ILLINOIS POLLUTION CONTROL BOARD
September 16, 1971

ENVIRONMENTAL PROTECTION AGENCY)
)
v.) PCB 71-51C
)
CITY OF CHAMPAIGN, ILLINOIS et al)

Dennis K. Muncy of Champaign, for the Environmental Protection Agency
Albert Tuxhorn of Champaign, for City of Champaign

Opinion of the Board (by Mr. Currie):

This case was originally brought as a consolidated action by a complaint filed by the Environmental Protection Agency ("Agency") on March 16, 1971, against the City of Champaign ("City") and the City of Urbana for causing or allowing the pollution of Boneyard Creek. On May 13, 1971, the Hearing Officer entered an order of severance dividing the complaint against the cities into two separate cases and, subsequently, the Board of Trustees of the University of Illinois ("University"), and Alpha Material and Fuel Company, a corporation ("Alpha"), were joined to these proceedings. A number of preliminary questions and jurisdictional objections have been raised and will be considered here first before we discuss the merits of the case.

I.

The City, in its Motion and Amendment to Motion to Strike and Dismiss First Amended Complaint, raises a series of objections to the procedure followed by the Agency in filing this case, all of which we reject.

The City claims that the Agency failed to comply with the provisions of Section 8-102 of Article VIII of Chapter 85, Ill. Rev. Stat. 1969, regarding the required notice in actions against local public entities. That section, however, pertains specifically to a "civil action for damages," which is not the case here. This proceeding is an adjudication before an administrative agency and the procedures to be followed are clearly defined in the Illinois Environmental Protection Act and in the Procedural Rules of the Illinois Pollution Control Board. Similarly, the City's reference to Section 2-102 of Chapter 85 is totally inapplicable since that section deals with "punitive or exemplary damages," a technical term having to do with additional payments in private civil damage actions. The penalties which the Board may invoke pursuant to the Environmental Protection Act are, on the other hand, not in the nature of "damages," but are, rather, administrative sanctions the precedent for which has been well established for many years.

The City further contends that the Agency did not serve process on the City pursuant to the requirements of the Civil Practice Act in that the Agency failed to leave any summons with either the Mayor or the City Clerk. The original combined complaint

against both Cities had been served on the Mayor and Council of the City of Champaign by registered Mail pursuant to Rule 305 (a) of the Procedural Rules of the I.P.C.B. and, after the cases were severed, the First Amended Complaint was served by registered mail on the City Attorneys who had already entered their appearances. These procedures are thoroughly adequate and are consistent with the Statute and with the rules of the Board. The notice requirements of the Civil Practice Act are inapplicable.

We also reject the City's technical argument that the complaint is insufficient in that it fails to specifically allege that "any contaminant" was caused, threatened, or allowed to be discharged. Pleadings before this body shall be judged by their substance and not by their form. Similarly, the City's argument that the complaint is insufficient for failure to specify the pollutants involved, for failure to allege sufficient facts to apprise respondent of the particular provisions of the statutes or regulations allegedly violated, for failure to allege the facts complained of with sufficient particularity, for failure to allege sufficient facts to support the "many conclusions of law and fact" contained therein and for failure to allege sufficient facts to raise any duty or legal obligation owed by the City to the complainant, are all rejected. Even if true (and we are not convinced that they are true) the points raised by these arguments could have all been covered, and actually were covered, by the ample discovery procedures afforded to all parties by the Hearing Officer pursuant to the Rules of the Pollution Control Board.

The City also raises various constitutional arguments challenging the entire Environmental Protection Act and the very existence of the Pollution Control Board, Basically, the City argues that the complaint which is brought pursuant to the Act denies the respondent due process and equal protection of the laws in violation of the U.S. and Illinois Constitutions; that the Board, "which acts as a court," has been unconstitutionally delegated judicial powers; that the section of the Act providing for a review of Board decisions by the Appellate Court, thereby skipping the Circuit Court level, unconstitutionally "discourages review" and "places an undue burden on respondents"; that the Board's authority to impose "civil penalties" is unconstitutional and that respondent is unconstitutionally "denied the right to jury trial and other procedural safeguards." While we have answered similiar arguments before, we will briefly address ourselves to the contentions of the City individually:

1. Delegation. The City asserts that the Environmental Protection Act denies it due process and equal protection of the laws. It claims that the Board has been delegated judicial powers "comparable to those of the Circuit Court" in violation of the Illinois Constitution. Presumably this argument refers to the Board's authority to conduct hearings and to impose appropriate penalties. As we have pointed out at length, (see E.P.A. v. Modern Plating Corporation,

PCB 70-38, 71-6, May 3, 1971) the precedent for the creation of quasi-judicial tribunals in this state is well-established. Workmen's compensation cases, handled by the Industrial Commission, are the most obvious examples of the proper and reasonable exercise of quasi-judicial powers by an administrative agency but similiar functions have been and still are being performed by the Illinois Commerce Commission, the Fair Employment Practices Commission, the Department of Finance, and, indeed, by our own predecessor, the Sanitary Water Board.

