ILLINOIS POLLUTION CONTROL BOARD
May 23, 1974

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY PETITIONER	)	
v.	)	PCB 73-384
ENVIRONMENTAL PROTECTION AGENCY RESPONDENT	)	

SUPPLEMENTAL OPINION AND ORDER OF THE BOARD ON THE MOTION OF PETITIONER TO RECONSIDER AND VACATE AN ORDER, AND, IN THE ALTERNATIVE, FOR A REHEARING (by Mr. Marder)

Petitioner has filed, on April 30, 1974, a Motion to Reconsider and Vacate an Order, and, in the Alternative, for a Rehearing. Upon review of the record and after taking notice of Board background data and precedent cases, the Board finds no reason to grant Reconsideration. The Board further finds that the questions raised in Petitioner's Motion do not warrant a rehearing. The following is a summary of facts leading to the above conclusion.

Petitioner argues that the Board's Opinion is based on inconsistencies, and cites our finding that the present aquatic life in Lake Coffeen is immaterial as arbitrary, when linked with our consideration of the aquatic life in McDavid Branch. Petitioner mistakenly believes that the Board's decision hinged on the presence of frogs (R. 37) in McDavid Branch. Such an argument is at best extremely naive and self-serving. Such a twisted interpretation of the thrust of the Board's Opinion mandates a reply.

The Board, in adopting water pollution regulations, recognized the intent of the Legislature that the waters of the State must be made safe for all legitimate and beneficial uses. The comprehensive scheme adopted takes into account differences in volumes of streams, their assimilative capacities, their uses and nature. In doing so it sets different limitations on different streams, but it does set limitations. McDavid Branch is, without a doubt, a water of the state and is thereby protected. The nature and flow of McDavid Branch is therefore the sole criteria for determining which effluent criteria apply. The fact that aquatic life exists in the McDavid Branch, be it frogs or otherwise, merely reinforces the Board's contention that it is indeed a water of the state; however, it is not the sole criterion. The fact that a diverse aquatic life exists in Lake Coffeen is indeed immaterial in that it in no way affects our decision on the Agency's rationale for denying a permit. Petitioner's sole reason for detailing the extent of life in Lake Coffeen was to present an affirmative defense that their effluent into said lake is not harmful to the existing aquatic life (as possibly distinguished from indigenous aquatic life). This affirmative de-

fense would be valid in a variance proceeding, but clearly is immaterial in a permit denial action. Permits are issued after sufficient information is received and a determination is made that the subject facility is in compliance with all applicable rules and regulations. Permit issuance and denials are not based on a determination of whether a non-complying stream is or is not harmful to the environment. The logical extension of Petitioner's affirmative defense is that each discharger could negotiate its effluent criteria based on a showing that aquatic life exists in the receiving stream. This is clearly unacceptable and certainly was not the intent of these regulations. The contention that the deletion of Mr. Dunham's testimony is inconsistent is unfounded; indeed, were it to be considered, it would merely reinforce the fact that McDavid Branch and Lake Coffeen are waters of the State and are therefore subject to regulations.

The State derives its powers to regulate waters of the state (and thus the rights to use such water) from two sources. The State Legislature, in adopting the Environmental Protection Act of 1970, duly created the Illinois Pollution Control Board as its agent to administer the regulation of the waters of the state. The two sources referred to above are the police powers of the state and the Illinois Constitution of 1970.

I. Police Power of the State

The police power is the inherent power which the State has, through the Legislature, to place such a restraint upon private rights as may be deemed necessary to preserve the health and comfort of the people and the welfare of society, and in exercising the police power, the Legislature may enact such laws as are reasonably necessary to preserve and promote the welfare of the people. The Legislature need not only regulate and restrain, but may prohibit whatever is harmful to the well-being of the people, even though such regulation, restraint, or prohibition interferes with the liberty or property of an individual. People v. Anderson, 355 Ill. 289 (1934: Relating to State Act Requiring T.B. Testing of Dairy Cattle); Powell v. Pennsylvania 127 U.S. 678, 32 L. ed. 253, 8 S. Ct. 992; People v. Warren, 11 Ill. 2d 420 (1957).

The police power is founded on the duty of the State to protect its citizens and provide for the safety and good order of society. People v. Johnson, 288 Ill. 442, 123 N.E. 543, 4 ALR 1535 (1919).

