ILLINOIS POLLUTION CONTROL BOARD
April 26, 1990

CALVARY TEMPLE CHURCH,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 90-3
	)	(Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

MR. JOHN R. SHEAFFER II, SHEAFFER & WINN, APPEARED ON BEHALF OF PETITIONER;

MR. JOHN J. BRESLIN, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by R. C. Flemal):

This matter comes before the Board upon a January 4, 1990 petition for review filed by Calvary Temple Church ("Calvary"). Calvary seeks review of the December 1, 1989 denial by the Illinois Environmental Protection Agency ("Agency") of Calvary's application for a construction and operating permit for a wastewater land treatment system. Public hearing was held on February 26, 1990 in Wheaton, Illinois; DuPage County Board Chairman Jack Knuepfer made a statement for the record. The parties submitted briefs on April 9, 1990.

BACKGROUND

On June 20, 1988, Calvary submitted to the Agency a Preliminary Engineering Report for a proposed wastewater management system for its proposed new church complex located in DuPage County, Illinois. In comments dated August 23, 1988 the Agency informed Calvary that to assure conformance with Section 208 of the Clean Water Act (33 U.S.C. §1251 et seq.) ("CWA") and consistency with the Illinois Water Quality Management Plan ("IWQQMP"), concurrence of the designated management agency for the facility planning area must be obtained (Agency Record, Exh. 24).

The Agency at that time apparently believed that Calvary should connect with the Aurora Sanitary District ("ASD") treatment plant for treatment of its sewage, concluding:

> [C]onsidering the above comments and proximity of the proposed project site to the existing sanitary sewer on Montgomery Road, it is our opinion that the

> wastewater from this project area must be transported through the [ASD]'s sewer system and treated at the [ASD] sewage treatment plant. Id.

Various correspondence between Calvary, the ASD, the City of Aurora, Northeastern Illinois Planning Commission ("NIPC"), and the Agency ensued. The ASD and NIPC sent letters of non-support for the proposed project to the Agency, on July 6 and October 10, 1989, respectively. On October 31, 1989, the Agency sent a letter to Calvary regarding a sewage lagoon on the proposed site. In that letter, the Agency again informed Calvary that the project was not in conformance with Section 208 of the Clean Water Act and not consistent with the IWQMP, reiterating the need to obtain the concurrences of the planning agencies:

> Prior to issuance of any permits by this Agency, the applicant would have to obtain written concurrence from the Designated Management Agency which is the Aurora Sanitary District, and the Areawide Management Agency, which is the Northeastern Illinois Planning Commission, for the applicant's proposal to amend the Water Quality Management Plan to include a new sewage treatment works not previously included in the plan. Failure to obtain concurrence may require the applicant to proceed through Conflict Resolution as identified in [35 Ill. Adm. Code 351]. Section 208 of the Clean Water Act contains provisions for public input regarding modifications to the Water Quality Management Plan and any citizens objecting to the construction of a sewage lagoon and sewage land application system in this residential area would have the opportunity to object to the proposed sewage plant. (Agency Record, Exh. 5.)

On November 15, 1989, Calvary submitted a permit application for construction and operation of a wastewater land treatment system for a proposed church complex in Naperville Township, DuPage County, Illinois. The Agency denied Calvary's permit application by letter of December 1, 1989. Calvary then filed this appeal.

REQUESTED RELIEF

The relief that Calvary is essentially asking, as indicated in its brief, is for the Board to require the Agency to provide an expeditious revision to the Illinois Water Quality Management Plan ("IWQMP"), based on its allegation that its proposed system is a zero discharge, non-point source land treatment system (also not subject to the NPDES permit system). Calvary also asks the Board to order the Agency to issue Calvary's permit over the objections of the ASD and NIPC.

APPLICABILITY OF CLEAN WATER ACT REQUIREMENTS

As a threshold matter, the Board must determine the applicability of Section 208 of the CWA to land treatment systems such as Calvary's.

The Agency's decision to deny the permit was based on its determination that there would be a conflict with the IWQMP, as indicated by the objections of the planning agencies. The Agency therefore did not amend the IWQMP, but rather thought the applicant should go through the conflict resolution process that is outlined in its rules, Section 351. The Section 351 rules were promulgated to implement Section 303(e) of the CWA which requires a continuing areawide planning process consistent with the plan requirements of Section 208, and to implement Section 4(m) of the Environmental Protection Act (Ill. Rev. Stat. 1987, ch. 111½ par. 1001 et seq.) ("Act"). Section 4(m) of the Act gives the Agency the authority to engage in the planning process and to develop plans with units of local government, as well as requiring that the Agency promulgate procedural rules for public hearings to be held on the planning process.

