

ILLINOIS POLLUTION CONTROL BOARD
July 10, 1975

ENVIRONMENTAL PROTECTION AGENCY,)
Complainant,)
)
v.) PCB 74-291
)
FERNDALE HEIGHTS UTILITIES CO.,)
Respondent.)

Steven Weiss, Assistant Attorney General for the EPA;
Daniel Kucera and John Pander Zries, Attorneys for Respondent.

DISSENTING OPINION (by Mr. Goodman) (Concurred in by Mr. Zeitlin):

The Board today issued an Opinion and Order in PCB 74-291. In this Order the Board noted that Respondent, Ferndale Heights Utility Company, had violated Rule 102 of the Noise Regulations, and Section 24 of the Environmental Protection Act, and assessed the sum of \$500 as a penalty for the violations. While I am in agreement with the majority of the Opinion and Order of the Board in this matter, I must respectfully dissent from the holding found on page 10 of the Opinion which reads as follows:

It is the Board's Opinion that a Rule 102 violation may be found in the absence of any noise survey data but where such data is presented and compliance with Rule 202 is proven, neither a Rule 202 nor a Rule 102 violation may be found.

This holding, in my opinion, not only flies in the face of precedent, which has been well established in air pollution and water pollution cases, but also Section 49 (e) of the Environmental Protection Act and the intent of the Board when adopting the Noise Regulations. See also Illinois Coal Operators Association v. Pollution Control Board, Ill. 2nd _____, 319 N.E. 2nd 782 (Supreme Court No. 46413, May, 1974).

The general rule in pollution cases has been that a violation of a general regulation may be found even though the alleged violation falls within the numerical limits of a specific regulation. The reason for this rule is the realization, by the triers of fact, that specific numbers in specific

rules cannot hope to cover all situations. This is also the reason why a general provision exists with the proviso that compliance with a specific regulation will act as a prima facie defense to a violation of the general regulation. The prima facie defense provision recognizes that, however well written, the specific rule can never cover certain situations wherein justice demands relief be granted notwithstanding the fact that the violation does indeed meet the numerical standard.

This is precisely the situation in this case. The Board, in the Opinion accompanying the promulgation of the Noise Pollution Control Regulations, In Re Noise Pollution Control Regulations, R72-2 8 PCB 703 (1973) specifically stated, with respect to Rule 102, that, "this is a standard nuisance-type regulation comparable to that appearing in the statute with respect to air and water pollution, that could apply irrespective of compliance with, or violation of, any regulation based on numerical limits". It is, therefore, obvious that the intention of the Board, when adopting the noise regulations, was to find that compliance with specific numerical standards need not constitute a complete defense.

The State Legislature, in recognition of this problem, saw fit to include Section 49(e) in the Environmental Protection Act which states that compliance with the rules and regulations promulgated by the Board, under the Act, shall constitute a prima facie defense to any action for violation of the Act. The Board, in enacting Rule 102, was merely following the lead of the legislature in adopting a provision which would cover the occasional case that might arise wherein compliance with numerical standards nonetheless works an injustice upon the public.

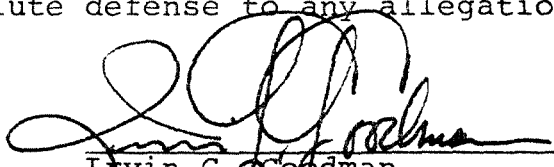
In the last analysis, it is the courts to whom the Board must look for guidance where the intent of the legislature might appear unclear. We are fortunate in this case to have such guidance by the Illinois Supreme Court. In Illinois Coal Operators Association v. Illinois Pollution Control Board, (Supra) the court held:

We read (Rule 102) as prohibiting emissions that unreasonably interfere with life or activity, whether such emissions may be said to violate Section 24 generally or whether they are emissions which more specifically may be said to violate a particular Board Regulation (referred to in Section 24) by exceeding, for example, the maximum permissible decibels which may be by a regulation emitted to a certain classification of land.

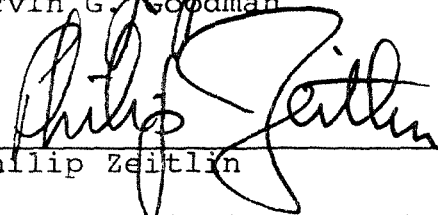
The intent of this holding seems clear i.e., that the prohibition is against emissions that unreasonably interfere with life or activities. Nowhere does the Court state that unreasonable interference with life or activities is not deemed to be prohibited solely upon a showing that the emissions meet the maximum permissible decibels which may be, by regulation, emitted to a certain classification of land.

Thus we have the following situation wherein 1) precedent indicates that violation of a general regulation may be found notwithstanding compliance with a more specific regulation; 2) a Board Opinion, written specifically to interpret Rule 102, states that a violation could be found notwithstanding compliance with a specific regulation; and 3) a Supreme Court opinion which supports the first two premises. In the face of all this, the majority, in the Ferndale Opinion, decides to the contrary. It is regrettable that, as in other aspects of life, a regulation cannot be written that will absolutely guarantee that compliance with a set of numbers will be an absolute defense for prosecution against pollution. However, such a regulation would have numbers so tightly drawn as to be meaningless from a practical standpoint. The method used to resolve this seemingly impossible problem is to develop numerical regulations that make practical sense for most cases supported by a general regulation which will allow the Board, in selected cases, to find a violation where justice dictates it must. The status of prima facie defense is as far as the Board can logically extend the protection which a specific numerical compliance given in a proceeding for a violation of a general regulation.

I must, therefore, respectfully dissent from the majority holding which, in effect, makes compliance with Rule 202's numerical numbers an absolute defense to any allegation of violation of Rule 102.




Irvin G. Goodman



Philip Zeitlin

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Dissenting Opinion was submitted on the 5th day of August, 1975.



Christan L. Moffett, Clerk
Illinois Pollution Control Board