

ILLINOIS POLLUTION CONTROL BOARD  
February 2, 1978

WINNETKANS INTERESTED IN )  
PROTECTING THE ENVIRONMENT )  
(WIPE), )  
 )  
Complainant, )  
 )  
v. ) PCB 77-320  
 )  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
 )  
and )  
 )  
VILLAGE OF WINNETKA, )  
 )  
Respondents. )

DISSENTING OPINION (by Mr. Young):

Although I agree that the Complaint must be dismissed, it should be dismissed for want of jurisdiction, rather than for the reasons set forth in the majority position.

It is not an accident that there is no provision in the Environmental Protection Act for a contest of the Agency grant of a permit; the permit function established by the Act was not structured to authorize such a proceeding nor is one necessary to accomplish the purposes of the statute.

The principal useful functions to the state of a permit system such as that established by the Act are as follows:

- 1) To provide an accurate quantitative and qualitative inventory of the emission, discharge or disposal of contaminants to the air, water and land; and,
- 2) To provide an accurate inventory of the location and identification of facilities and equipment capable of and necessary to the removal of contaminants prior to beneficial use or the emission, discharge or disposal to the air, water and land; and,
- 3) To provide reasonable assurance that proposed facilities and equipment necessary to the removal of potential contaminants have sufficient capability to remove such contaminants to levels necessary to comply with existing regulatory and statutory limitations or standards; and,

- 4) To provide a periodic update of inventory information; and,
- 5) To simplify enforcement; and,
- 6) To generate revenue.

The permit system performs the following useful functions for the permittee as follows:

- 1) Reasonable assurance by the state that the facilities and equipment proposed for the removal of potential contaminants have sufficient capability to remove such contaminants to the levels necessary to comply with existing regulations and statutory limitations or standards; and,
- 2) Concise summation by the state of operational parameters for facilities and equipment necessary for compliance with existing regulations and statutory limitations or standards.

Unless the permit system with the issuance of a permit provides the degree of finality which can be relied upon by the permittee sufficient to justify his commitment of resources and the initiation of construction, the system is of no value to the permittee and there is serious question if the expense of such a system could be justified.

If it was intended that the decision of the Agency in granting a permit be subject to Board review on complaint of any person it would be necessary, in order to satisfy due process requirements, for the Act to require publication of notice of permit applications and opportunity for public objection and hearing before the Board. No such provision now appears except as the Act was amended to do just that to provide authorization for Agency issuance of National Pollutant Discharge Elimination System (NPDES) permits for discharges to the waters of the State. The sections added (Sections 11(a)2 through 11(a)6, 11(b), 12(f), 13(b) and 39(b)) do not extend that authorization to other than NPDES permits.

The sheer volume of permits issued annually by the Agency mitigates against a system which would require public notice of permit issuance; the cost of publication of notice alone would be prohibitive. Such a system is unnecessary with the existence of a provision, as in Section 31(b) of the Act, which allows any person to bring a complaint for revocation of a permit for violation of any provision of the Act, the Board's regulations, or of any permit or term or condition thereof. Section 45(b) of the Act further provides that any person adversely affected may sue for injunctive relief if denied relief by the Board under Section 31(b).

No permit system, which issues permits prior to the construction and actual operation of a facility or equipment, can guarantee operation of that facility or equipment without a violation any more than operation of facilities and equipment in compliance with the law during one period of time guarantees compliance during the following period. In the system established by the Act, the issuance of a permit is no defense against any violation of the Act, regulations or permit terms or conditions, save that of operating without a permit.

I am unable to find any authorization in the Act which establishes an action before the Board to contest the Agency determination on a permit application except by the applicant alone, pursuant to Section 40. After commenting on the right of the applicant to contest Agency denial of a permit under Section 40 of the Act in 70 Northwestern L.R. 389 (1975), David P. Currie, Professor of Law, University of Chicago and the first Chairman of the Pollution Control Board, states (at p478):

"The statute makes no comparable provision for review of the Agency's grant of a permit. One receiving a permit for activity that allegedly violates the law can be charged with causing or threatening to cause such violation in a citizen complaint under Section 31(b), and the regulations expressly provide that the existence of a permit is no defense to such a complaint."

Decisions of the Pollution Control Board are subject to judicial review pursuant to the Administrative Review Act (ARA) as expressly provided by Section 41 of the Environmental Protection Act. The Environmental Protection Act makes no similar provision for the review of Agency decisions, and since the Act does not by express reference adopt the provisions of the ARA for Agency decisions, Agency grant of a permit is not subject to judicial review under the ARA (Ill. Rev. Stat. 1975 Ch. 110, §265). Nor is the issuance of a permit subject to review under the Administrative Procedure Act (effective on January 1, 1978) because the Agency permit action is not required to be preceded by notice and opportunity for hearing and exempt by Section 16(a) of that Act.

Since the purpose of the ARA was to dispense with the use of mandamus, certiorari, injunction and the other extraordinary actions as the means of reviewing administrative decisions (Quinlan and Tyson, Inc. v. City of Evanston, 324 N.E.2d 65, 25 Ill. App.3rd 65; People ex rel. Builders Supply and Lumber Co. v. Village of Maywood, 160 N.E.2d, 22 Ill.App. 283), it would seem that if the Agency issuance of the permit is subject to review, review must be sought in circuit court under one of the extraordinary writs.

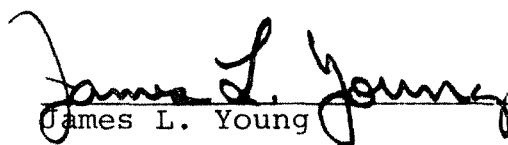
The Environmental Protection Agency has the duty to administer, under Section 4(g) of the Act, such permit systems as are established by the Act or regulations thereunder and are constrained to do so in accordance with Title X of the Act. Under Section 39, the Agency is required to adopt such procedures as necessary to carry out its duty to issue a permit upon proof by the applicant that issuance of the permit will not cause a violation of the Act or of the regulations.

It appears, especially from the absence of any provision of the Act which purports to authorize administrative review of Agency grant of a permit by the courts or the Board, that the action of the Agency in the grant of a permit was deemed a purely ministerial action and for that reason not made subject to the review usually reserved to discretionary administrative decisions.

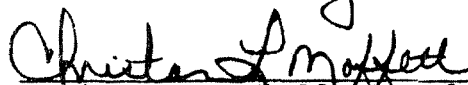
Finally, I must conclude the Agency, in the exercise of its duties under Section 4(g) and Title 10 of the Act, is not subject to a complaint before the Board under Section 31(b) of the Act. For this reason, I do not believe that the Board Procedural Rule 503(a), which purports to establish an action before the Board seeking revocation of a permit on the ground that it was issued by the Agency in violation of the Act or the regulations, is valid.

Although I appreciate that it is of no significance, I am a bit vexed by the proposition that the issuance of a permit by the Agency, which in express terms prohibits any violation of the Act or the regulations, somehow constitutes an Agency violation of the Act or the regulations.

Since the action here is nothing more than a petition for the review of the Agency grant of a permit over which the Board has no jurisdiction, the action should have been dismissed on that basis.

  
James L. Young

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was submitted to me on the 16<sup>th</sup> day of February, 1978.

  
Christan L. Moffett Clerk  
Illinois Pollution Control Board