ILLINOIS POLLUTION CONTROL BOARD
May 3, 1971

ENVIRONMENTAL PROTECTION AGENCY	)	
	)	
v.	)	#70-39
	)	
JOHN T. LAFORGE COMPANY, INC.	)	
JOHN T. LAFORGE COMPANY, INC.	)	
	)	
v.	)	#71-18
	)	
ENVIRONMENTAL PROTECTION AGENCY	)	CONSOLIDATED

Fred Prillaman, for the Environmental Protection Agency

Williams, McCarthy, Kinley & Rudy, Rockford, for John T. LaForge Company, Inc.

OPINION OF THE BOARD (BY MR. LAWTON):

Complaint was filed by the Environmental Protection Agency against John T. LaForge Company, Inc.,Respondent, of Freeport, Illinois, alleging that between August 22, 1967 and June 30, 1970, Respondent caused or permitted "certain organic matter" from its rendering operation to pollute the Pecatonica River in violation of Section 10 of the Sanitary Water Board Act and Rule 1.08 of the Rules and Regulations of Sanitary Water Board SWB11.

The complaint further alleges that between July 1, 1970 and the date of filing the Complaint, Respondent caused, threatened or allowed the discharge of certain organic matter from its rendering operation into the river so as to cause water pollution in violation of Section 12(a) of the Environmental Protection Act and Rule 1.08 of SWB11, continued in effect by Section 49(c) of the Environmental Protection Act. The complaint asks for the entry of an Order directing Respondent to cease and desist the causing of water pollution and for assessment of penalties in the maximum amounts allowable on the dates of the alleged offenses.

Answer was filed by Respondent denying the allegations of the complaint. Respondent also filed a Motion to Dismiss alleging that the Environmental Protection Act violates the provision of the Constitution of the United States and the State of Illinois, that the Environmental Protection Act does not authorize the Board to impose fines or penalties but that if the Act is so interpreted, Respondent is deprived of its right to trial by jury and that the provisions allowing the imposition of fines constitues an ex post facto law and is unconstitutional.

Respondent filed a petition for variance asking for leave to continue its pollutional discharges until October 8, 1971, during which time Respondent would construct a sewer line to connect with one being constructed by Burgess Cellulose, whose sewer, in turn, will connect with the sewage treatment facilities of the City of Freeport.

Respondent states the foregoing program will bring it into compliance with all relevant statutory provisions and regulations. Recommendation filed by the Environmental Protection Agency recommends that the variance be denied. The Board ordered that a hearing be held on the variance which was consolidated by order of the Hearing Officer with the pending enforcement proceeding. The motion to dismiss by stipulation was taken with the case; hearing was held on the consolidated matter in Freeport on March 5, 1971.

Before considering the merits of the case, it is necessary to consider and dispose of Respondent's Motion to Dismiss, which we deny.

We have this day entered an Opinion and Order in Environmental Protection Agency v. Modern Plating Corporation, #70-38, in which most contentions raised by Respondent have been fully considered and answered. While Respondent's Motion to Dismiss is defective in failing to specify what provisions of the United States and Illinois Constitutions that it contends are violated by the Environmental Protection Act, we have previously commented on the usual arguments made in this regard; assertions of vagueness, improper delegation of legislative power and denial of due process. The Opinion in Environmental Protection Agency v. Granite City Steel Company, #70-34, disposes of these contentions. As we said there, "All of [these contentions] ignore the fundamental presumption of the validity of a statute. None of them has any merit...

> "The vagueness issue was settled beyond all possibility of dispute by the Illinois Supreme Court's quite recent decision in Metropolitan Sanitary District v. United States Steel Corp., 41 Ill. 2d 440, 243 N.E. 2d 249 (1968). There the Court upheld against the charge of vagueness a statute giving the District authority to sue "to prevent the pollution" of certain waters. Even though "pollution" was nowhere defined in the statute, the Court had no difficulty sustaining it, pointing out that the term "pollution" had long since acquired a common meaning in nuisance cases and adding that "such a statutory authorization need not delineate with scientific precision, the characteristics of all types of pollution."

With regard to improper delegation of legislative authority we noted:

> "Legislatures are far too busy, and the business of governing is far too intricate and detailed, for any one body to prescribe precisely the particular rules governing every aspect of human behavior that requires regulation. All the legislature can reasonably be expected to do is to set basic policy, subject to certain procedural and substantive safeguards, and exercise its inherent authority by setting aside administrative rules that do not comport with its policy."

While it is not evident that a due process issue is being raised by the Motion to Dismiss, nevertheless, we have previously held that the contaminants emitted by one polluter may be considered in connection with discharges from other sources over which Respondent has no control. As noted in Granite City Steel Company, "No one has a constitutional right to be the straw that breaks the camel's back." The statute expressly provides a defense for anyone who can show that compliance would impose an arbitrary or unreasonable hardship. Section 31(c). Accordingly, it is manifest that the statute does not apply in any case in which its application would be unconstituional.

