ILLINOIS POLLUTION CONTROL BOARD
January 21, 1982

ILLINOIS POWER COMPANY (Vermilion Power Station),	)	
Petitioner,	)	
v.	)	PCB 79-61
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

SHELDON A. ZABEL AND CAROLYN A. LOWN, SCHIFF HARDIN & WAITE, APPEARED ON BEHALF OF PETITIONER;

BRUCE L. CARLSON, APPEARED ON BEHALF OF RESPONDENT.

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

This matter is before the Board on the March 22, 1979 Petition by Illinois Power Company (IPC) for review of certain conditions in the NPDES permit issued by the Illinois Environmental Protection Agency (Agency) for IPC's Vermilion Power Station (Station) located near Oakwood, Vermilion County, Illinois. Pursuant to a motion by IPC, the Board on March 29, 1979 stayed the contested conditions contained in the NPDES permit. On May 30, 1979 the Agency filed a Motion to Strike certain portions of IPC's petition. On June 22, 1979 the Board ordered the motion taken with the case. That motion was subsequently withdrawn by the Agency in its brief filed July 24, 1981. On December 12, 1980 the Hearing Officer herein requested Board review of his November 21, 1980 ruling which upheld objection by the Agency to interrogatories filed by IPC on July 8, 1980. These interrogatories concerned the treatment by the Agency of other permit applicants situated in conditions similar to those of IPC. On January 8, 1981 the Board affirmed the Hearing Officer's ruling stating in effect that how the Agency handled other similarly situated permit applicants was not a proper subject for Board review pursuant to Section 40 of the Illinois Environmental Protection Act. A hearing was held in this matter on April 23, 1981 at which time the parties herein presented a partial Stipulation of Facts to the Board. The Board has received no public comment in this matter.

IPC constructed a 120 acre, 687 million gallon reservoir near the Station on land that is owned by IPC. The reservoir was constructed by erecting an earth dam, dikes, and a spillway in a ravine adjacent to the Station (See Exhibit B to the Stipulation).

Construction of the reservoir was made necessary by the fact that the Vermilion River could not be relied upon to provide sufficient water for the Station's needs due to frequent periods of low flow. Approximately 61 percent of the water in the reservoir is obtained by pumping from the Vermilion River, the balance being rainfall and runoff from the surrounding area.

The reservoir is not a cooling lake, as defined by Board Regulations, but rather is a holding basin from which make-up water is drawn to replace that evaporated in the Station's mechanical draft cooling towers. To avoid an excess of build-up of dissolved solids in the water recirculated through the cooling towers, the towers are blown down (old tower water is replaced with fresh water) at an average rate of 0.465 mgd. The blowdown water is used to sluice ash to the ash pond after which the water is treated and discharged to the Vermilion River. Another 0.503 mgd is withdrawn from the reservoir and used for various in-plant purposes including approximately 0.046 mgd for boiler blowdown, which is returned to the reservoir along with any flow from roof and floor drains.

The parties stipulated that there is generally no discharge from the reservoir to the Vermilion River but spillover from the reservoir can occur during heavy rainfall and runoff depending upon conditions. Such spillover has historically occurred on an average of 15 days per year, continues for an average duration of 9-1/2 days and releases an average of 31 million gallons per occurrence.

Although the reservoir was constructed to provide a reliable supply of make-up water to the cooling towers, it has also been used by the Vermilion Fishing Club, Inc., a private organization for recreational fishing under a lease agreement with IPC (Stipulation Exhibit D). Pursuant to the lease, IPC may terminate the lease whenever in its sole judgment, the conduct of its operations require such termination. The Stipulation also includes a number of other facts which are not relevant to this proceeding.

The proposed settlement contains discussions of certain issues which the parties have resolved among themselves by withdrawing objections, modifying the language of certain permit conditions, and adding certain conditions to the permit. The parties request, in addition to deciding the remaining disputed issues in this case, that the Board remand the permit to the Agency for the clarifications agreed to in Part B, Paragraphs 2, 3, 4, 5, 6, 7, 8, and 9 of the Stipulation to the extent that the clarifications are not rendered moot by the Board's determination on remaining issues.

