

ILLINOIS POLLUTION CONTROL BOARD  
June 10, 1981

CATERPILLAR TRACTOR CO.,            )  
  )  
          Petitioner,                 )  
  )  
          v.                             )        PCB 80-3  
  )  
ILLINOIS ENVIRONMENTAL             )  
PROTECTION AGENCY,                 )  
  )  
          Respondent.                )

ORDER OF THE BOARD (by D. Satchell):

On March 19, 1981 the Board agreed to reconsider its Opinion and Order of February 5, 1981. Since that date the parties have filed several memoranda and motions, oppositions and responses. There are two issues remaining in this NPDES permit appeal. Caterpillar Tractor Company (Caterpillar) objects to the Board's refusal to order a requested condition concerning authorization to discharge other contaminants. The Illinois Environmental Protection Agency (Agency) objects to the Board's decision to strike the facility process evaluation from the permit. Pleadings fall into two sets dealing with these two issues.

AUTHORIZATION TO DISCHARGE OTHER CONTAMINANTS

On March 12, 1981 Caterpillar filed a motion to reconsider the Board's February 5, 1981 decision which refused to order the inclusion of a requested permit condition authorizing the discharge of other contaminants. On March 19, 1981 the Board agreed to reconsider. On May 1, 1981 Caterpillar filed a memorandum in support of its motion to reconsider. On May 22, 1981 the Agency filed a response to Caterpillar's memorandum and a motion to strike exhibits from the original motion for reconsideration.

In the February 5, 1981 Order the Board held:

As to the second issue presented by this appeal, the noninclusion of a condition which the USEPA had included in Caterpillar's prior NPDES permit, the Agency is not bound either to include the substance of prior conditions or to word any condition in a specific way. The Board upholds the Agency's exclusion of the condition Caterpillar requested. There is no evidence that the wording of this condition is required to accomplish the purposes of the Act, the Board's Regulations or the Clean Water Act.

During the permit application process, Caterpillar requested that the following specific language be inserted into its NPDES permit:

The permittee shall not, during the period of this permit, be authorized to discharge pollutants other than those specified in Part I herein, unless the concentrations of those pollutants do not exceed the standards and limitations of the Illinois Pollution Control Board's Water Pollution Regulations, Chapter 3, in force on the date of any particular discharge of said pollutants; provided, however, that the concentration of these pollutants shall not exceed any standard or limitation promulgated by the United States Environmental Protection Agency under Section 307(a) of the Federal Water Pollution Control Act, PL 92-500. At any time after compliance monitoring by the Illinois Environmental Protection Agency, the permittee upon written request of the Illinois Environmental Protection Agency may demonstrate that any pollutant not specified in Part I herein as in compliance with the effluent limitation of this paragraph.

This permit condition was included in the previous permit issued Caterpillar by USEPA and was specifically requested by Caterpillar in the new permit.

Caterpillar requests one of two alternative dispositions by the Board, that it either order the permit condition included in the language of the NPDES permit or hold that the requirements of state and federal law are in substance identical with the proposed language so that it is unnecessary to include the language in the permit.

Underlying this dispute is a question as to whether, in the absence of any conditions to the contrary, an NPDES permit authorizes the discharge of contaminants for which there is no effluent standard or limitation. Caterpillar argues that USEPA regulations contemplate that an NPDES permit based exclusively on federal law would in general authorize the discharge of other contaminants [40 CFR §122.13(a) and §122.61; 45 Fed. Reg. 33,428, 33,311, 33,448].

Caterpillar has attached to its motion a policy memorandum from Jeffrey G. Miller, Deputy Assistant Administrator for water enforcement of USEPA. This memorandum concluded that USEPA provides for a general authorization to discharge subject only to the conditions and limitations of the permit, in agreement with Caterpillar's position. This policy memorandum is found in EPA Policy Book, Permits Division, which compiles all of USEPA permit memoranda since 1973. Because it is a published policy statement by USEPA the Board does not require that this memorandum be presented as

evidence in a hearing. The Agency's May 22, 1981 motion to strike the exhibits from the motion for reconsideration is denied.

