ILLINOIS POLLUTION CONTROL BOARD May 17, 1972

ENVIRONME NT) AL PROTECTION AGENCY)	
	v.)	PCB 71-291
JAMES MCHUG	H CONSTRUCTION COMPANY)	

Dissenting Opinion (by Mr. Dumelle)

I agree with the first five-plus pages of the majority opinion which deal with the facts and the home rule and City-McHugh relations issues. And I would of course dissent from the Board Opinion (p. 8) which endorses the apportionment of transcript costs to the parties as going beyond the powers of this Board given to it by the Environmental Protection Act (see Dissenting Opinion IN THE MATTER OF TRANSCRIPTS (Procedural Rule 328), R72-1).

The issue in this case is that of proper pleadings and adequate notice to the respondents. The fact of a gross discharge of limestone to the North Branch of the Chicago River is admitted as having gone on since 1967 (R. 65, 78). A simple computation using the median flow of 90 gpm (R. 94, 135) and the 5200 mg/l solids found in the discharge (R. 35) and assuming an 8-hour work day shows 1,870 lbs. of limestone dust or sludge being discharged per day.

Were someone to stand on the nearby Lawrence Avenue Bridge and each day empty 18-plus sacks containing 100 lbs. each of limestone screenings into the River the result on the stream would be no different. Yet that is what occurred here. A joint venture of three large construction companies used to handling multi-million dollar tunnel work evidently saw nothing wrong in discharging almost a ton per day of solids to the very river their project was to improve.

The amended complaint was received by the Board on November 10, 1971 well in advance of the hearing held on March 29, 1972. Count 3 of the amended complaint is a key to the question of proper pleadings. It states that the discharge "did cause or tend to cause water pollution in Illinois as defined in Section 3(n)" of the Act, "in violation of Section 12(a) of the Act."

Let us then look at Section 12(a) of the Act. In addition to the prohibition against water pollution it has a significant second part which shortened reads as follows:

No person shall: Cause or threaten or allow the discharge of any contaminants into the environment in any State so as...to violate regulations or standards adopted by the Pollution Control Board under this Act;

The pertinent regulations are, of course, SWB-15, which was preserved in full force by the Act. For the stream sector in question Rule 1.03 governs. The pertinent section of 1.03 reads in full as follows:

- 1. These General Criteria, in addition to specific criteria, shall apply to all waters at all places and at all times.
 - a. Free from substances attributable to municipal, industrial or other discharges that will settle to form putrescent or otherwise objectionable sludge deposits; or substances (coal fines, quarry fines, fly ash, limesludge, etc.) which will form bottom deposits that may be detrimental to bottom biota.

The lime dust or chips discharged by McHugh is identical to "guarry fines" which are specifically prohibited above. It seems to me that McHugh et al, received ample notice in the amended complaint in light of a specific listing in the only regulation on that stream sector forbidding discharge of the identical materials they were in fact discharging.

I would also disagree with the conclusions of the majority opinion (p. 7) regarding the alleged violation of Section 12(d) of the Act. To me, the testimony of Mr. Burton (R. 144) (quoted on p. 7 of the majority opinion) was a flat admission that the limestone fines had in fact washed to the river during rains in the past.

One last comment. The portions of the record dealing with technical testimony were poorly reported and it is fortunate the case did not rest upon this. A reader can perhaps translate "milligrams per leader" (R. 213) to "milligrams per liter" and "alluent", "affluent" and "alluents" (R. 192, 198) as various forms of "effluent." But to take "inez" (R. 220) and to realize that "ionize" was meant or to determine what was meant by "subcivity" (R. 200) is asking too much both of this Board and certainly of a court sitting in review of this record.

Jacob D. Dumelle

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I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Dissenting Opinion was submitted on the 19 day of May, 1972.

hristan L. Moffett, Clerk

Illinois Pollution Control Board