Police power means the power to promote the public welfare by restraining and regulating the use of liberty or property, Klever, Shampony Karpet Kleaners v. City of Chicago, 238 Ill. App. 291 (1925). The Supreme Court has in effect boiled this down to two maxims: 1) So use your own property as not to injure others; 2) The safety of the people is the supreme law. City of Chicago v. Gunning System, 214 Ill. 628, 73 N.E. 1035, 70 LRA 230, 2 Ann. Cas. 892 (1905).

The police power cannot be exercised if such exercise is arbitrary

and unreasonable. People v. Anderson, 355 Ill. 289 (1934). The Board is not exercising the police power delegated to it in such a manner in this case. The Environmental Protection Act provides that pollution of the waters of this state constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish, and aquatic life, impairs domestic, agricultural, industrial, recreational, and other beneficial uses of water, depresses property values and offends the senses; 111 1/2 IRS 1011 (a) (1). Sec. 13 of the Act provides the Board with direct authority to make regulations to carry out the purposes of the Act. 111 1/2 IRS 1013. Therefore, the Board in regulating the discharges to a lake such as Lake Coffeen is carrying out the express mandate of the Act in preserving waters for indigenous aquatic life. The Board has determined the best way to achieve the purposes of the Act is to regulate all effluent discharges to waters of the State. The Board has determined through its regulations that a natural water cannot be used as a treatment work. This is a proper exercise of the police power to protect the welfare of the people of the State of Illinois. One cannot magically change a water of the State to an unregulated private lake simply by throwing a dam across a stream. The fact that Lake Coffeen is private and that it thus may be used by Petitioner is not in dispute. The point is that Petitioner must use the waters in a way which conforms to the legal restraints imposed. This concept is practiced every time one drives a car or owns property. The Board in deciding a case such as this must explore the consequences of its decision. If Petitioner's logic is allowed to be extrapolated to the extreme, there would be no method of preventing a landowner from damming up the Illinois River and creating a "private lake" free from control. More to the point, Petitioner's logic would suggest that unlimited pollutants of any nature could be pumped into their private lake - and so long as the overflow was treated to conform with applicable standards this would be acceptable.

II. Illinois Constitution of 1970

The Constitution of 1970 provides that the public policy of the state, and the "duty of each person" is to provide and maintain a healthful environment for the benefit of this and future generations. It also directly granted the power to the General Assembly to provide for the implementation and enforcement of this public policy. S.H.A. Const. Art. XI, Sec. 1. "The use of the term 'duty of each person,' is meant to emphasize that a person's right to use his property as he sees fit is limited at least to his obligation to maintain a healthful environment" (Comments to Art. XI, Sec. 1, S.H.A. Const.).

The Board fully recognized that it would be unduly restrictive to include treatment works in the definition of "waters." As such the definition of "waters" in Chapter III differs from that found in the Environmental Protection Act. The Chapter III definition specifically exempts treatment works. It also specifically denies authorization for use of natural waters as a treatment works. Having found that McDavid Branch and thus Lake Coffeen is a water of the state (a natural water), it is by definition precluded from use as a treatment plant. One should

explore the Board's intent when drafting the original regulations (Chapter III) to determine if the above logic is consistent.

Perhaps the most direct testimony elicited on this subject was by Dr. Wesley Pipes (R71-14, pp. 347-356, Sept. 9, 1971). Dr. Pipes argued that the sweeping language of the Environmental Protection Act would tend to include "waters in a waste treatment facility." Dr. Pipes drew specific reference to cooling ponds, oxidation ponds, tertiary treatment lagoons, and farm ponds. Dr. Pipes suggested that waste treatment facilities be deleted from the definition of "waters." The Board agreed and made the change - with the additional proviso excepting natural waters from use as a waste treatment facility.

Dr. Pipes further requested that cooling ponds be specifically called a treatment facility by requesting the term "waste energy" in the definition of industrial wastes. The Board agreed, and this request was incorporated.

Dr. Pipes wisely went on to discuss the potential impact of his requests. His own words best explain the concern the Board had in adopting these regulations, and the concern the Board must have if it were to agree with Petitioner. (Following testimony by Dr. Wesley Pipes, Sept. 9, 1971, pp. 351-53.)