Respondent argues that the Board lacks both statutory and constitutional power to assess money penalties. These contentions were analyzed at length and refuted in Environmental Protection Agency v. Modern Plating Corporation, supra. As to the alleged absence of statutory power to assess penalties, we noted that Section 33(b) of the statute flatly provides that the Board's order may include the imposition of money penalties. Answering the constitutional arguments raised, we held with extensive citation of Federal and state authorities that the power to impose money penalties does not constitute an improper delegation of judicial power to an administrative tribunal nor would the imposition of money penalties constitute a criminal sanction necessitating a jury trial.

Respondent asserts that charges of violations pre-dating the enactment of the Environmental Protection Act constitute ex post facto application of the law. This contention was squarely answered and refuted in Environmental Protection Agency v. J. M. Cooling, #70-2, entered December 9, 1970, where we said,

> "From the foregoing statutory provisions and regulations promulgated thereunder, it will be seen that the violations with which Respondent has been charged were violations of the law prior to the effective date of the new Environmental Protection Act and that the new Act keeps in force and effect all regulations previously promulgated by the Air Pollution Control Board, relative to air pollution and rules and regulations promulgated by the Department of Public Health, relative to refuse disposal sites. Any fines imposed for events pre-dating the new Act but constituting violations under the old statutory provisions cannot be deemed retroactive or ex post facto, since the fines imposed are within the statutory monetary limits as in each case provided. Both the offenses and the fines relating thereto were cognizable under prior law and the regulations promulgated thereunder were in force at all relevant times and are presently."

We now consider the substantive aspects of the case.

We find Respondent to have violated SWB5 on the dates alleged, and, order it to cease and desist the discharge of cyanide in any amounts from either of its plants. We find that Respondent's violation of SWB5 constitutes a violation of Section 12(a) of the Environmental Protection Act. We assess a penalty in the amount of $5,000.00 for the cyanide discharges. We find Respondent not guilty of violating Section 10 of the Sanitary Water Board Act, Technical Release 20-22, or Section 1.05 of Sanitary Water Board SWB11. Technical Release 20-22 is a criteria document promulgated by the Technical Secretary of the Sanitary Water Board but never adopted by the Board as a regulation and lacking the attributes of an enforceable legal standard. Section 10 of the Sanitary Water Board Act prohibits water pollution, defined in the Act to require a showing that the discharges alleged are likely to create a nuisance or render such waters injurious to the public health or welfare. The record is devoid of any evidence manifesting that the discharges alleged would produce such results. SWB11, Section 1.05 is a Water Quality Standard and not an Effluent Standard. Since the only tests conducted were of water from Respondent's sewer and not from the river, there is no evidence in the record to support a Water Quality Standard violation, irrespective of what the effluent measurement may have been.

We grant the variance requested by Respondent to permit concentrations of chromium, copper and zinc in its effluent to September 30, 1971, subject to the terms and conditions hereinafter provided in the decretal portion of this Opinion.

Modern Plating Corporation, employing approximately 180 employees and having a $15,000,000.00 payroll, operates two plating plants in Freeport, pumping the effluent from each of its operations into the Pecatonica River at a rate of 500,000 gallons a day. It processes between 2-1/2 and 3 million pounds of raw material each month, consisting principally of formed carbon steel parts processed through electroplating solutions for decorative and corrosion protecting purposes. The principal operation of Respondent is conducted at the "new" plant acquired in 1962. The so-called "old" plant represents approximately 10% of Respondent's production. Waste water containing cyanide and heavy metals employed in Respondent's plating operation are discharged into privately-owned sewers which, in turn, discharge into the Pecatonica River.

count. The permissible limit is a measurement of 400 per 100 milliliters. All measurements taken for all years in question were enormously in excess of this limitation, the lowest being 2,000 and the highest measured on October 20, 1970 in the amount of 9,900,000 per 100 milliliters. According to Mr. Lindstrom, witness for the Environmental Protection Agency, the discharge of the plant had a population equivalent of 555 people with a waste volume of 60,000 gallons per day (R80-81). The SWB11 schedule lists Respondent as having provided treatment lagoons with construction of additional lagoons to be commenced in July of 1969. The evidence shows that Respondent has no lagoons presently on its property nor under construction. It has failed to take any steps to bring itself into compliance, neglecting even to install minimum chlorination facilities, and continues in violation of all effluent standards except PH down to the present date.

