ILLINOIS POLLUTION CONTROL BOARD
October 24, 1985

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
v.	)	PCB 83-218
	)	
COMMONWEALTH EDISON COMPANY, (Certification No. 21RA-ILL-WPC-82-16)	)	

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

This matter comes before the Board on remand from the Circuit Court of Cook County (No. 83-L-53339) of the revocation of tax certification for the Byron Cooling Tower #2 owned by Commonwealth Edison Company ("Edison"). On December 28, 1983 the Board determined that Public Act (P.A.) 83-0883 required decertification of this facility. The Circuit Court vacated the decertification and remanded the matter to the Board for further hearing on the basis of 1) the inadequate notice to Edison of the initial decertification hearing and 2) the insufficiency in the record as to why cooling ponds and towers were found to be within the purview of the Illinois Revenue Act of 1939 (the "Revenue Act") (Ill. Rev. Stat. 1985, ch. 120, par. 502a-2).

A public hearing was held on July 12, 1985 in Morris, Illinois. Briefs were submitted by Edison on August 9, 1985 and by the Attorney General for the State on August 22, 1985. Edison waived its right to file a reply brief by letter dated August 29, 1985.

P.A. 83-0883, effective on September 9, 1983, amends the definition of a "Pollution Control Facility" as contained in the Revenue Act as follows:

> For purposes of assessments made after January 1, 1983, "pollution control facilities" shall not include, however, a) any system, method, construction, device, or appliance appurtenant thereto, designed, constructed, installed or operated for the primary purpose of (i) eliminating, containing, preventing or reducing radioactive contaminants or energy, or (ii) treating wastewater produced by the nuclear generation of electric power; b) any large diameter pipes or piping systems used to remove and disperse heat from water involved in the nuclear generation of electric power; or c) any equipment, construction, device or appliance appurtenant thereto, operated by any person other than a unit of government whether within or outside of the territorial boundaries of a unit of local government, for sewage disposal or treatment.

> The Pollution Control Board shall revoke any prior certification in conflict with this amendatory act of 1983 before January 1, 1984.

Pursuant to this statutory directive, the Board reviewed the tax certification of the Byron Cooling Tower #2 and decertified it on two grounds.

Subparagraph (a)(i)

In its December 28, 1983 opinion in this matter, the Board determined that cooling ponds and cooling towers should be decertified under the provisions of par. 502a-2(a)(i) as "device[s] constructed . . . or operated for the primary purpose of . . . reducing radioactive contaminants or energy." To reach this result, the Board first determined that this provision applied to all types of energy and not just radioactive energy. The Board then concluded that because cooling ponds and towers are primarily employed to reduce thermal energy (heat) by dissipating it to the atmosphere, they fell within the purview of subparagraph (a)(i).

Edison argues that this interpretation is at odds with common English usage which "requires that the adjective "radioactive" modify both parts of the compound noun 'contaminents [sic] or energy'". (Edison Brief at 8). Thus, according to Edison, subparagraph (a)(i) applies only to devices which reduce radioactive energy or radioactive contaminants, a function which cooling ponds and towers do not perform.

The Attorney General, although stating that several interpretations are possible, basically agrees that "common usage and accepted grammatical structure would imply that the adjective 'radioactive' would modify both [following nouns]." (A.G. Brief at 8).

The Board has reconsidered its interpretation of subparagraph (a)(i) and finds that this provision should not apply to the Byron Cooling Tower #2. The Board agrees that this outcome is supported by the grammatical structure of the provision which indicates that the legislature intended only to encompass devices which contain or reduce radioactivity. Moreover, as Edison argues, to find otherwise would be to render a portion of this enactment superfluous, specifically subparagraph (b). Subparagraph (b) provides for decertification of "any large diameter pipes or piping systems used to remove and disperse heat from water involved in the nuclear generation of electric power." If subparagraph (a)(i) was also construed to apply to all devices which reduce thermal energy, then the more specific provision concerning piping systems which disperse heat would be reduced to a redundancy. Such a construction would violate the presumption against the placement of superfluous provisions in a statute by the legislature.

Subparagraph (a)(ii)

In its previous determination, the Board also found that subparagraph (a)(ii) required decertification of the Byron Cooling Tower #1. This provision applies to any "device constructed . . . or operated for the primary purpose of treating wastewater produced by the nuclear generation of electric power." The Board determined that cooling ponds and towers were wastewater treatment facilities since 1) the thermal alteration of water constituted pollution and 2) the ponds and towers were constructed to remove the "contaminant of 'heat'". (Op. at 2-3).

