ILLINOIS POLLUTION CONTROL BOARD
September 8, 1988

CITY OF EAST MOLINE,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 86-218
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

MR. ROY M. HARSCH OF GARDNER, CARTON AND DOUGLAS APPEARED ON BEHALF OF PETITIONER;

MR. E. WILLIAM HUTTON OF IEPA APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J.D. Dumelle):

This matter comes before the Board upon Petitioner's December 19, 1986, Petition To Appeal Permit Denial regarding 35 Ill. Adm. Code 304.124. Discovery having been conducted, this matter was sent to hearing on August 28, 1987. Only two weeks previous, on August 14, 1987, Petitioner filed a Petition For Variance, docketed as PCB 87-127 and requested a continuance in this matter. Briefs were ordered and submitted on December 10, 1987 and January 11, 1988. This matter is ripe for final adjudication.

MOTION TO CONTINUE

On August 14, 1987, Petitioner filed a Motion To Continue This Proceeding Pending The Outcome Of Petitioner's Petition For Variance PCB 87-127. Basically, Petitioner's justification is as follows:

> "East Moline retained a consultant, Huff & Huff, Inc., to study the effect of the discharge from the water plant on the receiving stream in the Mississippi River. Allowing East Moline's motion for continuance would have allowed the record from the variance hearing regarding this issue to be incorporated in this record. Mr. Huff will testify at the variance hearing and explain and supplement the results of study which East Moline attempted to introduce at the hearing in this matter." Pet. Br. at 7.

The Motion To Continue is denied. This docket was initiated on December 19, 1986. The Petition For Variance was filed on August 14, 1987, only two weeks prior to the scheduled hearing. Pursuant to statute, notice of the hearing was published -- although the record indicates that the public did not participate. Discovery was complete and the matter was ripe for adjudication.

A scheduled hearing should not be continued indefinitely because an expert who is retained to speak in a collateral matter might say something favorable to Petitioner in that collateral matter. This docket is a permit appeal -- not a variance petition. A permit appeal involves different issues and proofs than a variance petition. Additionally, no one has explained why the experts from the variance petition could not testify in this permit appeal. To the extent that a scheduling problem is involved, the problem is of Petitioner's making. Petitioner had eight months in which to file a motion for continuance and this was not done. The Hearing Officer's Order denying the motion to continue is affirmed.

EVIDENTIARY MATTERS

At hearing, Petitioner sought to introduce three items of evidence which were not made available to the Illinois Environmental Protection Agency (Agency) when reviewing Petitioner's permit application. The hearing officer disallowed the proffered evidence, holding that because the data was not provided to the Agency at the time of making its decision, the evidence was beyond the scope of review, and therefore, inadmissible. It is well settled that the burden is on an applicant to justify issuance of a permit; the Agency reviews documents provided by the applicant and then determines whether the application and supporting documents demonstrate that the Environmental Protection Act (Act) will not be violated if the requested permit is issued. Pursuant to this scheme, the sole issue at a permit (denial) appeal hearing is whether the application package submitted to the Agency demonstrated compliance (with the Act) at the time it was submitted to the Agency. Ill. Rev. Stat. 1986, ch. 111 1/2, par. 1039(a); IEPA v. IPCB, (1984) 118 Ill. App. 3d 772, 455 N.E.2d 189. The burden on a petitioner who contests the IEPA's denial of an NPDES permit is no different; the applicant must show that the data provided to the Agency was sufficient to demonstrate that the Environmental Protection Act would not be violated if the requested permit were issued.

Petitioner has argued that in an NPDES permit appeal it may introduce data not made available to the Agency when reviewing the permit application. Petitioner is mistaken. This Board's review of an Agency decision to deny an NPDES permit is no different in scope than other routine permit appeals.

When a permit (denial) appeal is taken, this Board sits in review of that Agency decision. The issue at hearing is whether the Agency decision was correct, given the data provided by Petitioner in the application. If the Agency has imposed special permit conditions which the applicant desires to contest, this Board sits in review of the Agency's special permit conditions. In both cases the applicant must demonstrate that the Agency's decision is in error because the data submitted proved that no violation of the Act would occur if, (1), the permit were issued, or, (2), if the permit were issued without the special conditions.