SWB11 effluent standards of BOD of 20 milligrams per liter and of suspended solids of 25 milligrams per liter are in consideration of the Pecatonica River being a stream with a minimum 2 to 1 dilution (R83). SWB11 categorizes the Pecatonica River for fishing, boating, recreation, including full body contact, as well as industrial water supply. The stream quality must meet all criteria for all uses except public water supply. Among other things, the Pecatonica River is a primary recreation stream. High coliform count indicates the likely presence of pathogenic bacteria and virus in the water which have attributes of danger to persons using the water for primary recreation. It should be noted at this point that Section 1.08 of SWB11 is an effluent standard as distinguished from Section 1.05 which is a water quality standard. The significance of this difference relates to the propriety of measurements made in the Respondent's sewer as distinguished from measurements made in the river itself.

In Modern Plating we noted that where a violation is asserted in a water quality standard, the measurement must be made in the river. However, where the alleged violation is of an effluent standard, a test made in the Respondent's sewer is appropriate. The evidence is undisputed that Respondent has been a flagrant violator of the effluent standards applicable to BOD, ODI, suspended solids and coliform, nor does it appear that any effort has been seriously pursued to install chlorination facilities which have the capability of reducing fecal coliform to the required limits. Respondent's efforts, or the lack thereof, to control its pollutional discharges, cover a substantial period of years, but are impressive only by their lack of achievement. Communications from the State Sanitary Water Board as early as 1963 notified Respondent of the need to take affirmative steps to reduce its pollutional discharge. According to Edward LaForge, President of Respondent "actually there was very little done, I will have to admit that". (R.119.) Outside of the construction of the septic tanks, the first in 1937 and the second in 1950, Mr. LaForge conceded that they had done nothing except keep the place as clean as possible. He conceded his negligence with regard to the letters from the Sanitary Water Board in 1963 and 1966.

W. T. Nieman, a registered professional engineer, testified with regard to the proposed channel changes contemplated for the Pecatonica River and his work on proposals for Respondent's pollution abatement. For the last 40 years, consideration has been given to a realignment of the Pecatonica River. When originally proposed, channel realignment would entail the taking of a portion of the LaForge property, which area was under consideration for erection of sewer treatment facilities. However, in June, 1966, Respondent was aware that this land would not be taken (R.204). Nieman was employed by LaForge in 1963 with the view of developing plans for a sewage treatment program. The plan for a holding lagoon system was developed and submitted to Respondent in March of 1968 although this report dealt principally with the proposed river channel change at the LaForge property. Subsequently, plans for preparation of waste lagoons were developed and submitted to the State Sanitary Water Board which received the Board's approval. See Res. Ex. 6.

A proposal was made for the construction of this system which resulted in a bid of $113,000.00 which was rejected by Respondent. Nieman next designed a sewage treatment facility which contemplated the installation of a waste treatment operation consisting of grease collectors, a lift station, two anaerobic lagoons in series and chlorination of all discharge to the Pecatonica River. This program was likewise approved by the Sanitary Water Board and plans and specifications prepared. Bids ranging from $96,000.00 to $149,000.00 were received, which again were rejected by Respondent in September of 1970. The latest program prepared by Mr. Nieman comprised a set of plans and specifications for construction of a sanitary sewer line connecting the Respondent's treatment facilities to the Sanitary sewer constructed by Burgess Cellulose Company, which, in turn, would connect with the city sewer to be constructed. This program contemplated connection with Respondent's grinding facilities and grease collection operation. Manholes would be constructed at 300 foot intervals and a pumping station installed. It is this proposed construction that is the subject matter of Respondent's variance request.

At the request of the hearing officer, Respondent furnished more detail on the status of the construction, both of the city extension and the tie-in by Burgess Cellulose. It appears that the city construction will be completed well before the October date to which Respondent seeks its variance. Likewise, correspondence from Minnesota Mining and Manufacturing, the parent company of Burgess Cellulose, states that completion of its portion of the sewer construction will be no later than June 1, 1971. Mr. Nieman states that the Respondent's portion of construction will be completed in September of 1971. Accordingly, it appears that the construction program by all three entities involved,City of Freeport, Burgess Cellulose and Respondent, will be achieved before October 1, 1971.

