

ILLINOIS POLLUTION CONTROL BOARD
April 1, 1987

ILLINOIS POWER COMPANY)
(Hennepin Power Plant),)
)
Petitioner,)
)
v.) PCB 86-154
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

SHELDON A. ZABEL AND MARILI MCFAWN, SCHIFF HARDIN & WAITE
APPEARED ON BEHALF OF ILLINOIS POWER COMPANY;

THOMAS DAVIS, ATTORNEY AT LAW, APPEARED ON BEHALF OF THE ILLINOIS
ENVIRONMENTAL PROTECTION AGENCY.

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

This matter comes before the Board upon Illinois Power Company's (IPC's) September 22, 1986 petition for review of NPDES Permit No. IL0001554 which was reissued by the Illinois Environmental Protection Agency (Agency) on August 21, 1986. Hearing was held on January 8, 1987, at which the parties, but no members of the public, were present. IPC filed its post-hearing brief (Brief) on February 13, 1987, to which the Agency responded on March 2, 1987 (Response), and IPC replied on March 13, 1987.

IPC has contested certain provisions of its NPDES Permit for its Hennepin Power Plant. IPC has summarized the contested conditions as follows:

1. The limitations and monitoring requirements imposed for two internal waste streams identified as Outfalls 001(a) and 001(c), both of which discharge into the Condensor Cooling Water;
2. The requirement contained in Special Condition 3(A) to prepare weekly a Total Residual Chlorine (TRC) Concentration Curve for Outfall 001, the discharge point for the Condensor Cooling Water;
3. The requirement contained in Special Condition 7 to monitor once for 162 pollutants listed at Part V-A, B, and C of EPA Application Form 2C of the consolidated Permitting Program and to monitor twice for chromium, lead, nickel, zinc, sulfate and ammonia nitrogen;

4. The sampling frequency and sampling type for Total Suspended Solids (TSS) required at Outfall 004, the discharge point for the Ash Line Drain;
5. The type of sampling required at Outfalls 002, 003, and 005, all of which are Ash Pond discharges; and
6. The signature requirements imposed at Standard Condition 11, paragraphs (a) and (b).

(IPC Brief at 5-6).

This proceeding is an embarrassment to the state's environmental protection program. This is the third time IPC has appealed the NPDES permit issued for its Hennepin facility. As a result, IPC has been without a completely valid permit for seven years. In the first appeal (Hennepin I: IPC v. IEPA, PCB 79-243, 39 PCB 508, Oct. 2, 1980), IPC prevailed on procedural issues similar to the procedural issues before the Board in this action and prevailed in part on substantive issues, some of which are again before the Board here, and the Board remanded the proceeding to the Agency. In a subsequent appeal of the Board's decision to the appellate court, the court affirmed in part and reversed in part the Board's decision, and remanded to the Board. [IPC v. PCB, 100 Ill. app. 3d 528, 426 N.E.2d 1258 (3d Dist. 1981)]. On February 17, 1982, the Board again remanded the permit to the Agency "for issuance of a permit modified in accordance with the agreement and referenced materials." (PCB 79-243, 45 PCB 383, 384).

For whatever reason, it appears that such permit was not issued until July 12, 1985. That issuance resulted in a second appeal (Hennepin II), in PCB 85-119 which was decided March 27, 1986, (68 PCB 527). In that case, IPC litigated most of the same issues litigated in the instant appeal. The Board declined to reach the substantive issues after finding that "the Agency has a duty to respond in writing to comments by the permit applicant which are submitted in response to a draft permit, ... [and] to prepare a written statement of the bases for each permit condition listed in Section 309.108(b), [and] that the Agency ... failed to meet those requirements." (68 PCB 531). As the Board stated upon reconsideration, "if the Board were to continue to reach the merits of cases such as this, there would be little impetus for the Agency to correct its procedures to fully comply with state and federal law. (PCB 85-119 at 1, July 11, 1986). One issue that the Board specifically did not reach was "whether there was procedural error regarding the internal waste streams ... [which] is predicated upon a substantive determination that the waste streams at issue are internal." (id. at 2).

