

ILLINOIS POLLUTION CONTROL BOARD  
June 14, 1984

IN RE: )  
ILLINOIS DEPARTMENT OF ) PCB 84-72  
TRANSPORTATION; PERMIT FOR )  
AMERICAN TOXICS DISPOSAL, INC. )

DISSENTING OPINION (by B. Forcade):

Today, the majority of the Board has granted approval for the Chairman to countersign Illinois Department of Transportation ("IDOT") Permit No. 163LM ("the permit"). I believe the Board has made a premature and incorrect decision; accordingly, I dissent. Since the majority order does not provide factual or procedural background, I will supply it here.

American Toxic Disposal, Inc. ("ATD") wants to dredge up to 25 cubic yards of polychlorinated biphenyl ("PCB") contaminated sediment from the bottom of slip #3 in Waukegan Harbor. This material will be used in an experimental PCB treatment process. Presumably this process, if successful, could be one option for a solution to the problem of PCB contamination of Waukegan Harbor. Consistent with Illinois law, ADT made application for an IDOT permit. IDOT referred the matter to this Board for concurrence.

Under Illinois law, ch. 19, Ill. Rev. Stat. para. 65, § 18, it is unlawful to do any work of any kind in Illinois waters without an IDOT permit. Section 18 further provides that:

However, except as provided in this Act, no permit shall be issued or renewed authorizing any fill or deposit of rock, earth, sand, or other material, or any refuse matter of any kind or description in Lake Michigan except with the concurrence of the Pollution Control Board, and no such permit is valid without such concurrence.

Nothing herein shall be construed to authorize the discharge or other disposition of materials of any kind into Lake Michigan without first obtaining a permit signed by the Secretary of the Department of Transportation and countersigned by the Chairmen of the Pollution Control Board acting on behalf of such Board, and any person, corporation, company, city or municipality, or other agency, who or which (1) discharges or disposes of any such materials into Lake Michigan without a permit or in violation of a permit, or (2) does any of the things prohibited by this Section shall be guilty of a Class A misdemeanor.

Here, it appears that those sediments which are stirred up or resuspended by the dredging operation, but not removed from the harbor, will be "materials deposited" in Waukegan Harbor. It also appears that Waukegan Harbor is contiguous with, and therefore, within the definition of, Lake Michigan. Later, Section 18 requires IDOT to determine that dredged materials deposited in Lake Michigan will not cause water pollution as defined in the Environmental Protection Act ("Act"). Presumably, it is this determination for which Board concurrence must be sought.

After ATD applied for the IDOT permit, the U.S. Army Corps of Engineers ("The Corps"), Illinois Environmental Protection Agency ("IEPA") and IDOT issued a joint public notice on April 17, 1984, requesting comments on the proposed dredging activity on or before May 1, 1984. On May 1, 1984, Outboard Marine Corporation ("OMC") filed comments with IDOT requesting more information, more time, and a public hearing. On May 24, 1984, representatives of OMC, ATD, IDOT, the USEPA, and the Corps met to discuss OMC's concerns. At the conclusion of that meeting, the public comment period was extended until June 6, 1984. On June 7, 1984, IDOT received comments from OMC on the proposed project. OMC objected to the permit issuance and requested a full hearing. No hearing was held. IDOT issued the permit, effective June 14, 1984. On June 13, 1984, IDOT filed the permit and some related documents with this Board. On June 13, 1984, OMC filed a Petition for Hearing in this matter. On June 14, 1984, the majority of the Board concurred with IDOT. At the Board meeting, representatives of OMC and ATD addressed the Board and a June 12, 1984 letter from the Corps to OMC was filed by ATD. The Board also denied OMC's Petition for Hearing.

I dissent from the majority for three reasons. First, the record does not show that IDOT made a determination, based on facts, that the permitted activities will not cause a violation of the Act. Second, OMC was denied a hearing, contrary to Chapter 19. Third, OMC's claims are neither addressed nor refuted in the record before the Board.

Under chapter 19, Ill. Rev. Stat., para. 65, § 18, the deposit of dredged material may occur only where IDOT "determines that the deposit of dredged material will not cause water pollution," as defined in the Act. In a May 23, 1984 letter to OMC, IDOT stated:

The Department of Transportation's jurisdiction in this matter is limited to considerations regarding the dredging portion of the project. We are relying on input from the Illinois Environmental Protection Agency and the US Environment Protection Agency regarding the pollution control aspects of the project in our consideration of permit issuance. The USEPA has

indicated that the information included in the "Protocol to Dredge" addresses their requirements, and the IEPA has indicated that the project may be completed without adverse effects.

Here, the record contains on April 26, 1984 letter from IEPA to the Corps stating that ATD's proposal, if carefully planned and supervised, may be completed without causing water pollution as defined in the Act, but, requesting as a condition of the permit that ADT shall not cause water pollution as defined in the Act. In a May 2, 1984 letter to the Corps, USEPA requested 8 technical conditions, none of which directly address water pollution as defined in the Act. Both of these letters predate OMC's expression of concern about environmental impact of the dredging and neither specifically address OMC's concerns: failure of the silt curtains and the settling time for the amount of PCB contaminated sediment that is stirred up by the dredging operation. The record before the Board does not show fact-finding by IDOT on the issue of water pollution, nor fact-finding by IDOT on OMC's concerns.

Section 65 of chapter 19 also provides:

Subject to the notice and hearing hereinafter provided for, where a permit is sought for a structure, fill, or deposit in a slip, the Department shall require as condition precedent to the issuance of such permit, a signed statement approving such action by all riparian owners whose access to public waters will be directly affected by such structure, fill, or deposit. No such permit shall be issued without the approval of the Governor and without a public hearing, 10 days' notice of the time, place, and purpose of which is published in a newspaper of general circulation in the county in which such slip is located...

Since this permit is sought to cover the deposition of contaminated sediments stirred up by the dredging of slip #3, a hearing should have been held. OMC requested a hearing. No such hearing was held. I would have provided OMC a hearing before the Board to raise its concerns.

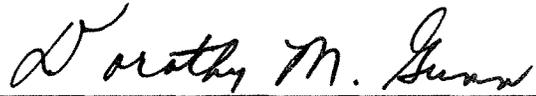
My last concern is the nature of OMC's concerns. OMC has claimed that ATD's operation will stir up from 3.2 to 7.5 kilograms of PCBs which will be resuspended in the water column, that large portions of resuspended materials may not resettle for approximately 40 days and that silt curtains are unreliable beyond one or two days. Many of these arguments cite USEPA publications or protocols for support. Since these factual arguments are of the type normally encountered in Board hearings, and since the record before us does not contain sufficient

factual material for the Board to reach an independent conclusion on the key issues, I would postpone decision until a hearing could be held.



Bill S. Forcade  
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was submitted to me this 14<sup>th</sup> day of June, 1984.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board