ILLINOIS POLLUTION CONTROL BOARD
September 28, 1989

FRED E. JURCAK, Petitioner,	)	
v.	)	PCB 85-137 (Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

MR. JOSEPH S. WRIGHT, ESQ., OF MARTIN, CRAIG, CHESTER & SONNENSCHEIN, APPEARED FOR PETITIONER;

MR. WAYNE L. WIEMERSLAGE, ESQ., APPEARED FOR RESPONDENT.

OPINION AND ORDER OF THE BOARD (by M. Nardulli):

This matter comes before the Board on a reversal and remand by the Appellate Court of Illinois, First District of the Board's Opinion and Order of December 20, 1985 in the above-captioned matter. (Jurcak v. IEPA, 161 Ill. App. 3d 48, 513 N.E.2d 1007 (1st Dist. 1987).) The facts of this cause have been sufficiently addressed in the Board's December 20, 1985 Opinion and in the appellate court's decision. Therefore, only those facts necessary to understand the instant decision and those matters which have occurred since the remand of this cause will be addressed.

This matter concerns a dispute over an amendment to the Illinois Water Quality Management Plan ("Plan") and a condition imposed by the Illinois Environmental Protection Agency ("Agency") in petitioner Fred E. Jurcak's ("Jurcak") National Pollutant Discharge Elimination System ("NPDES") permit. The Agency amended the Plan to include Jurcak's Gateway Sewage Treatment Plant ("STP"), but also included the following four factors:

a. a sinking fund of $25,000 be established to insure proper operation of the plant,

b. a condominium development have control over the Gateway STP,

c. a sinking fund be a condition of any NPDES permit for the plant, and

d. the project be connected to Frankfort's STP within one year after the completion of the expansion of Frankfort's STP.

The Agency incorporated the above factors into special condition No. 8 of Jurcak's NPDES permit which in essence requires Jurcak to shut-down his newly constructed STP within one year of completion of the Village's system.

Jurcak appealed the imposition of condition No. 8 to the Board. On December 20, 1985, the Board issued its Opinion and Order affirming the imposition of this condition solely on the basis that it lacked jurisdiction to review a condition in an NPDES permit when that condition was required by the Plan.

Jurcak appealed the Board's decision. The appellate court held that, while the Board had no authority to review the Agency's amendment of the Plan, the Board did have the duty to review the imposition of permit conditions. (Jurcak, 513 N.E.2d at 1010, citing, Ill. Rev. Stat. 1985, ch. 111 1/2, par. 1040(a)(1).) The appellate court declined from considering the propriety of the imposition of condition No. 8, reversed the Board's decision and remanded the matter for a hearing before the Board to consider whether there is a factual basis for the imposition of condition No. 8.

ISSUES PRESENTED

At the June 15, 1988 hearing, Jurcak made continuing objection to the Agency's introduction of new facts. This evidence was directed toward establishing that the Village of Frankfort ("Village") had completed the addition to its waste treatment facility, that the Village had been removed from restricted status and that the Village would allow Jurcak to connect to its sewer and water system.

Jurcak maintains that this new evidence may not be considered by the Board in its permit review because such evidence was not available at the time the Agency rendered its permit decision.

The Agency asserts that this evidence may properly be considered by the Board because the appellate court remanded this matter to the Board for another hearing "to consider whether

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[1]The Agency also imposed Special Condition No. 9 requiring Jurcak to submit plans and specifications. Special Condition No. 9 was apparently not appealed to the appellate court and, therefore, is no longer at issue. (See, Jurcak, 513 N.E.2d 1007.)

there is an adequate factual basis for the imposition of condition 8." (Jurcak, 513 N.E.2d at 1011.)

It is well established that, when a party contests the imposition of a permit condition, the sole question before the Board is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Act would occur if the permit was issued without the imposition of the special condition. (City of East Moline v. PCB, No. 3-88-0788, slip op. at 5 (3d Dist. 1988); Joliet Sand and Gravel v. PCB, 163 Ill. App. 3d 830, 516 N.E.2d 955, 958 (3d Dist. 1987).) Recently, the appellate court addressed the issue of whether new evidence may be introduced at a hearing before the Board in a NPDES permit appeal. (City of East Moline v. PCB, No. 3-88-0788, slip op. at 7-13 (3d Dist. 1989).) Relying on Dean Foods v. PCB, 143 Ill. App. 3d 322, 492 N.W.2d 1344 (2d Dist. 1986), the court concluded that new evidence which is relevant to the determination of whether the applicant has demonstrated that no violation of the Act would occur if the permit was granted without the imposition of conditions may be considered by the Board in a NPDES permit appeal. (Id., slip op. at 11, 13.)

We conclude that the evidence which the Agency sought to introduce at the June 15, 1988 hearing is irrelevant to the inquiry of whether Jurcak has demonstrated that the imposition of condition No. 8 is not necessary to achieve compliance with the Act. The Agency's suggestion that the appellate court's remandment of this matter with the directive to hold a hearing necessitates the introduction of this new evidence ignores the fact that, under City of East Moline, only that new evidence which is relevant to the Board's inquiry in a permit appeal may be considered. Simply because the appellate court in this cause declined to rule on the propriety of the imposition of condition No. 8 and remanded the cause to the technically qualified Board does not mean that any new evidence may be introduced. Evidence of the fact that the Village may now accommodate Jurcak's water treatment needs is irrelevant to whether the imposition of condition No. 8 is necessary to achieve compliance with the Act. Therefore, this evidence will not be considered by the Board in its review of the instant matter.