The hearing to contest permit denials, or to contest special permit conditions, is an adversarial hearing, providing for discovery, motions, cross-examination of adverse witnesses, argument, and briefs. It is this hearing which protects the due process rights of the applicant within the context of the Agency's decision to deny a permit or impose special permit conditions. But it must be remembered that it is the Agency's action which is being appealed; and, consequently, the framework for, and scope of review of that Agency action is established at the moment the Agency's action occurs.

The relative burdens of the parties at a permit appeal (non NPDES) are well established:

> "... A Petitioner ... must persuade the Board that the activity in question will not cause a violation of the Act or Board regulations. In response, the Agency may contest the facts in the application or it may choose to do either or it may choose to present nothing. ... the issue is simply whether or not, in the sole judgement of the Board, the applicant has submitted proof that if the permit is issued, no violation of the act or regulations will result. [the] propriety of this ... procedure was reviewed and upheld by the Appellate Court, Third District in SCA Services, Inc. v. IPCB &EPA, 71 Ill. App. 3d 715, 389 N.E.2d 953." EPA v. Allaert Rendering, Inc., PCB 76-80, September 6, 1979.

In a similar case the Board held as follows:

> "Under the statute, all the Board has authority to do in a [permit appeal] hearing ... is to decide after a hearing ... whether or not, based upon the facts of the application, the applicant has provided proof that the activity in question will not cause a violation of the Act or the regulations."

Oscar Mayer & Co. v. EPA, PCB 78-14, June 8, 1978.

Clearly, the burden is on the applicant; and at hearing the applicant's burden is to demonstrate that the Agency's denial of a requested permit (or imposition of special conditions) is simply not justified given the data provided by the applicant. At a hearing before the Board to contest denial of a permit application, the sole question before the Board is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Environmental Protection Act would have occurred if the requested permit had been issued. IEPA v. IPCB, (1984) 118 Ill. App. 3d 772, 455 N.E.2d 189; Joliet Sand & Gravel Company v. IEPA & IPCB, (1987) 163 Ill. App. 3d 830, 516 N.E.2d 955 (3rd Dist. 1987).

In reviewing the Agency's permitting decisions, the Board considers the data submitted with the application package. But, because the Board's role is one of reviewing the Agency's action, the Board does not consider new facts and circumstances which change after the date of decision; nor does the Board consider data submitted to the Agency after the permit application is denied (this is the province of a new permit application). The Board's duty is to review the Agency's decision within the context of the data provided by the Petitioner in its permit application, and determine whether this decision was correct or incorrect. The Illinois Supreme Court has held that the Agency's permitting decisions are not presumptively correct upon review by this Board. IEPA v. IPCB (1986) 115 Ill. 2d 65, 503 N.E.2d 343.

Thus, by placing itself in the Agency's position -- equipped with the same application data possessed by the Agency when the decision was made -- this technically qualified Pollution Control Board decides whether the permit application should have been granted. If the answer to this is yes, the Board can either order the permit issued or unilaterally strike the improper special permit conditions. The Board, by placing itself in the Agency's position, decides anew whether the permit should have been issued. In this sense, the Board is making its determination anew; afresh; a second time; de novo. Black's Law Dictionary. 4th Edition. In practical terms, all this really means is that the Board does not recognize the Agency's decision as presumptively correct. The Board does not grant deference to the Agency's decision.

In this context the Board is making a new, fresh, de novo determination regarding the Agency's decision concerning the sufficiency of the permit application package: The question is, did it justify issuance of a permit? The Board does not review Petitioner's permit application; the Board reviews the Agency's decision denying the permit application. Continuing the de novo metaphor, the Board considers anew whether the application

package submitted to the Agency demonstrated compliance with the Act and regulations. If the Board were reviewing the permit (rather than the Agency's decision) data would be submitted directly to the Board -- not via the record from hearing.

