ILLINOIS POLLUTION CONTROL BOARD
September 30, 1976

ENVIRONMENTAL PROTECTION AGENCY, Complainant,	)	
v.	)	PCB 75-310
CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, Respondent.	)	

Mr. Steven Watts, Assistant Attorney General, appeared for the Complainant;
Mr. Thomas L. Cochran, Attorney, appeared for the Respondent.

OPINION AND ORDER OF THE BOARD (by Mr. Zeitlin):

The Complaint in this matter was filed by the Environmental Protection Agency (Agency) on August 7, 1975. That Complaint alleged that Respondent Central Illinois Public Service Company (CIPS) had, from June 13, 1975 until the filing of the Complaint, caused or allowed construction of an electric generating plant without the required construction permit from the Agency, which plant would (upon completion) discharge condenser cooling water into waters of the State, in violation of Section 12(b) of the Environmental Protection Act (Act) and Rule 951 of Chapter 3: Water Pollution, of this Board's Rules and Regulations. Ill. Rev. Stat., Ch. 111-1/2, §1012(b)(1975); Ill. PCB Regs., Ch. 3, Rule 951 (1976).

A hearing was held in the matter at Newton, Illinois, on June 15, 1976. No testimony or arguments were presented at that hearing, but the parties did enter as a joint exhibit a Joint Stipulation of Facts (Stipulation), which forms the basis for this Opinion and Order.

The electric generating facility at issue in this case is presently being constructed by CIPS at Newton, Illinois, pursuant to a Certificate of Public Convenience and Necessity granted by the Illinois Commerce Commission on July 5, 1972. Ill. Commerce Commission, Doc. No. 57391 (attached as Ex. 1 to Stip. [Stip. exhibits hereinafter Ex. 1, Ex. 2, etc.]). The Commerce Commission's Order contemplated a steam-electric generating plant with a rated capacity of 1,200,000 kilowatts, to be built at an estimated cost of $140 to $145 million, (id., 4). When complete, the station will consist of two units, each with a rated output of 550,000 KW; the first unit is expected to begin operating commercially on Dec. 1, 1977, with the second to come on line in 1981, (Stip. ¶8).

Along with the generating station, CIPS is constructing an impoundment for condenser cooling water. Construction of that impoundment, termed "Newton Lake" (Stip., ¶14), commenced on about August 1, 1973, (Stip., ¶8). Newton Lake was formed by the construction of a dam approximately 1,300 feet below the confluence of Sandy and Laws Creeks, on Weather Creek. The lake has begun to fill and has already reached operational level, although it is still approximately 10 feet below spillway level, (Stip., ¶14).

The essence of the Agency's Complaint is that Newton Lake constitutes waters of the State, and CIPS' power station constitutes a wastewater source; that being the case, a construction permit would be required for the power station, pursuant to Rule 951. The parties agree that, as of June 15, 1976, CIPS had not received the construction permit for such a wastewater source, (R. 3, amending Stip. ¶17).

CIPS' Answer, filed August 26, 1975, raises several defenses to the alleged violation. Most of the defenses revolve around a case decided by the Board concerning another of CIPS' cooling impoundments, and CIPS' appeal of our decision in that case. Central Illinois Public Service Co. v. EPA, PCB 73-384, 11 PCB 677 (March 28, 1974); Id., 12 PCB 361 (May 23, 1974) (Supplemental Opinion on Denial of Rehearing), aff'd., _____ Ill.App.3d _____, 344 N.E.2d 229 (Ill.App.Ct., 5th Dist., Feb. 2, 1976), Rehearing Denied with Opinion, id., (March 25, 1976), Petition For Leave to Appeal Filed, Ill. Sup. Ct., April 28, 1976. The Board in that case found that a purportedly similar cooling impoundment at CIPS' Coffeen electrical generating station constitutes waters of the State, a finding which CIPS continues to contest. Without citation, CIPS alleges that the pendency before the Supreme Court of its Petition for Leave to Appeal in that case should somehow bar Board action on this case. We find that argument to be without merit. The Fifth District's decision in that case, upholding the Board's earlier determination on the issue of whether the Coffeen impoundment constitutes waters of the State, merely provides additional basis for our several decisions on similar issues.

CIPS' central argument here, as in PCB 73-384, is that a lake contained entirely on its own property, formed by the damming of intermittently flowing streams, does not constitute waters of the State. We have held the opposite in CIPS, supra., Citizens for a Better Environment v. Commonwealth Edison Company, PCB 73-245, -248, 13 PCB 69 (July 18, 1974), and EPA v. Central Illinois Light Co., PCB 75-387, ___ PCB _____ (July 22, 1976), as well as in a comprehensive Regulation on the subject, In The Matter of Water Quality Standards Revisions, Cooling Lakes, R75-2, 18 PCB 381 (August 14, 1975), Opinion 18 PCB 681 (Sept. 29, 1975).

The parties' Stipulation clearly indicates that the intermittent streams dammed to form Newton Lake were, prior to impoundment, waters of the State. Under the rationale of the cases cited above, they remain waters of the State. The discharge of heated condenser cooling water into Newton Lake thus mandates a construction permit for the source of such heated effluent: Newton Station. The Agency's prima facie case is thus made.