Despite the Board's presumption in Hennepin II that "the parties will take appropriate actions to minimize the administrative inefficiencies which could result" from that ruling [68 PCB 531], the parties are again before the Board in the present Hennepin III. The Agency, quoting Yogi Berra, states that "this case is like deja vu all over again." (Response at 2). IPC refers to "Third strike, you're out," and "Third time is the charm." (Post-Hearing Brief at 3).

The six issues set forth by IPC can be classified into two groups: conditions relating to internal waste streams (issues 1 and 3 as set forth by IPC) and those that do not (issues 2, 4, 5, and 6). The Board will deal with the latter issues first. There is no reason for the Board not to finally adjudicate these issues in that IPC no longer contends that the Agency has failed to meet the procedural prerequisites for the imposition of such conditions, and the only question which remains is whether IPC has demonstrated that the contested conditions are not necessary to accomplish the purposes of the Illinois Environmental Protection Act or are inconsistent with Board regulations.

Chlorine Concentration Curves

IPC contested the requirement of Special Condition 2 that Total Residual Chlorine (TRC) concentration curves be prepared weekly. IPC has proposed that it prepare quarterly concentration curves, monitor one half of the unit condensor at two minute intervals when peak TRC concentrations are predicted by the quarterly curves, rotating weekly the unit half to be monitored, and report the weekly maximum TRC value on Discharge Monitoring Reports (DMR's). (Reply at 3). The Agency now states that it would agree with IPC's proposal with two modifications: "that the time frames for the weekly sampling be specified in the permit as five to fifteen minutes for the first twelve months ... and second, that all results be recorded and reported on the DMR's." (Response at 13). The Agency also states that "it would consider deleting the quarterly concentration curves after one full year" and that "less sampling may subsequently be required during the weekly monitoring." (id). In turn, IPC states that "although the evidence does not warrant the modifications requested by IEPA, IPC could accept the modified proposal ... [if] the Permit affirmatively states that the required weekly sampling frequency and the requirement to prepare a curve will be reduced and expire, respectively, one year after the revised permit is issued if warranted by the data collected over that year." (Reply at 4).

Given the Agency's express willingness to consider the reduction and elimination of the requirement regarding sampling and preparation of the curves, IPC's testimony regarding the cost and lack of necessity of such conditions, and the Agency's failure to present any evidence rebutting IPC's evidence, the

Board will require the Agency to modify the TRC condition in accordance with IPC's suggested language on pages 5 and 6 of its Reply.

Ash Line Drain

Special Condition 5 establishes sampling requirements and limitations for Total Suspended Solids (TSS) and Net Oil and Grease for Outfall 004, an intermittent discharge from the ash line drain. The Agency has agreed with IPC that the existing condition should be modified to require three grab samples at periodic intervals during the time of discharge, to limit TSS to 30 mg/l and Net Oil and Grease to 20 mg/l. (Response at 15). IPC agrees with this modification, except that it contends that only a single grab sample should be required. (Reply at 6-7). IPC argues that under the Agency's language sampling would take a minimum of 45 minutes while the discharges to be sampled "last as briefly as fifteen minutes," thereby precluding full compliance with the condition. The Agency interprets its proposed condition differently, contending that "at least three grab sample aliquots may easily be obtained during a discharge period as brief as fifteen minutes." (Response at 16).

The Board can certainly understand the differences in interpretation regarding the sampling provision since it cannot understand which interpretation is correct. However, it is clearly the Agency's intent that three or more samples may be taken within a fifteen minute interval. Since IPC's only basis for disagreeing with the Agency's proposed language is the timing question, the Board finds that IPC has failed to demonstrate that the Agency's proposed language is not reasonably necessary to accomplish the purposes of the Act. Therefore, the Board will order the Agency to modify Special Condition 5 in accordance with the language set forth in its Response at page 15, except that the language shall be further modified to clarify that at least three samples may be taken within a fifteen minute period.

Ash Pond Outfalls

Outfall 002 is the discharge from Ash Lagoon No. 1, 003 is the discharge from Ash Lagoons Nos. 2 and 4, and 005 is the discharge from Ash Lagoon No. 3. IPC has not objected to the parameters regulated or the effluent limitations imposed upon these discharges by the permit, but has objected on the basis that the requirement for a twenty-four hour composite sample fails to recognize the real difficulties of compliance which maybe caused by severe weather. These problems may result from "malfunctioning of battery operated composite samplers due to freezing temperatures and the danger posed to plant personnel who must venture out to collect the composited samples or to perform manual sampling." (Response at 16).

