ILLINOIS POLLUTION CONTROL BOARD
October 18, 1973

CITIZENS FOR A BETTER ENVIRONMENT, AN ILLINOIS NOT-FOR-PROFIT CORP.,	)	
v.	)	
LT. COLONEL WILLIS S. ROSING, AS COMMANDING OFFICER, JOLIET ARMY AMMUNITION PLANT; BRIG. GENERAL LAURENCE E. VAN BUSKIRK, AS COMMANDING OFFICER, UNITED STATES ARMY AMMUNITION PROCUREMENT AND SUPPLY AGENCY; JAMES R. SCHLESINGER, AS SECRETARY OF DEFENSE; and UNITED STATES OF AMERICA,	)	#72-464
FORMERLY	)	
CITIZENS FOR A BETTER ENVIRONMENT, an Illinois Not-For-Profit Corporation	)	
v.	)	
JOLIET ARMY AMMUNITION PLANT, UNITED STATES ARMY PROCUREMENT AND SUPPLY AGENCY	)	
and	)	
UNIROYAL, INC., Operating Contractors, a New York Corporation	)	

PHILLIP MILLER, FOR CITIZENS FOR A BETTER ENVIRONMENT
JAMES R. THOMPSON BY JAMES K. TOOHEY, ASSISTANT UNITED STATES ATTORNEY, FOR RESPONDENTS

OPINION AND ORDER OF THE BOARD (BY MR. DUMELLE):

This proceeding was initiated by the filing of a complaint on December 12, 1972 by Citizens for a Better Environment, a citizens' group, against Joliet Army Ammunitions Plant, United States Army Ammunition Procurement & Supply Agency, and Uniroyal, Inc., Operating Contractor, a New York corporation. Uniroyal, Inc. was dismissed as a party Respondent by our July 19, 1973 Order. The original complaint alleged violation of the Environmental Protection Act and the Water Pollution Regulations by Respondent, Joliet Army Ammunition Plant, in the following particulars:

1. Since June 25, 1971, violation of Section 12(a) of the Environmental Protection Act by the discharge of contaminants into the environment so as to cause, or tend to cause, water pollution.

2. Since July 1, 1972, the discharge into the waters of the State of materials containing deoxygenating wastes in concentrations violating Section 404(b) of the Water Pollution Regulations of the Pollution Control Board.

3. Since October 11, 1972, the discharge into the waters of the State of materials containing concentrations of mercury in viol tion of Section 408(c)(i) of the Water Pollution Regulations.

4. Since March 7, 1972, failing to submit operating reports in violation of Section 501(a) of the Water Pollution Regulations.

5. Since March 31, 1971, failing to report utilization of mercury in violation of Section 501(b) of the Water Pollution Regulations.

6. Since July 1, 1972, failing to file a project completion schedule with respect to discharges of iron, lead, oil, total dissolved solids and pH in violation of Section 1002(b)(i) of the Water Pollution Regulations.

Respondents Joliet Army Ammunition Plant and United States Army Ammunition Procurement and Supply Agency, represented by the United States Attorney for the Northern District of Illinois moved to dismiss the complaint on the grounds of sovereign immunity, failure to consent to suit, and that the named Respondents were not legal entities and not subject to suit. Complainant filed an answer to the motion to dismiss to which Respondents filed a reply. The motion to dismiss was denied by our order of March 15, 1973. Respondents filed a motion for reconsideration, which was taken with the case by our May 17, 1973 Order.

Hearing was held on the complaint on May 23, 1973, at which time the United States Attorney appeared specially on behalf of the Respondents reasserting their position that the Board lacked jurisdiction to consider this complaint for reasons above stated. Although the hearing proceeded purportedly with the Respondents making only a special appearance, the Assistant United States Attorney actively participated in cross-examination of the complainant's witnesses. While we deem such action improper in the circumstances, we will not construe it as a waiver of respondents' special appearance. On June 29, 1973, complainant moved for leave to amend its complaint by designating the parties Respondent as follows:

Lt. Colonel Willis S. Rosing as Commanding Officer,
Joliet Army Ammunition Plant;
Brig. General Laurence E. Van Buskirk, as
Commanding Officer, United States Army Ammunition
Procurement and Supply Agency;
Mr. James R. Schlesinger, as Acting Secretary of Defense;
and the United States of American, Respondents.