It is not necessary that the Board decide the effect of a USEPA permit since Board regulations can modify this aspect of the NPDES permit. The Board has provided in Rule 410(b) the following:

No person may discharge any pollutant subject to, or which contributes to or threatens to cause a violation of any applicable federal or state water quality standard, effluent standard, guideline or other limitation, promulgated pursuant to the FWPCA or the Act, unless limitation for such pollutant has been set forth in an applicable NPDES permit.

Rule 410(b) has been the subject of two conflicting appellate court cases: Peabody Coal Company v. PCB, 36 Ill. App. 3d 5, 344 NE 2d, 279 (Fifth District, 1976) and U.S. Steel Corporation v. PCB, Ill. App. 3d 1; 367 NE 2d 327 (Second District, 1977). Peabody held Rule 410(b) invalid while U.S. Steel upheld the rule. The Fifth District based its finding upon Section 27 of the Act which directs the Board to take into account the factors of technical feasibility and economic reasonableness in promulgating a regulation. The court found the Board had failed to do so. The second District, however, upheld the rule against all challenges. The Board regards Rule 410(b) as valid.

Rule 410(b) is somewhat different from the USEPA interpretation. A permit would authorize the discharge only where the discharges did not violate any Board or federal standards. The Board finds that Caterpillar's proposed permit condition is essentially a restatement of Rule 410(b).

If the NPDES permit were construed as actually prohibiting the discharge of everything not mentioned in the permit, it would be impossible to comply with it. Because of the broad definition of contaminant, it is possible for discharges to contain an indefinite number of contaminants. It could be impossible for a discharger to ensure that nothing other than what is permitted by the permit were discharged. The general policy that the permit should state with certainty the discharger's duty would not be satisfied.

The permit as written is ambiguous as to which of three possible interpretations of the meaning of its effluent limitations is applicable: USEPA rules which would authorize the discharge of anything not mentioned in the permit; the language of the permit which apparently prohibits the discharge of anything not mentioned

in the permit; or, the language of Rule 410(b) which authorizes the discharges of other parameters which do not violate state or federal standards.

The Agency is required to include effluent limitations and other requirements established by Board regulations or USEPA regulations (Section 39(b), Rule 910(a) and Section 301(b)(1)(C) of the Clean Water Act). The Agency must include more stringent state requirements. The interpretation of the effluent limitations given by Rule 410(b) is more stringent than the USEPA interpretation which authorizes other discharges even if they violate Board regulations or USEPA standards. The Agency is therefore required to include a permit condition based on Rule 410(b). The Agency has not contended that Caterpillar's proposed condition is inconsistent with Rule 410(b) or any applicable USEPA regulations.

The Opinion and Order of February 5, 1981 is modified with respect to the other contaminants provision. The matter will be remanded to the Agency for inclusion of the requested condition.

#### FACILITY PROCESS EVALUATION

On March 9, 1981 the Agency filed a motion to reconsider that portion of the Board's Opinion and Order of February 5, 1981 which struck from this NPDES permit the condition requiring Caterpillar to complete a facility process evaluation prior to reapplying upon expiration of its permit. On March 19, 1981 the Board agreed to reconsider. On March 27, 1981 Caterpillar filed an opposition to the motion. On May 1, 1981 the Agency filed a memorandum in support of its motion for reconsideration. On May 12, 1981 Caterpillar filed a response in opposition.

With respect to the facility process evaluation, the Board found, for a number of reasons, that the facility process review was required to accomplish the purposes of the Act within the meaning of the second paragraph of Section 39(b). However, the Board found:

[T]hat the condition relates to what is required when Caterpillar if ever reapplies for an NPDES permit. The Agency lacks authority under the Act to expand the requirements of an application for an NPDES permit which are set forth in Chapter 3, Rule 902. The Agency's decision to include this provision is therefore reversed.


The Agency contends that it could have accomplished the same result in two ways: It could have required that the same information be submitted during the term of the permit at a date not tied

to the expiration date; or, it could wait for the reapplication and deny the permit for failure to demonstrate that toxic pollutants do not cause a violation of regulations. The Agency, however, did neither in this case. Its motion to reconsider is denied.

The Opinion and Order is modified pursuant to Caterpillar's motion. The Agency's motion is denied. The permit is remanded to the Agency for issuance of a modified permit.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 10<sup>th</sup> day of June, 1981 by a vote of 4-0.

  
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Christan L. Moffett, Clerk  
Illinois Pollution Control Board