ILLINOIS POLLUTION CONTROL BOARD
January 5, 1989

NORTHERN ILLINOIS ANGLERS' ASSOCIATION, an Illinois Corporation,	)	
Petitioner,	)	
v.	)	PCB 88-183
THE CITY OF KANKAKEE, a Municipal Corporation,	)	
Respondent.	)	

ORDER OF THE BOARD (by J. Marlin)

By its Order of November 17, 1988, the Board ordered the parties in this matter to brief the issue of whether a 1987 consent decree entered by the Kankakee County Circuit Court precludes Board action on this complaint given the requirement of Section 31(b) of the Environmental Protection Act (Act) that complaints not be duplicitous or frivolous. Northern Illinois Anglers' Association (NIAA) filed its brief on December 8, 1988, and the City of Kankakee (Kankakee) filed its brief on December 12, 1988.

NIAA asserts that its complaint should be accepted for hearing because "the relief sought by complainant in this cause is of a distinctively different character than the court proceeding, arising as a result of an action created by statute, in clear contrast to the court's power to enforce its [consent decree] by way of contempt proceedings". As support for this assertion NIAA relies primarily upon Janson v. Illinois Pollution Control Board, 69 Ill. App. 30 324, 387 N.E. 2d 404 (3rd Dist. 1979).

In Janson, the Third District held that a complaint before the Board was properly allowed by the Board and was not precluded by an action in circuit court which sought the enforcement of previously issued consent decree. The court found it "clearly apparent that the separate proceedings are not identical and do not involve a resolution of the same issues". The court based its holding on two findings.

First, the court addressed the issue of the requested relief:

> The relief sought in the circuit court action was an injunction prohibiting future pollution activities of the petitioner and collection of the monetary penalty provided

> for in the court approved stipulation order. The Pollution Control Board has no authority to adjudicate the issue of petitioner's violation of the stipulation approved by the circuit court action. The Board has no authority to issue or enforce injunctive relief as requested in the circuit court or to punish for civil contempt.
>
> 387 N.E. 2d at 408.

Secondly, the court compared the relative timing of the events underlying each action.

> Also of great significance is the time span that the petitioner allegedly engaged in pollution activities. The circuit court proceeding initially involved petitioner's pollution activities which occurred prior to and resulted in the 1971 stipulation which provided the petitioner would upgrade his dump operation activities.
>
> * * *
>
> On the other hand the complaint before the Pollution Control Board, as heretofore indicated, alleged specific violations of the Environmental Protection Act and the 1973 Solid Waste Rules of the Pollution Control Board, and the latter did not become effective until July 27, 1973.
>
> Id.

Consequently, in Janson the circuit court and Board actions were distinct in both legal and factual bases. On this issue, the court concluded:

> Although the two proceedings do have some aspects in common we do not believe that they are sufficient to classify them as identical causes of action and thereby require the abatement of one by the other.
>
> 387 N.E. 2d at 752.

Because the court found the two actions distinct, it held that the doctrine of priority jurisdiction did not apply to the Janson appeal. After recognizing that the Board and circuit court had some concurrent jurisdiction under the Act, the court described the doctrine of priority of jurisdiction.

> The doctrine of priority of jurisdiction provides that where two actions between the same parties on the same subject are brought in different courts with concurrent jurisdiction the first court which acquires jurisdiction retains its jurisdiction.
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> 387 N.E. 2d at 751.

Now that Janson has been reviewed, the Board can apply the rationale of that court to the facts at hand. The circuit court "action" relevant to this matter concerns a consent decree entered by the Circuit Court of the Twenty-First Judicial District, County of Kankakee, on May 26, 1987. The People of the State of Illinois, as represented by the State's Attorney of Kankakee County, Illinois Environmental Protection Agency (Agency) and Kankakee were parties to the settlement agreement. NIAA was not a party to the agreement. The consent decree resulted from a complaint brought by the People of the State of Illinois, at the request of the Agency. The basis for the action, and subsequent consent decree, were discharges to waters of the State by Kankakee's wastewater treatment system.

A copy of the consent decree is attached to Kankakee's brief. Under Section VII, entitled "Final Judgement Order", the decree provides:

> This Court shall retain jurisdiction of this matter for the purposes of interpreting, implementing and enforcing the terms and conditions of this Decree and for the purpose of adjudicating all matters of dispute among the parties.
>
> (Consent Decree, p.12).

