

ILLINOIS POLLUTION CONTROL BOARD
December 20, 1985

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

MR. ROY M. HARSCH AND MR. FREDERICK L. MOORE, JR., MARTIN, CRAIG,
CHESTER & SONNENSCHNEIN, APPEARED FOR PETITIONER;

MR. WAYNE L. WIEMERSLAGE, APPEARED FOR RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J.D. Dumelle):

This matter comes before the Board upon a permit appeal filed on behalf of Fred E. Jurcak (Jurcak) on September 4, 1985 which requests the Board to reverse the Illinois Environmental Protection Agency's (Agency) decision imposing Special Conditions Nos. 8 & 9 in the NPDES permit issued to Jurcak on July 31, 1985. (Pet. p. 5). On February 17, 1983, Jurcak filed with the Agency an application for Joint Construction and Operating Permit and for Authorization to Construct a sewage treatment plant (STP) designed to serve Gateway Development, a 146-unit mobile home park being developed by Jurcak. The Agency denied the application on August 12, 1983, stating that it could not issue the construction permit for the proposed Gateway STP until Jurcak obtained an NPDES permit for the STP's discharge. Jurcak appealed this decision to the Board on September 15, 1983. (PCB 83-134). Upon agreement of the parties, the Hearing Officer continued the permit appeal hearing without a date on January 12, 1984.

Jurcak filed an application for an NPDES permit for a point source discharge from the proposed Gateway STP on March 14, 1984. After a public hearing and comment period, the Agency informed Jurcak it would not issue such a permit unless he obtained a modification of the Illinois Water Quality Management Plan (IWQMP) to add the new point source discharge from the proposed Gateway STP. On November 21, 1984, Jurcak filed a Petition for Conflict Resolution with the Agency pursuant to 35 Ill. Adm. Code, Subtitle C, Chapter II, Section 351.101 et seq. requesting an amendment to the IWQMP to reflect the addition of a new point source.

On July 1, 1985, the Agency rendered its Final Decision which provided for the requested amendment but included four conditions which were that 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 issued Jurcak an NPDES permit for the proposed Gateway STP on July 31, 1985, which incorporated the above conditions into Special Condition No. 8 of the permit and included Special Condition No. 9 which required Jurcak to submit two complete sets of plans and specifications for the proposed Gateway STP showing compliance with conditions 1, 2, 5, and 6 listed under Special Condition No. 6: Authorization to Construct. Briefs were filed by Jurcak on December 3 and 12, 1985 and the Agency on December 9 and 17, with a motion to strike objectional testimony on December 13, 1985. Jurcak filed a response to the motion to strike on December 18, 1985.

The Agency's December 13, 1985, Motion to Strike is granted in part and denied in part. At the hearing on November 19, 1985, the Hearing Officer admitted testimony concerning conditions imposed by the Agency in the July 1, 1985 amendment to the IWQMP which was incorporated into an NPDES permit condition, attempts to sell the real estate and other facts not presented to the Agency prior to July 31, 1985. The Board declines to strike the testimony concerning conditions imposed by the Agency in the amendment to the IWQMP. Under 35 Ill. Adm. Code 103.204(b), when the admissability of evidence depends on an arguable interpretation of substantive law, the Hearing Officer shall admit the evidence. The issue of whether the Board can review amendments to the IWQMP when incorporated into an NPDES permit condition is one of first impression before the Board. A related issue was presented in Village of Gilberts v. Holiday Park Corporation, PCB 85-96, August 15, 1985. At issue was whether the Board could review IWQMP amendments prior to any NPDES permit issuing. The Board held it lacked the statutory authority to review such an amendment. However, in the instant case, the Board is given the authority under the Environmental Protection Act to review conditions imposed in an NPDES permit to determine whether the condition(s) imposed accomplish the purpose and provisions of the Act. Thus, the admissability is clearly arguable and the hearing officer's decision to allow testimony concerning amendments to the IWQMP is upheld. The testimony concerning attempts to sell the real estate and other facts not presented to the Agency prior to July 31, 1985 will be stricken as the Board finds that such testimony concerns facts not presented to the Agency prior to the Agency issuing Jurcak an NPDES permit for the proposed Gateway STP.

