

ILLINOIS POLLUTION CONTROL BOARD

December 19, 1974

ECHO LAKE COMMITTEE,)
Petitioner,)
)
v.) PCB 74-313
)
ENVIRONMENTAL PROTECTION AGENCY,)
Respondent.)

OPINION AND ORDER OF THE BOARD (by Dr. Odell)

On August 22, 1974, the Echo Lake Committee (Committee) filed its Petition for Variance with the Pollution Control Board (Board). The Petitioner requested a variance from Rule 203(h) of the Water Pollution Regulations (Chapter Three) which states: "(h) Any substance toxic to aquatic life shall not exceed one-tenth of the 48-hour median tolerance limit (48-hr TLM) for native fish or essential fish food organisms." The Committee wanted to apply a 2 1/2 percent rotenone solution to Echo Lake located in Lake County, Illinois, on September 6, 1974, to eliminate the over-population of carp and bullhead in order to improve water clarity and the game-fishing. On August 29, 1974, the Board ordered additional information to be submitted to enable us to decide whether the Petitioner satisfied the test of arbitrary or unreasonable hardship under Section 35 of the Environmental Protection Act (Act).

On September 6, 1974, the Echo Lake Committee carried out its fishkill without having obtained Board approval for its action. Petitioner went ahead because the Conservation Department will only apply rotenone in late August through September each year and the Committee felt it could satisfy the requirements to enable it to obtain a variance. It appears that the Petitioner discussed its situation with a Board staff member before the September 6 treatment. The staff member gave the Petitioner no opinion on the merits of its Petition, but did explain briefly to the Petitioner the procedures to be followed for seeking a variance.

On September 30, 1974, the Echo Lake Committee supplied additional information to the Board on its variance petition. The information indicated that:

1. Echo Lake is a 25 acre lake with an average depth of 4 1/2 feet. The lake is located one mile north of Lake Zurich in Lake County, Illinois.

2. The fish toxicant to be applied is Pro-Noxfish (Pinick Chemical Co.); EPA Registration #432-171; composed of 2 1/2 percent

rotenone, 2 1/2 percent sulfoxide, and 95 percent inert material. After application, the final concentration of rotenone in the lake will be 2ppm.

3. Application of rotenone is to be done under the control of Gary Erickson, State Fisheries biologist from the Illinois Department of Conservation.

4. Arrangements for fish disposal have been made with a local disposal company.

5. Rotenone presents various hazards to users coming in contact with it. It is poisonous if swallowed or absorbed through the skin. Contact with eyes, skin, or clothes necessitates washing with soap and water. Rotenone is combustible.

6. Rotenone remains toxic for one week to one month after application, depending upon various factors including water alkalinity and temperature.

7. Rotenone can be detoxified by adding chlorine or potassium permanganate at concentrations equal to that of the rotenone in the water.

8. Echo Lake is not used as a water source for human or animal consumption.

9. No portion of the lake is publicly owned.

10. Area residents favor treatment.

11. No water discharges from the lake from July through the winter. Application in September will not produce any downstream problem.

12. Failure to approve the variance would result in an arbitrary or unreasonable hardship in that the lack of clarity of the lake directly affects the community in several ways:

"a. The turbid water condition, which exists all year, presents a safety hazard to the community since rescue of a drowning person often relies on being able to see the person under water.

"b. The turbid water condition decreases the utilization of the lake for swimming and boating.

"c. The lake cannot support a healthy gamefish population (since gamefish are sight feeders). This has resulted in decreased utilization of the lake for fishing by the community.

"d. The lake, which should be an asset, is now a liability, which directly affects property values."

The additional information supplied September 30 included a letter dated November 8, 1973, from Gary Erickson which pointed

out that the lake is in essentially the same condition as it was in 1967. Mr. Erickson stated that rehabilitation of the lake was questionable because of the lake's connection with Lake Zurich. Dredging 1/4 of the lake to a depth of 10 feet must be completed before rehabilitation could be considered.