2. Jury Trial. In addition, for the reasons detailed in the Modern Plating decision, we reject the jury trial argument as incorrect. As we said in Modern Plating:

"An administrative order to pay money to either a governmental or non-governmental entity which Order is granted without the right of a jury trial is not a novel concept nor in violation of constitutional principles. The constitutional right to a trial by jury is guaranteed by the 6th Amendment of the United States Constitution in all criminal prosecutions and the 7th Amendment 'in suits at common law.' An administrative order to pay a penalty is not the consequence of a criminal prosecution, and such payment does not constitute a criminal penalty ....Nor is the proceeding before an administrative agency a suit at common law.[1]"

3. Penalties. The City's further argument that the Board has been granted the power to levy "civil penalties...far in excess of many of the fines provided for the Criminal Code of the State of Illinois for misdemeanors" has no merit. While we recognize that certain misdemeanors are more serious than others, we are not prepared to compare the seriousness to the community of an isolated case of pollution with the seriousness of any given misdemeanor. The heavy-thumbed butcher who cheatingly tips the scales commits a misdemeanor, but who would seriously compare the penalty he risks to the penalty provided for one who endangers the health and welfare of the entire community by causing or allowing pollution of our environment? The legislature has a good deal of latitude in making the sanction fit the offense, and its judgment here is not unreasonable.

4. Review. Finally, the City's contention that "denial of the right of review in the Circuit Courts... discourages review, places an undue burden on respondents and denies equal protection of the laws," is patently wrong. If anything, the opportunity afforded to respondents under the Environmental Protection Act to have adverse administrative rulings reviewed directly by the Appellate Court encourages rather than discourages review. Under our Act, there is no need for a repetitive, lengthy and costly rehashing of the same

[1] EPA v. Modern Plating Corporation (PCB 70-38, 71-6, May 3, 1971) p.6

litigated matters at the Circuit Court level since the public hearing conducted by the Board pursuant to the Act and its own Procedural Rules guarantees to the parties a full, fair, impartial, complete, inexpensive and speedy trial on the merits with all the procedural and substantive constitutional guarantees which could be afforded by any court in the land. To the contrary, a requirement that the parties conduct a new trial at the Circuit Court level would cause the undue burden referred to by the City and would result in expensive and time-consuming protracted litigation while the issues raised by the case would be undecided and the public, and presumably the environment, would suffer. But the short answer is that direct review in the Appellate Court is flatly authorized by the Illinois Constitution and cannot therefore be said to violate that same document. The federal Constitutional question is settled against the City by the long accepted and upheld practice of direct appellate review of comparable federal agencies.

5. Parties. The City has also stated that the complainant in this case is the Environmental Protection Agency whereas the Act requires that such actions be brought in the name of the People of the State of Illinois. We reiterate once again that our primary concern is with substance and not form. In any event, we specifically refer the City to Rule 303 (b) of the Procedural Rules of the Illinois Pollution Control Board which states that:

> "Misnomer of a party is not a ground for dismissal, the name of any party may be corrected at any time."

There are, additionally, several preliminary matters raised by the Third Party Respondents, to which we now turn.

II.

The University has scattered several points among a series of objections and briefs challenging the Board's authority in this case. We shall deal beiefly with each point.

As the Hearing Officer correctly ruled, the Third Party Complaint as ordered by the Hearing Officer and served by the City on the University in this case was an appropriate means of joining the Third Parties pursuant to Rule 309 of the Procedural Rules of the Illinois Pollution Control Board to a proceeding already authorized for hearing by the Board. The procedure thus followed insured a "convenient, expeditious, and complete determination" of the claims, and, since the Third Party complaint raised no new or additional charges of pollution to change the substance of the initial complaint upon which the Board had authorized a hearing, the University cannot claim prejudice or surprise. In effect, the Third Party complaint incorporated the First Amended Complaint by reference, thereby fully apprising the University of the essentials of the case against it. Additional information relied upon by Respondents and Third Party Respondents to adequately prepare their cases could have been, and in fact actually was, as we have already indicated, obtained by the ample discovery allowed prior to the hearing on the merits.

We also note that consultation with all parties was conducted before a final hearing date on the merits was established and that no motion for a continuance on behalf of the University was ever submitted to the Hearing Officer or to the Board. Finally, we reject the University's objections based on sufficiency of the complaint for the same reasons we rejected similar objections by the City.

The University has submitted documents entitled (1) Entry of Special Appearance of Third Party Respondent, the Board of Trustees of the University of Illinois, and Motion to Expunge and Strike or, in the alternative, to Dismiss for Want of Jurisdiction, and (2) Brief in Support of Motion on Special Appearance of Third Party Respondent, the Board of Trustees of the University of Illinois, to Expunge and Strike or, in the alternative, to Dismiss for Want of Jurisdiction. The principal thrust of these arguments seems to be that the University of Illinois is exempt from and not subject to the operation of the Environmental Protection Act. This is wrong.

Section 47 of the Act quite clearly states that:

> "The State of Illinois and all its agencies, institutions, officers and subdivisions shall comply with all requirements, prohibitions, and other provisions of the Act and of regulations adopted thereunder."

In its Brief, the University states that "if all of the provisions of the Environmental Protection Act were made applicable to the State of Illinois, its agencies, institutions, officers and subdivisions, there would exist an impossible and illogical situation in which the State, through the Pollution Control Board, would be levying fines against the State itself, and the group it supports, for failure to take an action which could not be taken because the state had not appropriated the money therefor. Presumably the state would then have to appropriate the money to pay the fine."

It was clearly the intent of the Legislature in adopting Section 47 of the Act to ensure that all state agencies would comply with all provisions of the Act and the Rules and Regulations promulgated thereunder. To construe this section as merely requiring reporting by the Agencies would be tantamount to emasculation of the section and would virtually exempt state agencies from compliance with state laws pertaining to the protection of the environment. As the statute says, the State should ensure that its own hands are clean before penalizing others for soiling the environment.