The Board does not, however, conduct a de novo review in the sense that it considers new evidence not previously presented to the Agency during its deliberation. Doing so would usurp the distinct function of the IEPA as the state permitting agency. Ill. Rev. Stat. 1987 ch 111 1/2 par. 1004 and 1039(a) IEPA v. IPCB (1986) 115 Ill. 2d 65, 503 N.E.2d 343.

The Board's general procedural rule governing NPDES permit appeals provides as follows:

TITLE 35: ENVIRONMENTAL PROTECTION
SUBTITLE A: GENERAL PROVISIONS
CHAPTER I: POLLUTION CONTROL BOARD
PART 105: PERMITS
SECTION 105.102: PERMIT APPEALS

b) NPDES Permit Appeals

* * * *

8) The hearings before the Board shall extend to all questions of law and fact presented by the entire record. The Agency's findings and conclusions on questions of fact shall be prima facie true and correct. If the Agency's conclusions of fact are disputed by the party or if issues of fact are raised in the review proceeding, the Board may make its own determination of fact based on the record. If any party desires to introduce evidence before the Board with respect to any disputed issue of fact, the Board shall conduct a de novo hearing and receive evidence with respect to such issue of fact." 35 Ill. Adm. Code 105.102(b)(8).

Petitioner argues that this provision of the Board's procedural rules constitutes authority to submit new data to this Board, data which was not submitted to IEPA with the application package. Petitioner is mistaken.

As a threshold matter it should be noted that the Pollution Control Board is not the permit issuing agency of the State of

Illinois; this task belongs to the Illinois Environmental Protection Agency. Ill. Rev. Stat. 1986 ch 111 1/2 par. 1004, 1039. There is nothing in the Act to indicate that the General Assembly intended to assign this task to the Board in the single category of cases involving NPDES permit appeals. Petitioner's suggested interpretation of the above-quoted rule is inconsistent with the statutory authority conferred on the IEPA to issue permits.

When the Board adopts substantive regulations it also issues an opinion explaining the regulations, the intent and its anticipated scope. On August 29 and September 5, 1974 the Board adopted the regulations set forth in R73-11 and R73-12, In RE: NPDES Regulations. On December 5, 1974, the Board issued its opinion explaining the rules, their intent and anticipated scope.[1] In explaining the sections concerning NPDES permit appeals, the Board explained the Rule's intent at pages 3,4 & 5 of the December 5, 1974 Opinion.

A review of the Board's Opinion demonstrates that the Board did not intend to create an exception to the General Assembly's separation of functions, nor did the Board believe it was doing so:

> "... the NPDES Regulation, as adopted, reflects the Board's determination to continue the basic fundamentals of the existing permit system ... the NPDES Program does not represent a radical departure from past permit practices." R73-11/R73-12, December 5, 1974, at p. 4.

The Board went on to discuss the tension between the federal scheme and Illinois' separation of functions into two agencies: the Pollution Control Board and the Illinois Environmental Protection Agency. In specifically addressing the question of NPDES permit appeals the Board posited as follows:

> "During the consideration of the NPDES Regulations three problems surfaced. These three problem areas were 1) What should be the nature of the Board review concerning Agency issuance or denial of NPDES Permits?, 2) What should be the form of any hearing at the Agency level?, and 3) ..." R73-11/73-12, 12/5/74 at p. 5.

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[1] In 1974 the Board utilized a different numbering system in indexing Board regulations. However, the changes in numbering systems do not alter the substance of the regulations: current Rule 105.102(a)(8) is identical in substance to former rule 502(b)(8), which was adopted in rulemaking Dockets R73-11 and R73-12.