Complainant also moved to amend paragraphs 2, 3 and 4 of the original complaint limiting the violations asserted in those paragraphs to the period between the commencement dates alleged in each paragraph, respectively, and December 1, 1972, and moved to delete paragraph 6 relative to reporting on the utilization of mercury.

Oral argument was held before the Board relating principally to jurisdictional contentions and sovereign immunity. Complainant's motion to amend its complaint was granted without opposition by Respondents.

Our Order permitting the amendment of the complaint and dismissing Uniroyal as a party Respondent was entered on July 19, 1973.

On July 25, 1973, complainant filed its amended complaint. On August 20, 1973, Respondents filed a supplemental memorandum in support of their motion to dismiss.

Since by our order of May 17, 1973, we have taken with the case the Government's motion for reconsideration of our denial of its earlier motion to dismiss the complaint, this subject will be reviewed de novo in this Opinion and Order. Jurisdictional issues raised in this proceeding are matters of first impression and of extreme importance and difficulty, and have not been exhaustively analyzed in any prior proceeding. Briefly stated, we are confronted with the following issues requiring determination, all of which must be resolved before violations of the Environmental Protection Act and the Water Regulations can be considered:

1. Does the defense of sovereign immunity apply to the Respondents in the context of the instant case;

2. If the defense of sovereign immunity is initially available, have the government and its instrumentalities nevertheless expressly, or by implication, waived the defense of sovereign immunity with respect to the subject matter of the present proceeding and submitted to State jurisdiction and compliance with State water standards.

3. If sovereign immunity has been waived is the Pollution Control Board the proper forum for adjudication of the issue presented in the complaint;

4. If sovereign immunity has been waived and the Pollution Control Board is a proper forum for resolution of the issues presented, are the parties Respondent designated by the amended complaint properly subject to the Board's jurisdiction in view of the fact that the amendment to the complaint did not occur until after the hearing had been completed.

While the defense of sovereign immunity is available to the United States Government and its instrumentalities in the first instance, such immunity can be waived by action of the sovereign. See State of Washington v. Udall, 417 Fed. 2d, 1310 and cases cited. California v. Davidson 3 ERC 1157 U.S. Dist. Ct. Nor. Dist. Calif; County of Milwaukee v. Veterans Administration Center 5 ERC 1412 U.S. Dist. Ct. East. Dist. Wis. The immediate issue therefore, is to ascertain whether such waiver has occurred and whether consent to suit has been effected.

The Federal Water Pollution Control Act Amendments of 1972 contain provisions cited by both sides to substantiate their respective positions. (Citations and section numbers will be as contained in U. S. Code Service, FCA Ed. Title 33 Navigation).

Section 1323 provides in part as follows:

> 1323. Federal facilities pollution control. -- Each department, agency or instrumentality of the executive, legislative and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. The President may exempt any effluent source of any department, agency or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so, except that no exemption may be granted from the requirements of section 306 or 307 of this Act (33 USCS §1316 or 1317)...

No suggestion has been made that Presidential exemption has been granted with respect to any of the effluent emissions complained of in the present case. Section 1365 provides as follows:

> 1365. Citizen suits - (a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf --
>
> (1) against any person (including (1) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act (33 USCS §§1251-1376) or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act [33 USCS §§ 1251-1376] which is not discretionary with the Administrator.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such Act or duty, as the case may be, and to apply any appropriate civil penalties under Section 309(d) of this Act [33 USCS §1319].
>
> (b) No action may be commenced --
>
> (1) under subsection (a)(1) of this section --
>
> (A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order; or
>
> (B) If the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.
>
> (2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 306 and 307(a) of this Act [33 USCS §§ 1316, 1317(a)]. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.
>
> (c)(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.
>
> (2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(d) The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorneys' and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) For purposes of this section, the term "effluent standard or limitation under this Act" [33 USCS §§ 1251-1376] means (1) effective July 1, 1973, an unlawful act under subsection (a) of Section 301 of this Act [33 USCS § 1311]; (2) an effluent limitation or other limitation under section 301 or 302 of this Act [33 USCS §§ 1311 or 1312]; (3) standard of performance under Section 306 of this Act [33 USCS § 1316]; (4) prohibition, efflue standard or pretreatment standards under Section 307 of this Act [33 USCS § 1317]; (5) certification under section 401 of this Act (33 USCS §134; or (6) permit or condition thereof issued under Section 402 of this Act [33 USCS § 1342]; which is in effec under this Act [33 USCS §§ 1251-1316] (including a requirement applicable by reason of Section 313 of this Act [33 USCS § 1323].

