

ILLINOIS POLLUTION CONTROL BOARD

May 23, 1974

CITIZENS FOR A BETTER ENVIRONMENT,)
An Illinois Not-for-Profit Corp.,)
Complainant,)
vs.) PCB 74-103
DR. RICHARD BRICELAND, ILLINOIS)
ENVIRONMENTAL PROTECTION AGENCY,)
UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY, and HARVEY M.)
SHELDON,)
Respondents.)

ORDER OF THE BOARD (by Mr. Henss)

Complainant has filed a "Citizen's Complaint" against certain officials and agencies of the State and Federal Government who are principally charged with enforcing the environmental protection laws. It is alleged that the Illinois Environmental Protection Agency and its Director, Dr. Richard Briceland, have failed to prosecute companies which are reasonably believed to be discharging contaminants into Illinois waters in violation of the Environmental Protection Act or in violation of the Water Pollution Regulations. Complainant contends that the Agency has a mandatory duty under Section 31 of the Environmental Protection Act to file enforcement actions against those dischargers who may be in violation. That Statute provides that if an Agency investigation "discloses that a violation may exist, the Agency shall" (emphasis supplied) file an enforcement action before the Illinois Pollution Control Board. Complainant further alleges that Dr. Briceland, as Director of the Agency, has established a policy of not filing enforcement actions "which were mandated" by the Statute.

The United States Environmental Protection Agency and its Regional Counsel, Harvey Sheldon, are made Respondents in Count II on the theory that they "conspired" with the Illinois EPA to violate the Illinois Statute and Rules. All of the allegations which were made against the Illinois EPA are incorporated into Count II. In addition, Count II alleges that there was a conspiracy to issue Federal NPDES permits to

Illinois companies which are violating Illinois effluent and water quality standards. This alleged conspiracy is said to be in violation of Section 401(a)(1) of the 1972 Amendments to the Federal Water Pollution Control Act and Rule 951 of the Board's Rules which are intended to prevent the issuance of waste water discharge permits where the discharge would violate the Illinois Regulations. Complainants ask that this Board order the Respondents to cease and desist from their alleged violations.

Under Section 31(b) of the Environmental Protection Act we are required to schedule this matter for hearing unless we determine that the Complaint is duplicitous or frivolous. The Board has held that a Complaint is frivolous "if we could not grant relief even were all the allegations proved". (Farmers vs. Illinois State Toll Highway Authority, PCB 71-159). If we determine that we have no authority or jurisdiction in the matter the Complaint should be dismissed.

The Complaint against the Illinois Agency and its Director is essentially a charge that they have failed to perform an allegedly non-discretionary duty, i.e. the filing of enforcement actions against dischargers who, as indicated by EPA investigation, may be violating the Act or Regulations. Historically the method of forcing a public official to perform a non-discretionary duty is through writ of mandamus. This is the method adopted by the same Complainant, Citizens for a Better Environment, in a recent action against Russell Train, Administrator of the United States Environmental Protection Agency (CBE vs. Russell Train, 73C2849 E.D. Ill.).

We are not a court of general jurisdiction. We have only the powers conferred upon us by statute, but the statute does indicate that we have some authority over public officials. Section 33(b)(4) states that our cease and desist orders may be enforced by injunction or mandamus in a court of law.

However that does not answer the ultimate question here: Do we have authority to order the EPA and its Director to file prosecution cases before us or to coerce the Agency and Director into doing so by issuing an "advisory" opinion? We hold that we lack such authority.

It is significant that the Statute creating this Board also created the Environmental Protection Agency and designated the functions of this Board and the Agency. The functions were carefully separated. A key separation of functions is the delegation to the Agency of the power to prosecute violators and the delegation to the Board of the power to adjudicate whether a violation has occurred and to assess penalties where appropriate.

This separation of functions was one of the factors considered by the Illinois Supreme Court in its recent decision upholding the authority of this Board to impose monetary penalties. *City of Waukegan vs. Pollution Control Board* ___ Ill. ___ (March 1974). The Court upheld the Statute because of the checks and balances which were built into it. The whole power of two or more departments (legislative, judicial, executive) was not lodged in the same hands. The Supreme Court said that the separation of the investigative and prosecuting body, the Environmental Protection Agency, from the adjudicative body, the Board, was one of the devices built into the Act as a protection against arbitrariness.

The Appellate Court has held that we cannot impose monetary penalties in a variance case. *Citizen's Utilities Company of Illinois vs. Pollution Control Board, et al* ___ Ill. App. ___ (November 1972). The Court said that prior to the Board's imposition of penalties "the Agency should have filed a Complaint and followed proper enforcement procedures" (emphasis supplied). It is clear that we cannot bypass the function of the EPA in an enforcement case.

We do not have the authority to order the Agency or its Director to file more enforcement actions before us, nor do we have authority to issue an "advisory opinion" which, although falling short of a direct order, might coerce the Agency into the filing of enforcement actions. To do so would violate the principle built into our enabling Statute that the newly created Agency and the newly created Board are to have different functions in the disposition of prosecution cases. Since we lack authority to require or coerce the filing of additional enforcement actions before us we therefore will dismiss the action which has been brought against the Illinois EPA and its Director.

Count II, the conspiracy charge brought against the United States EPA and its Regional Counsel, is also dismissed. Count II incorporates all of the allegations which had been made against the State Agency in Count I and is in large measure based upon Count I. Count II falls with Count I.

Our decision today does not mean that we will never entertain actions commenced against the Agency and its Director. Such actions could be entertained where consistent with the separation of functions which has been built into the Statute. For example, this same Complainant, Citizens for a Better Environment, recently filed a Complaint before this Board against the same Respondents, Illinois EPA and Dr. Richard Briceland (PCB 74-29) alleging that the Agency had failed to file annual Waste Discharge Reports as required by Section 1001

of the Water Pollution Regulations. The Reports are to be filed annually with this Board for informational purposes. We do have jurisdiction to decide that case since it does not involve the separation of functions which is essential between prosecutor and judge.

We do not decide whether the Illinois Environmental Protection Agency has been mandated by Statute to prosecute every discharger who, according to an investigation, may be violating the Act or Regulations. We make no comment about the timing of such prosecutions or the right of the Director as opposed to a private citizen to decide when a prosecution shall be commenced by the Agency. If the decision to prosecute is discretionary with the Director, one might ask whether an action will lie for abuse of that discretion or failure to exercise that discretion. These are issues which might be considered by a court of general jurisdiction but not by us.

This Board has been vigorous in its enforcement of the Legislative mandate to protect the environment. Our decision is not a retreat from positions previously taken nor does it indicate any change of attitude regarding the necessity for enforcing the Statute and Regulations. Our decision simply stated is that the Illinois system does not authorize us to order the commencement of the prosecution cases. As an arm of the State vitally interested in cleaning up the environment we would welcome a court decision on these issues, since it is our desire to exercise our complete jurisdiction.

For the reasons specified in this Opinion we find that this Board lacks jurisdiction to require the EPA and its Director to file enforcement actions. The Complaint is dismissed.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Order was adopted this 23RD day of May, 1974 by a vote of 5 to 0.

Christan L. Moffett