During the Board's consideration of the (then) proposed rules on NPDES permits, the IEPA had sought to alter the system concerning permit appeals. During the negotiations on the regulation, the Agency sought to establish a system whereby the Board would not consider a permit denial anew in an NPDES permit appeal. The Agency sought to have its permitting decisions afforded a presumption of correctness, upon appeal to the Board: "... the Agency's amended and original proposals provided for less than de novo review at the Board level of the Agency's decision." Op. December 5, 1974, p. 5. Consequently, the Agency sought to change the Board's role into one of reviewing the Agency's decision (to deny or impose special permit conditions) according to a higher standard of review, thereby establishing the Agency's position as presumptively correct in NPDES permit appeals -- as noted above this was the position advocated by the Agency during that rulemaking proceeding.

In rejecting the Agency's proposal the Board retained the same standard of review for NPDES Permit Appeals as for most permit appeals: "The Board interprets the Act to require a complete de novo review of all contested provisions of the Agency's decision to issue or deny an NPDES Permit. Op. 12/5/74 p. 5. Twelve years later this position was echoed by the Illinois Supreme Court IEPA v. IPCB, 1986, 115 Ill. 2d 65, 503 N.E.2d 343. The Board may review the Agency action de novo -- but it does not render a decision on a new permit application package. Also contrary to the language of 35 Ill. Adm. Code 105.102(b)(8), the Board may not afford Agency findings of fact a prima facie presumption of correctness.

The use of the term 'de novo' in the regulation and directly above is most unfortunate. 'De novo' is a term of art and in the administrative law area it connotes a particularized concept: a new and fresh decision on the merits. However, as seen above, the term de novo (or anew) merely describes the Board's lack of deference on the IEPA's technical/engineering conclusions regarding the sufficiency of a permit application and whether that application demonstrates compliance with the Act and Board regulations. Allowing an applicant to introduce new data never submitted to the permitting agency would be contrary to the expressed intentions of the Board, as set forth above; and doing so would directly conflict with the General Assembly's charging IEPA with the duty to review, decide and issue (or deny) requested permits. It is fundamental that the source of power or authority of an administrative agency must be found in the statute creating it. Village of Hillside v. John Sexton Sand & Gravel Company, 105 Ill. App. 3d 533, 434 N.E.2d 382 (1st Dist. 1982). The Board is not empowered to usurp the General Assembly's separation of functions.

Among its seven Members, the Pollution Control Board consists, inter alia, of a mechanical engineer, microbiologist, entomologist, chemist and geologist. The Pollution Control Board currently retains a scientific and technical staff of two persons. The Pollution Control Board is not the State agency charged with making initial permit decision. The structure of Pollution Control Board demonstrates that it was created as a rulemaking body and adjudicating body sitting in review.

It is the Illinois Environmental Protection Agency with its legions of engineers and specialists who must make an initial determination as to the sufficiency of a permit application. Nowhere in the Act is a permit applicant directed to tender application data to the Board for an initial determination of sufficiency. The Board's function is to sit only in review of Agency decisions based upon the record presented; thus evidence not submitted to the Agency is not relevant in a permit appeal hearing.

Petitioner cites Dean Foods Company v. PCB, 143 Ill. App. 3d 322, 492 N.E.2d 1344 (2nd Dist. 1986) for the proposition that at an NPDES Permit Appeal Hearing, Petitioner may submit data not previously supplied to the IEPA in the initial permit application. Clearly Dean Foods holds that Petitioner may do so. The Dean Foods decision is in error.

Without delving into the facts giving rise to the Dean Foods decision, the Board notes that the Second District held that new information regarding "Best Degree of Treatment" may be submitted to the Pollution Control Board at an NPDES permit (denial) appeal -- even though this data was not originally provided to the IEPA.

Notwithstanding the language of 105.102(b)(8) concerning "de novo review", as indicated above, the Board is not the State's permitting agency and does not review applications for permits. The structure as created by the General Assembly establishes the Board as a technically qualified board of review. And in performing this task, the Board considers all data provided to the Agency and decides afresh, anew, de novo, whether the application package and data submitted therewith is sufficient to demonstrate compliance with the Act. If, in the Board's qualified opinion the answer is yes, the Board orders the IEPA to issue the permit (or strike unnecessary special conditions); if the Board decides the Agency was correct -- the application package did not demonstrate compliance with the Act and regulation -- the Board affirms the Agency action.