The Legislature, in adopting the Environmental Protection Act, recognized the inadvisability of exempting certain special interest groups from compliance with the Act. The City of Chicago and the

Metropolitan Sanitary District of Greater Chicago, for example, which had been generally exempted from prior state environmental legislation, are no longer granted such exemptions under the new Act. Similarly, state agencies at all levels must comply with all requirements of the Act. Many state agencies, such as penal institutions, must comply with applicable regulations promulgated by the state Department of Health, among others, and we see no inconsistency in requiring state agencies to adhere to the provisions of the Environmental Protection Act as well, especially since the Legislature so clearly intended this result.

We need not decide whether it would be appropriate, if other facts so indicated, to impose money penalties on another state agency, for as discussed below we see no cause for money penalties in this case. The University's argument that equipment cannot be purchased unless the General Assembly appropriates money for it does not destroy the appropriateness of an order to comply; it does underline the heavy responsibility of the General Assembly to fulfill its specific promise of state compliance by making the necessary appropriations.

The University further challenges the jurisdiction of the Board by asserting that if the University is amenable to suit on the claim asserted by the Agency, such suit may only be brought in the Court of Claims. In support of this assertion, the University states that this is a proceeding which "sounds in tort" and that the Court of Claims has exclusive jurisdiction over all tort claims against the Board of Trustees of the University of Illinois.

In actuality, these proceedings are neither criminal in nature nor are they actions in tort. This is an administrative adjudication under authority of the Illinois Environmental Protection Act, which quite clearly states, as we have indicated above, that all state agencies must comply with all the provisions of the Act and Rules adopted thereunder. Exclusive jurisdiction of "tort" claims against the University may well be in the Court of Claims but the action we are dealing with here is not a "tort" claim but rather a new, statutory action, which did not exist at common law. The Pollution Control Board is the proper body to hear this matter, as the Environmental Protection Act plainly provides.

III.

Finally, we address ourselves to the motions filed by the Third Party Respondent, Alpha Material & Fuel Company.

Alpha's motion for a summary order of dismissal, based on technical objections to the nature and form of the Third Party

complaint, is denied. As we stated above, the Hearing Officer correctly ordered the Respondent to serve a Third Party Complaint on the University and Alpha as a means of joining these parties to a proceeding already instituted. The claims against these third parties were neither duplicitous nor frivolous. The Third Party Complaint, together with the First Amended Complaint and the voluminous documentation exchanged on discovery, was more than adequate to fully apprise Alpha of the charges against it and of the issues in the case.

Alpha's Motion challenging the jurisdiction of the Board is based on arguments we have already considered. Alpha repeats the City's assertion that the Act improperly confers legislative and judicial powers upon the Board, which we once again reject as erroneous.

Alpha states that Sections 12 and 13 of the Act are invalid because they unlawfully delegate "arbitrary" powers to the Agency and the Board and, essentially, because they are vague, lacking in preciseness and indefinite. In EPA v. Granite City Steel Co. (PCB 70-34, March 17, 1971) we considered these points and rejected them. The Act defines the clear limits of the Board's authority and is as precise as a statute can be without including numerical standards.

Furthermore, as to whether or not the Act requires testimony at the hearings to be given under oath, we point out that such testimony was, as a matter of fact, given under oath. Therefore we do not see the need to comment on the question of whether or not testimony before the Board must at all times be given under oath.

Alpha's objections contained in paragraph five of its Motion Challenging Jurisdiction filed on June 1, 1971, are also rejected. The procedures followed and the time allowed the parties for discovery and for preparation of their cases herein were more than adequate. Furthermore, at no time did Alpha ever request additional time or a continuance to prepare its case more fully, and, when specifically asked by the Hearing Officer whether it was ready to proceed on June 8, 1971, Alpha replied that it was. Nevertheless, additional time was granted to all parties by the Hearing Officer to assure adequate preparation of their cases, and a more meaningful exchange on discovery and the full public hearings on the merits of the case did not begin until June 28, 1971. Further delay would have been counterproductive.

The objection raised by Alpha to the provision of the Act allowing direct review of Board decisions by the Appellate Court is rejected once again for the same reasons stated above.

Finally, Alpha claims that Sections 27 and 35 of the Act violate the U.S. and Illinois Constitutions by depriving Alpha of

equal protection of the laws since they apply differently in different geographic areas of the State. While these sections are not even remotely at issue in this case,we would point out that if Alpha's argument were accepted, it might also be utilized to hold that different speed limits for different highways in different portions of the state are also unconstitutional. We are dealing with the health and welfare of the public and the quality of the environment and therefore must take into consideration a variety of circumstances and conditions which may well be different in different areas of the state. Not to take such variations into consideration might lead to unfairness, or at worst, impossibility in attempting to apply the law effectively. Alpha's contention is therefore rejected.

We now consider the merits of the case.

IV.

The Agency has alleged that on eight separate occasions the City violated Section 12 (a) of the Environmental Protection Act ("Act") and Rules 1.05 and 1.08 of the Rules and Regulations of the Sanitary Water Board, SWB-14, continued in effect by Section 49 (c) of the Act. Section 12 (a) of the Act states that "no person shall cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board..." Rule 1.05 of SWB-14 states the applicable criteria for "aquatic life sectors" in terms of maximum and/or minimum permissible levels of dissolved oxygen, pH, temperature and toxic substances. Rule 1.08 of SWB-14 is the State's implementation and enforcement plan designed to control and prevent pollution of the waters of the State of Illinois.

The specific dates of the alleged violations are August 7 and 18, September 18, 21, 23 and 30, and October 14, all during 1970, and, in addition, February 18, 1971. In its Third Party Complaint, the City alleged that the University caused the violations of August 7 and 18 and that Alpha was responsible for the violations of September 18, 21 and 23, if, indeed, there were violations on any of those dates at all. By stipulation, however, Alpha admitted causing a violation on September 21 and the City agreed to amend its Third Party Complaint by deleting any allegations against Alpha pertaining to the alleged violations of September 18 and 23.