The Agency now believes that "the personal risk factor cannot be disregarded or dismissed ... [and] since the Agency would tend to agree with the discussions on the integrity of the data (Brief at 47-8; Exhibit A at 9), the Agency would agree to impose a special condition applicable specifically to outfalls 002, 001, and 005 to the effect that a single grab sample will be accepted in lieu of a 24-hour composite 'only if inclement weather prohibited access to all of the outfalls for seven consecutive days.' (Brief at 47)." (Response at 16-17). In response, IPC points out that the facility personnel responsible for this sampling work five day weeks and requests the special condition to provide that "if inclement weather prohibits the collection of a 24 hour composite sample for five consecutive days, sampling shall consist of a grab sample." (Response at 8).

While the record is unclear regarding the work week of the responsible personnel or the possibility of using other personnel on the remaining two days of the week, the Board finds it to be highly unlikely that the integrity of the data would be significantly jeopardized by a five day rather than a seven day provision. Further, it is not unreasonable to presume a standard five day work week. Therefore, the Board will order the Agency to add a special condition in accordance with IPC's request at page 8 of its Reply.

Signature Requirement

IPC objects to Standard Condition 11 regarding who has authority to sign NPDES permit applications [11(a)] and reports submitted under the NPDES permit program [11(b)]. The Agency cannot, of course, impose conditions less stringent than Board rules, and there is no evidence in this record to support any rule more stringent than the Board rule. Therefore, Standard Condition 11(a) should be rewritten to simply set forth the requirement of Section 309.222(a) which delimits who can sign NPDES permit applications. Since the Board has no regulation regarding who can sign reports, and since both parties agree that 40 C.F.R. Section 122.22(b) sets forth a reasonable standard, 11(b) should be rewritten in conformance with the federal rule.

Internal Waste Streams

IPC contests the effluent limitations and monitoring requirements imposed at Outfalls 001(a), 001(c) and 005(a) in that they constitute internal discharge points and are, therefore, subject to 40 C.F.R. Section 122.45(h). As the Agency states, it had

erroneously maintained that certain of IPC's Hennepin Plant waste streams were not internal waste streams despite the comments and other protestations of Petitioner. With

this admittedly mistaken view, the Agency did not then believe that it was bound by the procedural requirements to 40 C.F.R. 122.45(h) to set forth the exceptional circumstances which would justify limits on internal waste streams. Regrettably, the Agency had not revised its thinking on the issue at the time the present permit was issued in 1986. Therefore, not only does the document containing the Agency's responses to Petitioner's comments fail to set forth any justification for the regulation of internal waste streams, but also a further step back was not taken. In order to comply with 40 C.F.R. 122.45(h), 35 Ill. Adm. Code 309.108, 40 C.F.R. 124.56, 40 C.F.R. 124.10, and other similar requirements, the Agency must also issue a new fact sheet and draft permit upon which Petitioner may then comment. (Response at 4).

The Board finds the use of the word "regrettably" to be a bit weak. The Agency has known since at least August 13, 1985, when Hennepin II was filed, that IPC contended that these outfalls were internal thereby requiring an Agency showing of exceptional circumstances. "Regrettably," a year later, following the reissuance of a permit which contained no such showing, the Agency "revised" its thinking. The Agency explains this by stating that "in August 1986 the Agency was unaware of any caselaw in any jurisdiction which provided a definition of the phrase 'internal waste stream'." (Response at 6). What caused the Agency's sudden enlightenment in late 1986 is left to speculation.

As a result, it is "deja vu all over again." IPC states that "this matter must be remanded to IEPA with instructions to satisfy the clear prerequisites of Section 122.45(h) if it desires to impose any monitoring requirements ... IPC requests in this proceeding that the Board make a finding that IEPA failed to comply with the procedures contained in Section 122.45(h) and instruct IEPA to comply with that Section if it imposes conditions on internal waste streams when reissuing the permit for this facility." (Brief at 13). The Agency does not disagree with those requests. (Response at 6).

