ILLINOIS POLLUTION CONTROL BOARD
May 17, 1972

ENVIRONMENTAL PROTECTION AGENCY	)	
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	)	
v.	)	# 71-291
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JAMES McHUGH CONSTRUCTION CO. et al.	)	

William J. Scott, Attorney General, by Richard Wade Cosby, for the Environmental Protection Agency; Richard L. Curry, Corporation Counsel, by Michael S. Jordan, for City of Chicago; Messrs. O'Keefe, Ashenden, O'Brien & Hanson, by John F. Ward, Jr., for Kenny Construction Company, Joint Venture.

Opinion & Order of the Board (by Mr. Currie):

The amended complaint charges three construction companies engaged in a joint venture, along with the City of Chicago, which employed them, with causing water pollution and creating a water pollution hazard in violation of section 12(a) and (d) of the Environmental Protection Act. There are no conflicts in the evidence.

The City employed the contractors to construct a so-called underflow sewer at Lawrence Avenue in Chicago, for the purpose of creating a storage space for overflows from combined sewers that would otherwise be discharged directly to the streams. In the course of tunneling a quantity of ground water is encountered, and city water is used to cool the drilling machinery. When this water is pumped to the surface for disposal, it contains suspended limestone from the tunnel.

The City's contract with the contractors required them to construct a settling basin with a half hour's retention time when half full, in order to allow the suspended material to settle out before discharge to the North Branch of the Chicago River. A City engineer was on the site at all times to see to it the contract specifications were adhered to.

An Agency inspector testified that on three days in September, 1971, he observed the discharge of grayish liquid from a trough on the work site directly into the North Branch of the Chicago River, and that it resulted in a discoloration of the River itself. He took samples of the effluent, which revealed suspended solids of 5200 mg/l, iron of 23.3, and lead

of 0.56. Employees of the City and of the contractors left no doubt that the source of the discharge was the effluent from the settling pond. The inspector also testified to the presence of large amounts of thick material of a similar color near the riverbank on the work site, which respondents' witnesses confirmed constituted material dredged from the settling pond in order to maintain its capacity.

Before discussing the legal significance of the foregoing facts, we turn to several ancillary issues raised by the parties.

The City argues that it is immune from Board jurisdiction because it is a home rule unit under Section 6 of Article 7 of the 1970 state Constitution. This argument is totally lacking in merit. Even the most cursory examination of the Constitution reveals that its purpose and effect are to confer governmental authority on local governments, not to limit state authority nor to exempt local governments from complying with state laws in their own proprietary functions. Thus section 6(a) provides that "a home rule unit may exercise any power and perform any function pertaining to its government and affairs," with certain exceptions; section 6(i) makes clear that no unexpressed negation of state authority is intended by specifying that home rule powers are to be exercised "concurrently with the State." The State did not in adopting the new Constitution abdicate its responsibility for the public health and welfare.

The City argues that application of the pollution laws in this case would be "harsh and unreasonable in light of the objectives of the respondents in this case." The suggestion seems to be that because the purpose of the construction is the prevention of combined sewer overflows that cause pollution, anything goes. This contention is unacceptable. Of course the project is commendable, but like everything else it must be done so as to minimize adverse effects on the environment. Sewage treatment plants reduce pollution too, but they are not exempt from pollution control laws requiring them to do it right. Cf. also EPA v. John T. LaForge Co., #70-39 (May 3, 1971) (rendering plant); Buerkett v. EPA, #71-303 (Feb. 17, 1972)(recycled oil). There was no suggestion that means could not have been found to prevent the discharge in this case while continuing the project; indeed the discharge has since been directed to a municipal sewer.

The City further argues that the State is precluded from complaining about discharges from the work site because the

contract specifications were approved by the Sanitary Water Board. The Agency says the evidence does not show SWB approval, merely that that Board reviewed the specifications. In any event, what the SWB did is no defense. Even the issuance of a permit for the discharge would not have authorized violations of the law or regulations such as are here charged. Such a permit would merely have meant the Board believed the equipment could be operated so as to avoid violations; responsibility for any resulting violations remains upon the permit holder. A driver's license is no defense to a charge of speeding.

The City next argues that it cannot be held for any violations that may have occurred because it employed independent contractors to do the job for it. We do not believe that independent-contractor cases drawn from unrelated fields of law are especially relevant in determining the persons on whom the statute imposes a duty to prevent pollution. Governmental policies respecting the allocation of insurance burdens in personal-injury cases, for example, bear no necessary relation to the policies made explicity by the Environmental Protection Act. The statute makes it unlawful not only to "cause" but also to "allow" pollution. We think this language goes beyond the common law and imposes an affirmative duty on persons in a position of potential control to take action to prevent pollution. We hold that the common law of independent contractors is not incorporated as such into the statute, but that the question for our decision is whether, in light of statutory policy, a respondent is in such a relationship to the transaction that it is reasonable to expect him to exercise control to prevent pollution.

