ILLINOIS POLLUTION CONTROL BOARD
December 18, 1980

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| ILLINOIS POWER COMPANY, (Hennepin Power Plant), Petitioner, | ) | |
| v. | ) | PCB 79-243 |
| ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent. | ) | |

ORDER OF THE BOARD (by D. Satchell):

On November 5, 1980 Illinois Power (IPC) filed a motion for rehearing and on November 6, 1980 Illinois Environmental Protection Agency (Agency) filed a motion for clarification, or alternatively for rehearing, concerning the Board's October 2, 1980 Opinion and Order. On November 19, 1980 each party filed a response to the other's motion. On November 20 the Board agreed to reconsider and denied an Agency motion for relief from clerical error.

CHLORINE LIMITATION

The Agency objects to the last paragraph on page 3 of the Opinion which concerns Rule 910(a)(6) of Chapter 3 and the question of whether the Agency is authorized to impose its own effluent limitations in a permit different from the federal limitation, where there is a federal limitation but no state limitation. The Agency is concerned that the language of the Opinion may preclude it from imposing its own effluent limitations where the parameter is subject to neither a federal or a state effluent limitation. When the entire paragraph is read it is clear that this latter question was not before the Board. The October 2, 1980 Opinion and Order was not intended as a holding on this point.

CHLORINE MONITORING

In connection with the chlorine monitoring requirement, IPC objects to the option given the Agency of either imposing a permit condition based on total chlorine residual with quarterly concentration curves or a chlorine monitoring condition based on a different method of measuring chlorine. IPC's evidence on chlorine monitoring centered upon the lack of necessity for weekly monitoring curves. However, in connection with the evidence on what standard should be applicable, there was some indication that IPC preferred monitoring by free available chlorine. Had the option

not been included in the Opinion, the result would have necessarily been a permit with effluent limitations expressed as free available chlorine and monitoring by total residual chlorine.

In expressing its decision as an option the Board intended to allow IPC to amend its application to request monitoring by way of free available chlorine if that were indeed its desire. The information attached to the motion as Exhibit C should be presented to the Agency by way of an amendment to the application.

In its response to IPC's motion the Agency has requested that the Board remand the condition so that the Agency may rewrite it to require that free available chlorine be monitored by means of a chlorine concentration curve to be developed quarterly. This appears to be what IPC is requesting in its Exhibit C. However, IPC did not make its request for free available chlorine monitoring in connection with the permit application which resulted in this appeal. The question as to whether free available chlorine on quarterly concentration curves is required to accomplish the purposes of the Act is not before the Board. There is ample leeway in the Order as it is written for the Agency to so modify the condition. The Board therefore declines to modify its Opinion and Order with respect to this condition, except to the extent that IPC is specifically authorized to amend its permit application on remand.

REMAND

IPC objects in general to the remand for further action "not inconsistent with the Board's Opinion of this date." IPC contends that the Board should have rewritten the permit conditions in question and ordered the Agency to incorporate those particular conditions in the permit. Section 4(g) and Section 39 of the Environmental Protection Act (Act) confer upon the Agency the duty and authority to issue permits. Procedural Rule 502(a)(10) provides that the Order of the Board in a permit appeal "may affirm or reverse the decision of the Agency in whole or in part, may remand the proceeding to the Agency for the taking of further evidence or may direct the issuance of the permit in such form as it deems just, based upon the law and the evidence."

Remand of the permit to the Agency for further action is consistent with the Act and Board Procedural Rules and is not a subdelegation of the Board's Section 40 appellate powers.

Any NPDES permit issued pursuant to the Board's mandate in this case will be a final action of the Agency appealable to the Board pursuant to Section 40(a). If the Agency does not follow the Board's Order, or if IPC has additional objections to conditions in the permit as issued, it may raise these objections in this manner.

SCREEN BACKWASH

IPC has stated at several points that the Board must either apply Rule 401(b) or Rule 403. However, Rule 401(b) contains at least five references to other rules in Part IV. It is intended to be read in conjunction with the rest of Part IV. Indeed, if Part IV contained no effluent limitations, then Rule 401(b) would be meaningless. In an enforcement action Rule 401(b) creates an affirmative defense to a complaint alleging violation of the effluent standards--the respondent can admit that the contaminant is present in its discharge, but demonstrate that it is also present in its intake water. Its function in the context of a permit is somewhat similar.

Section 40(a) of the Act places the burden of proof in a permit appeal upon the permit applicant. The burden of demonstrating that a contaminant in a discharge is a part of the intake background is upon the permit applicant.