We will examine each of the dates of alleged violations individually, leaving till afterwards the question of the City's responsibility for them.

1. August 7, 1970

The Agency alleges that on August 7, 1970, the City "caused or allowed" the discharge of waste waters from a sewer it operates and maintains located south of Green Street between

Locust and First Streets into Boneyard Creek "so as to cause or tend to cause pollution" of Boneyard Creek in violation of Section 12 (a) of the Act and Rules 1.05 and 1.08 of SWB-14. In support of its allegation, the Agency offered ten samples taken over a period of 3 1/2 hours on the morning of August 7, 1970. The results of the laboratory analyses performed on the 10 samples as indicated on the Special Analyses Report Forms of the Agency (E.P.A. Exhibits 4 through 13, inclusive) were as follows:

Samples	EPA Exhibit No	Time Taken	Temperature	pH	Suspended Solids
1	Ex-4	9:03 a.m.	88°F	2.2	36 mg/l
2	Ex-5	9:30 a.m.	84°F	2.3	33 mg/l
3	Ex-6	9:50 a.m.	84°F	2.4	30 mg/l
4	Ex-7	10:10 a.m.	82°F	2.5	27 mg/l
5	Ex-8	10:30 a.m.	80°F	2.7	16 mg/l
6	Ex-9	10:50 a.m.	80°F	3.0	21 mg/l
7	Ex-10	11:15 a.m.	80°F	6.0	34 mg/l
8	Ex-11	11:30 a.m.	82°F	6.1	34 mg/l
9	Ex-12	11:50 a.m.	82°F	2.9	33 mg/l
10	Ex-13	12:20 p.m.	84°F	11.8	52 mg/l

According to Mr. Wallin (R. 122), the ten samples were all taken from the same location, south of Green Street between Locust and First Streets, some 30 feet downstream from the point at which the Boneyard Creek and the City's storm sewer system merge (R. 122).

Test results indicated pH readings ranging from extremely low, 2.2 (E.P.A. Ex. 4) to extremely high, 11.8 (E.P.A. Ex. 13). Temperature changes of as much as 4° F. in less than an hour were recorded and suspended solid measurements were as low as 16 mg/l (E.P.A. Ex. 8) and as high as 52 mg/l (E.P.A. Ex. 13). Testimony indicated that the water was slightly turbid (R. 113), with blackish deposits, thick film, and the evident formation of sludge banks on the bottom (R. 113).

Mr. Wallin testified that a normal, unpolluted stream should have pH readings ranging between 6.5 and 8.5 (R. 133);that waters showing pH values as high or as low as the extremes measured on August 7 would be detrimental if not fatal to aquatic life (R. 140, 182); and that low values would also be corrosive to concrete and corrugated metals. He further testified that clear, unpolluted streams should produce suspended solids test results of between 5 and 10 mg/l (R. 143) and that higher readings would tend to cause the formation of "sludge banks" which would also be extremely detrimental to aquatic life by causing

the clogging of the air intake structures of small fresh water aquatic life organisms and resulting in the reduction of food sources for higher aquatic life, such as fish (R. 145).

Mr. Wallin further testified that he believed the University's Abbott Power Plant was the actual source of the contaminants on August 7 due to regeneration of its demineralizer system and to operation of its dust control device (R. 215) and the City alleged as much in its Third Party Complaint. But no proof was adduced by any party to substantiate this claim or to exclude the possibility of alternative sources.

Counsel for the City and for the Third Party Respondents repeatedly stressed the apparent deficiencies in the testing methods employed by the Agency and the departure of such methods from the techniques specified in Standard Methods for the Examination of Water and Waste Water, Twelfth Edition, 1965 ("Standard Methods"). (R. 273-299). They pointed out that Rule 1.01 of SWB-14 indicates that Standard Methods should be employed where applicable although other methods may be required in certain cases. (R. 638-9). Specifically, Standard Methods was not followed with respect to turbidity or color tests, emptying and preparation of the sample bottles, temperature measurements (the Agency used an alcohol thermometer whereas Standard Methods calls for the use of a mercury thermometer), and time elapsed between extraction of the sample and laboratory analysis of pH concentrations. They also argue that the samples were taken too near the outfalls under regulations allowing a mixing zone. We will discuss the alleged violations in terms of suspended solids, temperature changes, pH, and settleable solids,taking into consideration these variations from Standard Methods:

(a) Suspended Solids: Suspended solids readings ranged from 16 to 52. At present we have no stream standard for suspended solids; if one is desirable, we invite the Agency to propose it. Rule 1.08 of SWB-14, specifically subparagraph 11b, is an effluent standard for treatment works. We cannot find an effluent violation where measurements have been taken not of the effluent but of the water some 30 feet downstream from the outfall. It is also doubtful that this standard, which specifically refers to treatment plants, is applicable to storm sewers. It would be helpful if the Agency would propose a clarification. As for the general allegation of water pollution under § 12 (a) of the Act, the Agency failed to adequately show the detrimental relationship between the recorded levels of suspended solids and the gills of aquatic life organisms, much less the bottom biota in Boneyard Creek, which are affected principally by the settleable portion of the suspended solids. Therefore, we find no suspended solids violation.

