

ILLINOIS POLLUTION CONTROL BOARD
January 21, 1982

REYNOLDS METALS COMPANY,)
)
) Petitioner,)
)
) v.) PCB 79-235
)
) ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,)
)
) Respondent.)

CLIFTON A. LAKE, ROOKS, PITTS, FULLAGAR AND POUST, APPEARED ON BEHALF OF PETITIONER.

BARBARA A. CHASNOFF, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by I. Goodman):

This matter is before the Board upon the petition of Reynolds Metals Company (Reynolds) for review of NPDES Permit No. IL0001341 issued by the Illinois Environmental Protection Agency (Agency) on October 12, 1979. A hearing was held on this matter on Monday, June 3, 1981 at which the parties herein presented a Stipulation of Fact (Stipulation). The Board has received no public comment in this matter.

On September 3, 1981 the Agency filed its Brief and attached thereto a Motion for Leave to supplement the record. The supplement consists of Reynolds' permit application. Reynolds did not object to the Motion and has referred to the document in its Briefs. The Board will, therefore, grant the Agency's Motion and accepts the permit application as part of the record herein.

According to the Stipulation, Reynolds owns and operates a facility for the fabrication of aluminum metal and aluminum alloys located in McCook, Illinois. In connection with the operation of this facility, Reynolds generates, treats as necessary, and discharges waste waters to the Summit-Lyons ditch, which is tributary to the Chicago Sanitary and Ship Canal. Waste water is discharged through two outfalls, one of which is the treated waste water discharge from Reynolds' main waste water treatment plant and the other, a combined sewer overflow which, when it overflows, discharges a combination of untreated waste waters and storm water runoff.

Reynolds' original NPDES permit was issued by the United States Environmental Protection Agency (USEPA) on June 9, 1976.

October 12, 1979 the Agency reissued to Reynolds a NPDES permit which differed in certain significant respects from the one previously issued by USEPA. Although the parties have resolved most of their differences with respect to the renewed permit, the conditions for the overflow outfall remain to be settled.

The Reynolds facility is designed in such a manner that during a precipitation event sufficient to cause a combined sewer flow beyond the hydraulic capacity of the main waste water treatment facility (1200 gpm), a pumping station with a capacity of 15,000 gpm pumps the effluent into storage lagoons with a total capacity of 6 million gallons of waste water. The storage lagoons are subsequently pumped down through the main waste water treatment plant utilizing its excess dry-weather capacity. As it is now constituted, Reynolds combined sewer overflow meets the requirements of Paragraphs 1, 2 and 3 of Rule 602(c) of the Board's Rules and Regulations; Chapter 3: Water Pollution (Water Rules).

The original NPDES permit, as issued by USEPA, permitted direct discharge under excess flow conditions in order to avoid flooding out the main waste water treatment plant since it imposed no express effluent limitation on that discharge. It did, however, require the storage lagoons be emptied as quickly as possible in order to provide retention capacity for subsequent rainfalls. The federal NPDES permit was certified by the Agency under Section 401(d) of the Clean Water Act when it was issued. However, in reissuing Reynolds' NPDES permit, the Agency has imposed additional express requirements that effluent discharges from the combined waste water outfall comply with the effluent limitations for pH and oils, fats, and grease contained in Rule 408(a) of the Water Rules.

The issue is, therefore, whether as a matter of law the Agency may impose Rule 408(a) Effluent Limitations on overflow discharges in the NPDES permit where applicants have complied with the requirements of Rule 602(c). It is the Agency's position that it is within its discretion to impose Rule 408(a) Effluent Limitations on discharges notwithstanding the provisions of Rule 602(c). Reynolds, of course, argues that Rule 408(a) limitations are inapplicable when the requirements of Rule 602(c) are met. The Stipulation presents the foregoing as the sole legal issue in question in this matter and states that there exists no factual dispute in connection with the case.

Notwithstanding the parties' attempt to reduce this case to one legal issue, the Board perceives three issues that it must address. These issues are: 1) whether combined sewer systems in compliance with Rule 602(c) performance criteria are still subject to Rule 408(a) effluent limitations; 2) whether the Agency has authority to impose Rule 408(a) effluent limitations as a condition to a NPDES permit; and 3) if so, whether the Agency should have done so in this case.