Respondent's Answer (¶3) raised as an issue the pendency of an NPDES Permit, No. IL 000018, issued by the U. S. Environmental Protection Agency, whose terms are presently the subject of a request for adjudicatory hearing by CIPS. However, that request for adjudicatory hearing concerns CIPS' Coffeen Lake. CIPS does not state the relevancy of that matter to this case. With nothing further before us, we fail to see the relevancy of either the NPDES permit system generally, or specifically any NPDES permit concerning another station and lake, to this case.

Likewise, we fail to see any relevance to CIPS' alleged affirmative defense that the Agency, on October 9, 1974, stated that the construction of Newton Lake would be completed without causing water pollution, and that, "This construction does not propose a discharge into navigable waters [so that] certification by the Illinois Environmental Protection Agency under the provisions of Section 401 of the Federal Water Pollution Control Act of 1972. . . is not required." (Stip., ¶5; Ex. 4.) Again, the relevance of these facts to this case is not pleaded by Respondent and is not apparent to us. The defense is spurious.

Respondent also raises the issue of other permits which have been applied for or received concerning the power station and cooling impoundment at Newton. Those permits cannot affect our finding on the issue of violation.

Finally, Respondent alleged in its Answer that, prior to the Board's adoption of the Cooling Lakes Regulation on August 14, 1975, any application for permit filed by it "would have been an exercise of futility." Respondent apparently feels, without so stating, that it could not have filed a permit application indicating compliance with the relevant thermal regulations for discharges into waters of the State and thus could not have received a Permit. This defense is wholly without merit.

If CIPS felt that either it was unable to submit an application indicating compliance with those regulations, or that compliance with those regulations would have been unreasonable, it nonetheless could have pursued either of two avenues to obtain relief from those standards and obtain the necessary permit. CIPS could have, at any time, filed a Petition for Variance. Similarly, even before the enactment of R75-2, supra., providing specific regulatory standards for the setting of thermal standards for cooling lakes, CIPS could conceivably have obtained the relief which it felt was needed through the mechanism of a specific regulatory change. The Board provided just such relief, albeit only until July 1, 1978, to Commonwealth Edison, In the Matter of Water Quality Standards Revisions, R72-4 (June 28, 1973) (Opinion adopted November 8, 1973) ("the five mile stretch"), amending PCB Regs., Ch. 3, Rules 203(i)(4), 203(i)(9)(1976).

Respondent CIPS' conception of the reasonableness of compliance with the permit application requirements set pursuant to the Act, where statutory provisions and precedent for appropriate relief have been ignored, provides no defense to the alleged violation.

Despite the foregoing issues raised as defenses, and without admitting a violation, Respondent's Brief states that, "It thus appears clear the only issue presently before the Board is the question of whether any civil penalty may or should be imposed on CIPS by the Board." The Agency's prima facie case of violation having been made and there being no well-pleaded defenses, we turn to consideration of the factors set forth in §33(c) of the Act. In view of the Illinois Appellate Court, Second District's, Opinion in Processing and Books v. Pollution Control Board, No. 73-204 (Ill.App.Ct., 2d Dist., May 7, 1976) aff'g., EPA v. Processing and Books, PCB 72-148 (May 10, 1973), Supplemental Order (May 31, 1973), placing the burden with regard to §33(c) on Respondent, we shall address first the issues in §33(c) as they are raised by Respondent.

First, CIPS argues that no pollution of any kind is occurring as a result of construction at the Newton power station; CIPS notes that the plant is not yet operational. This argument avoids, however, the real issue here and the basic purpose of the permit system. Timely and proper permit applications to the Agency would provide assurance - before the fact - that no pollution will result from construction of Newton Station, after the station has been constructed and operation has commenced. Without adherence to the permit system and its requirements, we can have no such assurance.

CIPS also notes that no water is flowing over the dam site as yet. While that assertion misses another major issue - whether the water flowing into the lake will be free of pollution - CIPS again fails to address the purpose of the permit system. Without prior construction permits, we cannot know whether water flowing into the lake, or for that matter out of it, will cause pollution of waters of the state.

With regard to §33(c) CIPS again raises the pending case, supra., concerning its Coffeen Lake. CIPS claims that it has not been "dilatory or recalcitrant in its conduct," because it has taken "all reasonable steps to determine what it considers a vital and important legal question, namely, whether the state has jurisdiction over its private lakes..." Put simply, CIPS' contest of that issue in an unrelated case cannot excuse simultaneous violation of existing law and Regulations enacted pursuant to that law.

CIPS again states that it would have been an "exercise of futility" to follow the same procedure for Newton as it had at Coffeen. CIPS blithely excuses its violations with regard to Newton, and continues construction without the necessary permits, by stating that compliance with the permit system would have been a duplication of legal effort. This allegation is wholly without merit.

CIPS' next claim is that it has applied for all other necessary permits for Newton, and has committed itself to an expensive SO_2 scrubber removal system for the station. While CIPS' compliance with other regulations is laudable, it is also to be expected. Compliance with other related or unrelated laws and regulations is simply irrelevant to the violation charged.