In applying this test we recognize that there are cases in which a person who receives economic benefits from a transaction so lacks the capacity to control whether or not pollution occurs that it would be unfair to hold him responsible. We doubt, for example, that one who hails a taxicab could be held for its smoky exhaust, or the buyer of a pair of shoes for water pollution at the tannery. But the City is in no such helpless position in the present case.

A review of our prior decisions in this area reveals several cases in which we have held the statutory term "allow" imposes affirmative duties that may in some cases go beyond those of the common law to exercise care to prevent others from causing pollution. For example, EPA v. Amigoni, #70-15 (Feb. 17, 1971) held a landfill operator responsible for open burning apparently caused by others using his property:

> An owner of a refuse disposal facility must be responsible for the actions of those who he allows to dump refuse on his property. If such persons use open burning to dispose of their refuse on his facility, it will be presumed that such is allowed and consented to by the owner of the refuse facility. An owner of such a facility has a duty to supervise its operations and to stop open burning on his premises whether by himself or by those who he allows to do so.

In EPA v. Clay Products Co., #71-41 (June 23, 1971), we held a landfill owner must exercise some control over those operating the facility under lease: "In order to assure that the owner exercises care that improper operations do not occur on his property, we think it appropriate that the prospective provisions of our order apply to it as well as to its lessees." In EPA v. City of Waukegan, #71-298 (Dec. 31, 1971), we held the trustee of a land trust not responsible for landfill operations by others on its property because "this kind of ownership, without involvement in the management of the property itself, is not enough to impose liability . . . . No proof existed that this trustee . . . participated in, or had anything to do with, decisions concerning the use of the property." In the same case, however, two trucking companies were held for dumping at a landfill site whose owner had not obtained the requisite permit: "We think they should be held to the responsibility of inquiring as to whether a permit has been issued for the site and therefore whether it is a proper place for the disposal of refuse. . . . To allow them to go free in this case would give carte blanche to all haulers of refuse in the state to dump anywhere they wish and say 'I didn't know.'"

Guided by these precedents and by the statutory policy that those in a position to prevent pollution must do so, we believe the City can properly be held responsible for the violations alleged in the present case. This is not a case of an unsophisticated citizen who hires a contractor to build his home; this is the Public Works Department of a great city, manned with qualified engineers and in an excellent position to oversee the operation so as to prevent pollution. Indeed the City recognized its responsibility in this regard by inserting in the contract a provision requiring construction and maintenance of a settling basin, by placing an engineer on the site to enforce the contract, and by participating in later decisions to improve the treatment facilities. The City fully

involved itself in pollution control planning and implementation on this project, and it was jointly responsible with the contractors for preventing pollution. We would reach the same result if the contract had attempted to absolve the City of responsibility, for we do not believe the policy of the statute can be evaded by contract in a case, such as this one, in which the City is so clearly in a position to control its contractors in regard to pollution. The City commendably accepted that responsibility; in any event its capacity for control made it responsible for such violations as may have occurred.

The contractors suggest the converse of the independent-contractor principle on their behalf: that they simply relied on the City's specifications for the settling basin and therefore should not be held responsible if the basin was inadequate. But the statute forbids the contractor to cause pollution; he cannot avoid responsibility by relying on the advice of others. Both the City and the contractors are responsible for any violations in this case.

This brings us to the merits. We note the Agency's contention that the amended complaint charges a continuing violation ever since July, 1970, but that is not the way we read it. It charges that discharges occurred from September 17 to September 27, 1971, and that "the aforesaid discharge" (that is, in September, 1971) caused water pollution and a water pollution hazard "on or after July 1, 1970." The allegation is that September 1971 discharges caused water pollution after July 1970--a date whose relevance appears to be that it was the effective date of the statute. We do not think the addition of the single word "thereafter" in paragraph 2 ("thereafter, and specifically on or about September 17, 1971. . .") constituted fair warning that other dates were involved. The clear implication was that "thereafter" meant September 1971, when the discharges were observed. The Agency should be more careful in drafting if it means to charge a continuing violation.

The effluent contained 5200 mg/l of suspended solids, 23.3 of iron, 0.56 of lead; the regulations allowed 25, 10.0, and 0.1 respectively. Rules and Regulations SWB-15, Rule 1.07, paragraphs 10, 12. The violations were clear and, in the case of suspended solids, extreme. However, they were not charged. The amended complaint, like the original complaint, says nothing about any effluent standards, but speaks only of water pollution and of water pollution hazard. The Agency has proved violations it has not pleaded, and we cannot find violations on that basis. EPA v. Holland Ice Cream Co., #71-319 (Feb. 3, 1972). While violation of the regulations constitutes a

violation of the statute (§ 12(a)), some reference to the regulations is necessary as a matter of adequate notice and opportunity to defend. Similarly, while the Agency clearly proved a failure to remove color of an effluent to below obvious levels before discharge, as required by paragraph 10(b)(3) of Rule 1.07, this violation too was not pleaded and therefore cannot be found.