(b) Temperature Changes: Temperature variations of 4°F within less than one hour exceed the limits specified in Rule 1.08 (4) of SWB-14. In the case of thermal discharges to the Illinois River, we have held the 600' mixing zone described in Technical Release 20-22 accurately expressed the purposes of the Sanitary Water Board. (In the matter of Commonwealth Edison Company, Dresden Unit No. 3, PCB 70-21, 3/3/71). In the present case measurements were taken only 30 feet from the outfall (R. 248). When dealing with small streams such as the Boneyard however, it is reasonable to question whether a 600' mixing zone could have been intended. Conceivably, the mixing zone could be the entire length of the stream if there are numerous outfalls, so the regulation would apply nowhere. The Agency's witness stated that he believed 30 feet was enough to insure adequate admixture (R. 248). In any case, the City's argument that the standard does not apply even beyond 600 feet if there is no dilution water is incorrect since the mixing zone concept is based on assumption that dilution will occur; and the regulations make clear that the less there is to dilute with, the less may be discharged.

But we need not decide the size of the mixing zone applicable to temperature changes in the Boneyard, since the Agency failed to follow the prescribed testing method. Not only were temperature measurements made with an alcohol rather than a mercury thermometer, so that it could not be shaken down below the air temperature, but tests were made in the sampling jar rather than in the stream as required (R. 280). We do not know how serious an effect these departures had on the results, but the alleged violation is of only a few degrees, and we have nothing to show the change cannot be explained by testing inaccuracy. We therefore find that no temperature violation was established. We urge the Agency to propose a suitable regulation if the required testing methods should be modified.

(c) pH: The reported pH values ranging from 2.2 to 11.8 greatly exceed the limits prescribed by Rule 1.05 of SWB-14 (6.0 to 9.0). That rule applies to "aquatic life sectors" and, since the Boneyard has never been excluded from such designation, the standards for aquatic life sectors are applicable (see Springfield Sanitary District v. EPA, PCB #70-32, 1971). We recognize that the Boneyard is not presently in a condition to support aquatic life; but that is the reason the case was brought, not an excuse for leaving the creek polluted. The regulations require that streams now in bad shape be upgraded to support aquatic life.

As we pointed out above, we have previously acknowledged the reasonableness of the 600 foot mixing zone in some cases. Tests here were taken 30 feet from the outfall. Rule 1.05 however, contains its own definition of a mixing zone, excluding from protection only "areas immediately adjacent to outfalls." Whether in the context of the small Boneyard the area "immediately adjacent" extends 600 feet seems doubtful. But we need not decide

whether 30 feet is "immediately adjacent" since such extreme pH levels as here measured clearly constitute water pollution under Sec. 12(a) of the Act because they are likely to be lethal to fish life and corrosive to metals and concrete and extremely hazardous to people as well. Neither TR 20-22 nor SWB-14 can be read to repeal Sec. 12(a) of the statute by allowing water pollution within 600 feet of an outfall; the statute is clear that water pollution is forbidden at every point on the stream.

Standard Methods says that pH readings can change rapidly and that, therefore, testing for pH should be done in the field (Standard Methods, p. 32-3). The samples taken by the Agency here were allowed to sit around for several hours before they were transported to the Agency's laboratory. However, no proof was introduced to show that such extreme values as these could be accounted for by the testing deficiencies. The United States Department of the Interior publication A Practical Guide to Water Quality Studies of Streams (1969), of which we take official notice, states that if there are delays in testing pH values, "such data may vary by 0.3 to 0.5 units or more from the values in the stream" (p. 32). This is a much smaller range of deviation than would be necessary to explain the readings in the present case. We find the extremely low and high pH values found August 7 constitute water pollution as described in Section 12(a) of the Act.

We find no violation of Rule 1.08 since that rule contains no pH standard.

(d) Settleable Solids:

Since no effluent settleable solids tests were run, Rule 1.08 does not govern. In addition, Rule 1.05 contains no settleable solids standard so no violation of that rule can be found either. We would point out, however, that Rule 1.03 of SWB-14 does apply to settleable solids and that it explicitly applies at all places, not being limited by a 600 foot mixing zone. Further, that rule clearly indicated that no nuisance of a pollutional nature will be allowed anywhere. Violations of Rule 1.03 of SWB-14 were not charged here. Our procedural rules require invocation of the regulations relied on, but we have forgiven their omission in the absence of surprise. In any event, the presence of settleable solids and their harm to the biota was amply shown and their only source on the date in question was the City's sewer system. It is thus our opinion that the evidence justifies a finding of water pollution under Sec. 12(a) of the Act due to the presence of settleable solids in the Boneyard.

In summary, therefore, we find water pollution under Sec. 12(a) of the Act on August 7, 1970 by virtue of extremely low and extremely high pH levels and of settleable solids that interfere with aquatic life.

2. August 18, 1970.

The Agency collected only one sample on August 18, 1970, that being taken from the exact location from which the August 7 samples were taken. (R. 193-6). The sample was taken at 4:45 pm and results of laboratory analyses revealed a pH reading of 10.1

and a suspended solids reading of 40 mg/l (EPA Exhibit 17). Dark color, odor, and turbidity observations were made (R. 195), but there was no showing that these were sufficient to interfere with aquatic life. Sludge banks were observed but could have been there for quite some time, and they were not shown to be related to the City's discharge. The City maintained that the University was responsible for any violation although no proof to that effect was adduced and other sources could have existed.

The Agency dropped its allegation that Rule 1.05 had been violated (R. 526) although the stream had been sampled. Finally, the Agency did not allege any violation of Rule 1.03 of SWB-14.

For reasons outlined above, we find no suspended solids violation on August 18, 1970. We think, moreover, that a single pH reading of 10.1, far less extreme than the repeated results on August 7, does not sustain a water pollution finding in light of the uncertainty of the tests performed.

