

ILLINOIS POLLUTION CONTROL BOARD

March 14, 1974

IN THE MATTER OF)
)
PROPOSED REGULATIONS FOR THE)
IMPLEMENTATION OF THE NATIONAL) PCB R73-11, R73-12
POLLUTANT DISCHARGE ELIMINATION)
SYSTEM)

ORDER OF THE BOARD DENYING MOTION TO SUSPEND PROCEEDINGS (by Mr. Henss)

The Illinois Environmental Protection Agency submitted proposed regulations for the implementation of NPDES on October 1, 1973. Four hearings were held on the Agency's original proposal. On January 16, 1974 the Director of the Illinois Environmental Protection Agency requested that this Board "temporarily defer further action on the NPDES Regulations" pending review of the matter by the Agency. Subsequently, on January 30, 1974 in light of certain comments and criticisms which had been made, the Agency submitted a second proposal. A fifth hearing was then scheduled in this proceeding for March 13, 1974.

On the day of the hearing, March 13, 1974, the Illinois Environmental Protection Agency appeared and filed its Motion to Suspend Proceedings. The Motion specifically requests that this Board "suspend all further proceedings in this matter until September 5, 1974 and that the Board table the proposals made by the Agency to the Board in this proceeding for the implementation of an NPDES program in Illinois". Dr. Richard Briceland, Director of the Illinois EPA, testified that the Federal Agency had termed the January 30, 1974 proposal "exceedingly cumbersome". This criticism was one of the factors leading to the motion to suspend proceedings (R. 801).

The Motion to suspend proceedings and table the proposals is hereby denied. The Illinois Environmental Protection Act requires that we adopt Regulations which will enable the State of Illinois to implement the national pollutant discharge elimination system without creating a dual permit system for Illinois. Section 13(d) of the Act states: "for purposes of implementing an NPDES program, the Board shall adopt: requirements, standards and procedures which together with other regulations adopted pursuant to this Section 13 are necessary or appropriate to enable the State of Illinois to implement and participate in the national pollutant discharge elimination system pursuant to and under the Federal Water Pollution Control Act Amendments of 1972." The Statute further provides "that it is in the interest of the People of the State of Illinois for the State to authorize such NPDES program and secure Federal approval thereof, and thereby to

avoid the existence of duplicative, overlapping or conflicting State and Federal statutory permit systems". [EPA Section 11(a)] We regard it as our duty to adopt regulations which will assist in implementing NPDES for Illinois, coordinate the appropriate regulations, and thereby avoid a dual permit system in this State. A suspension of these proceedings would thwart this purpose of the Governor and the Legislature.

The testimony on March 13, 1974 indicates that the United States Environmental Protection Agency, with the assistance of the Illinois Environmental Protection Agency, will now proceed to issue NPDES permits in Illinois. The intent of the two agencies is to issue the Federal permit even though the Administrator of the U. S. EPA has not yet approved a State program which will implement the provisions of the Federal Act in Illinois. All major dischargers in Illinois are to receive these Federal permits prior to December 31, 1974. The issuance of Federal permits prior to Federal approval of the State program assures a dual system for Illinois and is precisely the thing the Legislature and Governor sought to avoid.

Issuance of the Federal permit is apparently to be the cooperative effort of the State and Federal agencies. This is partly due to a Federal requirement that the State certify, prior to issuance of the Federal permit, that the conditions of the permit will, not later than July 1, 1977, bring compliance with any State water quality standards, treatment standards, or schedules of compliance (emphasis supplied) which are more stringent than the Federal limitations. [Federal Water Pollution Control Act Amendments of 1972, Section 401(a)(1); Section 301(b)(1)(C)] Our Rule 951 presents some problems for such certification by the Illinois EPA. That Rule provides:

"The Agency shall not approve any effluent discharge for the purposes of any Federal permit unless that discharge is in compliance with all provisions of the (Illinois Environmental Protection) Act and this Chapter, or has been granted a variance under Title IX of the Act."

