ILLINOIS POLLUTION CONTROL BOARD
July 25, 1972

ENVIRONMENTAL PROTECTION AGENCY	)	
	)	
	)	
v.	)	# 72-216
	)	
	)	
IOWA-ILLINOIS GAS & ELECTRIC CO.	)	

Opinion of the Board (by Mr. Currie):

The parties have stipulated that, as alleged in the complaint, Iowa-Illinois installed four gas-oil turbine generating units at its Moline electric generating station in April 1970 without applying for construction permits from the Air Pollution Control Board. The parties differ as to what we should do about it.

The company argues that this Board has no jurisdiction over acts committed before July, 1970, when this Board came into existence. We reject this argument for reasons stated at length in EPA v. J.M. Cooling Co., #70-2 (Dec. 9, 1970). Since the complaint will be judged and any penalties determined on the basis of the law in force at the time of the acts in question, there is no problem of retroactivity; the mere fact that a different tribunal than at the time of the acts has jurisdiction raises no constitutional question. Cf. Nelson v. Miller, 11 Ill. 2d 378, 143 N.E. 2d 673 (1957). Various provisions of the Environmental Protection Act manifest the legislative concern for continuity in enforcement; no reprieve for violations of former law was intended; the regulations invoked in the complaint were preserved by section 49(c) of the statute. Continuing enforcement of prior law by the new agencies was explicitly provided for in section 49(b):

> All proceedings respecting acts done before the effective date of this Act shall be determined in accordance with the law and regulations in force at the time such acts occurred.

Thus proceedings for violations antedating the new statute were expressly contemplated. Since the old Board that formerly had enforcement powers was abolished, the necessary implication is that such proceedings were to be brought before this Board or in the courts. As for the concilation requirement of prior law, which the company says was not here followed, that is a procedural provision no longer available; like the Air Pollution Control Board's other procedures, it was abolished by the new statute and is not revived by section 49(b). The reference to prior laws in that section is to substantive law governing whether or not there was a violation and the extent of penalties therefor.

The company further argues that this complaint is barred by a statute of limitation, Ill. Rev. Stat. ch. 83, § 15, which requires "actions . . . for a statutory penalty" to be commenced within two years after the cause accrued. The acts complained of occurred in April, 1970; the complaint was filed in May, 1972. But the Illinois Supreme Court has squarely held this provision does not apply to suits filed by governmental units, because statutory limitations are construed not to apply to the sovereign in the absence of specific inclusion. Clare v. Bell, 378 Ill. 128, 37 N.E. 2d 812 (1941). The provision in question thus applies to private suits for penal damages, such as liability to an owner for illegally cutting his trees, Mueller v. Bittle, 321 Ill. App. 363, 53 N.E. 2d 56 (1944), or the liability of incorporators to creditors before deposit of capital, Gridley v. Barnes, 103 Ill. 211 (1882), not to suits by a county for penalties for nonpayment of back taxes (Clare) or to complaints by the State seeking money penalties.

The company argues that the complaint does not reasonably inform it as to the claim asserted, contending it cannot determine whether EPA sought a penalty for past omission or to require late compliance. The complaint quite plainly seeks both; it is not vague in the slightest and should be quite easily understood.

The company argues that the regulation (Rules and Regulations Governing the Control of Air Pollution, Rules 3-2.110, 3-2.130) requiring a permit was "vague and indefinite" as to its applicability to gas-oil turbines, contending that the "emphasis" of the State's control program at the time was on smoke and particulates, and that the turbines presented little problem in this regard. It is not entirely clear what legal conclusion is sought to follow from these contentions. No explicit argument is made that a permit was in fact not required. Although the emission regulations at the time did focus upon smoke and particulates, the statutory prohibition of air pollution was not so limited, and the permit regulation explicitly applied to facilities with potential for emitting <u>any</u> air contaminant. Nor is there any basis in this record for suggesting that gas-oil turbines have <u>no</u> potential for emitting smoke or particulates. That gas-oil turbines were not outside the permit regulation is emphasized by the specific exception for small gas boilers; no such exception would have been necessary if the regulation itself excluded all gas and oil-fired units.

The basis of the regulation was to allow the Agency to scrutinize any potential source of harmful emissions in order to assure that it would be constructed so as to prevent air pollution or the violation of emission regulations. Prevention is preferred to cure. That a permit would have been issued if sought is no defense to a complaint for having failed to seek it; such a defense would destroy the entire permit program with its important policy of prior agency review. Thus the failure to obtain permits before installing these turbines was a violation of the regulations; and the further argument that the complaint is moot because a permit

was finally obtained in 1972 is without merit. Late compliance moots the request for an order to comply in the future but does not excuse the past omission.

The thrust of the above argument respecting the emphasis on smoke and particulates appears to be that the regulation was unconstitutionally vague, although the Constitution is not invoked. We think this company should have had no difficulty in determining from the broad language of the regulation that a permit was required for these units. The rule spoke of any contaminants, and there was no applicable exception. There is no claim that the company carefully perused the regulation and concluded it was exempt; admittedly the failure to file was an oversight. The rule is not void for vagueness (cf. EPA v. Granite City Steel Co., #70-34 (March 17, 1971), and authorities cited), and Iowa-Illinois is in any event in no position to complain.

Apart from these legal arguments, the company asks that we exercise our discretion not to impose money penalties because it acted in good faith and caused no environmental harm. These factors are of course relevant and reduce the amount of the penalty that should be assessed. But good faith cannot be a complete defense if the regulations are to be enforced. It is the affirmative obligation of everyone building equipment that may be a source of emissions to obtain a permit, for the important policy reasons indicated above, just as it is the obligation of every citizen not to drive before obtaining an operator's license. No traffic court would allow as a defense to driving without a license that the accused did not know he needed one, or that he had forgotten to apply, or that he had not run down any pedestrians. The same principle applies here. The integrity of the permit system, which is an essential part of the control program, requires a small penalty in this case to help assure that people in similar positions are aware of their obligations. We will impose a penalty of $1000 after considering all the circumstances.

ORDER

Iowa-Illinois Gas & Electric Co. shall, within 35 days after receipt of this order, pay to the State of Illinois the sum of $1000 as a penalty for the failure to obtain permits before installing four gas-oil turbines at its Moline plant. Payment shall be by check payable to the Fiscal Services Division, Environmental Protection Agency, 2200 Churchill Road, Springfield, Illinois 62706.

I, Christan Moffett, Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion this 25 day of July, 1972, by a vote of 4-0 .

Christan L. Moffett