3. September 18, 1970.

On this date the Agency collected two samples. The First was taken at 4:25 pm from the main channel of the Boneyard at a point located near the First Street Bridge, somewhat downstream from the sewer located on the west bank of the Boneyard, north of Green Street between Locust and First Streets. Laboratory analysis of this sample revealed readings of 10.1 pH and 18 mg/l suspended solids.

The other sample was taken from street water entering a storm sewer catch basin at the northwest corner of Healey and Locust Streets. Results of analyses showed 12.0 pH and 3,220 mg/l suspended solids.

As above we find no suspended solids violation; we cannot find the City violated any effluent standard on the basis of a sample of its influent. Indeed it is unclear whether we can deal adequately at present with discharges to storm sewers either at the inlet or at the outlet of the sewer. We should welcome a proposal for new regulations.

The pH test results here are even less reliable than on the earlier dates, since the bottle containing the sample was kept under artificial refrigeration for three full days before lab tests were run on its contents. Moreover, there was but one stream sample, and its pH was less extreme than on August 7. We think the pH evidence insufficient on September 18 and hence find no violation on that day.

4. September 21, 1970.

Three samples were taken on September 21, 1970: the first, at approximately 4:10 pm, was taken from street water entering a storm sewer catch basin at the northwest corner of Healey and

Locust Streets and lab analyses showed pH levels of 12.0 and total suspended solids of 1.060 mg/l (EPA Exhibit 21). The second sample was taken at 4:17 pm from the effluent being discharged from the twelve-inch tile located on the west bank of the Boneyard some eight feet north of the Green Street storm sewer tunnel. Laboratory analyses of this second sample showed a pH reading of 12.0 and 824 mg/l suspended solids (EPA Exhibit 20). The third and final sample taken on September 21, 1960 was taken at 4:18 pm at a point some eight feet upstream of the outfall from which the second sample had been taken, and tests results were 21 mg/l total suspended solids (EPA Exhibit 22). As correctly pointed out by the City, no samples whatsoever were taken downstream of the outfall.

The pH reading of 12.0 and suspended solids reading of 824 mg/l are extremely high, but here they came from an effluent sample. It is impossible to determine the effect such high readings would have on a stream without first knowing the amounts of discharges and the volume of dilution water. EPA v. Denny, #71-32 (August 30, 1971). In addition, while the suspended solid levels greatly exceeded the standards for treatment plants specified in Rule 1.08 (which, as we have noted, does not contain a pH standard), we are not here dealing with treatment plants, but rather with storm sewers. While a discharger cannot avoid these standards simply by having no treatment plant to handle waste sources of the type contemplated by the regulations, storm sewer discharges are not intended to be covered. And there were no samples taken below the outfall from which water pollution could be found.

Nevertheless, Alpha admitted in its Supplemental Answer that improper operation of its truck washout facility on September 21 caused a violation of Rule 1.08 and of Section 12(a), and the City agreed by stipulating (R. 599) that the statements in Alpha's Supplemental Answer were true. Furthermore, the evidence substantiates the Sec. 12(a) violation due to the white turbidity settling on the bottom (R. 363-4) traceable to the City's outfall.

Therefore, we find that excessive amounts of settleable solids entered Boneyard Creek from the City's sewers on September 21, 1970 polluting the creek under Sec. 12(a) of the Act, and that on the same date Alpha violated Rule 1.08 of SWB-14 and § 12(a) of the Act.

5. September 23, 1970.

The Agency took one sample on this date at 4:03 pm from water entering the same catch basin located at the northwest corner of Healey and Locust Streets. Results of lab analyses run on this sample showed pH levels of 11.8 and total suspended solids of 1,692 mg/l (EPA Exhibit 23). Since the only evidence offered by the Agency relates to water which went into the sewer

but not to that which went into the stream or to stream quality itself, we find no violation on this date.

6. September 30, 1970.

In support of its allegation of violations occurring on September 30, 1972, relating to a sewer located on the east side of the Fifth Street Bridge, the Agency introduced only one sample, taken from approximately two feet inside a twelve-inch storm tile bearing the designation "#22". Results of tests run on the sample were 65 mg/l total iron and pH of 5.6 (EPA Exhibit 24). A witness testified that the discharge was slightly red and contained particles of rust which settled rapidly and covered a portion of the stream bed for 10 to 15 feet downstream (R.386).

As we have already noted, in order to properly evaluate the effect of measured effluents, the Board must also be given some idea of the amount of dilution involved. Therefore, our observations concerning the pH level in the effluent on September 21, 1970, are equally applicable here.

There is no effluent standard for iron at the present time, except as a settleable solid, but we need not decide whether that applies here since these particles apparently settled on the creek bed to interfere with aesthetic uses of the Creek and aquatic life, causing pollution under Sec. 12(a) of the Act. But notwithstanding such finding, the City denies ownership of the tile in question, and since no proof was put forth by the Agency concerning such ownership, we must find that the Agency has not proved that any violation occurred on September 30, 1970. The Agency now concedes this point (Brief, p.4).

7. October 14, 1970.

With respect to its allegation that the City caused or allowed the discharge of waste waters from a sewer located at the southwest corner of Second and Springfield Avenue on October 14, 1970, in violation of law, the Agency offered one sample, taken some two feet beyond the point of discharge from the sewer. Test results showed a fecal coliform reading of 1,220,000 per 100 milliliters and BOD of 19 mg/l (E.P.A. Exhibit 25).

The E.P.A.'s witness testified that the fecal coliform test results were indicative of a discharge of raw sewage into the stream (R. 597). We believe that such an extremely high fecal coliform reading suggests the strong possibility of a severe health hazard. The water was polluted under Section 12. But there was no evidence to show that this stream condition was traceable to effluent from the City's sewers, and therefore we cannot find the City responsible.