Section 101(a)(5) of the CWA establishes a national policy that each state develop and implement areawide waste treatment management planning processes to assure adequate control of sources of pollutants. Section 208 of the CWA establishes a system for areawide waste treatment management which includes requirements for the planning process:

> Plans prepared in accordance with this process shall contain alternatives for waste treatment management, and be appplicable to all wastes generated within the area involved. (Section 208 (b)(1)(A), emphasis added)

The plan must also identify "treatment works necessary to meet the anticipated needs of the area over a twenty-year period, annually updated..." (Section 208(b)(2)(A)). Section 212(2)(A) includes in the definition of the term "treatment works", "any works, including site acquisition of the land that will be an integral part of the treatment process (including land used for the storage of treated wastewater in land treatment systems prior to land application) or is used for ultimate disposal of residues resulting from such treatment".

Section 208(b)(2)(K) requires plans to include "any process to control the disposal of pollutants on land or in subsurface excavations within such area to protect ground and surface water quality".

Lastly, Section 208(c)(1) also requires the State to designate an areawide management agency which develops water

treatment plans and a designated management agency which implements the water treatment plan. For the area in this case, these agencies are NIPC and ASD.

A plain reading of the Section 208 planning requirement indicates that Section 208 applies to a wastewater land treatment system such as Calvary's. The language of Sections 208 and 212 shows that Calvary's proposed land treatment system is a treatment works. Furthermore, all wastes generated in the area are meant to be considered in the plan, and, as required by Section 208(b)(2)(K), plans are to include any process to control the disposal of pollutants on land. Calvary submits that the Agency's procedural requirements implementing Section 303(e) are unreasonable and "[do] not encourage the implementation of technology that will result in the national goal of eliminating discharge." The Board has previously noted the benefits associated with land treatment technology (In the Matter of: Proposed Amendments to 35 Ill. Adm. Code 304.120, Deoxygenating Wastes Standards, R86-17(B) 98 PCB 357 (April 27, 1989); and In the Matter of: Petition of the City of Tuscola to Amend Regulations Pertaining to Water Pollution, R83-23, 88 PCB 391 (April 21, 1988)). However, the Board finds nothing which would exempt land treatment from the Section 208 and 303(e) areawide planning process.

On the matter of the Section 351 Agency procedural rules, the Board further finds that it has no authority to review the reasonableness of Agency rules promulgated pursuant to the directives of the Act. The Board intends to make no finding on the applicability of the Section 351 rules to petitioner, but only finds that land treatment systems such as petitioner's are certainly encompassed by the Section 208 and 303(e) Clean Water Act requirements for areawide planning of wastewater treatment.

BOARD REVIEW

The Board now turns to the remaining issue of whether the Board can grant Calvary's requested relief and order the Agency to amend the IWQMP and issue Calvary's permit, and, if not, which relief is appropriate in this circumstance. The Board finds guidance on this issue from the First District Appellate Court case Jurcak v. Illinois Environmental Protection Agency, 161 Ill. App. 3d 48, 513 N.E. 2d 1007, 112 Ill. Dec. 398 (1987). In that case, Jurcak filed a permit application for operation of his sewage treatment plant which was denied because the point source was not authorized by the IWQMP. Jurcak then filed a petition for conflict resolution with the Agency pursuant to the Agency's Section 351 rules. The Agency amended the plan to allow the new point source, but attached conditions. The conditions were also included in the NPDES permit issued by the Agency. Jurcak then appealed these conditions to the Board. The Court found that

although the Board has the duty to review conditions if it is requested to do so by a permit applicant, it has no authority to review the IWQMP, nor is an Agency decision amending the IWQMP reviewable except through an action in the circuit court by a writ of certiorari. The court further found that despite the conflict which might arise with the IWQMP if the Board were to strike a condition, the Board does have the jurisdiction to review the condition at issue. The court stated that the Board's review of permit conditions "required evaluation and judgment based on scientific data, knowledge of wastewater treatment technologies and engineering methodology and application of technical standards" (112 Ill. Dec. 402).

Applying the Jurcak reasoning and findings, the Board has jurisdiction and the duty pursuant to Section 40 of the Act to review a permit denial if it is requested to do so by an applicant. There is no distinction here in the Board's technical review of permit conditions and a denial of a permit, as both are authorized by Section 40 of the Act. However, the Board cannot order the Agency to amend the IWQMP since it is barred from reviewing any Agency determination to amend or not amend the IWQMP.

In the instant review, the Agency denied the permit, and expressly did not conduct a full technical review of the permit application:

> The following information, clarification or corrections must be provided for us to complete our technical review and are to be considered specific reasons why the Act and Subtitle C, Chapter I will not be met:
>
> 1. As stated in the Agency's letter to you dated October 31, 1989, the proposed project is not in conformance with Section 208 of the Clean Water Act and is not consistent with the [IWQMP]. Prior to issuance of any permits by this Agency, the applicant will have to obtain written concurrence from the Designated Management Agency, which is the [ASD], and the Areawide Management Agency, which is the [NIPC], for the applicant's proposal to amend the [IWQMP] to include a new sewage treatment works not previously included in the plan.
>
> 2. The engineering report for these facilities has not been approved, including a complete analysis of [all] alternatives for sewer service as detailed in the October 31, 1989 Agency letter.