Rule 951 existed at the time the Illinois legislature enacted P.A. 78-862 which was passed in 1972 with the intention of qualifying Illinois to administer the NPDES program. To the extent that Rule 951 conflicts with that legislative enactment the Rule is voided. It is obviously the intent of the Legislature to allow the Illinois EPA to issue Illinois NPDES permits without reference to the limitations of Rule 951 after the Illinois NPDES program comes into existence. [EPA Section 39(b)] However, we doubt that the Illinois Agency can certify its approval of discharges which are in violation of Illinois Standards prior to approval of an Illinois NPDES program. For one thing, it seems that the Legislature did not contemplate such a possibility, since the thrust of the legislation was for a "one permit" system and not the dual and overlapping system which will exist upon issuance of Federal permits alone. Secondly, such

certification is not contemplated by the Federal law. On October 1, 1973 when the Illinois EPA filed its proposal, the Agency said:

"Region V of the U. S. EPA has requested the Agency to propose to the Board the deletion of the present Rule 951 in its entirety so that the Agency may provide certification, as required by Section 401 of the FWPCA, of proposed NPDES (U.S.) permits for discharges presently not in compliance with Chapter III effluent requirements and other standards. The Agency believes that even if Rule 951 were abolished, it would be unlawful to provide such certifications because the certification would state that the discharge would be in compliance with the provisions of Section 301(b)(1)(C) of the FWPCA when such would not be the case."

We think that the Agency was correct in October 1973. The Agency can hardly certify that an applicant for a Federal permit is meeting Illinois water quality standards, treatment standards or schedule of compliance unless the applicant is actually in compliance with Pollution Control Board standards or the terms of an Illinois NPDES permit. When the Illinois NPDES program is implemented, such schedules of compliance will be established by the Illinois Agency but will be subject to review and modification. Until this procedure has been developed, certification of Federal permits by the Illinois Agency seemingly is prohibited by the Federal law as well as the Illinois law. We believe that the early implementation of an Illinois NPDES program is necessary in order to facilitate the issuance of Federal permits as well as Illinois permits.

In order to avoid a dual permit system and the application of overlapping and conflicting regulations it will be necessary to implement an Illinois NPDES program for the issuance of Illinois NPDES permits. Under Section 39(b) of the Act an Illinois NPDES permit could "allow discharges beyond deadlines established by the Act or by Regulations of the Board without the requirement of a variance" from Illinois requirements. Operating permits need not be obtained for any facility for which an Illinois NPDES permit has been issued. [EPA Section 13(b)(1)] Compliance with the terms of an Illinois NPDES permit would then constitute compliance with all Illinois and Federal requirements except for the discharge of toxic pollutants injurious to human health. [See: EPA Section 12(b)]

These benefits of the "one permit" system will not be available unless Illinois implements its NPDES program and it is approved by the Administrator of the U. S. EPA.

The Deputy Director of the Illinois EPA testified that the Federal permits to be issued this year prior to the Administrator's approval of an Illinois system will not protect the Illinois discharger from prosecution for substantive violations of Illinois effluent or water quality standards. In addition, operating permits will be required under existing Illinois law. [See: EPA Section 39(b)] An operating permit cannot be issued for a facility which will cause

a violation of the Illinois Regulations, unless a variance has been granted from those Regulations.

In addition to its request that we table Illinois NPDES proposals, the Agency requested that we eliminate operating permits for those dischargers for which an NPDES permit is required. However, even if we did this the recipient of a Federal permit would still be subject to the Illinois effluent and water quality standards.

A suspension of these proceedings then will assure a dual system in Illinois. In addition to compliance with the Federal NPDES permit an Illinois applicant would have to comply with Illinois requirements regarding standards and variances and unless we amend the regulations would also have to comply with Illinois requirements regarding operating permits. It is entirely possible that the applicant would be faced with two different compliance deadlines. These facts were understood by the Agency at the time it requested suspension of these proceedings. This is clear from the following testimony of the Deputy Director of the Illinois EPA:

Q. I have about two or three. I would just like to ask a very few questions, since it is late in the day. I think it was brought out in answer to Mr. Marder's question that dischargers in Illinois are subject to prosecution unless the permit is issued under a certified Illinois system.