The basic issue that the Board must determine in this case is whether or not the reservoir is to be termed a water of the State. This determination will dictate which of the Board's regulations pertain to the reservoir and the manner in which they

shall be applied. It is clear that the reservoir, as an artificial accumulation of surface water privately owned and wholly within the State of Illinois, is a water of the State unless it falls within the exception for sewers and treatment works. "Treatment works," as defined in Chapter 3, means individually or collectively those constructions or devices (except sewers, and except construction or devices used for the pretreatment of wastewater prior to its introduction into publicly owned or regulated treatment works) used for collecting, pumping, treating or disposing of wastewaters or for the recovery of byproducts from such wastewaters. This reservoir is a construction used for collecting, pumping, treating or disposing of wastewaters in that it receives and stores the boiler blowdown wastewater for eventual use in the cooling towers prior to treatment and discharge to the Vermilion River. In finding this reservoir a treatment works, the Board makes no finding concerning the permit status of this or any other similar body of water so constructed in the future. In addition to receiving and storing wastewater, the reservoir also receives and stores make-up water for the cooling towers. This additional use clouds the treatment works issue and presents the Board with a question very much like that of the perched or side channel lake identified primarily with the topic of cooling lakes.

The issue of "perched" or "side channel" lakes which are treatment works impoundments, and therefore not waters of the State, has previously been before this Board on a number of occasions. In a cooling lake case where a natural stream had been dammed to form an impoundment, the acquisition of more than half the impounded waters from some other source was found by the Third District Appellate Court to relieve the impoundment of regulation as an artificial cooling lake, Environmental Protection Agency v. Central Illinois Light Company, 54 Ill. App. 3rd 155, 23 PCB 107. This decision was an interpretation of Board language in the Opinion supporting the promulgation of Rule 203(i)(10) of Chapter 3: Water Pollution Regulations. The Board was making a distinction between a cooling lake which was a water of the State and a perched or side channel lake which are considered treatment works stating "where artificial diking is erected, and water to fill the resultant enclosure is largely obtained by withdrawal from a nearby natural body of water such as a lake or river, the enclosure constitutes a treatment works." The Third District Appellate Court interpreted the word "largely" as meaning 51 percent or more of the water coming from a pumping operation. Principally in response to the Third District decision in the Central Illinois Light Company case, the Board instituted a series of hearings designed to develop a permanent rule which would determine what constituted a treatment works with respect to an impoundment. The Board found that it would be impossible to promulgate a rule that could cover all of the potential criteria for determination that a particular body of water was or was not a treatment works and thus dismissed the proceeding, R77-17, stating it would consider such impoundments on a case-by-case basis in the future.

In this case, there is a reservoir created by damming a ravine to contain sufficient water to service IPC's Vermillion Station condensors since the Vermillion River is not capable of supplying sufficient amounts of water at all times. Since the reservoir is not used to dissipate the heat generated by the condensors, there is no contention that the impoundment constitutes a cooling lake. Nevertheless, similarity between the reservoir and cooling lake is sufficient for the Board to use the rationale in Environmental Protection Agency v. Central Illinois Light Company id., to the facts in this case.

The damming of a ravine for the use of a reservoir of water must be considered as much a matter of logic as it is an attempt to collect the natural waters which are normally encountered with the presence of a ravine. Certainly if one wishes to store water the preferred configuration would be a deep hole where there is little surface area as possible in order to lower evaporative losses and minimize the amount of real property required. The amount of water contributed to an impoundment by pumping as opposed to that contributed by natural sources is a criterion in the determination of whether the impoundment is to be considered a perched or side channel lake. Unlike most cooling lakes, the intermittent stream involved in this case is not only not the total source of water in the impoundment but does not contribute even a majority of the water. According to the Stipulation, 61 percent of the water in the impoundment is pumped from the Vermillion River, the balance coming essentially from precipitation and land runoff. Public access and public use is another of the criteria which may be used in the determination of an impoundment's designation. Here it is stipulated that the ravine is located on property owned and controlled by IPC and there is no public access to the impoundment but there is use of the impoundment by a private organization under a contract with IPC. The use by the private club under a contract cannot be construed as public access to the impoundment. The fact that the impoundment is large and apparently supports a fishery is likewise not determinative.

