

ILLINOIS POLLUTION CONTROL BOARD
March 14, 1972

IN THE MATTER OF)
) #R72-1
TRANSCRIPTS)
(Procedural Rule 328))

DISSENTING OPINION (BY JACOB D. DUMELLE):

When the Board voted on March 2 to adopt this procedural rule which would put the burden of transcript costs on a citizen pursuing an action to abate a pollutional situation, I was on active duty with the United States Navy. The vote on enactment was 3 to 1; I would have added a further emphatic nay to that roll call about which I had previously and publicly informed my fellow Board members. A complainant's cost of transcript could run from \$800 to \$1,000 per day in an ordinary case which could continue for one or more days. Amended Rule 328 would require, in most cases, that the cost of the stenographic transcript of an enforcement hearing be borne by the parties to the action, both complainant(s) and respondent(s). The proposed rule would have the effect of discouraging citizen participation by virtually precluding all but extremely affluent persons or organizations from instituting enforcement actions. The statute gives each citizen the right to sue to abate a pollution situation and the rule effectively takes it away. Additionally, the rule places an undue burden on alleged polluters forced to pay for a defense even if it is later found that no violation existed.

What was sacrificed with the rule adoption was the magnificent principle of citizen participation in environmental decisions. Gone now is that survivor of the perilous and obstacle-strewn legislative process, an important purpose of the legislature in passing the Environmental Protection Act. The Board has now enacted a "procedural" rule that effectively and nearly completely thwarts citizen access to the environmental decision-making process of this state. Whole substantive sections of the Environmental Protection Act have been rendered meaningless. The noble experiment that saw the dawn so briefly is now consigned to indefinite night. Gone is the opportunity for the game warden to take almost immediate and certainly effective steps to halt obnoxious water pollution (See Hanna v. Minnesota Paints, PCB 71-123, July 26, 1971). Gone is the chance for the civic organization to make its voice heard and listened to as it set itself to the task of protecting Lake Michigan (See League of Women Voters, et al v. North Shore Sanitary District, PCB 70-7, 12, 13 and 14, March 31, 1971). Gone is the opportunity for

students to learn while doing as they attempt to lessen the opacity of railroad diesel engine exhausts (See Youth for Environmental Salvation v. Chicago, Milwaukee, St. Paul & Pacific Railroad, PCB 71-254, filed August 31, 1971).

Alternatives which would not have materially impaired the pollution fight should have been tried. The shortage of funds which precipitated action on the rule could in no way be thought of as permanent. The Governor and several legislators publicly expressed their interest in enacting the necessary deficiency appropriation upon the reconvening of the General Assembly. Deferring enforcement hearings until after a deficiency appropriation was obtained would not have stopped the state's pollution abatement effort. This could likely have been accomplished early in the spring legislative session. As for situations which required immediate attention, the path of injunction in the courts is always open. Further, the Board should have sought the opinion of the Attorney General as to whether it was obliged to continue its effort even while accumulating expenses beyond its budget.

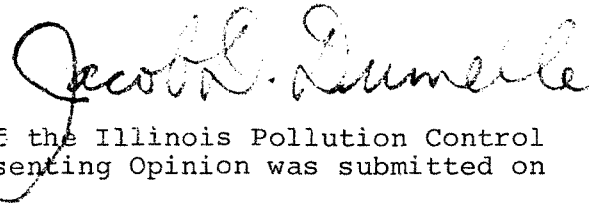
As enacted, the rule is somewhat different than the original proposal. Added to the final version is a vague and permissive declaration that "the Board may reassume transcript cost in any class of proceedings upon receipt of adequate appropriations at any time." This gratuitous statement particularly suggests that the Board is trifling with a principle that should be respected. Citizen access and citizen participation in making environmental decisions is a newly created right the right to bring an action before the Pollution Control Board to abate an occurrence of pollution -- and should have such stature that it could be regulated only by the legislature itself. I am deeply concerned in this matter with the ease with which the Board has tampered with the design and intent of the legislation.

There are legal arguments to be made as to the invalidity of the enacted rule but I will not dwell on them here since the Board has earlier been put on notice that the rule raises serious questions of statutory authorization, due process of law and equal protection of the law (See Clean Air Coordinating Committee, et al v. Illinois Pollution Control Board, Docket No. 72L 2209, filed February 22, 1972). Unquestionably, the trend of recent court decisions, both civil and criminal, is to knock out government-erected financial impediments to non-affluent persons seeking to vindicate legal rights. I have chosen to restrict my comments chiefly to the public policy considerations which loom so overwhelmingly in this matter. The Governor of Illinois has recognized this overriding public policy question in his recent Special Message on the Environment where he said that:

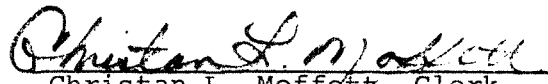
It is...intolerable for the high cost of transcripts to obstruct private citizens from having access to the board. 1/

1/ Special Message on the Environment
Richard B. Ogilvie, Governor of Illinois,
Thursday, March 9, 1972, p. 13

Gone entirely now is the grand design painstakingly preserved when the Act was assaulted by its special interest critics from every quarter. In its place now is the principle of the "majestic equality of the law" about which Anatole France has reminded us: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread." Citizens cannot act on their own but must now wait for government agencies to act to protect the environment, no matter if the action is slow or fast, or half-way or effective. The intent of the Act was saved from its enemies only to be done in by its friends.



I, Christan Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Dissenting Opinion was submitted on the 15th day of March, 1972.



Christan L. Moffett, Clerk
Illinois Pollution Control Board

