

ILLINOIS POLLUTION CONTROL BOARD
February 5, 1981

CATERPILLAR TRACTOR CO.,)
)
) Petitioner,)
)
) v.) PCB 80-3
)
) ILLINOIS ENVIRONMENTAL PROTECTION)
) AGENCY,)
)
) Respondent.)

MR. RICHARD J. KISSEL, MARTIN, CRAIG, CHESTER & SONNENSCHNEIN,
APPEARED ON BEHALF OF PETITIONER;

MR. STEPHEN GROSSMARK, ASSISTANT ATTORNEY GENERAL, APPEARED ON
BEHALF OF RESPONDENT.

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

On January 3, 1980 Caterpillar Tractor Co. filed an appeal of the NPDES permit no. IL 0001732 issued by the Illinois Environmental Protection Agency (Agency) on December 4, 1979 for Caterpillar's Joliet manufacturing facility, the effluent of which discharges into the DesPlaines River after treatment with chemicals, an air floatation unit, an activated sludge treatment unit, aeration basins and clarifiers. The application was made on December 28, 1978.

Of ten issues originally presented to the Board, the Agency has agreed to modify the permit regarding eight of these (Tr. 2-9). The two remaining issues for the Board's consideration are as follows:

1. Is there adequate authority for the Agency to include, as Par. six of Attachment B, the following condition?

6. Facility Process Evaluation

Accompanying the reapplication for permit, the permittee shall submit to the Illinois EPA and USEPA an evaluation of all plant processes with regard to known or potential toxic pollutants* which may have been or are being discharged to the receiving water.

The process evaluation should consider the potential for discharge of pollutants by reviewing the raw materials, solvents, catalysts, modifiers, stabilizers, preservatives, cleaning agents, intermediates, products, possible unintentional by-products, and other potentially toxic chemicals present at the plant. Following this evaluation, if a reasonable possibility is shown to exist for discharge of a toxic or potentially toxic pollutant in other than trace amounts, its presence or absence should be confirmed by wastewater sampling. Samples for analysis shall be composites taken so as to be representative of the discharge which would occur during an operating day for the process sampled. Insofar as is possible, samples shall be taken prior to dilution with cooling water or mixing with other process wastewaters. The analytical techniques shall be those specified in 40 CFR 136 or chosen from published methods with prior approval of USEPA.

The final report containing the detailed results of the process evaluation, including measured or estimated amounts of any toxic pollutants found, shall be submitted no later than 180 days prior to the expiration of this permit.

*Toxic pollutants are defined in Section 502(13) of the Clean Water Act (PL 95-217). Note that the term "toxic pollutant" is not limited to the list designated under Section 307 of the Clean Water Act, nor to the 129 Priority Pollutants or any other list. The toxic substances of concern in the waste of this particular facility depend upon the raw materials, products, and processes employed at this facility.

2. Was the Agency in error to have excluded the following language, contained in Caterpillar's last, USEPA-issued permit?

The permittee shall not, during the period of this permit, be authorized to discharge pollutants other than those specified in Part I herein, unless the concentrations of those pollutants do not exceed the standards or limitations of the Illinois Pollution Control Board's Water Pollution Regulations, Chapter 3, in force on the date of any particular discharge of said pollutants; provided, however, that the concentrations of these pollutants shall not exceed any standard or limitation promulgated by the United States Environmental Protection Agency under Section 307(a) of the Federal Water Pollution Control Act, PL 92-500. At any time after compliance monitoring by the United States Environmental Protection Agency, the permittee on written request of the United States Environmental Protection Agency may demonstrate that any pollutant not specified in Part I herein is in compliance with the effluent limitations of this paragraph.

Section 39(b) of the Act sets forth the powers of the Agency in issuing permits: "All NPDES permits shall contain those terms and conditions ... which may be required to accomplish the purposes and provisions of this Act," ... "and may include, among such conditions, effluent limitations and other requirements established under this Act, Board regulations, the Federal Water Pollution Control Act Amendments of 1972 [Clean Water Act] and regulations pursuant thereto." The Board's role in deciding permit appeal matters is to either uphold or overrule the Agency's decision as to the conditions in issue.

The Facility Process Review condition prescribes activity which is to be performed in the event Caterpillar applies for its next permit. Its terms are not linked to the period of the instant permit. The Agency argues that it imposed this condition pursuant to its authority under §39 of the Act and certain of the Board's Water Pollution Control Rules and Regulations (Chapter 3). The motivation for inclusion was the indication in Caterpillar's application (at p. II-0, Item 16) of the presence of toxic pollutants listed pursuant to §307(a) of the Clean Water Act (algicides; chlorinated organic compounds/methyl chloride and methyl chloroform; chlorinated cutting oils; "pesticides, see algaecides (sic)"; and chromium) (Tr. 92-4,111).