In either case the Board sits in review of the Agency's decision. In so doing the Board examines the data possessed by the Agency at the time it made its decision -- data not in the Agency's possession is not contained in the Board's record because it is immaterial to a review of the Agency's decision.

In the case at issue, Petitioner sought to introduce its Exhibits No.'s 3, 4 & 5. The Hearing Officer excluded these exhibits because they were not provided to the IEPA as part of the regular permit application package. R. 39, 47. The Hearing Officer was correct. His ruling is affirmed. Documents not provided to the Agency are not admissible in a hearing where the entire purpose is to review that very Agency decision. Although there may be heretofore unidentified exceptions to this general rule, in a case such as this, substantive evidence supporting the application of a Petitioner must be tendered to the Agency first. Otherwise, it is immaterial to this Board's review of the Agency's decision to deny the requested permit. The Board's review of an Agency decision to deny an NPDES permit is no different in scope than other routine permit appeals; and the scope of review is limited to data provided to the Agency at the time of making its decision.

BACKGROUND

The City of East Moline is a community of approximately 22,000 residents and 100 businesses in western Illinois. East Moline owns and operates a public water supply treatment plant (WTP) located in Rock Island County, East Moline, Illinois. Raw water is withdrawn from the Mississippi River and is treated via chemical flocculation, sedimentation, filtration and disinfection; lime and alum are used as softening and flocculation agents. Solids generation averages approximately 7,000 lbs/day consisting of the following:

Aluminum Hydroxide	12%
Calcium Carbonate	71%
River Turbidity	17%

Those solids which separate out in the sedimentation basin are discharged several times per week to a drainage ditch. Filter backwash is also discharged to this same 16,000 ft. drainage ditch, which eventually flows back to the Mississippi River.

Treatment of the raw water begins at the pumping station where powdered activated carbon is added and then pumped to two separate rapid-mix units and on the flocculation units. Next the water is directed to rectangular clarification basins where settling occurs. Treated water from the clarification units is combined. The water is then filtered in rapid sand filters and directed to a clearwell where it is stored prior to being pumped into the distribution system. Pet. Ex. No. 2.

As noted above, filter backwash from the rapid sand filters and sludge from the clarification units and drain lines from various process units is discharged from the water plant into a drainage ditch. The drainage ditch flows into a storm sewer which then flows into the Mississippi River. Pet. Ex. No. 1.

Discharge from the water plant is approximately 176,000 gallons/day, with suspended solids concentration limits of 20,000 mg/l -- but the average is 10,000 mg/l. Pet. Ex. Nos. 1 & 2.

Additional discharge from the water plant consists of backwash from the rapid sand filters. These filters are backwashed daily resulting in a discharge of 3,800 gal/min for 30 minutes. Sedimentation basins are flushed every other day which results in a solids discharge of approximately 1,000 gal/min. The total suspended solid load to the Mississippi River is approximately 7,000 lbs/day.

PERMIT DENIAL

Petitioner challenges the Agency's denial of a NPDES permit stating that the current regulation is invalid as applied to Petitioner because the regulations are arbitrary and unreasonable.

35 Ill. Adm. Code 304.124(a) prohibits discharge of effluent containing total suspended in excess of 15 mg/l. The regulation was promulgated on December 24, 1981.

In applying for the desired permit, Petitioner tendered data which demonstrated that total suspended solids from Petitioner's treatment plant are between 10,000 and 20,000 mg/l. Pet. Ex. 1 & 2.

By its explicit terms 35 Ill. Adm. Code 304.124(a) prohibits the discharge of effluents in concentrations beyond those enumerated in Section 304.124(a) . 35 Ill. Adm. Code 301.275 defines effluent, inter alia, as a wastewater. 35 Ill. Adm. Code 301.425 defines wastewater, inter alia, as an industrial waste. And 35 Ill. Adm. Code 301.285 defines industrial waste as follows:

> "Industrial Wastes: any ... liquid ... resulting from ... the development, processing or recovery ... of any natural resource."

