

ILLINOIS POLLUTION CONTROL BOARD
July 11, 1974

MODINE MANUFACTURING COMPANY)
)
 v.) PCB 74-14
)
 ENVIRONMENTAL PROTECTION AGENCY)
)

DISSENTING OPINION (by Mr. Dumelle):

This case hinges about the reclassification of the receiving stream to a use lesser than general use.

I dissent in this case for basically four reasons. They are:

1. The reclassification is vague.
2. The reclassification is of doubtful legality.
3. The reclassification is contrary to the intent of the Regulation.
4. The reclassification is poor public policy.

Vagueness

The discharge of Modine is to an unnamed tributary to Dutch Creek. Nowhere in the opinion or order is the length of it given. The order (par. 1) itself reclassifies the stream "at the point at which it receives Modine's discharge". Classification for any use cannot be at a "point" but must be for some stated length which is not given.

Doubtful Legality

The Environmental Protection Act discusses the classification by the Board of waters of the State (Sec. 27). The intent is obvious that reclassifications are to be handled in regulatory and not in adjudicatory proceedings. How was the public to know that a stream was to be downgraded in use from a public notice on this variance proceeding? Did the "reclassification" procedure meet the Federal notice requirements in order that it be acceptable to the Administrator of the U.S. Environmental Protection Agency? Will the Illinois Environmental Protection Agency now submit this variance case to the Administrator pursuant to Sec. 4(m) of the Act and ask that Federal approval be given to this change in the Illinois implementation plan? To ask these questions is to answer them. The "reclassification" imposed in the instant case is probably null and void and of no legal effect.

Intent of the Regulation

When Rule 302(k) was adopted I was an active participant in the Board discussion at the time. I can attest that I asked for Rule 302(k) to prevent the unneeded construction of expensive ammonia removal processes at waste treatment plants. I cited the example of shallow streams without adequate shade where, in hot spells, the water temperature essentially follows air temperatures. In these cases, fish could not live and strict adherence to the ammonia water quality standard (1.5 mg/l - Rule 203(f)) would be expensive and not needed.

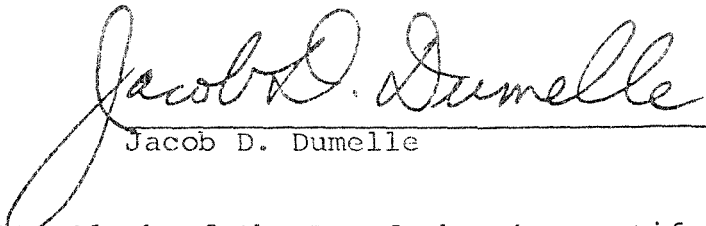
In this proceeding both the petitioner and the Agency have misread Rule 302(k). Their testimony has centered around the low flow characteristics upstream of Modine's discharge and whether or not a balanced aquatic biota could be maintained in these waters under low flow conditions. Below Modine and by virtue of its discharge, the flow is continuous. If the contaminants in Modine's discharge were absent, a diversified aquatic biota certainly would result. The intent of Rule 302(k) was to require continuous dischargers (as Modine) to make their effluents free from contaminants so as to be sufficient to support a diversified aquatic biota absent physical impediments such as lack of shade or lack of depth.

Poor Public Policy

It is poor public policy to reclassify waters in a variance proceeding even assuming it were somehow legal to do so. Suppose some discharger asked that a major river (the Mississippi, the Illinois, etc.) or a lake (Lake Michigan) be reclassified in his variance case. Would the Board consider this? Of course not. Then how can it reclassify in this case?

The intent of Rule 302(k) was to make dischargers meet water quality standards in their effluents when necessary unless some natural reason (shallowness, lack of shade, perhaps an outcropping of some toxic mineral, absence of habitat, etc.) mitigate against creation of a diversified aquatic biota.

Submitted by:



Jacob D. Dumelle

I, Christan L. Moffett, Clerk of the Board, hereby certify that the above Dissenting Opinion was submitted on this 9th day of September 1974.



Christan L. Moffett
Clerk of the Board