(g) For the purposes of this section, the term "citizen" means a person or persons having an interest which is or may be adversely effected.

(h) A Governor of a State may commence a civil action under subsection (a), without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the administrator to enforce an effluent standard or limitation under this Act the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State. (June 30, 1948, c. 758, Title V, §505, as amended, Oct. 18, 1972, P. L. 92-500, §2, §6 Stat. 888).

Complainant contends that Section 1323 constitutes a waiver of sovereign immunity and consent to State jurisdiction so far as the Federal Government and its installations are concerned. This section provides that each department, agency or instrumentality of the executive legislative and judicial branches of the Federal Government having jurisdiction over any property or facility shall comply with State requirements respecting control and abatement of pollution to the same extent as any person is subject to such requirements. Certain provisions for Presidential exemption are provided which have not been promulgated in respect to the matters here in contention or the facilities involved. Respondents contend that Section 1365 limits citizen suits to only those violations specified in 1365 and that in any event, any suit brought thereunder must be filed in the United States District Court.

An analysis of these two sections does not persuade us that citizen suits are limited to the violations described or venue provided in 1365. This section relates to suits alleging violation of effluent standards or orders promulgated or issued pursuant to the Federal Act. It does not purport to foreclose or limit the coverage and capabilities available under 1323. Indeed, Section (e) of 1365 states as follows:

> "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency),"

providing a square recognition that 1365 does not foreclose citizen action that would be available in the absence of 1365, and includes those actions available against the Federal Government and its instrumentalities pursuant to 1323. The totality of both sections manifests that 1365 is an alternative and not an exclusive remedy for citizen suits and that 1323 is available for the type of action presently before us.

Accordingly, we do not view 1365 as a limitation on the provisions of 1323 either with respect to the scope of the complaint or the jurisdiction of the District Court. Since the action is not based on 1365, whatever limitations specified therein relating to District Court jurisdiction are not applicable.

California v. Davidson 3 ERC 1157 was decided by the United States District Court, Northern District of California, on January 19, 1971. The State of California brought an action for injunction and monetary relief against the Commanding General of Fort Ord Military Reservation alleging that the operation of the Fort polluted Monterey Bay by discharging sewage near the beach. Violation of applicable California Water Quality Standards had been previously asserted in a cease and desist proceeding brought before the California Regional Water Quality Control Board which had issued a cease and desist order after hearing in which representatives of the Fort had an opportunity to appear pursuant to State Code. Because of the Fort's failure to comply with the provisions of the cease and desist order, an injunction proceeding was initiated in the Superior Court of California and removed to the United States District Court. The defense of sovereign immunity was asserted by the Fort pursuant to motion to dismiss. The motion to dismiss was denied, the court holding on the facts of the case, that the defense of sovereign immunity was not available. The court addressed itself to the then existing provisions of the Federal Water Control Act, which provided (Sec. 466(i)):

> "Each federal agency...having jurisdiction over any real property or facility,...shall, consistent with the paramount interest of the United States as determined by the President, insure compliance with applicable water quality standards and the purposes of this Act..."

The court noted that this section mandated all Federal Agencies to comply with applicable water quality standards which legislative history made clear included both State and local regulations. The Court observed that while the President could permit noncompliance, no such action had been taken and lacking such Presidential action, any discharge by Fort Ord in violation of state or local water pollution standards, exceeds the specific limitation found in the 466i and renders it subject to suit. The Court concluded that Defendant's motion to dismiss on the grounds that the action was an unconsented suit against the sovereign should be denied citing State v. Udall, 417 Fed. 2d 1310. The present case is an a fortiori application of the requirement of Federal facilities to comply with local regulation. The language of 1323 is broader and more inclusive than previous Sec. 466i and provides that all departments, agencies and instrumentalities of all branches of the Federal Government, executive, legislative and judicial, engaged in any activity resulting or which may result in the discharge of pollutants, shall comply with State and local requirements respecting control of pollution to the same extent that any person is subject to such requirements. No clearer statement of the Congressional intent could be made. No exemption is provided except by Presidential Action. California v. Davidson stands as square authority for the subjection of a military facility to State regulation of its pollution discharges on the basis of Sec. 1323. To the same effect, see County of Milwaukee v. Veterans Administration Center 5 ERC 1421, U.S. Dist. Ct. East. Dist. Wis. requiring the Veterans Administration to comply with county air regulations pursuant to Sec. 1857(f) of the Clean Air Act containing the same provisions with respect to requirement of Federal compliance with State and local regulations as in Sec. 1323 of the Water Amendments. The opinion in California v. Stastny 4 ERC 1447 (U.S. Dist. Ct. Cen. Dist. Calif.) cited by Respondents does not discuss the doctrine of sovereign immunity, notwithstanding its reference to Sec. 1857 of the Clean Air Act. No reason is suggested for its holding and we believe the doctrines expressed in the Davidson and County of Milwaukee cases are apposite.