Evidence of witnesses McGregor, Andregg, Franzmeier and Burchardt (R168,174,180,184) all sustain the position expressed by Respondent that it performs a necessary function in the Freeport area by picking up the dead carcasses and disposing of them. Alternative methods of disposal, particularly that of burying the dead animals, do not appear desirable substitutes. From the state of the record, the following facts emerge:

Respondent has been conducting its animal pick-up and rendering service in the Freeport area for 34 years, during which time it has been virtually oblivious of its obligation to eliminate its pollutional discharge into the Pecatonica River. These pollutional discharges have been in excess of the legal limits for oxygen-demanding waste and suspended solids and inexcusably high in fecal coliform. While chlorination facilities could have reduced the coliform count to permissible limits, no efforts in this direction have been demonstrated. In more recent years, particularly since 1963, when the State Sanitary Water Board expressed its concern at the manner in which Respondent was conducting its operation, some consideration was given to methods to control the pollutional discharge. However, in each instance, the plans were rejected because of cost. Had the State Sanitary Water Board exercised the same diligence in seeking compliance as is now being demonstrated by the Agency, it is likely that treatment facilities would have been installed before now. SWB11 states that Respondent has provided for treatment lagoons and additional lagoons will be under construction in July of 1969. The facts do not bear out either the presence of lagoons or any remedial construction, by any date. There is no dispute that Respondent's discharges violated SWB11 and it is hereby ordered to cease and desist such pollutional discharges except as permitted pursuant to the terms of the variation hereby granted. The indifference that Respondent has shown in the past to fulfill its obligations to the State by abating its contamination of the Pecatonica River make it difficult to grant a variance at this time. While Respondent employs approximately 18 people, the hardship that would be imposed by the closing of the plant would not be on the company itself, but on the community generally in not having the facility furnished by Respondent in picking up the dead carcasses. However, in granting the variation, we will insist that chlorination facilities be installed to reduce the fecal coliform to the limits provided in SWB11 of 400 per 100 milliliter. We cannot sanction a continuing indifference to this violation.

Normally, we would require as a condition to the variance a provision that Respondent would not increase the strength or quantity of its pollutional discharges during the period of the variance. Because of the unique aspects of Respondent's operation, the demonstrated need for its services in the community and the possible epidemic consequences of any limitation imposed on its operation, we do not impose such a requirement in this case.

The evidence sustains violation of SWB11, Section 1.08 and therefore of Section 12(a) of the Environmental Protection Act. However, because of the Agency's failure to take measurements in the river we are unable to find a violation of Section 10 of the Sanitary Water Board Act.

Respondent is ordered to cease and desist its pollutional discharges into the Pecatonica River except in conformance with the terms of the variation hereinafter provided. A penalty for Respondent's casual indifference to the law is imposed in the amount of $1,500.00. Respondent's failure to take any steps to abate its pollutional discharges constitutes an egregious violation for which a much heavier penalty would be appropriate. However, the evidence indicates that respondent is in a precarious financial condition and the amount of the penalty is set accordingly. (cf. Greenlee Foundries, Inc. v. EPA, PCB 70-33)

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

IT IS THE ORDER OF THE POLLUTION CONTROL BOARD THAT:

1. Respondent is found to have violated SWB11, Section 1.08 and Section 12(c) of the Environmental Protection Act on the dates stated in EPA Ex. 9, and is hereby ordered to cease and desist its pollutional discharges in excess of the amounts permitted in the variance as in paragraph 3 hereinafter provided.

2. A penalty is assessed against LaForge in the amount of $1,500.00 for violation of SWB11 and Section 12(a) of the Environmental Protection Act.

3. Respondent is permitted to discharge its effluent into the Pecatonica River until October 8, 1971, in excess of the limits provided in SWB11, Paragraph 1.08, subject to the following terms and conditions:

   (a) fecal coliform concentration shall not exceed 400 per 100 milliliter.

   (b) Respondent shall complete on or before May 28, 1971, construction of an effluent lagoon to accommodate 1/2 hour retention of its effluent discharge, subject to plans and specifications to be approved by the Environmental Protection Agency, and provide chlorination to assure compliance with the effluent limitations provided for in paragraph (a) above.

(c) Respondent shall diligently pursue its program of construction of a sewer line to connect with the Burgess Cellulose sewer line which will, in turn, connect into the sewage treatment facilities of the City of Freeport, so that no effluent shall be discharged into the Pecatonica River.

(d) Respondent shall post with the Environmental Protection Agency a bond or such other security as shall be approved by the Agency in the amount of $25,000.00 which shall be forfeited to the State of Illinois in the event Respondent continues the operation of its plant after October 8, 1971, in violation of any of the provisions of the Environmental Protection Act or the relevant regulations.

(e) Respondent shall report to the Board and to the Agency when it has installed its chlorination facilities which shall be inspected by the Agency within 10 days thereafter, and report made to the Board with regard to the effectiveness of such facilities. The Respondent shall report to the Agency and the Board on June 1, 1971 and every month thereafter on the status of construction of all sewer facilities being installed by the City of Freeport, the Burgess Cellulose Company and Respondent.

Violation of any of the foregoing terms shall result in a revocation of the variance.

I, Regina E. Ryan, do hereby certify that the above Opinion and Order was approved by the Board on the 3 day of May, 1971.

Clerk of the Board