In accordance with the Agency's request the Board finds that Outfalls 001(a) , 001(c) and 005(a) are from internal waste streams and that the Agency failed to satisfy the procedural requirements of 40 C.F.R. 122.45(h) in imposing conditions on those outfalls. This stops short of the complete relief requested by IPC. IPC argues that it has demonstrated that there are no exceptional circumstances which could justify the

imposition of conditions on the internal waste streams, and presumably, that the Board should order those conditions deleted from the permit.

This argument is very similar to the argument advanced by IPC and rejected by the Board in Hennepin II, and the Board once again declines to reach the merits of whether the Agency's conditions can be upheld. Due to the Agency's presumably good faith, though perhaps less than understandable, prior belief that these conditions were being applied to non-internal waste streams, the Agency had no reason to set forth exceptional circumstances. Given that the parties now agree that internal waste streams are involved (now that the Agency has "revised its thinking") the exceptional circumstances which should have been listed by the Agency should serve to frame the factual issues regarding the propriety of the imposed conditions. However, since no such circumstances are set forth, those issues have not been properly framed. Therefore, for the Board to rule on whether such circumstances exist would be to speculatively prejudge what the Agency's rationale may be for the imposition of the conditions.

IPC has attempted to do precisely that and believes that it has demonstrated that there can be no basis for finding that exceptional circumstances exist. As such, it has essentially attempted to prove a negative. It believes that since it has offered some evidence that no exceptional circumstances exist and the Agency has presented no contrary evidence, it must prevail. However, as the Agency points out, "it is one thing to argue that the Agency has not justified a permit condition; it is something else entirely to contend that the Agency cannot do so." (Response at 7). Since the Agency has not yet determined what, if any, exceptional circumstances exist, it is difficult to conceive what evidence IPC would have had the Agency present in support of those conclusions. The Board cannot find on the basis of the record before it that IPC has demonstrated that there is no possibility that exceptional circumstances exist regarding the internal waste streams at issue which would justify the imposition of conditions.

Furthermore, as in Hennepin II, if the Board were to reach the merits of this question, its procedural holding that the Agency must follow 40 C.F.R. 122.45(h) would be relegated to the level of dicta in that by reaching the merits, the Board would in practical effect be ruling that the procedural failure is harmless error. In asking for a ruling on the merits, IPC must concede that if the Agency had been able to demonstrate exceptional circumstances at hearing, the Board could properly affirm the Agency's action, despite the procedural flaws. The Board finds this position inconsistent with its remand request. Such a holding by the Board would be to give the Agency free reign to ignore the demonstration of exceptional circumstances

until the appeal hearing before the Board, and in fact might well encourage the Agency to do so. If the Agency were free to wait until hearing, it would stand only to lose by stating its rationale earlier, since IPC would be given greater notice and opportunity to develop rebuttal testimony, thus totally emasculating Section 122.45(h).

It appears, however, that IPC believes that once it has been determined that the Agency's position that a waste stream is not internal, is incorrect, the Agency cannot prevail regarding conditions imposed upon that waste stream, but if IPC presents sufficient evidence that no exceptional circumstances could exist, it can prevail. This is the process which the Board has referred to as "having its cake and eating it too," which will not be allowed.

In holding that on remand the Agency may consider the imposition of conditions on the internal waste streams following the procedures of Section 122.45(h), the Board realizes that it is only adding to IPC's well-founded frustration with the permitting of its Hennepin facility. The Board shares in that frustration; it has no desire to consider Hennepin IV, although it is fully cognizant that today's ruling may result in just that. The Agency cannot be allowed to forever frustrate the ability of an applicant to receive a final determination on its permit application through a series of procedural errors. At some point the Board must step in and say that this proceeding has now come to an end. This proceeding is perilously close to that point. The Board fails to understand the last minute revision in thinking by the Agency that has necessitated this remand. In two proceedings now the Agency has presented no evidence at hearing and rather has admitted error prior to even hearing IPC's evidence. While the Board may have inadvertently encouraged the Agency in maintaining that posture through its ruling in Hennepin II, the Board cannot, and will not, allow the Agency to continue to use its own procedural errors to shield itself from the necessity of fulfilling its proper permitting function. If the Agency continues to avoid its responsibility, the Board will be forced to act for it. At a minimum the Agency has shown an inability to take timely and appropriate actions regarding the permitting of the Hennepin facility which borders on a demonstration of bad faith in the permitting process. Such delay fails to serve the interests of the parties, the Board, the public, or the environmental program of this State.