Would that be a correct statement of what I think Jeff said?

A. Yes, it would be, except for failure to have a permit.

Q. Except for what?

A. Except for failure to have a permit. Any other substantive violations other than failure to have a permit--because we are considering that their permit, if they have an application on file with USEPA, is pursuant to the amendments, the same as having an application on file with us. So we are just talking about substantive violations of effluent or water quality standards.

A person would be subject to prosecution for those, yes.

Q. Well, then, this request for suspension of the proceeding would to me mean that the permits which are issued this year would provide no protection from the Illinois statute to persons receiving that permit, and prosecution could be brought even though they are in compliance with the terms of the permit, would that be true?

A. That would be potentially possible. It would not be a result that we would look for; but it would be possible.

Q. Would it not seem to be better, then, to act quickly to have a simple Illinois system so that those permits can be relied upon?

A. Absolutely. The thing we would like to do is to proceed to get an approved Illinois program as quickly as possible.

Q. Well, it sure would be nice to receive the information from the Agency that would make that possible, then, rather than a motion to suspend. Are you saying that you cannot give us that kind of information? If so, what kind of a time schedule are you talking about?

A. I don't think anybody at all is certain exactly what that information is that not only will satisfy the Board but other people who have commented on the Regulations that will work the best for this Agency given the environmental effort that has gone on in the last three years. I think the problem that we have been having in drafting the regulation is simply we are trying to accomodate everyone and at the end accomodating really no one.

Q. Well, I would say this procedure is sort of a trap to the person who gets a permit, in that he receives it and he thinks he is okay, and yet he has been misled, he can be prosecuted; and all of these people who have been getting these permits for the balance of this year--and that apparently includes all of the major dischargers, and a great number of--the great majority of all dischargers in the state will be receiving this permit, and I assume they will be thinking that, well, they are okay, they have got a permit, all they have to do is comply with its terms; and what you are telling us is that they could still be prosecuted under the Illinois statute. Now, is there justice in that?

A. Well, I am certainly hoping that should the procedure that we outlined be followed that no industry, municipality, or other discharger in the state would be misled--certainly not by the Agency or USEPA as to whether or not he would be subject to potential enforcement action by the EPA or a private citizen to enforce the substantive standards of the Pollution Control Board regulations

during that period of time that he is not on an Illinois permit, but only on a federal or U. S. NPDES permit.

As I indicated, though, we are not as interested in hauling a lot of people before the Pollution Control Board or the Circuit Court as we are trying to get them on compliance programs to bring them into the system. That is the problem we have all the time that is addressed to some extent by our permit program and is supplemented through the variance program, and ultimately if we find that neither of those devices work through our enforcement program. But we are ultimately looking to bring a guy into compliance.

Q. Right.

A. And I hope we can communicate that to him and indicate without otherwise tying our hands that should we get a reasonable compliance program it is not our intention to prosecute him during that period of time, that he does not have protection against an enforcement action by IEPA.

Q. Others could prosecute, you accept that possibility?

A. Oh, yes, and we are sure that the industries or municipalities that are getting permits during this period would understand that as well."

It is our view that a suspension of these proceedings for the purpose of issuing NPDES permits without the approved participation of Illinois in the National Pollutant Discharge Elimination System would be in direct contravention of the Illinois statute. The Agency indicated that it might not file actions to enforce the Illinois regulations while a discharger was in compliance with the terms of his Federal permit. However, the Act makes it "the duty of all State and local law enforcement officers to enforce such Act and Regulations". [EPA Section 44(a)] Presumably, in the absence of Agency enforcement, civil or criminal actions would be filed by the Attorney General or by the various State's attorneys.

We now have no alternative under the Statute but to proceed as expeditiously as we can toward promulgation of an NPDES regulation for the State of Illinois.

It is ordered that the Motion to Suspend Proceedings and Table the Proposals be denied.

Mr. Seaman was not present for the vote.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Order was adopted this 14th day of March, 1974 by a vote of 4 to 0.

Christan L. Moffett