In its discussion of whether a penalty is warranted, CIPS again cites the Agency's statements to the Department of Transportation that Lake Newton would not involve any discharge into "navigable waters," and in that regard was, "certainly...an indication the Agency did not consider any of the streams involved navigable and that no harm could come to the public by reason of Newton Lake." That letter, (Ex. 4), concerned pollution during construction, and does not concern itself with the possibility of thermal pollution after completion of Newton Station and Lake. A proper permit application to the Agency itself was the proper vehicle to obtain Agency judgment on such subsequent operation. The Agency's judgment concerning "navigability" is likewise immaterial here. That judgment by the Agency was made with reference to federal law, and has no relationship to the permit requirement at issue in this case. (Ex. 4 cites §401 of the Federal Water Pollution Control Act Amendments of 1972, P.A. 92-500.)

Finally, CIPS claims that there is no evidence that Newton Lake will ever be a source of pollution within any meaning of that word as used in the Act. This claim fails to address the issue of whether Lake Newton itself will ever be polluted, and again begs the central issue. The permit system, and compliance therewith, is necessary to assure the State that just such pollution will not occur.

Although, as noted previously. the burden of introducing matters for the Board's consideration under §33(c) of the Act is Respondent's, we shall also examine matters included in the Stipulation of the parties which may bear on our consideration under §33(c).

First among these is the Illinois Commerce Commission's Order with regard to Newton Station and Lake, (Ex. 1). Insofar as that Order states that Newton Station will enable CIPS to provide safe, reliable, and adequate electrical service, it bears on the social and economic value of Newton Station. Such social and economic value must, however, be weighed against the likelihood of pollution which may result from operation of the station after its construction. Without compliance with the permit requirement in issue here, it is impossible for the Agency or the State to make an informed determination of how that balance is to be resolved. Respondent's failure to submit a permit application with regard to discharges into Newton Lake from the power station prevents examination of the station's effect on the natural resources of the State, a determination which may have considerable bearing on the social and economic value of the station as a potential pollution source.

Although the suitability or unsuitability of Newton Station and Lake to its site has not been raised here by the parties, such suitability was addressed by the Commerce Commission in its Order, (Ex. 1, ¶9). The Commerce Commission determined that the site is indeed suitable, (id.). The Commerce Commission's Order, however, does not indicate that it considered the pollution potential of Newton Station. Such evaluation is inherent in the construction permit system violated here by CIPS.

The technical practicability and economic reasonableness of compliance with the permit requirement by CIPS provides no mitigation in this case. CIPS simply ignored the permit requirement as it applies to Newton Station and Lake. As noted above, CIPS' claim that compliance with that requirement would have been "an exercise of futility" is without merit: CIPS had several avenues by which it could have complied with that requirement.

The character and degree of CIPS' injury to and interference with the protection of the health, general welfare and physical property of the people in this case is simply that CIPS has prevented predictive evaluation of just these factors. The permit system is designed to prevent just such injury and interference through a mechanism deemed necessary by the Legislature in the Environmental Protection Act. Our Rules, as violated here, are intended to fulfill that statutory mandate, and prospectively protect the health, welfare and physical property of the people.

In view of CIPS' unexcused violations, we find that a civil penalty of $5,000 is necessary to protect the integrity of the permit system and further the purposes of the Act. The Board considers the permit system necessary for the protection of the environment, and that the permit system and its requirements may not be ignored by any individual or company for reasons of its own choosing. See, Aluminum Coil Anodizing v. Pollution Control Board, No. 74-394 (Ill.App.Ct., 2d Dist., July 22, 1976).

We shall not, however, order CIPS to immediately cease and desist its violations. Albeit belatedly, CIPS has filed a Regulatory Petition for a specific thermal standard covering discharges from Newton Station into Newton Lake. R76-6. As a result of the pendency of that regulatory proceeding, we shall order CIPS to cease and desist its violations within 180 days of the date of the Board's final action in R76-6. That period should provide adequate time for CIPS to prepare, and for the Agency to evaluate, a permit application reflecting the results of that regulatory proceeding.

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

ORDER

IT IS THE ORDER OF THE POLLUTION CONTROL BOARD that:

1. Respondent Central Illinois Public Service Company is found to have constructed a wastewater source in Newton County, Illinois, without the requisite construction permit from the Environmental Protection Agency in violation of Section 12(b) of the Environmental Protection Act and Rule 951 of Chapter 3: Water Pollution, of the Board's Rules and Regulations.

2. Respondent shall pay as a penalty for the above violations the sum of Five Thousand Dollars ($5,000.00), payment to be made within thirty (30) days of the date of this Order, by certified check or money order to:

Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
Springfield, Illinois 62706

3. Respondent shall cease and desist such violation within one hundred eighty (180) days of final action by this Board in the Regulatory Proceeding R76-6.

Mr. James Young abstained.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 30th day of September 1976, by a vote of 4-0.

Christan L. Moffett

Christan L. Moffett, Clerk
Illinois Pollution Control Board