The City of East Moline's water treatment plant takes raw water from the Mississippi and treats this water for use in homes and businesses. Whether this processing is called development or processing, or recovery, the fact remains that water from the Mississippi is a natural resource and East Moline's handling of this raw water falls within 35 Ill. Adm. Code 301.285.

Thus, because it is processing an industrial waste, the City of East Moline is regulated by the contaminant limits of 35 Ill. Adm. Code 304.124(a). This being the case there are only two issues to be addressed: No. 1, whether Petitioner's application package demonstrated that its plant will meet the standards and

No. 2 whether the Petition may succeed in obtaining a permit by alleging that the regulation is invalid as applied to the City of East Moline.

The Board will address both these issues serially, beginning with the latter: Whether Petitioner may obtain a permit from this Board by alleging that a regulation is "invalid-as-applied" to the City of East Moline.

There is no cause of action before this Board allowing for challenging a regulation "as applied" to an individual. Merely labelling an action as such does not create a new cause of action.

Petitioner argues that The Celotex Corporation v. IPCB, 1983, 94 Ill. 2d 107, 445 N.E.2d 752 stands for the proposition that it may attack a regulation as applied. Such reliance on Celotex is misplaced. A thorough reading of Celotex makes clear that a party -- any party -- does not waive its right to challenge an administrative agency's regulation as being improperly promulgated simply because such challenge was not initiated within 35 days of the (purported) promulgation of the rule. A regulation which is improperly promulgated is not cured of this defect by the passage of time and therefore should not be enforced by administrative agencies. Petitioner's "as-applied" language does not exist anywhere in the court's opinion in Celotex.

To the extent that Petitioner urges that Village of Cary v. Pollution Control Board, 82 Ill. App. 3d 793, 403 N.E.2d 83 (2nd Dist. 1980), creates such a cause of action, it is mistaken. The Cary case involved a request for variance, and the proper issues to be considered at such a hearing. The Cary case did not involve a permit appeal (as is this case) and nothing in the language of Cary indicates this to be the case. If Petitioner seeks to challenge the regulation pursuant to its request for variance (PCB 87-127) the Board will address that issue at that time. But in this proceeding (PCB 86-218) the sole issue is whether the permit application package demonstrated compliance with the Act and Board regulations. Citations supra.

Although the Cary and Celotex cases are eight and five years old, challenges to the validity of regulations, 'as applied' have only recently arisen. In addition to the above analysis explaining Cary and Celotex the General Assembly has enacted legislation precluding subsequent attacks on the validity of a regulation. In specific on June 27, 1988 the General Assembly passed HB-1834 which was signed by the Governor on July 14, 1988. The enacted language is as follows:

> "Action by the Board in adopting any regulation for which judicial review could

> have been obtained under Section 41 of this Act shall not be subject to review regarding the regulation's validity or application in any subsequent proceeding under Title IIII, Title IX or Section 40 of this Act."

This amendment, clearly seeking to preclude subsequent "as applied" challenges to regulations, is clear indicia that the legislature never intended the sort of proceeding now sought by petitioner. Subsequent enactments may be used to help determine the legislature's original intent, particularly where the amendment is enacted shortly after the interpretation of the statute it amends comes into dispute. Central Illinois Public Service Company v. IPCB, 116 Ill. 2d 397, 507 N.E.2d 819 (1987).

In sum, Petitioner may not now challenge the validity of the regulation claiming that such is invalid as applied to the City of East Moline.

There is no doubt that Petitioner could timely seek a hearing to determine the validity or applicability of the regulation pursuant to Ill. Rev. Stat. ch. 111 1/2 par. 1029 which states as follows:

> "Any person adversely affected or threatened by any rule or regulation of the Board may obtain a determination of the validity or application of such rule or regulation by petition for review under Section 41 of this Act."

