where the permit is denied, and the applicant has timely filed for renewal of a permit, the Board has consistently held that the facility may lawfully continue its operations pursuant to the expired permit, which is deemed to continue in effect during the pendancy of any appeal. If the appeal is dismissed prior to issuance of a permit, the facility cannot operate lawfully. Where the conditions of an issued renewal permit are the subject of challenge, the facility operates pursuant to the renewal permit whose objectionable conditions may be stayed by the Board.

The Act contains a detailed system for processing permits and resolving disputes. Section 40 of the Illinois Environmental Protection Act ("Act") allows a petitioner to appeal to the Board any final permit determination of the Agency, and to appeal to the Appellate Court any final determination of the Board. This right of appeal must be exercised within 35 days. It must be emphasized that, once an application is filed with the Agency or an appeal is filed with the Board, Sections 39(a) and 40 of the Act impose decision deadlines on the Agency and the Board respectively. Failure by the Agency or the Board to timely decide results in a deemed approved permit. There is nothing in the Act that requires the petitioner to waive these deadlines.

It is also important to note that Section 39 requires the Agency to give specific reasons for its denial of a permit. Agency failure to state a reason in the denial letter constitutes a waiver of the right to rely on the unstated reason; on appeal the Board may not consider reasons for denial which were unstated, even if those reasons would be valid.

In this instance, all parties had followed their mandates or exercized their rights. The Agency had timely denied a permit; the petitioner had timely appealed to the Board, the Board timely upheld the Agency's denial and the petitioner had timely appealed to the appellate court, where jurisdiction of the August, 1986 decision now rests. Following the Board's affirmation of the Agency's denial, the petitioner also reapplied to the Agency for a permit. The Agency again timely denied the permit in March, 1987 for reasons different from those given for its denial of the

earlier permit application. The petitioner timely appealed this denial to the Board.

As the majority Order notes, in Alburn the Board held that where a permit had been issued, the Agency lacks authority to modify that permit while it is the subject of an appeal. The Board's reasoning was that "two permits covering the same process or equipment and issued pursuant to the same legal authority cannot have simultaneous legal effect", and went on to conclude that the earliest issued permits have "primacy and that the later permits, assuming they exist, did not nullify the legal effect of the prior permits". The Alburn reasoning was subsequently refined in the Caterpillar case, in response to arguments made by the litigants regarding practical difficulties encountered in an attempt to settle the appeal. In Caterpillar, the Board went on to state that the Agency could consider new information and "issue" a voidable permit, which could be ratified by the permittee to become effective upon dismissal of the prior action. This procedure accommodates the petitioner's right to review of issues and affords protection to its operating status, while still fostering problem resolution with the Agency.

Before today's Order, the Board had not considered the ability of the Agency to issue a permit while a denial appeal was pending before the Board, let alone while a denial appeal was pending before an appellate court.

Where no permit exists, as is the case here, there cannot be a transfer of jurisdiction of any existing permit from the Agency to the Board to the Appellate Court. While I would agree that the Appellate Court now has jurisdiction over the Board's Order affirming the August, 1986 permit denial, I fail to see how pendancy of that appeal vests any jurisdiction of a subsequent application in that Court, or how the Agency is precluded or absolved from its statutory duty to issue or deny a permit upon the basis of the subsequent application.

In short, the Alburn and Caterpillar decisions do not apply to the facts in this case. Moreover, this Board decision violates the rationale for the Caterpillar case, which preserved all appeal rights and benefits while allowing for exercise of the right of the filing of an application and timely Agency decision thereon. Here, the majority would require an applicant to abandon some rights in favor of others. It is unclear from the majority opinion whether the majority considers that the pendancy of the court appeal bars one or both of the following acts during the pendancy of an appeal: 1) the permitee's filing of a subsequent application, or 2) the Agency's action on that application within the statutory time period. Caterpillar assumes that the applicant may file the application, and the Agency may issue a "voidable" permit before the applicant dismisses its prior appeal. Ironically, the rights the Board

sought to preserve pursuant to Caterpillar are now lost if the Agency denies the permit. Whether one or both acts are barred, it is clear that an applicant is being forced to choose between the right of judicial review of a previous administrative action concerning a permit application, and the right to have either one or both administrative agencies (i.e. the Agency and/or the Board) make timely decisions concerning the changed factual situation which a subsequent application presents.

While the effect of the majority holding is to reduce the number of appeals pending before the Board and the Courts, an additional effect may be to delay bringing a facility into the permit system. In this case, for instance, if Joliet does not choose to dismiss its earlier appeal, it cannot safely reapply for a permit until that appeal is finally decided some months hence. If the Board's decision is upheld, the application process must begin again. Whereas if a simultaneous appeal and permit reapplication procedure is allowed to function, as I think it practically and legally must, a permit could issue well before a final appellate decision is reached.

I appreciate the Board's concern about potential for abuse of the permitting system through the filing of successive appeals by an applicant who has filed successive deficient applications. However, even assuming that there are several applicants who choose to expend the not-inconsiderable monetary and other resources necessary to prosecute several simultaneous appeals in the courts and before the Board rather than in developing data, the device chosen by the majority to curtail one perceived abuse can serve to foster another.

For example, as aforementioned, Section 39(a) of the Act requires the Agency, in a permit denial letter, to give "specific, detailed statements as to the reasons". Thus, the Agency cannot later, on a re-review of the same information, alter or add to those reasons. Notwithstanding, in a system where permit applications and reapplications may be processed by multiple and differing Agency permit reviewers over time, it is natural that new "afterthought" objections are or can be raised, in good faith as well as in bad. (See, e.g., Illinois Power Co. v. IEPA, PCB 86-154, April 1, 1987, a third appeal of issues arising from an application filed in 1979.) This tendency to raise new objections to previously submitted information could be encouraged by the majority holding, to the detriment of the permit system and the environment.

The Act's fast-track appeal system was designed to give quick answers to all disputes arising between the Agency and the regulated community, in the interest of protection and enhancement of the environment. I believe that the majority's holding frustrates the intent of this system.

For all of the foregoing reasons, I respectfully dissent.

Joan G. Anderson

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I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was submitted on the 22nd day of June, 1987.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board