

ILLINOIS POLLUTION CONTROL BOARD
May 28, 1985

IN RE: SITE-SPECIFIC)
RULEMAKING FOR THE) R84-30
CITY OF EAST PEORIA)

OPINION AND ORDER OF THE BOARD (by B. Forcade):

On July 16, 1984, the City of East Peoria ("East Peoria") filed a petition for site-specific rulemaking with the Board. The petition requests a rule which would allow East Peoria's Sewage Treatment Plant No. 1 to change the location of their sewage effluent discharge point from the Illinois River to a small waterway adjacent to the Illinois River, known as Ditch A. In order to facilitate this change, East Peoria seeks relief from the effluent limitation of 35 Ill. Adm. Code 304.120(c), which sets maximum contaminant levels at 10 mg/l of BOD and 12 mg/l of suspended solids to waterways such as Ditch A. East Peoria seeks to have its discharges to Ditch A regulated at 20 mg/l BOD and 25 mg/l of suspended solids; that is, the same limitations that presently apply under Section 304.120(b) to the facility's discharges into the Illinois River.

Hearing was held in this matter on September 10, 1984. Thereafter, the Illinois Department of Energy and Natural Resources filed a "Negative Declaration" of economic impact on November 29, 1984. The Economic Technical Advisory Committee concurred on January 23, 1985. The Board proposed the site-specific rule on June 13, 1985. First notice of the rulemaking was published at 9 Ill. Reg. 12579 on August 16, 1985. The first notice comment period expired on September 30, 1985. Only one comment was received, from the Illinois Environmental Protection Agency ("Agency"), which opposed the proposed rulemaking.

On January 9, 1986, the Board adopted for Second Notice East Peoria's requested effluent limitation with some monitoring requirements added at the request of the Agency. The Board delayed submission to the Joint Committee on Administrative Rules ("JCAR") to allow the participants an opportunity to comment on the new monitoring requirements.

On January 24, 1986, the Agency submitted a public comment (P.C. No. 3) requesting the Board further defer sending the proposed rule to JCAR until the United States Environmental Protection Agency ("USEPA") had reviewed the matter. On March 26, 1986, USEPA's review of the rule was filed with the Board as P.C. No. 4. USEPA's comment generally supported the Agency's position in this rulemaking that the petitioner failed to adequately demonstrate technical infeasibility, economic unreasonableness, or lack of potential influence on water quality

standard attainment in the proposed receiving waters. The USEPA can object to any future NPDES permits issued under the site-specific rule, pursuant to 40 C.F.R. 123.44.

On March 31, 1986, the hearing officer, at the direction of the Board, transferred copies of P.C. Nos. 3 and 4 to East Peoria in order to provide an opportunity for response and comment. Neither the Agency nor USEPA had copied East Peoria on any of the correspondence. On April 28, 1986, East Peoria, by letter, requested additional time to provide comments to P.C. Nos. 3 and 4 and requested that the Board defer action in this matter (P.C. No. 5). On May 5, 1986, East Peoria filed its response to P.C. Nos. 3 and 4 (P.C. No. 6). East Peoria requested the Board submit the proposed rule to JCAR and proceed to final promulgation of the site-specific rule.

On June 5, 1986, the Board adopted an Order rescinding the Second Notice Opinion and Order, and allowed the First Notice of the proposed rule to lapse. This action was the result of three factors. First, the delays caused by the Agency's post-second notice comments (P.C. Nos. 3,4) precluded the Board from taking final action within the time requirements imposed by the Administrative Procedures Act. Second, during the pendency of this proceeding the Fourth District Appellate Court announced its Opinion in Central Illinois Public Service Company v. IPCB, 142 Ill. App. 3d 43. That Opinion implied that the Board lacked authority to grant site-specific relief from a general rule in a regulatory proceeding, absent specified levels of justification for such relief. The third reason for the June 5, 1986 Order was the unresolved conflict as to whether the proposed regulatory relief for East Peoria would be approvable by USEPA. Accordingly, the Board stated:

Therefore, the Board will allow the proposed rule to lapse and, by this Order, rescind its January 9, 1986, second notice Opinion and Order. The Board intends to let this proceeding remain on its docket pending resolution of issues regarding site-specific relief. If this course of action is not acceptable to East Peoria or the Agency, they are free to submit a motion for reconsideration of today's action, recommending an alternative approach.

The Board has not received any filings in this docket since the June 5, 1986 Order.

Since the June 5, 1986, Order, the site-specific rulemaking problems posed by the Central Illinois Public Service Company decision have been resolved. On April 2, 1987, the Illinois Supreme Court reviewed the Third District opinion, as well as

subsequent amendments to the Environmental Protection Act. Central Illinois Public Service Company v. IPCB (Slip Opinion, April 2, 1987). The court concluded that the Board does possess the authority to grant site-specific relief in the context of a regulatory proceeding. Thus, the only remaining concern is whether the Board should adopt the substantive relief East Peoria requests in light of the USEPA concerns. If so, the Board should proceed to a second First Notice. If not, the Board should dismiss the proceeding.