With respect to the screen backwash effluent limitation IPC has several arguments concerning the application of Appalachian Power Company v. Train 545 F. 2d 1351, 1377, 4th Circuit 1976. The effluent limitation in question is based on Rule 403 of Chapter 3, not upon any federal effluent limitation. Section 301(b)(1)(C) of the Clean Water Act (CWA) requires that the permit contain any more stringent limitations, including those necessary to meet water quality standards or treatment standards established pursuant to state law or regulations. Similar provisions are found in Section 39(b) of the Act and Rule 910(a) of Chapter 3. The State of Illinois is free to adopt more stringent water pollution rules than the federal rules and these must be included in the NPDES permit. If a state's substantive law requires background contamination to be cleaned up, then a condition must be included in the NPDES permit, regardless of whether the CWA so requires. The question before the Board was exclusively one of state law: Do the fish constitute an offensive discharge under Rule 403 and, if so, are they nevertheless background under Rule 401(b) of Chapter 3?

IPC quotes the following language from Section 12(f) of the Act: "No permit shall be required under this Subsection and under Section 39(b) of the Act for any discharge for which a permit is

not required under the Federal Water Pollution Control Act Amenments of 1972 (PL92-500) and regulations pursuant thereto." IPC contends that this, in connection with Appalachian Power, limits the Agency's authority to impose permit conditions which would require a discharger to remove background contaminants. However, Section 12(f) relates to the permit requirement: the Board cannot require NPDES permits of dischargers which would not be required to have NPDES permits under the Clean Water Act. IPC has not at any time in this proceeding contended that the facility, or its cooling water discharge, is not subject to the NPDES permit requirement. Once the permit requirement is established, conditions required pursuant to state law must be included.

## CATEGORIES OF FISH

IPC has indicated confusion about the categorization of fish. It has demonstrated that there exist a certain number of dead fish in the river water before it is taken into the intake structure. These fish constitute background within the meaning of the Rule 401(b); Rule 403 therefore does not require that they be removed from the discharge where no more than traces are added. There also exist in the Illinois River live fish, some of which are impinged in the intake structure. Those fish which die prior to discharge, and which are floating, violate Rule 403. They are not within the background exception of Rule 401(b), even though they were present as live fish in the river prior to intake. Live fish are not "background" contaminants within the meaning of Rule 401(b) with respect to fish killed by IPC's process.

Illinois Power has expressed concern about fish which are merely injured in the impingement process but which may recover subsequently. The basis of the permit condition is not the protection of fish. This was the subject of the Section 316(b) study. The permit condition is based on Rule 403 which proscribes the discharge of dead, floating fish to the river.

Rule 401(b) states that, "it is not the intent of these regulations to require users to clean up contamination caused essentially by upstream sources or to require treatment when only traces of contaminants are added to the background." Upon reconsideration the Board will modify its previous Opinion and Order in the following manner: "The permit should expressly authorize the discharge of background or the addition of traces to background."

Rule 401(b) also states that the effluent standards "are absolute standards that must be met without subtracting background concentrations." If IPC is adding more than traces to the background of dead fish, then it must remove all of the dead fish from its discharge.

## COST OF COMPLIANCE

Assuming that IPC is in violation of Rule 403, it is subject to an enforcement action regardless of whether the condition required by Rule 403 is included in the permit. If IPC is already required to spend a certain amount of money to comply with Rule 403 and the same expense would bring it into compliance with the permit condition, then it cannot say that the condition imposes any hardship upon it. It is Rule 403 which causes the hardship, not the permit condition.

Still assuming that Rule 403 requires the permit condition, IPC may petition the Board for a variance from Rule 403. Under Rule 914 of Chapter 3 the Board can order modification of the NPDES permit as a result of a variance. In a variance proceeding the cost of compliance may be alleged as arbitrary or unreasonable hardship.

Section 35 of the Act authorizes the Board to award variances while Section 39 authorizes the Agency to issue permits. If the Agency were to consider the cost or difficulty of compliance in deciding whether to incorporate a permit condition required by Board regulations, then it would be usurping the authority delegated the Board under Section 35. The permit would be a type of variance from the Board regulation.

## MISCELLANEOUS CONDITIONS

With respect to the redundant oil and grease reporting requirements, the Agency has responded to IPC's motion by offering to delete the redundancy. The Board authorizes the Agency to do so on remand.

With respect to Standard Condition No. 27, the Board intended to endorse the Agency's suggested modification in the language, which appears to adequately protect IPC. The permit conditions relate to exercise of the Agency's authority to impose effluent limitations pursuant to Rule 910(a)(6) of Chapter 3. If this authority is exercised, it will be by way of permit modification. IPC may challenge that authority by way of appeal of the modified permit. The Board does not perceive any additional protection afforded by IPC's surplusage.

The Board's Opinion and Order of October 2, 1980 is modified as noted above.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 19th day of January, 1980 by a vote of 5-0.

Christan L. Moffett

Christan L. Moffett, Clerk
Illinois Pollution Control Board