8. February 18, 1971.

The Agency took one sample from the Creek on February 18, 1971 from approximately the same location as the sample of October 14, 1970. Test results showed a fecal coliform reading of 120,000 per 100 milliliters and BOD of 21 mg/l (E.P.A. Exhibit 26).

As on October 14, 1970, the high fecal coliform readings indicate a health hazard, but again there was no evidence tying this condition to the City's sewers.

Summary

In summary, we find the following:

1. August 7, 1970 - Water pollution under §§ 12(a) of the Act by virtue of extremely high and low pH and setteable solids;

2. September 21, 1970 - Water pollution under §§ 12(a) of the Act by virtue of setteable solids; violations by Alpha of Rule 1.08 and of §§ 12(a).

In addition to the specific instances of pollution found above both the City and the University have stipulated to the polluted nature of Boneyard Creek generally and to their part in its condition, although both disclaim legal responsibility in this proceeding. The stipulation signed by both (at p.3) states:

> The Boneyard has, for more than 40 years, been a polluted drainage ditch or water source unsuited for domestic, commercial, agricultural or recreational uses or to livestock, wild animals, birds, fish or other aquatic life. . . . A substantial portion of the polluted waters discharged into the Boneyard flow through various outlets of storm sewers owned by the City of Champaign. . . . The University of Illinois has contributed to the pollutional problems of the Boneyard by virtue of discharge from its Abbott Power Plant to the extent and manner and nature set forth in the alternative motion of the Board of Trustees of the University of Illinois to dismiss the Third Party Complaint for want of jurisdiction and in the affidavits and exhibits attached thereto. . . .

The affidavit of Mr. Kretschmer, Director of the University's Department of Plant and Services, concedes the necessity for control equipment to bring the power plant into compliance with the laws and regulations, reporting that its fiscal year 1971 budget request "included an item of $100,000.00 for installing the necessary equipment for treatment of the demineralizer waste waters of the Abbott Power Plant to insure that, when discharged, such waters would be of the quality prescribed by state and local water pollution laws and regulations." Moreover, on the basis of samples collected in April, 1970, the Sanitary Water Board on June 17 of that year informed the University that "a pollutional discharge is occurring from the Abbott Power Plant to a storm sewer system tributary to

the Boneyard Creek" in violation of statute (Letter of C.W. Klassen to V.L. Kretschmer, June 17, 1970). The University's response was to concur that "the results obtained from the samples collected during your investigation, in general, agree with information we have previously collected" and to promise to eliminate the problem (Letter of V.L. Kretschmer to C.W. Klassen, June 29, 1970). (Both these letters and the affidavit are appended to the University's Entry of Special Appearance of Third Party Respondent, the Board of Trustees of the University of Illinois, and Motion to Expunge and Strike or, in the Alternative, to Dismiss for Want of Jurisdiction.)

In short, we find that the University has conceded and never denied the existence of Boneyard pollution from its power plant and has committed itself to solving the problem. We further find that the City has conceded that material from its storm sewers contributes to the pollution of the Boneyard. To the issue of the City's legal responsibility for what comes from its sewers we now turn.

V.

Section 12(a) of the Act makes it a violation to "cause or allow" the discharge of any contaminants into the environment so as to cause water pollution in Illinois. The City points to the evidence that the City did not generate the waste but only transported it (R. 530) and to the stipulation signed by the Agency agreeing that

> In no instance has the City of Champaign originated, authorized, acquiesced in, licensed, or ignored any pollutional discharges into the Boneyard or failed to take any positive action to prevent any continued pollutional discharge of which it had knowledge or which has been called to its attention. (R. 614)

Citing the compilation Words and Phrases to the effect that "To 'allow' a thing to be done is to acquiesce in or tolerate; knowledge, express or implied, being essential" (Brief, p. 42), the City argues that because "if all illegal connections to the storm sewer were eliminated, as they are in the process of being so eliminated, no effort on the part of the Respondent could prevent pollution from storm water urban runoff," " to impose upon municipalities the duty to insure against the occurrence of such pollution is unthinkable." (Brief, p. 48).

To hold that the City has an obligation to take affirmative action to limit the pollution attributable to material flowing through its sewers, however, does not necessarily make the City an "insurer" that no such pollution will ever occur. It cannot be a complete defense that the City did not itself generate any wastes or discharge anything into its own sewers; so to hold would absolve any municipality from the need to treat domestic sewage deposited by others into its sanitary sewers, a plainly untenable proposition. We think the City, by undertaking to carry storm waters from lands within its borders, assumed a certain duty to avoid unnecessary pollution as a result. Indeed in the practical

sense, if not in the legal, the City has accepted this principle, for it has taken action on numerous occasions, according to its own statement, to prevent others from dumping unauthorized pollutants into its storm sewers; its stipulation, quoted above, stresses that the City has never failed "to take any positive action to prevent any continued pollutional discharge of which it had knowledge or which has been called to its attention."

We believe this principle is embodied in the statutory term "allow." As the Agency says in its brief (p. 12), "To allow an act is generally an act of omission and not commission. People v. Harnson, 170 N.Y.S. 876, at 877, 183 App. Div. 812. The verb denotes an abstinence from prevention. Board of Education v. Board of Education, 3 Ohio S. & C.P. Dec. 70 at 71." We have consistently so held in regard to the identical word "allow" in connection with the statutory ban on open burning (Environmental Protection Act, Section 9(c)). E.g., Environmental Protection Agency v. Amigoni, #70-15 (Feb. 17, 1971):

> An owner of a refuse disposal facility must be responsible for the actions of those whom he allows to dump refuse on his property. If such persons use open burning to dispose of their refuse on his facility, it will be presumed that such is allowed and consented to by the owner of the refuse facility. The owner of such a facility has a duty to supervise its operations and to stop open burning on his premises whether by himself or by those who he allows to do so.