The thrust of the USEPA concerns were expressed in a March 21, 1986, letter from Mr. Douglas Ehorn, Planning and Standards Section, USEPA to Mr. James Park of the Agency (P.C. No. 4). That letter states:

The most significant unresolved issue surfaced during our review was the potential for ammonia-N Water Quality Standards (WQS) violations given approval of the relocation of the effluent discharge point. Based upon the information presented, it is likely that relatively stringent ammonia-N limitations would be necessary to protect WQS in the new receiving stream. Clearly, as pointed out by IEPA in the record, the characterization of current effluent quality may not be representative of future effluent quality from the facility. Overall, we concur with the judgment that the record presents an inadequate demonstration of the capability of the receiving waters to assimilate the wastewater without resulting violations of ammonia-N and dissolved oxygen WQS. We further support the Agency's contention that the Board should not disregard the issue of the likelihood of WQS violations when considering the requested relief. Effluent limitations contained in the East Peoria NPDES permit must be sufficient to achieve and maintain WQS, particularly for dissolved oxygen and ammonia-N. Under Federal regulations, the relief in effluent limits proposed in the Board's draft order cannot be realized in the NPDES permit without supplemental information.

Overall, USEPA supports the contention by IEPA that the petitioner failed to adequately demonstrate any evidence of technical infeasibility, economic unreasonableness, or lack of potential influence on WQS attainment in the proposed receiving water. Indeed, the Board record characterizes the annual savings

as "minimal" and explicitly indicates the technological infeasibility and economic hardship would not result if the request were denied. In view of the record and the existing use designation of the proposed receiving waters, the evidence is deemed insufficient to satisfy Federal regulations requiring the demonstration of a substantial and widespread social and economic impact to justify a WQS variance. We concur with the contention that a slight annual cost-saving should not be dispositive in a site-specific rulemaking request which may influence WQS attainment.
(P.C. No. 4)

On May 5, 1986, East Peoria responded to the USEPA comments regarding water quality violations (P.C. No. 6). In essence, East Peoria asserted that the Board's water quality standards for general use do not apply to Ditch A:

In any event, it appears that the general use water quality standards applicable to waters of the state as set forth in the Illinois Administrative Code at title 35, subtitle C, part 302, subpart B are not applicable to the ditches in question. The cited regulations are applicable to "waters" of the state. However, the definition of "waters" found at title 35, subtitle C, chapter 1, section 301.440 of the Illinois Administrative Code excludes "sewers" from its definition. A "sewer" is defined at section 301.390 as "a stationary means of transport or stationary system of transport, excluding natural waterways or land run-off, or both." It is therefore, a sewer. The water quality standards with which the IEPA and USEPA are so concerned do not appear to apply to the ditches in question.

Unfortunately, East Peoria's assertions are in direct conflict with the Board's prior holdings in this proceeding. In its June 13, 1985, First Notice Opinion, the Board stated, "East Peoria seeks relief from the effluent limitation of 35 Ill. Adm. Code 304.120 (c), which sets maximum contaminant levels....to waterways such as Ditch A..." (Emphasis added, Opinion, p. 2), and "In granting this relief, the Board recognizes that water quality standards will continue to be applicable to Ditch A" (Opinion, p.5). The Board has consistently held that the general use water quality standards are applicable to Ditch A.

The actual conflict regarding East Peoria's discharge can be distilled into a simple question, "How much information is enough information on the environmental impact". After reviewing the information in the record, the Board concluded:

As stated above, the environmental information and water quality data supplied by the City is sketchy and would be considered insufficient to support the granting of relief in most situations involving such requests. However, given the facts in the instant proceeding, the Board does not believe that any significant benefit to the environment or public interest would be served by denying the requested relief.

USEPA reviewed the relevant information and reached a different conclusion, "overall, we concur with the judgment that the record presents an inadequate demonstration of the capability of the receiving waters to assimilate the wastewater without resulting violations of ammonia-N and dissolved oxygen WQS." Under the present scheme of federal-state environmental decision-making for NPDES permits, USEPA retains ultimate authority to determine what constitutes acceptable NPDES effluent limits for a discharger such as East Peoria. 40 C.F.R. 123.44 (1986). In effect, if USEPA disagrees with the Board's decision on the adequacy of the information, USEPA can "veto" that decision by issuing a federal NPDES permit with more stringent limits. The March 21, 1986, letter from USEPA clearly states that under federal regulations and based on the existing factual record, "...the relief in effluent limitations proposed in the Board's draft order cannot be realized in the NPDES permit...".

In addition, on May 21, 1987, the Board received a communication from the United States Environmental Protection Agency which expressed concern, inter alia, with NPDES site-specific rulemaking. The Board will include the portion of that document which relates to the East Peoria proceeding as a public comment in this proceeding.


In its June 13, 1985, First Notice Opinion and Order, the Board made a very close judgment call in a difficult case, based on admittedly sketchy information. Based on the opposition to that judgment call as expressed by the Agency and USEPA and based on USEPA's ultimate authority to determine whether the relief can issue, the Board will reverse its position on this issue. Accordingly, the Board finds that East Peoria has failed to demonstrate that effluent discharges to Ditch A will not cause or contribute to violations of applicable general use water quality standards and the requested regulatory relief is denied.

ORDER

The petition for site-specific rulemaking filed by the City of East Peoria is denied, and this proceeding is dismissed.

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 28th day of May, 1987, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board