ILLINOIS POLLUTION CONTROL BOARD

December 5, 1974

ENVIRONMENTAL PROTECTION AGENCY, Complainant,	)	
v.	)	PCB 72-466
RAIL-TO-WATER TRANSFER CORPORATION, Respondent.	)	

ORDER OF THE BOARD (by Dr. Odell)

On September 27, 1974, the Environmental Protection Agency (Agency) filed a Motion For Modification with the Pollution Control Board (Board). The Agency quotes page three, paragraph three of our September 5, 1974, Opinion which states:

> To decide whether 9(a) has been violated, we must find not only that there has been interference, but also that the interference has been unreasonable. To determine reasonableness, we look to the standards in Section 33(c) of the Act.

The Agency asks us to revise this language. The Agency argues that the Illinois Supreme Court, in City of Monmouth v. Pollution Control Board 57 Ill. 2d 482, 313 N.E. 2d 161 (1974), PCB 71-259, "has clearly indicated that a showing of a Section 9(a) violation of an "unreasonable interference" type, can be made without relying upon Section 33(c). That is, Section 33(c) may be relied upon in fashioning remedies and penalties, but is not an element in deciding the issue of whether a violation exists. Had the court found that Section 33(c) is an element of proof of a 9(a) violation, the Court could not have concluded as it did, that 9(a) was violated since the element of technical feasibility was improperly introduced."

We deny this portion of the Motion by the Agency. In a recent case decided by the Illinois Supreme Court, Incinerator, Inc. v. Pollution Control Board (# 46369, November, 1974), PCB 71-69, the Court held that Section 33(c) must be considered in determining "unreasonable interference" under Sections 3(b) and 9(a) of the Act. The Court stated:

> The principal question raised on this appeal concerns the alleged violation of section 9(a) of the Environmental Protection Act. . . . The term "air pollution" is defined in section 3(b) of the Act as "the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably inter-

> fere with the enjoyment of life or property." . . . Section 33(c) of the Act provides . . .
>
> In City of Monmouth v. Pollution Control Board (1974), 57 Ill. 2d 482, it was alleged that section 9 of the Environmental Protection Act was unconstitutional for the reason that it did not contain sufficient standards for determining what constitutes air pollution. We there held that section 9(a) when read in conjunction with other provisions of the Act, including section 33(c), contains sufficient standards. Likewise in City of Waukegan v. Pollution Control Board (1974) 57 Ill. 2d 170, we observed that section 33(c) provides a protection against arbitrariness and furnishes guidelines for the Board in reaching its decision. However, in neither of those cases did we give specific attention to the related issues now raised on this appeal.
>
> The provisions here in question rather clearly direct that the unreasonableness of an alleged air pollution interference must be determined by the Board with reference to the section 33(c) criteria. Air pollution of the second category is not proved unless there has been a showing of an unreasonable interference with the enjoyment of life or property. Section 33(c) sets forth four categories of factors which bear upon the question of reasonableness and specifically directs that the Board "shall take into consideration" such factors in making its orders and determinations. Section 33(a) requires the Board to file and publish a written opinion stating the facts and reasons leading to its decision. The Board must take into consideration the factors referred to in section 33(c) and must indicate that it has done so in its written opinion by stating the facts and reasons leading to its decision. (emphasis added)

The Agency also moves that we modify the language found on page 7 of the Opinion which states, "The evidence is inconclusive on many questions of fact." The Agency argues that although it understands the statement to refer to methods of abatement, the sentence could be interpreted to mean that other evidence, such as the citizen's statements, were "inconclusive."

While we choose not to change the language in the Opinion, we will explain the meaning of the sentence. The sentence refers only to inconclusive evidence on methods of abatement of particulate emissions during the shiploading operations. In particular, in some aspects of Phases II and III of the transport process, the evidence was inconclusive as to the best method of control of dust

emissions. In Phase III, effective methods of dust control for tween-deckers were not introduced into evidence. In Phase II, the evidence for methods of control of dust at the first emissions source was not conclusive. Some evidence of the need for an enclosed system was introduced. How such an enclosed system would work was not fully explained by the Agency.

The Motion For Modification is denied.

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 5th day of December, 1974, by a vote of 5 to 0.

Christan L. Moffett