ILLINOIS POLLUTION CONTROL BOARD
April 10, 1986

IN THE MATTER OF:	)	
	)	
SITE-SPECIFIC RULEMAKING	)	R85-15
FOR THE SANITARY DISTRICT	)	
OF DECATUR, ILLINOIS	)	

CONCURRING OPINION (by. R.C. Flemal, J.D. Dumelle, and B. Forcade):

Though we agree with the majority that this matter should proceed to Second Notice, we find it unfortunate that it does so without the continued inclusion of the "sunset provision". This provision was supported by the Board in the First Notice Opinion because the characteristics of this proceeding are such that the use of a sunset provision is particularly warranted.

The majority notes, in discussing the need for a sunset provision here, that "The Board has not retreated from its concerns expressed in the First Notice Opinion..." We would assert that such a retreat unquestionably has occurred, and that the reasons cited by the majority for removing the provision are in no way of sufficient weight to justify such a retraction.

The majority Opinion notes four factors which ostensibly support deletion of the sunset provision:

> The implications of, and rationale for, a 10 year sunset provision as it would relate to Decatur's circumstances would better have been raised earlier and aired at hearing. Additionally, the Board's rationale supporting "sunset" in large measure focused on concerns applicable generally to site-specific regulations (and arguably to general regulations), rather than concerns special to the Decatur situation. Next, the effect of specific sunset language on local bond issues is a matter that needs further consideration. Finally, the Board, on balance, does not feel that a sunset provision is so essential in Decatur's case, given other review benchmarks, as to warrant delaying the decision in order to hold further hearings (footnote omitted).

In response, it admittedly would have been better to have raised at hearing "(T)he implication of, and rationale for", a sunset provision in this proceeding. Hindsight is commonly keener than foresight. Nevertheless, it is irrefutable that the scope of action taken by the Board in any given proceeding is not

limited solely to the matters discussed at hearing in that proceeding. The Board has the authority and duty to impose conditions, sua sponte, on any relief it grants. Moreover, to hold otherwise, or to even imply otherwise, would effectively incapacitate the Board by requiring additional hearings to be held in many, if not most of its cases and proceedings.

One is also tempted to draw the inference from the majority view that because the issue of sunsetting was not discussed at hearing, the decision to propose a sunsetting provision in the First Notice Rule was somehow faulty by virtue of "surprise". Such implication can certainly not have been intended by the majority. Both the Agency and Decatur had, and utilized, the opportunity to address the matter of sunsetting during the comment period following First Notice. Additionally, both the Agency and Decatur had the opportunity to request an additional hearing if they perceived the need to do so. They did not so request.

Further, though the majority correctly points out "(T)he Board's rationale supporting "sunset" in large measure focused on concerns applicable generally to site-specific regulations (and arguably to general regulations), rather than concerns special to the Decatur situation" (footnote omitted), this does not negate the applicability of a sunset provision in this proceeding. The majority does not attempt to deny the usefulness and/or desirability of sunsetting as a concept. In fact, in evaluating the justification for a sunset provision in this matter, the majority Opinion goes so far as to say that:

> The Board has not retreated from its concerns expressed in the First Notice Opinion, including loss of justification with time, inequitable future distribution of the spoils and burdens of environmental regualtion, assignment of the burden of justification for exceptions to rules, evolution of treatment technologies and understanding of appropriate environmental controls, and obsolescence of rules.

Taken together, these statements seem to indicate that the majority as a whole accepts the rationale behind sunsetting. The majority deleted the sunset provision from this proceeding, however, because of what the majority saw as a lack of discussion in the First Notice Opinion geared to Decatur specifically. That position is somewhat illogical, however, given that the majority has indicated its general acceptance of the sunset concept. By accepting the concept (which is the larger universe), the majority implicitly accepts the extension of that concept to specific applications. The majority, then, should have logically had no trouble moving from the general to the specific, but nevertheless did.

It is also incorrect for the majority to conclude that the First Notice Opinion focused largely on general concerns regarding sunsetting, rather than on rationale specifically directed to the Decatur situation. To the contrary, the First Notice Opinion very clearly noted:

> An additional matter of concern to the Board is the permanency of the rule as offered by the Proponents. It is readily possible to imagine situtations where a rule fully justifiable and rational at a given point in time may not continue to be so at a future date. In the instant matter, but by no means peculiar to it, would be a situation where future dischargers to the Sangamon River find that their increment of discharge induces DO violations in the River, but that the violations would not exist in the absence of the exception granted to the District. The record does support the conclusion that the District's exception would utilize a portion of the River's capacity which would then not be available to a future user.

This passage, when added to preceding discussion and to the repeated reference to Decatur and the Sangamon River in the discussion of the sunsetting provision, clearly indicates that it was the Board's opinion that the need for a sunsetting provision stemmed from the specific conditions at Decatur and along the Sangamon River. Only after the establishment of this fact was the issue of the general philosophy and applicability of sunsetting addressed in the First Notice Opinion.

Regarding the majority's contention that "(T)he effect of specific sunset language on local bond issues is a matter that needs further consideration", any concern given to sunsetting's impact on bond issues is a matter of pure speculation. In its First Notice comments, the Agency noted that a ten year limit on the relief granted "could conflict" with the marketability to fund municipal construction work. Such bare assertion seems hardly worthy of the lofty status to which the majority elevates it. In addition, if this issue was of realistic concern, one would have expected Decatur to have elaborated on this point in particular in its First Notice comments. Decatur, and not the Agency, is the entity which would endure real hardship if inclusion of a sunset provision were to adversely impact the saleability of the city's bonds. However, Decatur did not use its First Notice comment opportunity to elaborate on this issue.

The majority's final note, that "(A) sunset provision is (not) so essential in Decatur's case, given other review benchmarks, as to warrant delaying the decision in order to hold further hearings" has already been addressed through the prior discussion. Should a sunset provision have been included here, no further hearings would have been required (see above).

Furthermore, it is irrational and possibly irresponsible for the Board to forego use of the sunset provision as a tool, while simultaneously contending that it has not retreated from the "concerns" which would have been addressed by the inclusion of just such a provision. It would appear that those two positions are contradictory and mutually exclusive.

For the reasons as expressed above, we concur.

Ronald C. Flemal

Jacob D. Dumelle

Bill S. Forcade

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Concurring Opinion was filed on the 16th day of April, 1986.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board