Similarly, in Environmental Protection Agency v. Clay Products Co., #71-41 (June 23, 1971):

> As we held in EPA v. Cooling, #70-2 (December 9, 1970), the statute and the regulations are not limited to deliberate violations. Care must be exercised to prevent fires from occurring and to extinguish them if they do.

We believe these principles are equally applicable to water pollution. The use of the word "allow" expresses a legislative policy requiring affirmative action by the owner of such property as refuse dumps or sewers to prevent unnecessary pollution. This does not make him an insurer; it does not mean the Board will impose monetary penalties every time somebody pours oil into a city's sewer in the middle of the night. The question of technical and practical feasibility of control enters into the determination of a city's obligation here, just as it does in every other case under the statute (Sections 31(c), 33(c)). We will not require the City to do what is unreasonable; but we do hold that the statute requires it to do its level best to prevent pollution from its sewers. This conclusion is buttressed by the fact that the City, as owner, is in a far more advantageous position than is the Agency

to perform routine policing of its own sewer system. This is not to say, as the City argues, that the Agency is attempting by this proceeding to shift its own responsibilities to the City. The Agency remains ultimately responsible to see to it that the pollution laws are enforced. But the statute is quite clear that the Agency is not expected to go it alone: Section 44 specifies that "It shall be the duty of all state and local law-enforcement officers to enforce such Act and regulations. . . ." The battle cannot be won unless all levels of government cooperate to reduce pollution.

Defining the precise scope of a sewer owner's responsibility cannot be done in a single case. Preliminary guidelines, however, can be stated. Most clearly, it is the City's obligation to do what it can to prevent others from discharging inappropriate materials into its sewers. The enforcement of a sewer discharge ordinance, such as Champaign has, is one step in furtherance of this duty. It is not enough to take action after an instance of creek pollution has been brought to the City's attention; the City must not only correct what it knows about, it must also make an effort to find out what needs correction. It must police the creek itself to determine its condition; it must police the sewers to determine any illegal sources of pollution; it must then take corrective action, which may include the filing of complaints with this Board as well as local remedies.

In the case of the pollution caused by the University and by Alpha, the City has quite commendably traced and discovered the source of pollution and brought to us for appropriate action the parties responsible. However, the City's concession that the Boneyard is polluted as a result of its sewers creates an obligation to institute a program of policing and enforcement, beyond any that was described in the record, to prevent further pollution from the sewers to the extent practicable. We do not hold that the City must necessarily terminate every bacterial discharge, or that it must run all its stormwater through a sewage treatment plant. The issues of practicable methods of reducing pollution can be addressed when the City reports to us its findings as to the causes of Boneyard's pollution. We shall therefore order the City to institute a program of surveillance and policing and to report to us within six months as to the sources of pollution and what can be done about them.

As for Alpha, that company has completed an improvement program that results in complete recycling of its wastewater and should eliminate further discharges. We commend the company for

its effective action, and we believe effective operation of the new system can be stimulated by the entry of an order forbidding future discharges.

As for the University, its intentions appear clearly in the direction of cleaning up the power plant problem as soon as it can get the appropriation. We urge the General Assembly to make that appropriation, and we think it appropriate to stress our concern by entering an order requiring the University to correct the problem within the shortest practicable time. Moreover, the University's plans at present, as described in the record, are not sufficiently specific; we shall order that the University tell us in the immediate future just what it intends to build, what effluents can be expected, and when completion will be achieved.

We do not find a case for imposing money penalties against any of the respondents at this time. Alpha promptly and effectively remedied its problem, which resulted from a one-shot accident; the University has done what it can until its moneys are appropriated; the City has in good faith pursued many problems created by others through the use of its sewers, and we think no significant purpose would be served by taking money from any of them now.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

It is the order of the Pollution Control Board that:

1. The City of Champaign shall, by no later than March16, 1972, submit to the Environmental Protection Agency and to the Pollution Control Board a report containing, but not limited to, the following:

    a) A description of the condition of the Boneyard and, to the extent reasonably determinable, the sources of its pollution;

    b) A description of steps taken by the City in the intervening period to deal with cases of pollution of Boneyard Creek;

    c) A detailed program for the policing of Boneyard Creek and of its sewers in order to prevent the discharge of unnecessary pollutants into the Creek through the Storm sewer system operated and maintained by the City;

    d) A detailed program designed to clean up and improve the quality of the water in Boneyard Creek within a reasonable but fixed period of time, to the extent practicable;

2. The University of Illinois shall, by no later than December 3, 1971, submit to the Environmental Protection Agency and the Pollution Control Board a report containing, but not limited to, the following:

   a) A program detailing the corrective measures to be taken in the future by the University to control the discharge of contaminants from the Abbott Power Plant into sewers tributary to the Boneyard Creek. Such plan shall include measures for the interim control of pH and settleable solids and shall indicate a fixed time schedule for the implementation and completion of the program.

3. Alpha Material and Fuel Company shall cease and desist the discharge of contaminants into the Boneyard Creek so as to cause or tend to cause water pollution of the Creek.

4. Upon receipt of the above required reports the Board will decide what further proceedings are appropriate.

I, Regina E. Ryan, Clerk of the Pollution Control Board, certity that the Board adopted the above Opinion this 16 day of September, 1971.

Regina E. Ryan