The proposed Gateway STP is located outside the Village of Frankfort's limits in Will County on U.S. Route 45, approximately 1.5 miles south of U.S. 30. The proposed plant is to have a

design average flow of 34,000 gallons per day or three hundred and forty population equivalents. The plant is to discharge into an unnamed creek which is a tributary to Jackson Creek. Jackson Creek has a seven-day, ten-year low flow of zero cubic feet per second and is classified as a general use water. (Pet. p. 1-2).

At the outset, the Board notes that this is only an appeal of Special Condition Nos. 8 and 9 which were imposed by the Agency in Jurcak's NPDES permit. Although Jurcak argues in his briefs that he is contesting the imposition of Conditions 1,2,5 and 6 listed under Special Condition No. 6: Authorization to Construct, that is certainly not stated in the petition, nor was any attempt made to amend the petition to include such request. Furthermore, the fact that evidence was presented regarding those conditions is insufficient to demonstrate that they were being contested in that such evidence is clearly relevant to the issue of the propriety of Condition 9 which was contested. Finally, requesting such relief in closing briefs is clearly untimely. Therefore, the only issue before the Board is whether the imposition of Special Condition Nos. 8 & 9 accomplishes the purpose and provisions of the Environmental Protection Act (Act). For the following reasons, the Board affirms the imposition of Special Condition Nos. 8 & 9 in Jurcak's NPDES permit.

SPECIAL CONDITION NO. 8

On March 28, 1980, Governor Thompson certified the adoption of the areawide water quality management plan for the counties of Cook, DuPage, Kane, Lake, McHenry and Will as part of the official Water Quality Management Plan for Illinois. This plan identifies, among other things, points of authorized sewage discharge. Under Section 208(e) of the Clean Water Act and 35 Ill. Adm. Code 309.105(d), no NPDES permit shall be issued which is in conflict with an adopted Water Quality Management Plan. Since the IWQMP did not contain the proposed Gateway STP discharge, Jurcak had to seek an amendment to the plan to include such discharge which the Agency granted, subject to conditions, on July 1, 1985. Special Condition No. 8 of Jurcak's NPDES permit incorporated those conditions into the permit. Jurcak only objects to the requirement that the Gateway Development be connected to the Village of Frankfort's STP one year after the plant's expansion is completed. Frankfort expects the expansion to be completed in 1988, thereby giving Jurcak until 1989 to connect the Gateway Development to the Frankfort STP. (Pet. p. 4).

In support of his appeal, Jurcak argues that the imposition of Special Condition No. 8 is unreasonable. Specifically, Jurcak argues that Special Condition No. 8 will require Jurcak, or any other future owner, to dismantle the entire Gateway STP and connect Gateway's sanitary sewer system to the Frankfort treatment plant at a cost of \$250,000. (Pet. Brief p. 10). Moreover, Jurcak asserts that by imposing Special Condition No.

3, the Agency has effectively prohibited construction of the Gateway Development. Jurcak argues that he has been unable to obtain financing to construct the Gateway STP and two potential purchasers have declined to purchase the property because of Special Condition No. 8. Id. Lastly, Jurcak argues that since the Agency has stipulated that if the proposed STP is operated and built in compliance with the application and conditions imposed in the permit, the facility will not violate effluent standards and there will be no adverse impact on the receiving stream, and to require him to disconnect from a properly operating STP is not only impractical, it is technologically and economically impossible and lacks any rational basis whatsoever. (Pet. Brief pp. 11-12).