However, from the pleadings, evidence and briefs it is apparent that Petitioner is not seeking a declaration of the validity or applicability of the statute; Petitioner is seeking to have the regulation declared invalid as applied to the City of East Moline.

Petitioner has argued as follows:

> "The 15 mg/l TSS standard contained in Section 304.124(a) of the Board's water pollution control rules is invalid as applied to East Moline's water plant because the rule imposes an arbitrary and unreasonable hardship on East Moline." Pet's. Br. p. 11.

Petitioner has mistakenly pleaded the elements for the request of a variance -- not a permit appeal. While the Board notes that Petitioner has filed a Petition For Variance (PCB 87-127) that action is not a part of this docket. The issue of hardships is irrelevant in this action. Petitioner chose to appeal the Agency's denial of a request for permit; hence this

permit appeal. And the sole issue before the Board in a permit appeal hearing is whether the applicant submitted data to demonstrate compliance with the Act Oscar Mayer & Co. v. EPA, PCB 78-14. decided June 8, 1978, IEPA v. IPCB, (1984) 118 Ill. App. 3d 772, N.E.2d 189.

In answer to the question whether Petitioner may obtain a permit by alleging that regulation is invalid as applied, the answer is no. In order to obtain a permit, the applicant must demonstrate that issuance of the requested permit will not violate the Act.

Having held that there is no action before this Board allowing for the challenge of a regulation "as applied", the Board will now consider the sufficiency of Petitioner's case in chief.

Necessary threshold issues are whether the regulation was properly promulgated and whether the regulation governs the type of activity engaged in by Petitioner.

35 Ill. Adm. Code 304.124 provides as follows:

> a) "No person shall cause or allow the concentration of the following constituents in any effluent to exceed the following levels ...
>
> Total Suspended Solids 15.0 mg/l"
>
> * * * *

The Board adopted water quality standards (of which Section 304.124, supra, is a part) on January 6, 1972 in an Opinion and Order by (then) Chairman David Currie. The rule was properly promulgated and is, thus, valid.

The next question is whether the standard for total suspended solids (35 Ill. Adm. Code 304.124) regulates Petitioner's activity. This answer is apparent: The regulations regulate total suspended solids by imposing an upper limit of 15 mg/l; Petitioner's water treatment plant discharges water with an average total suspended solid count of 10,000 mg/l. Obviously, 35 Ill. Adm. Code 304.124, Total Suspended Solids, applies to discharges from Petitioner's water treatment plant.

Having found that the regulation was properly promulgated and that it regulates Petitioner's discharges, the Board now turns to the issue of whether Petitioner's application package and data demonstrates compliance with the Act. As noted above, if the application package demonstrated compliance with the Act, then the Agency decision (to deny) is in error and the Board will

order the Agency to issue the permit. If, however, the application package did not demonstrate compliance, then the Agency decision was correct and must be affirmed.

Based upon the hearing record and the evidence submitted Petitioner has failed to show that its permit application package demonstrates compliance with the Act. On the contrary Petitioner's evidence shows exactly the opposite. Petitioner has submitted data showing that its total suspended solids reach a maximum of 20,000 mg/l with an average of 10,000 mg/l. Pet. Ex. 1, p. 2. The regulation set for at 304.124 sets a maximum of 15 mg/l subject to the averaging rules of 35 Ill. Adm. Code 304.104(a). The permit from which Petitioner appeals imposed a maximum of 30 mg/l. Based upon the evidence presented, Petitioner has failed to show that its application and package demonstrated compliance with the Act. The Board has no choice but to affirm the Agency's decision.

Additionally, upon reviewing the data contained in the three Exhibits not admitted into evidence (Petitioner's Ex. 3, 4, 5) the Board finds that even if these documents were admitted into evidence (contrary to the above explanation see pp. 3-15) that the Board's final decision would remain the same. There is simply no evidence in the record or in the offers of evidence which demonstrates compliance with the regulations setting maximum concentration limits for total suspended solids (304.124). The Agency decision denying the application for NPDES permit is affirmed.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 8th day of September 1988 by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board