The question before the Board therefore is whether the permit condition may be required to accomplish the purposes and provisions of the Act.* The Board finds the condition to be required to accomplish the following purposes of the Act:

1. to assure that adverse environmental effects are fully considered and borne by those who cause them (§2(b) of the Act);
2. to assure that no contaminants are discharged into the waters of the state without being made subject to conditions required in order to achieve compliance with state and federal law (§11(b) of the Act); and
3. to assure that the Board's regulations are not construed to limit, affect, impair or diminish the authority, duties and responsibilities of the Agency to control pollution, to protect and enhance the quality of the environment, and to achieve all other purposes of the Act (§11(c) of the Act).

There is no evidence in the record that Caterpillar knew of the presence in its effluent of toxics other than those it reported.

*In Peabody Coal Co. v. IEPA, PCB 79-296, May 1, 1980, the Board referred to permit conditions such as the facility process evaluation here at issue as "discretionary," and those conditions specifically required to be included pursuant to federal or state regulations as "mandatory." As use of these terms has caused considerable confusion, the Board will no longer employ them in its analysis of whether appealed permit conditions are required to accomplish the purposes of the Act.

The Agency maintains that the presence of some toxics indicates the possible presence of others (Tr. 92-4). To impose the requirement on Caterpillar to evaluate the potential of all of its plant processes for discharges of known and potential toxic pollutants which either are presently or may have been discharged to the receiving water (and to sample when they are present in other than trace amounts) will assure that the adverse environmental impact of these toxic discharges are borne by Caterpillar, and not the public, by assuring that Caterpillar considers them.

Caterpillar is the best source for information regarding the presence of toxics and the degree of their presence in its discharges. (Tr. 115). To force the Agency to inspect and monitor these toxics not only would increase the burden upon that agency but would not place responsibility for considering the adverse environmental effects of the discharges on the one causing them. A toxic substance present in a discharge but not identified or quantified is still in fact a substance which an NPDES permit must regulate; when it is suspected to be present but is not quantified it is reasonable for the Agency to regulate it with monitoring and sampling requirements as permit conditions.

Moreover, the condition allows a construction of the Board's regulations in a way which does not impair the Agency's duties and authority under the Act to protect and enhance the quality of the waters of the state. As Caterpillar is the best source for information on its own toxic discharges, the Agency should not be prohibited from applying its monitoring authority to the evaluation of processes in order to have a discharger consider the existence and potential existence of toxic substances. Under the Board's regulations, the Agency must require monitoring. Under the condition at issue the Agency requires a specific kind of monitoring. This monitoring is not prohibited by either the Act or the Board's regulations and it enables the Agency to fulfill its duties to protect and enhance the quality of waters of the state.

However, the Board finds that the condition relates to what is required when Caterpillar, if ever, reapplies for an NPDES permit. The Agency lacks authority under the Act to expand the requirements of an application for an NPDES permit which are set forth in Chapter 3, Rule 902. The Agency's decision to include this provision is therefore reversed.

As to the second issue presented by this appeal, the noninclusion of a condition which the USEPA had included in Caterpillar's prior NPDES permit, the Agency is not bound either to include the substance of prior conditions or to word any condition in a specific way. The Board upholds the Agency's exclusion of the condition Caterpillar had requested. There is no evidence that the wording of this condition is required to accomplish the purposes of the Act, the Board's regulations or the Clean Water Act.

The permit proceeding is remanded to the Agency for issuance of a permit consistent with this Opinion.

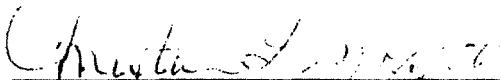
This Opinion constitutes the findings of fact and the conclusions of law of the Board in this matter.

ORDER

It is the Order of the Illinois Pollution Control Board that the Agency's inclusion of paragraph six of Attachment B in the NPDES permit No. IL 0001732 issued on December 4, 1979 to Caterpillar Tractor Co. is reversed. The permit is remanded to the Illinois Environmental Protection Agency for further action consistent with the Opinion herein.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order were adopted on the 5th day of January, 1980 by a vote of 3-0.



Christan L. Moffett, Clerk
Illinois Pollution Control Board