The Environmental Protection Agency (Agency) filed a Motion to Dismiss on October 11, 1974. The Agency argued that since the Petitioner had performed the fishkill, the Petition should be dismissed as moot. A Request For Order was filed by the Agency on October 30, 1974. In pertinent part, it stated:

"1. The Agency believes that Petitioner has failed to state an arbitrary and unreasonable hardship pursuant to Rule 401(b) of the Procedural Rules of the Board and Section 35 of the Environmental Protection Act. . . . Thus, its petition should be dismissed as inadequate. Though Petitioner claims that the Department of Conservation will apply fish toxicants only in late August or September, no reason has been given why the fishkill could not have been delayed until the end of September in the hope that a Board decision could be reached. The Agency further notes that there was no compelling reason for the toxicant to be applied this year since the subject lake has been degraded, according to Department of Conservation records, for seven years or more.

"2. . . . The Agency . . . believes that Petitioner's decision to proceed with the fishkill as planned renders this variance petition moot.

"3. If Petitioner had not proceeded with the toxicant application as planned, the Agency would be able to recommend the grant of said variance pursuant to conditions similar to those imposed by the Board in City of Jacksonville v. Environmental Protection Agency, PCB 74-92."

We deny the Agency's Motion To Dismiss on the grounds of mootness. Since the Committee is subject to an enforcement action following its application, we cannot say that any decision rendered in this case would have no legal effect upon the rights and obligations of the parties.

We grant the Agency's other motion (Request For Order) and dismiss the Petition for Variance as inadequate. First, there is insufficient evidence in the record to enable us to determine the possible benefit to the lake from the application of the toxicant. Mr. Erickson's letter of November 8, 1973, points out rehabilitation difficulties because of (we presume) possible carp migration from Lake Zurich to Echo Lake. Also, there is no evidence in the record on whether the dredging has been carried out. Second, we normally condition the grant of such variances on the use of certain procedures to protect the environment. In City of

Jacksonville v. Environmental Protection Agency, PCB 74-92
(September 19, 1974), we granted the Petitioner a variance to apply a fish toxicant to Lake Jacksonville subject to certain conditions, including the following:

"c) That Lake Jacksonville be closed for all primary and secondary contact uses, including but not limited to swimming, boating, and camping, for the fourteen day period during and after administration of the subject toxicant, and until fingerling rainbow trout or fingerling bluegill survive 48 hours exposure in livecars;

"d) That all necessary precautions be taken to protect cattle and other mammals and amphibians which may use Lake Jacksonville as a source of drinking water;

"g) That dead fish be deposited into enclosed container-type trucks and transported to a sanitary landfill in the vicinity;

"h) That Petitioner comply with all other statements made in its petition and accompanying reports and its amended petition regarding administration of the toxicant;

"i) That Petitioner report to the Agency the results of the subject administration of fish toxicant within thirty-five days of the completion of the operation."

"j) That treatment shall be made under the direct, on-site supervision of Fishery Biologists of the Department of Conservation. The City shall notify the Agency 10 days in advance of the treatment so that they may observe the treatment if they care to."

In Lake Patterson Fishing Club v. Environmental Protection Agency, PCB 74-341 (November 22, 1974), we included the following conditions in our variance grant:

"(a) Petitioner shall close Patterson Lake and the lake's surrounding land area to all primary and secondary contact uses, including but not limited to swimming, boating, fishing, and camping during the period of administration of the fish toxicant and until such time as a fingerling rainbow trout or fingerling bluegill will survive 48 hours of exposure in livecars.

"(c) The application of the fish toxicant to Patterson Lake shall be made under the direct, on-site supervision of a fishery biologist from the Illinois Department of Conservation."

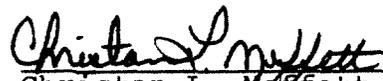
These conditions represent the usual kinds of safeguards necessary to protect the public interest when a variance is granted to apply a fish toxicant. In the subject case, the Petitioner has already proceeded with its fishkill. To grant a variance here would mean sanctioning a fishkill without insuring the kinds of safeguards indicated in the two similar cases indicated above.

The Board is not prepared to do this. Since the Board has no evidence that the quoted procedures were carried out by the Echo Lake Committee when it conducted its September fishkill, we rule that the requirements of Rule 401 of our Procedural Rules have not been met and that, therefore, the Petition is inadequate.

Petition for Variance is dismissed for lack of adequate information.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 19th day of December, 1974, by a vote of 4 to 0.


Christan L. Moffett