Both Edison and the Attorney General disagree with this reasoning. Edison argues that "wastewater" treatment facilities are considered by the industry to be only those facilities which treat water containing chemical contaminants and suspended substances. Since the only function of cooling ponds and towers is to dissipate heat, industry does not consider them as "wastewater" treatment facilities. Edison presented industry witnesses at hearing to support this interpretation; these witnesses were uncontradicted (R. at 40-41,54). In fact, the Attorney General submits that "it would seem that the Legislature intended to have wastewater interpreted as defined by the industry rather than using a broader generic definition". (A.G. Brief at 9).

Although upon reconsideration, the Board concurs with the outcome as urged by Edison and the Attorney General, the Board does not agree that the legislature intended industry's interpretation of wastewater to be controlling. Rather, the Board finds that the proper interpretation of these terms can be determined by reference to the Revenue Act and the Environmental Protection Act.

Under the express terms of P.A. 83-0883, the definition of water pollution as given in the Environmental Protection Act governs whether a device qualifies as a pollution control facility entitled to tax certification. The Environmental Protection Act defines water pollution as the "alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or . . . discharge of any contaminant . . . . " Ill. Rev. Stat. 1985, ch. 111½, par. 1003 (nn) (emphasis added). A contaminant is "any solid, liquid or gaseous matter, any odor, or any form of energy from whatever source." Id. par. 1003(d) (emphasis added). Clearly, under these definitions, the water received for cooling by the Byron Cooling Tower is contaminated with heat. However, it does not thereby follow that the thermally polluted pondwater also constitutes "wastewater."

This is because not all contaminants are wastes. "Wastes" as a class are limited to substances, specifically "garbage, sludge . . . or other discarded material, including solid, liquid, semisolid, or contained gaseous material . . . ." Id.

par. 1003(11). "Contaminants", however, include odors and energy in addition to substances.

The Board's water pollution regulations also reflect this dichotomy. Thus, "pollutants" constitute the broader class comprised of "sewage, garbage, . . . chemical wastes, biological materials, radioactive materials, [and] heat . . . ." 35 Ill. Adm. Code 301.340. By contrast, "wastewater" is more narrowly confined to water polluted by substances: "sewage, industrial waste, or other waste . . . . " Specifically, industrial wastes are "any solid, liquid or gaseous wastes resulting from any process of industry . . ." and "other wastes" includes only "garbage, refuse . . . and all other substances . . . whose discharge would cause water pollution . . . ." 35 Ill. Adm. Code 301.425, 301.285 and 301.330.

Thus, by definition, "wastewater" contains a foreign substance whether gas, liquid or solid. The pollutant "heat" is a manifestation of energy, not a substance. Thus, thermally polluted water is not "wastewater" unless it also contains a foreign gas, liquid, or solid. Since the Byron Cooling Tower #2 does not treat any foreign substances but only the contaminant heat, it cannot be said to be a wastewater treatment facility.

This result is also supported by reference to the statutory maxim "Expressio unius est exclusio alterius". This rule provides that the legislature's expression of one thing or one mode of action in an enactment, excludes any other. Thus, the specific decertification of one type of heat dissipation device (diffuser pipes) in subparagraph (b) implies that the decertification of other heat dissipation devices (towers and ponds) was not intended. This is so even though towers and ponds were not specifically excluded. See, 2 A. Sutherland, Statutory Construction par. 47.23 (4th ed. 1974).

Thus upon reconsideration, the Board finds that the tax certification for the Byron Cooling Tower #2 should be reinstated.

Finally, the Board wishes to mention Edison's argument that if its cooling ponds and towers are decertified, then the Revenue Act would be unconstitutional. Because the Board has determined that the tax certification should be reinstated, this claim need not be reached. However, the Board wishes to reiterate its position stated in its December 28, 1983 Opinion in this matter:

> "The Board does not find this to be an appropriate case for adjudication by the Board of the constitutionality of this legislative enactment. The arguments accepted by the Board in Santa Fe supporting its resolution of a constitutional challenge to an enactment altering the enforcement mechanism of the Environmental Protection Act are

inapplicable here. They do not persuade the Board that it should enter the arena of taxation law to consider the constitutionality of a tax benefit provision of the Revenue Act."

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

ORDER

Tax Certification No. 21RA-ILL-WPC-82-16 issued to Commonwealth Edison Company is hereby reinstated.

IT IS SO ORDERED.

B. S. Forcade and J. T. Meyer concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 24th day of October, 1985, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board