> Until these issues have been resolved, a technical review for purposes of permit issuance cannot be completed. (Agency Record Exh. 2, Emphasis added)

The Agency also states that it did not reach the issue of whether issuance of the permit would cause a violation of the Act, and that this issue was not addressed by the parties at hearing (Agency Brief at 2-3).

The Agency states that the reasons set forth in its permit denial letter are to be considered specific reasons why the Act and Subtitle C, Ch. I (the Board's Water Pollution Regulations) will not be met, yet the Agency states no provisions of the Act or regulations which would be violated. Although the Agency believes that Section 4(m) of the Act may be violated, Section 4(m) does not require the applicant to secure concurrences of the planning agencies prior to full Agency technical review. The Agency hints that certain odor regulations may be violated, but this was not addressed at hearing and there is no evidence in the record that the Agency conducted a review of this or of the technical merits of Calvary's system. The Board therefore finds that remand is required in this instance to afford the applicant this full review, and for the record to be complete on the technical matters involved in Calvary's land treatment system, including but not limited to whether violations of Subtitle C, Ch. I would occur.

It is apparent from the Agency's denial letter and brief that the Agency believes that due to an apparent conflict with the IWQMP, before it can issue a permit, Calvary must obtain the concurrences of the planning agencies. Notwithstanding whether or not the concurrence of the planning agencies is required before the Agency may amend the plan, the Board believes that the concurrence of the planning agencies is not required before the Agency can complete its technical review for purposes of permit issuance. As the Agency also states in its brief, such concurrence is not always required for the Agency to issue a permit (Agency Brief at 12). Therefore, even following the Agency's argument, it becomes apparent that such concurrence would not be required before the Agency can complete its technical review of a permit application.

The Agency also states that it did make a permit decision, giving weight to "the specific objections of the local agencies, based on the physical and cost effective availability of existing sewer service" (Agency Brief at 12). What the Agency failed to do was to conduct a full technical review and inform the applicant whether its wastewater land treatment system would cause a violation of the Act and applicable Board regulations. The Board cannot now conduct the required "evaluation and judgment based on scientific data, knowledge of wastewater treatment technologies and engineering methodology and the

application of technical standards" when the record before the Board lacks an Agency technical review and these matters have not been addressed at hearing. The Court in Jurcak found that the applicant had a right to have the Board review the Agency's decision on technical aspects of the permit "despite the conflict which might arise" with the IWQMP (112 Ill. Dec. at 400). In order for the Board to implement that holding, the Board must have authority to require the Agency to make such a technical decision, "despite the conflict that might arise" with the IWQMP (Id. at 401). Today, the Board orders the Agency to make such a decision.

Therefore, the Board finds that since there were no technical issues reached, the Board cannot grant Calvary's requested relief and require the Agency to issue a permit for construction of a wastewater land treatment system without any technical review in the record which shows that such system would not cause a violation of the Act or Board regulations governing such systems, or any other provisions of the Act or Board regulations. The Board believes remand to the Agency is more appropriate in this circumstance. The Board finds it is improper for the Agency to deny the permit or impose conditions on a permit for the reasons given by the Agency. The Agency's roles in permit issuance under the Act and as Water Quality Management Agency are separate roles. Furthermore, should the Agency grant Calvary's permit, there is no guarantee that the permit can be used if the proposed facility has not secured other approvals that may be required by law. Also, whether or not Calvary obtains the approval of the planning agencies, the Agency could still deny the permit based on its technical review.

On the issue of whether Calvary should be required to supply the Agency with alternatives to its system prior to full Agency review (point 2 of the permit denial letter), the Board notes that Calvary bears the burden of proof of whether the wastewater land treatment system will not cause a violation of the Act or regulations. Alternatives to Calvary's system are peripheral to this review and would presumably require their own permit applications. Therefore, the Board further finds that the presentation of alternatives to petitioner's system is not required for the Agency to complete its review of the permit application.

The Board makes no findings on the applicability of the Section 351 rules to this proposed wastewater land treatment system, or whether or not Calvary would be required to go through conflict resolution prior to any amendment to the IWQMP.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

The Board hereby remands this matter to the Agency for consideration and evaluation of whether or not Petitioner's wastewater land treatment system would cause a violation of the Act and any applicable Board regulations, consistent with this Opinion.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 4th day of April, 1990, by a vote of 7-0.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board