ILLINOIS POLLUTION CONTROL BOARD
April 1, 1987

ILLINOIS POWER COMPANY (Hennepin Power Plant),	)	
Petitioner,	)	
v.	)	PCB 86-154
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

CONCURRING OPINION (by J. Anderson):

While I joined in the Board's decision to allow the Agency to consider imposing conditions pursuant to Section 122.45(h), I believe the more appropriate action would have been to direct that the permit be issued without further Agency review.

As the Board Opinion makes eloquently clear, this case is a distressing example of the permit process gone out of control. I see no legal or environmental reason that compels us to wait for a "Hennepin IV".

The only remaining issue is the Agency's assertion that it has a right to a remand so it can consider, pursuant to the provisions of 40 CFR 122.45(h), whether to demonstrate that "exceptional circumstances" exist, and thus allowing the Agency to impose further permit conditions on what it now concedes are internal waste streams. Of course, by remanding for further Agency review, the Board has set the stage for a "Hennepin IV" appeal of permit conditions.

Under the circumstances of this NPDES permit appeal wherein the Board holds a de novo hearing not limited to the Agency's record, I think we could properly hold that the Agency has already effectively waived any demonstration of exceptional circumstances because of its failure to carry its burden of going forward on this issue in the Board proceeding.

Once the Agency conceded at Board hearing that these were indeed internal waste streams, I believe the Agency had an affirmative responsibility to at the very least articulate to the Board any disagreement with IPC's testimony that no exceptional circumstances exist. I might even have settled for an explanation by the Agency as to what its concerns were that prevented it from arguing this issue.

Instead, the Agency said nothing (except for a hypothetical on-line statement in its brief), choosing instead to rely on a legalistic assertion that its admission of error following its permit determination did not preclude it from now looking at the "exceptional circumstances" issue. Even if this were to be true, by its decision not to tackle this issue before the Board, the Agency effectively rejected a perfectly appropriate Board forum. Why? The Agency cannot claim surprise - it is the party that switched position, it did not claim that there was vital information it needed. Moreover, the federal regulations do not mandate the Agency to utilize Section 122.45(h); on the contrary, the Agency has a "demonstration" burden if it intends to use that Section.

The Board's concern that its ruling in Hennepin II might have contributed to the Agency's failure to present evidence at hearing is understandable (Board Opinion at p. 8); however, I do not find it so persuasive as to offset the consequences of deferring to this concern. While arguably not evidence per se, the Agency did not hold back at hearing when articulating its new thinking on other substantive aspects of the permit. As it is, we have a situation where we are prolonging what is already an abuse of process, an inappropriate use of the Board's hearing process, and a waste of legal and budgetary resources.

The Board should not have allowed the stage to be set for a "Hennepin IV".

Joan G. Anderson

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Concurring Opinion was filed on the 9th day of April, 1987.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board