The facts in this case seem to be fairly equally divided between supporting a position that the reservoir is a water of the State and supporting the position that it is a perched or side channel impoundment. On balance, the Board finds that the facts in this case favor a finding that the impoundment is a perched or side channel lake. That finding, coupled with the prior finding under the facts of this case that IPC uses the impoundment as a treatment works for its boiler blowdown, leads the Board to the conclusion that the impoundment is not a water of the State and that discharges out of rather than into the impoundment are subject to regulation under the NPDES rules.

Another unsettled issue presented by the parties is IPC's objection to standard condition #27 because the condition, as written by the Agency, fails to provide IPC the specific right to appeal the exercise of Agency authority in establishing certain conditions in the permit in addition to the specific right

to appeal the condition itself. This issue was addressed by the Board in Illinois Power Company v. EPA, PCB 79-243. There, the Board made clear in its Order dated December 18, 1980 that the right to appeal a permit condition imposed pursuant to Rule 910 (a)(6) of Chapter 3, includes the right to challenge the exercise of that authority. That issue, inter alia, was appealed to the Third District Appellate Court. Although the Third District perceived the issue to be the right of the Agency to exercise the authority and therefore declined to decide the issue terming it premature, it did address IPC's concern in dicta. The Court said "the Board has clearly stated that Petitioner can attack the exercise of the Agency's authority to impose limitations under Rule 910(a)(6), if the Agency invoked such authority...the Board has acknolwedged Petitioner's right to review any such modification in the permit. This preserves all of Illinois Power's right to review such conditions and therefore its proposal to condition 27 is extraneous." Illinois Power Company v. Illinois Pollution Control Board and The Illinois Environmental Protection Agency, No. 81-34 Appellate Court of Illinois, Third District (September 30, 1981). The Board holds that the Agency's condition 27 sufficiently reserves IPC's rights of appeal and will therefore uphold condition 27 as written.

With regard to the Agency's denial of IPC's permit application to discharge from IPC's reservoir into the Vermilion River, the Board's findings today will result in a reversal of that denial. However, IPC's objection to standard condition #13 as being ambiguous is without merit. Standard condition #13 is upheld as written. IPC also argues that 906(f) of Chapter 3 mandates the evaluation by the Agency of any comments received concerning a draft NPDES permit and requires a reasoned response to be provided by the Agency. Although dialogue between the Agency and a permittee is to be encouraged during the pendency of the permit application, the Board finds that Rule 906(f) of Chapter 3 demands only that the Agency evaluate the comments and either issue or deny the permit. There is no mandate that the Agency respond to the comments in writing or otherwise.

With regard to the balance of the disputed issues in this case, the Board will accede to the parties request that the permit be remanded to the Agency for the clarifications agreed to in Part B, Paragraphs 2, 3, 4, 5, 6, 7, 8, and 9 of the Stipulation presented at hearing, to the extent those clarifications are not rendered moot by this Opinion.

This Opinion constitutes the findings of fact and the conclusions of law of the Board in this matter.

ORDER

1. NPDES Permit #IL0004057 issued by the Illinois Environmental Protection Agency for the Vermilion Power Station of Illinois Power Station is hereby remanded to the Agency for modification consistent with the Opinion herein.

2. The Board shall retain jurisdiction in this matter.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 21st day of January, 1982 by a vote of 4-0.

Christan L. Moffett, Clerk
Illinois Pollution Control Board