> "The net effect of these proposed changes would be to create implicitly a new Water Use Designation: 'Waste Water Treatment Facilities Waters.' Without more, the waters which fit this designation would not be required to meet any water quality criteria, except indirectly as the quality of water in the treatment facilities might cause effluent criteria to be violated. One could contend with strong factual support that the water in any private lake, pond, or stream contains some waste materials and was changing in quality and therefore fit this designation. The changes which I have suggested in the proposed regulations could in the long run provide a mechanism by which all private waters of the State would be exempt from application of any of the criteria of the proposed regulations contrary to the Board's apparent intention and to mine in making the suggestions.
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> "I believe that waste treatment and disposal is an appropriate use for some of the waters of the State. However, the use of waters for waste treatment and disposal should be regulated and controlled so that pollution, that is, interference with other uses, of other waters does not occur. The Board should be very careful to avoid a situation in which more and more of the waters of the State might each year find themselves in the implicit category of Waste Water Treatment Facilities Waters and accordingly exempt from meeting the criteria established for other water use designations."

Dr. Pipes then testified that he felt a change in Rule 901 to requi

influent and effluent data should be incorporated. The Board rejected this proposal, obviously feeling that the proviso of "natural waters" in Rule 104 was adequate protection. Dr. Pipes' words detailing the dangers of more and more waters of the state becoming waste water treatment facilities are at the heart of the instant case.

From the above review it is apparent that the Board in promulgating Chapter III agreed that certain waters which were classically termed "waters of the State" should be excluded from Rule 104. Waters in tertiary lagoons, waste treatment plants, or certain cooling lakes were to be exempt. The best case of a cooling lake which is exempt would be Commonwealth Edison's cooling lake at Dresden. There the lake is formed from a slipstream of an existing water, rather than as a continuum of an existing stream. In Commonwealth Edison's lake the natural path and aquatic life in the existing stream were allowed to flow normally. This is quite different from the instant case, and is the type of situation contemplated by the Board in its consideration of Chapter III.

As mentioned in the Board's Opinion on this matter (Pg. 3) that "Such other cases in the future will be decided on the merits of each case," this indicates the Board's awareness of both the complexities and the importance of such a decision. While cases detailing very similar facts would be decided similarly, the myriad of possible distinguishing factors prompts the Board to deal with this type of situation on a case-by-case basis. The question of waters of the State goes far beyond that of cooling lakes and has arisen in many previous cases before the Board. In most such cases, the principle of "protection of an existing stream" has been followed without contention. In cases such as Danville Sanitary District v. Environmental Protection Agency, PCB 74-12 and City of Carbondale v. Environmental Protection Agency, PCB 73-430,* dischargers have accepted the requirements of Rule 404 (f) without question. Although the flow in the receiving stream was intermittent, the most stringent (4 mg/l BOD_5 and 5 mg/l Suspended Solids or 10/12 with Piffer exemption) regulation has applied. The concept of preservation of the (intermittent) stream has held. Petitioner's logic would cause us to believe that if any of the above streams were to be dammed (and a pool or lake formed), the constraints of Rule 404 (f) would no longer apply.

The Board takes note that Petitioner is in a unique position. Many dollars have been spent in the construction of Lake Coffeen. Petitioner cannot at this time conform with the applicable thermal constraints. The Board also notes that cooling lakes can indeed be an environmentally sound and indeed preferable method of handling the problem of condensor cooling. However, the Board also notes that the present rules and regulations do not allow this operation, without a variance from the Board. Again we emphasize that this is so to prevent misuse of an existing stream. Petitioner would seem to imply that such a rule is arbitrary and unreasonable. If such is the case, the Environmental Protection Act has ample administrative remedy open to Petitioner. Petitioner may apply for a variance under Section 35 of the Act. Petitioner may fur-

* In these cases dischargers have requested variance from the restrictions of Rule 404 (f), thereby accepting its validity.

ther request an amendment to Chapter III to allow the remedy they desire If Petitioner were to file for a regulatory change complying with the provisions of Sect. 28 of the Environmental Protection Act, it would be the duty and responsibility of the Board to review the issue. Amendments to Various Board rules have been proposed and adopted in the past, and changes will continue to be made as new information becomes available. The flexibility of both the variance and regulatory amendment procedures was specifically incorporated in the Environmental Protection Act, to allow for both warranted delay and permanent change. These forms of relief are suited to Petitioner's plight. Permit appeals are not the proper forum for change. Having found by all the above that Lake Coffeen is indeed bound by existing Chapter III Rules and Regulations, the Board must reject Petitioner's motion.

It must be remembered that Petitioner was not denied a permit because it does not comply with Board effluent criteria. The Agency denied the permit only because Petitioner failed to supply adequate information for the Agency to determine whether a permit should be issued.

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

ORDER

IT IS THE ORDER of the Pollution Control Board that Motion of the Petitioner is denied.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, certify that the above Opinion and Order was adopted by the Board on the 23rd day of May, 1974, by a vote of 5 to 0.

Christan L. Moffett