The threshold issue is whether the Agency is authorized to impose Rule 408(a) limitations in the face of the provisions of Rule 602(c) and Reynolds' compliance therewith. Part VI of the Water Rules is entitled "Performance Criteria" and contains specific requirements concerning existing and potential sources of water pollution that, in the Board's opinion, merit special consideration. Rule 602(c) specifically addresses the problem of existing combined sewers which are at the mercy of the vagaries of rainfall in the area. In adopting Rule 602(c), the Board acknowledged that treatment sufficient to assure that the waste water overflow from existing combined sewers complies with Rule 408(a) limitations is technologically infeasible or economically unreasonable. Therefore, combined sewer systems in compliance with with Rule 602(c)(1) and (2) performance criteria are not also subject to Rule 408(a)'s limitations. If they were, there would be no need for Rule 602(c)(3), which authorizes the Agency to require additional treatment to prevent the accumulation of sludge deposits, depression of oxygen levels, or for removal of floating debris and solids.

Although the effluent limitations set out in Rule 408(a) are normally not applicable to combined sewer systems which satisfy Rule 602(c) performance criteria, the Agency has the authority to make them applicable when necessary to protect water quality, pursuant to Rule 910(a)(6). This authority was affirmed by the Second District Appellate Court in U.S. Steel Corporation v. Illinois Pollution Control Board, 52 Ill.App.3d 1, 9 Ill.Dec.893, 367 N.E.2d 327 (1977), which determined that Rule 910(a)(6) constitutes a directive, not a delegation, from the Board to the Agency which is consistent with the Agency's authority under Section 39(b) of the Illinois Environmental Protection Act (Act) to issue NPDES permits with those conditions necessary to accomplish the purposes of the Act (c.f. Peabody Coal Company v. Illinois Pollution Control Board, 36 Ill.App.3d 5, 344 N.E.2d 279 5th District, 1976, and Illinois Power v. Illinois Pollution Control Board et al., No. 81-34, Appellate Court of Illinois, 3rd District, Sept. 30, 1981). That court did not limit the type of condition the Agency may impose, more than to say it must be necessary to carry out the provisions of the Act "prior to promulgation by the Administrator of the U.S. Environmental Protection Agency of applicable effluent standards and limitations pursuant to Sections 301, 302, 306 and 307 of the FWPCA," U.S.S. Corp. v. Illinois Pollution Control Board, 367 N.E.2d at 335. In turn, the Board would not preclude the Agency from imposing conditions just because the particular conditions are not regulations normally applicable to the permittee.

Having upheld the Agency's authority to impose such conditions, the Board will now address the issue of equitable estoppel based upon prior Agency actions. Reynolds argues that the Agency is estopped from imposing the 408(a) restrictions in its reissued discharge permit because it had previously granted the construction and operating permit for the facility with which Reynolds achieved compliance with Rule 602(c), and that permit made no attempt to

require Reynolds to eliminate the overflow discharges or subject the discharge to the effluent limitations of Rule 408(a). Although the Board acknowledges that the doctrine of equitable estoppel is applicable to State administrative agencies, we find that it does not lie in this case. The Agency did not, and indeed, could not relieve Reynolds from the impact of any conditions pursuant to the Act and the Board's regulations when it issued the construction and operating permit on October 4, 1974, since it has no such authority. Even if the Agency should issue such a construction permit which subsequently imposes a threat to the health and welfare of the people of the State of Illinois, it is the Board's opinion that the Agency would not be estopped from its primary duty to protect the environment through the remainder of the NPDES permitting process. The Board finds that in this case the Agency is not estopped from imposing conditions premised on Rule 408(a) limitations on Reynolds combined sewer outflow.

Having found that the Agency has the authority to impose conditions based on Rule 408(a) limits and is in no way barred from doing so, the Board will now address the issue of whether or not the limitations imposed are shown as necessary in this case. The data presented in the Stipulation is the basis for the imposition of limitations by the Agency on Reynolds. It indicates that Petitioner's treatment complies with Rule 602(c) and overflow discharges have occurred approximately three times per year on an annual average basis. Review of the results of the grab samples taken during the discharges, corrected for grab sample analysis, indicate only two excursions of the oil and grease limitations of Rule 408(a) during the four years for which samples are available. Considering the infrequent occurrences of discharge, and considering the even less frequent excursions over the limitations, and considering the type of discharge and the high rate of dilution that necessarily attends the discharge, the Board finds the probability of harm to the environment is de minimus. Since the effects of the discharges on the environment are de minimus, the Board finds that the conditions based on 408(a) limits imposed by the Agency on Reynolds' reissued NPDES permit are not necessary in this case and shall be deleted from the reissued permit.

This Opinion constitutes the finding of facts and the conclusions of law of the Board in this matter.


ORDER

NPDES Permit No. IL0001341 issued by the Illinois Environmental Protection Agency on October 12, 1979 to Reynolds Metals Company for its facility located in McCook, Illinois is hereby remanded to the Agency for further consideration consistent with the Opinion herein.

Mrs. Anderson and Mr. Anderson concurred.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order were adopted on the 21st day of January, 1982 by a vote of 4-0.


Christan L. Moffett, Clerk
Illinois Pollution Control Board