The Board, therefore, will reluctantly order IPC's permit remanded to the Agency for further action consistent with state and federal law and not inconsistent with this opinion. The Board does not believe that it is necessary to set forth the state and federal requirements in that the Agency now appears to understand them, except for Section 16(c) of the Administrative Procedure Act (APA), the applicability of which the Agency still

disputes. (Response at 18-20). At best, it is disingenuous of the Agency to contend that Section 16(c) of the APA is inapplicable because IPC does not have a valid permit. It appears that IPC had a valid permit as of 1979 and that the only reason it has not been renewed is that the Agency has been unable for the last seven years to properly issue one. Under the reasoning of Borg-Warner v. Mauzy, 100 Ill. App. 3d 862, 427 N.E.2d 415 (3d Dist. 1981), IPC's last valid permit remains in effect. Therefore, the Board concludes that Section 16(c) is applicable.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

The Board hereby orders that NPDES Permit No. IL0001554 be remanded to the Agency for further action as set forth below:

1. The Total Residual Chlorine condition (Special Condition 3) shall be modified in accordance with the following language:
 3. Chlorine may not be discharged from each unit's main cooling condensers for more than two hours a day.
 - A. A concentration curve shall be generated quarterly using grab samples with sample frequency of two minutes or less over the exposure time for each half of each unit's condensor. The exposure time is defined to be from the point of first detectable measurement to the point of the last detectable measurement of total residual chlorine ("TRC"). The concentration curves prepared quarterly shall be submitted with the Discharge Monitoring Reports. This requirement to generate quarterly concentration curves shall expire one year from the effective date of the modification if the quarterly curves submitted indicate maximum TRC concentration to be occurring between five and fifteen minutes after chlorine injection.
 - B. Weekly sampling shall be conducted in the discharge flume between five and fifteen minutes after chlorine injection using grab samples with a sampling frequency of two minutes at one half of one condensor, with the condensor unit half monitored rotated each week. All TRC values monitored shall be reported on the DMR. If the requirement to

prepare quarterly concentration curve expires pursuant to paragraph (A) above, the requirement to monitor throughout the five and fifteen minute interval shall be reduced to a requirement to monitor weekly using a single grab sample at the predicted maximum concentration time for each quarter.

- C. The frequency and duration of chlorine dosing period plus the amount of chlorine applied shall be reported on the Discharge Monitoring Reports in accordance with past practice.
- 2. Special Condition 5 regarding the ash line drain shall be modified in accordance with the following language:
 - 5. Sampling shall consist of a minimum of three grab sample aliquots of at least 100 milliliters collected at periodic intervals during the time of discharge.
 - A. Net Total Suspended Solids shall not exceed 30 mg/l on a daily maximum basis.
 - B. Net Oil and Grease shall not exceed 20 mg/l on a daily maximum basis.

Additionally, the introductory language of this condition shall be further modified to clarify that at least three samples may be taken within a 15 minute period.

- 3. A special condition shall be added regarding Outfalls 002, 003 and 005 that provides as follows:
 - If inclement weather prohibits the collection of a 24 hour composite sample for five consecutive days, sampling shall consist of a grab sample.
- 4. Standard Condition 11(a) shall be rewritten to simply set forth the requirement of Section 309.222(a) and Standard Condition 11(b) shall be rewritten in accordance with 40 C.F.R. Section 122.22(b).
- 5. The Agency may consider the imposition of conditions on Outfalls 001(a), 001(c) and 005(a). Such conditions may only be imposed in accordance with the procedures of 40 C.F.R. Section 122.45(h) and other applicable state and federal law.

IT IS SO ORDERED.

Board Member J. Anderson concurs.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 1st day of April, 1987 by a vote of 6-0.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board