The appellate court held that this Board has jurisdiction to review the imposition of permit condition No. 8. (Jurcak, 513 N.E.ed at 1010.) Therefore, we reach the primary issue in this matter of whether Jurcak has demonstrated that the application, as submitted to the Agency, demonstrated that no violation of the Act would occur if the permit was issued without condition No. 8. Condition No. 8 in essence allows Jurcak to construct the Gateway STP but then requires that Jurcak cease operating the Gateway STP and connect to the Village's STP within one year after the Village's system removed from restricted status and becomes operational.

Section 39(b) of the Act regarding NPDES permits provides that:

> The Agency may include, among such conditions, effluent limitations and other requirements established under this Act, Board regulations, the Federal Water Pollution Control Act Amendments of 1972 and regulations pursuant thereto, and schedules for achieving compliance therewith at the earliest reasonable date. (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1039(b).)

Jurcak argues that the imposition of condition No. 8 is not necessary to achieve compliance with the Act or Board regulations because the condition does not relate in any way to effluent limitations or the quality of the discharge. In support of this assertion Jurcak cites NRDC v. EPA, 28 ERC 1410 (D.C. Cir. 1988) which held that permit conditions other than those relating to the discharge itself may not be imposed in an NPDES permit.

The Board agrees with Jurcak's interpretation of condition No. 8. Rather than imposing a condition necessary to achieve compliance with the Act, the Agency has imposed a condition of convenience. To issue Jurcak an NPDES permit allowing him to construct and operate the STP for a certain period, subject to the condition that in the future he must cease operating the STP and connect to the Village's system, is tantamount to an Agency finding that Jurcak has demonstrated compliance with the Act and Board regulations. At no point does the Agency claim that the required connection to the Village's STP is necessary to assure a proper discharge.

The Agency argues that the imposition of condition No. 8 is necessary to comply with the Act which incorporates the Clean Water Act ("CWA") which, in turn, provides that, "[t]o the extent practicable, waste treatment management shall be on an areawide basis ... ." (33 U.S.C. Sec. 201(c).)

The Agency interprets Section 201(c) of the CWA as requiring that waste treatment for Jurcak's development be provided by the Village. We disagree and conclude that condition No. 8 is not necessary to comply with the CWA. While Section 201(c) of the CWA requires the states to develop waste treatment management plans on an areawide basis, it gives the states a great deal of flexibility in developing the plans. The states are allowed to determine what is meant by the term "areawide" and are also only required to develop the plans on an areawide basis "to the extent practicable." It cannot be said that, but for the imposition of condition No. 8, Jurack would be out of compliance with the CWA. Striking condition No. 8 does not necessarily result in a

violation of the CWA. The Board stands by its previous statement that condition No. 8 may impose an onerous burden on the petitioner by requiring him to abandon an otherwise properly operating STP and connect to the Village's POTW at a cost of $250,000. The imposition of a condition that would require this type of expenditure for no other reason than to comply with a plan that the Agency has the power to modify is not required under the CWA. We do not interpret the CWA as mandating the imposition of condition No. 8 upon Jurcak. Similarly, we do not interpret the Act or Board regulations as mandating the imposition of condition No. 8.

The Agency requests that, if condition No. 8 is stricken, the permit be remanded to the Agency to take such action as is consistent with state and federal law. The Agency maintains that this action would likely result in the Agency reconsidering the issuance of the NPDES permit and "revoking" [sic] it until issuance would be consistent with the Plan. According to the Agency, Jurcak would be given the opportunity to provide the Agency information in a joint Section 208/NPDES hearing that would show that connection to the Village's STP is impracticable. If he does, the Agency would amend the Plan and reissue Jurcak an NPDES permit. If Jurcak disagrees with the Agency's denial of a revision of the Plan the Agency maintains he may appeal that to the circuit court as he could have done the first time in 1985. If Jurcak disagrees with the Agency's denial of an NPDES permit, he may appeal that to the Board. The Agency asserts that, in either instance, the Agency, circuit court and the Board would have current, fully developed facts before them to make a decision. The Agency sees this as necessary to avoid conflicts between federal law and Board action.

In reversing the Board's prior determination in this matter, the appellate court recognized the potential for conflict between the Plan and the NPDES permit. (Jurcak, 513 N.E.2d 1010-11.) The court noted that the Agency has sole authority to amend the Plan. (Id.) However, the court ruled that since the Agency incorporated a provision of the Plan into Jurcak's NPDES permit, the Board must review that condition to determine if it is necessary to achieve compliance with the Act. (Id.) According to the court, if the Board concludes that the condition is not necessary to comply with the Act, the Agency is allowed to modify the Plan in accordance with the Board's decision. While the Board has no authority to modify the Plan, it has a statutory duty to review the imposition of permit conditions. Here, the Board concludes that Jurcak has demonstrated condition No. 8 is not necessary to achieve compliance with the Act. Remandment to the Agency for further proceedings is not necessary.

CONCLUSION

Based upon the permit review record and the relevant information presented at the hearing ordered by the appellate court, the Board finds that the imposition of condition No. 8 in Jurcak's NPDES permit is not necessary to achieve compliance with the Act or Board regulations. The Agency is therefore ordered to strike condition No. 8 from Jurcak's NPDES permit.

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

ORDER

Within 30 days of the date of entry of this Order, the Illinois Environmental Protection Agency is ordered to strike condition No. 8 from the NPDES permit issued to petitioner on July 31, 1985.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1985, ch. 111 1/2, par. 1041, provides for appeal of final Order of the Board within 35 days. The rules of the Supreme Court of Illinois established filing requirements.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board hereby certifies that the above Opinion and Order was adopted on the 28th day of September, 1989, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board