Notwithstanding these arguments, the Board finds that it lacks the authority to review Special Condition No. 8. Jurcak argues that Special Condition No. 8 is a condition imposed in a permit which the Board, indisputably, has the authority to review. However, this argument does not go far enough. To request the Board to strike Special Condition No. 8 would be asking the Board to effectively amend the IWQMP which the Board lacks the authority to do. Village of Gilberts v. Holiday Park Corporation and Illinois Environmental Protection Agency, PCB 85-96, August 15, 1985. Under 35 Ill. Adm. Code 351.402, the Agency has the authority to make a final decision on proposed revisions to the IWQMP. This "final decision" may be appealed to the U.S. Environmental Protection Agency or to the circuit court. (35 Ill. Adm. Code 351.403). Jurcak had his opportunity to appeal the Agency's "final determination" via this route but failed to do so. The Board, therefore, cannot review the Agency's decision to amend the IWQMP since it lacks the statutory power to do so. This position is consistent with the holding in National Marine Service v. Illinois Environmental Protection Agency, 120 Ill. App. 3d 198, 458 N.E. 2d 551 (1983), in which the Fourth District Appellate Court, citing Peabody Coal Co. v. Pollution Control Board, 49 Ill. App. 3d 252, 364 N.E. 2d 929 (1977), stated that:

"We read Peabody as holding that where a Federal permit system is at hand, the PCB, absent a statutory grant of power, is without authority to become involved in the state certification process which must be followed before a Federal permit may issue. This reading is consistent with the restrictive view of the PCB's authority to oversee the IEPA's activities which was noted by our Supreme Court in Landfill, Inc. v. Pollution Control Board, 74 Ill. 2d 541, 387 N.E. 2d 258."

However, the Board sympathizes with Jurcak's argument that Special Condition No. 8 may impose an onerous burden on him by requiring him to abandon an otherwise properly operating STP and connect to Frankfort's STP at a cost of approximately \$250,000. The Board recognizes that the

Agency has effectively insulated Special Condition No. 8 from review by the Board through the permit appeal process by couching the terms of Special Condition No. 8 in an amendment to the IWQMP which the Board lacks the authority to review pursuant to Village of Gilberts v. Holiday Park Corporation and Illinois Environmental Protection Agency, PCB 85-96, August 15, 1985. However, as noted above, Jurcak had the opportunity to appeal that condition to USEPA or the Circuit Court and failed to do so.

SPECIAL CONDITION No. 9

Special Condition No. 9 in Jurcak's NPDES permit requires the submission of two complete sets of plans and specifications for the proposed Gateway STP showing compliance with Conditions 1, 2, 5 and 6 listed under Special Condition No. 6: Authorization to Construct.* The Board hereby declines to strike Special Condition No. 9 from Jurcak's NPDES permit finding that it is necessary to accomplish the purpose and provisions of the Act.

The Agency argues that Special Condition No. 9 is required to assure that adverse effects upon the environment are fully considered and to assure a thorough assessment of the potential adverse environmental effects. Moreover, the Agency argues that the additional plans and specifications are needed because compliance with conditions 1, 5 and 6 was not assured through the plans already submitted to it. (Rep. Brief p. 9). Jurcak responds by arguing that the requirements of Special Condition No. 9 are economically unreasonable and unnecessary to assure compliance with acceptable permit conditions, and, in fact, the Agency already possesses multiple complete sets of plans and specifications. (Pet. Brief pp. 7-8). The Board does not agree. Compliance with conditions 1, 5 and 6 will require changes of design in the plant. Consequently, new "as built" plans are needed. Therefore, the Board affirms the Agency's imposition of Special Condition No. 9 in Jurcak's NPDES permit.

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

ORDER

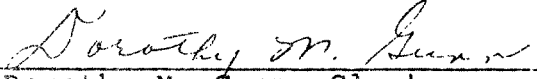
The Board hereby affirms the Agency's July 31, 1985 imposition of Special Condition Nos. 8 & 9 in Fred E. Jurcak's NPDES permit.

IT IS SO ORDERED.

* The parties stipulated at hearing that condition #2 had been satisfied. (Rep. Brief p. 4).

Board Member J. Anderson concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 20th day of December, 1985 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board