Also, under Section VII, the decree states:

> Kankakee shall cease and desist from violation of 35 Ill. Adm. Code 304.121 for fecal coliform not later than January 1, 1988, in conformance with the monthly average chlorine residual requirement in its NPDES Permit. Kankakee shall cease and desist from violation of its NPDES Permit and 35 Ill. Adm. Code 309.102 for BOD_5, suspended solids and for system overflows by July 1, 1989.
>
> (Consent Decree, p.11)

NIAA's complaint entails allegations which can be summarized as follows.

Basis for Alleged Violation	Time Period of Alleged Violation
Five-day biochemical oxygen demand (BOD_5) discharge	1/1/88 - 7/31/88
Suspended solids (SS) discharge	1/1/88 - 7/31/88
Fecal coliform discharge	1/1/88 - 7/31/88
BOD_5, TSS Fecal coliform discharge in excess of permit requirements which caused destruction of aquatic life	8/1/88 - 8/9/88
Operating plant without supervision of Certified Class I Operator	8/1/88 - 8/8/88

NIAA alleges violations for Kankakee's discharges of BOD_5 and SS for a time period included by the consent decree's cease and desist provision. That is, the consent decree requires Kankakee to cease its BOD_5 and SS violations by July 1, 1989, yet NIAA's allegations concerning those parameters concern alleged incidents of violation before that date.

With regard to the alleged fecal coliform violations, NIAA alleges that these violations occurred subsequent to January 1, 1988. The consent decree provides that Kankakee shall cease and desist from violations of the fecal coliform standard not later than January 1, 1988.

Unlike in Janson, the time span for the alleged pollution activities involving discharges of BOD_5 and SS as alleged by NIAA in its complaint before the Board, is covered by the cease and desist portion of the consent decree. However, as to fecal coliform, the alleged violations took place subsequent to the time-span covered by the cease and desist order. The Board believes that a citizen action seeking to enforce Board regulations concerning fecal colifom for a time period subsequent to January 1, 1988 is not barred by the circuit court's consent decree.

With regard to NIAA's allegation concerning the Certified Operator violations, it appears that the consent decree did not address that specific aspect of Kankakee's activities during the time frame alleged by NIAA.

Given these circumstances, it is the Board's position that it should defer to the circuit court as to adjudging Kankakee's activities concerning BOD_5 and SS during that time span referenced in NIAA's complaint. Obviously, the circuit court

addressed these activities and retained jurisdiction of the matter prior to the Board's current involvement. To that extent the Board dismisses NIAA's complaint.

However, the Board will accept the complaint insofar as the allegations concerning fecal coliform after January 1, 1988 and the Certified Operator violation. If the Board were to accept Kankakee's argument that a private citizen is barred from bringing an enforcement action against Kankakee, the Board would effectively be finding that no private citizen could ever seek enforcement against Kankakee, so long as the consent decree has not been vacated. Such an outcome seems to be counter to the intent of the Act which clearly provides for citizen enforcement.

The Board need not and does not address the issue of whether NIAA would have standing to bring an enforcement action before the circuit court seeking enforcement of the May 1987 consent decree. Neither does the Board take a position as to whether NIAA could properly pursue its complaint in the circuit court. However, the Board does refer NIAA to Section 45(b) of the Act. Today, the Board merely addresses the issue of whether NIAA's complaint is duplicative of a prior action before the circuit court.

Although NIAA was not a party to the circuit court's consent decree, it is the actions of the respondent, Kankakee, which are relevant to any enforcement action. The intent behind the prohibition against "duplicitous" complaints is to avoid the situation where private citizens' complaints raise the same issue and unduly harass a repondent. Pursuant to Section 31(b) of the Act, the Board may "dismiss complaints raising allegations identical or substantially similar to matters previously brought before the Board". Winnetkans Interested in Protecting the Environment v. Pollution Control Board, 55 Ill. App. 30 475, 479-480, 370 N.E. 2d 1176 (2st Dist. 1977). It is the Board's position that in instances where the Board has concurrent jurisdiction with the circuit court, substantially similar matters previously brought before the circuit court can similarly be dismissed by the Board. Brandle v. Ropp, PCB 85-68, 643 PCB 263(June 13, 1985).

For these reasons, the Board does not believe its action today deprives NIAA of any statutory right to prosecute Kankakee. The circuit court acted as the forum to adjudge the propriety of Kankakee's actions concerning its discharges of BOD_5 and SS for the time period referenced in NIAA's complaint, and the environment is no less protected as a result. As stated above, the Board accepts the complaint to the extent of the fecal coliform after January 1, 1988 and Certified Operator allegations. The remainder of the complaint is dismissed.

IT IS SO ORDERED.

J. Anderon concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 5th day of January, 1989, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board