

ILLINOIS POLLUTION CONTROL BOARD
December 16, 1982

IN THE MATTER OF)
)
PARALLEL SHORE PROTECTION) R 82-11
IN LAKE MICHIGAN)
(Subtitle C; Part 311))

Order of Dismissal.

OPINION AND ORDER OF THE BOARD (by I.G. Goodman):

On September 15, 1982 the Board adopted a Proposed Rule/ First Notice Opinion and Order in this matter. The First Notice was published in the Illinois Register on October 15, 1982 (Vol. 6, No. 42), and the First Notice period ended on December 1, 1982. During that period only one comment was received; that being from the Illinois Department of Transportation (IDOT) on October 6, 1982.

The purpose of this rulemaking as proposed by IDOT was to obviate the need for Board review of individual Lake Michigan permit applications for approval of structures in the water which comply with general permit conditions as proposed in this rulemaking. The Board would, in effect, grant its concurrence by having the Board Chairman sign a general permit document (see Ex. 2) which would be issued to future applicants whose applications demonstrate compliance with the general permit conditions for parallel shore construction as determined by IDOT. Those conditions were to be established to insure that there would be no harmful environmental effects caused by construction of the structures. For a description of the types of structures involved, see Exhibit #1, pp. 664-753 and 787-799.

In its comments IDOT argues that the Board derives the power to adopt its proposal under Section 13 (a)(3) of the Environmental Protection Act which allows the Board to prescribe standards "for the issuance of permits for construction...of any...facility...capable of causing or contributing to water pollution." However, IDOT's proposal does not prescribe standards for the issuance of such permits, but rather prescribes standards for Board concurrence in the issuance of a permit by IDOT. That is, the proposal acts as a limitation upon Board action rather than as a limitation upon IDOT or the applicant. If IDOT determines that a general permit should issue, it issues without any Board action or even Board knowledge.

An argument could be made that the Board has in fact taken action through the adoption of IDOT's proposal. However, to argue that is to argue that a present Board may by regulation bind a future Board's action on an issue which the Board has been given the duty to consider (i.e. concurrence).

Ill. Rev. Stat., c. 19, § 65 mandates that the Board concur in any permit issued by IDOT authorizing deposits in Lake Michigan. IDOT now requests that the Board concur in certain such permits before application is even made. Could the Board by regulation express its concurrence in all future Lake Michigan permits? Certainly not. To do so would negate by regulation the mandate of the legislature, which an agency cannot do.

IDOT's proposal differs only in degree: it only negates part of the legislative mandate. That, too, however, is unacceptable. If the proposal is appropriate, then the statute should be changed, which only the legislature can do. The Board cannot.

The Board has attempted to remedy this problem through its modification of IDOT's proposal. However, IDOT has commented that these changes are unacceptable to it. Therefore, the Board is left with no alternative but to dismiss the action.

The Board notes, however, that it is a full-time Board which has the ability to give expeditious consideration to any permit which IDOT may bring before it.

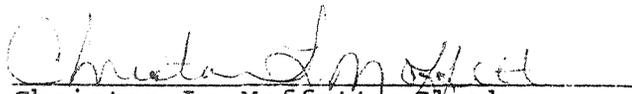
ORDER

Proceedings in this matter are hereby dismissed.

IT IS SO ORDERED.

Chairman Dumelle concurred.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 16th day of December, 1982 by a vote of 5-0.


 Christan L. Moffett, Clerk
 Illinois Pollution Control Board