The charge is water pollution, which § 3(n) of the Act defines as such a discharge or alteration of the stream "as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life." We have had occasion before to observe that this definition requires proof as to the detrimental effect of a discharge upon the stream:

> In order to constitute water pollution, there must be an affirmative showing of the existence or likelihood of a nuisance or that the receiving waters will be rendered injurious to the public health.

EPA v. Modern Plating Corp., #71-38 (May 3, 1971), finding no water pollution because the only testing was of the effluent itself and not of the river alleged to have been polluted. See also EPA v. Holland Ice Cream & Custard Co., supra: "No evidence was introduced as to the condition of the stream that was alleged to have been polluted, and such proof is necessary on these charges." No stream samples were taken either upstream or downstream of the discharge; the Agency offered no evidence as to interference with any uses, present or potential, of the stream; the sole testimony as to the condition of the river was that it was somewhat discolored by the discharge. The material discharged was limestone; we cannot infer, in the absence of any evidence, that it would have a detrimental effect on the stream. Our new regulations, PCB Regs., Ch. 3, Rule 203(a), make it unlawful to create unnatural color or turbidity in a stream, but that provision was not in force at the time of the events in this case, nor was any comparable provision pleaded. Once again the Agency has pleaded water pollution and proved something altogether different that was not pleaded. We suggest more care in the preparation of complaints or of evidence, or both. See also EPA v. Koppers Co., #71-49 (July 22, 1971); EPA v. City of Champaign, #71-51C (September 16, 1971); EPA v. Ayrshire Coal Co., #71-323 (April 25, 1972).

We are left with the allegation that the acts of the respondents, as alleged in the complaint, created a water pollution hazard in violation of section 12(d) of the Act. Proof of actual pollution is unnecessary under this provision, which is designed to catch incipient pollution threats before the actual harm has occurred. See EPA v. Ayrshire Coal Co., supra. But it cannot mean that every effluent containing high concentrations of contaminants is prohibited without further proof, for that would render meaningless the restricted definition of water pollution. The proper application of that provision to a case like the present one is the application the Agency urges in its brief, namely, that the piling of limestone slurry on the riverbank after dredging the settling pond created a risk that the material might be washed into the river. Cf. EPA v. Ayrshire Coal Co., supra, applying the hazard provision to piles of coal-mine refuse placed where storm runoff could wash pollutants into the stream.

But the evidence here falls far short of that in Ayrshire in terms of showing that a true hazard of pollution existed. Substantially all we know is that the material--limestone rather than acid-forming coal refuse--was placed near the riverbank. We know nothing of drainage patterns, in contrast to Ayrshire, where diversion ditches were shown to have been constructed and to have failed so that runoff in fact was reaching the stream. A witness for the respondent contractors testified somewhat vaguely to the possibility of runoff during a rain:

Q At the time it was deposited on the river bank, did the drying process involve also some running off into the river of some of the more liquid portions of the sludge?

A Only if it would rain or something. If we cleaned it up, it wouldn't run off.

Q Was it so solid when it was deposited on the bank that it wouldn't run off?

A It wouldn't run off, no.

We do not think this somewhat ambiguous testimony established the Agency's burden of showing a significant risk of runoff from the sludge pile to the river, as is required to prove a water pollution hazard.

Moreover, the complaint does not adequately give notice that runoff from the sludge pile was an issue in the case. One reading that document would be led to believe that the "aforesaid actions" alleged to create a pollution hazard meant the discharge of contaminants into the North Branch, which is the only action, apart from generalities about the drilling operation, that is mentioned. This aspect of the case is governed by EPA v. Commonwealth Edison Co., #70-4 (Feb. 17, 1971), in which we held that invocation of the statutory air pollution ban was inadequate to support evidence as to sulfur dioxide problems in a case otherwise dealing explicitly and exclusively with particulates:

> The natural implication of this paragraph, tucked away as it is like a boiler-plate catchall provision, is that it is just another handle for establishing excessive emissions of the type already charged in the complaint, namely smoke and other particulates. We do not ask that the Agency plead all its evidence; we do think it is not too much to insist that the words "sulfur dioxide" be mentioned if that substance is to be brought into a case otherwise dealing with particulates alone by reference to the general prohibition against air pollution.

So here, the implication of the complaint is that the charge of water pollution hazard is based upon the discharge of effluent from the settling pond. Fair warning requires mention of the sludge pile if it is to be brought into the case.

Thus we conclude the Agency has failed to prove any of its allegations as to violations, and therefore that our judgment must be for the respondents. We note that the discharge complained of has since been terminated and the effluent directed into a sewer leading to a treatment plant, and that the sludge piles have been moved away from the river bank. The problem has therefore been corrected.

The Agency having failed to prove its case, the amended complaint is hereby dismissed for want of proof, with prejudice.

Mr. Dumelle dissents.

I, Christan Moffett, Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion and Order this 17th day of May, 1972, by a vote of 3-1.

Christan L. Moffett