Based upon the foregoing analysis, it is our view that by Sec. 1323, the United States Government has waived sovereign immunity and consented to suit with respect to the matters specified therein. Since the instant case is not brought for violations or relief provided in 1365, but for violations of State standards, the provisions limiting suit to actions in the District Court are not controlling. Sec. 1323 subjects all departments, agencies or instrumentalities of the executive branch of the Federal Government to the jurisdiction of the State with respect to all State requirements relating to the discharge of pollutants "to the same extent that any person is subject to such requirements." Analysis

of this section leads to the inescapable conclusion that the Federal Government has subjected itself to not only the substantive limitations set forth in any relevant statutes and regulations, but also to the procedural provisions contained in such regulations. Procedure before the Pollution Control Board is an inherent part of the pollution control program of the State of Illinois to which "any person" would be subjected for violation of the relevant regulations and statutory provisions. We point out that the Federal Government is a "legal entity" as defined in Section 3(i) and is therefore subject to the Illinois Environmental Protection Act and to Board's Rules and Regulations. The fact that the Federal Government is not specifically defined as a "person" in the Illinois Environmental Protection Act, Sec. 3(i), is no longer relevant in view of provisions of Sec. 1323 subjecting the instrumentalities of the United States Government to the coverage of the Act, irrespective of whether in the absence of 1323, they might not otherwise be so subject. Accordingly, we view 1323 as a waiver of sovereign immunity and consent to State jurisdiction for violations of the State Regulations. The section likewise subjects the Federal Government to the procedural aspects of the State environmental program to the same extent that any person is subject to such requirements. California v. Davidson 3 ERC 1157.

We do not believe the citations of the government are persuasive in the face of this provision nor is the characterization of the Joliet facility as a Federal fort controlling. While Article I, Sec. 8, Clause 17 of the United States Constitution may invest Congress with exclusive jurisdiction under such facilities, it is by a Congressional Act that sovereign immunity is waived and submission to the State Pollution Control Regulations is effectuated relative to pollution violations. It should be noted that the facility in California v. Davidson was Fort Ord. Clearly, the language of Section 1323 covers all instrumentalities of the Federal Government and does no more than subject the Federal installation's pollutional discharge to State statutes and procedures. This in no way is a relinquishment of authority over Federal installations, but rather a submission to state jurisdiction of one limited aspect of the facility's operation. What is complained of is the pollutional discharge by Respondent into the environment. The effluents complained of while generated on the Federal facility are creating their harm and damage to the environment "in the waters of the State of Illinois" and ultimately outside of the Federal reservation. What is subject to control is not so much what takes place on the reservation as the impact of such activities beyond the jurisdiction boundaries of the reservation. This is precisely the type of violation to which 1323 is designed to apply.

Nor are we persuaded that because the Illinois Attorney General elected to file a proceeding against the same Respondent in the United States District Court for violation of the Clean Air Act that this constitutes a recognition that the present proceeding before the Pollution Control Board is considered improper by him. Many proceedings that are cognizable by the Pollution

Control Board in the first instance have, at the election of the Attorney General, been brought in State or Federal Courts in lieu of an administrative proceeding before the Board. The fact that the Attorney Gemeral may have a multiplicity of options as to how he proceeds should not be construed as a recognition that any particular avenue of approach is unavailing. Furthermore, the case cited by Respondents is a suit for violation of the Federal Clean Air Act for which Federal jurisdiction would be more appropriate than before a State administrative Board. The present case is one involving violation of State standards with respect to which the Pollution Control Board has clear and unquestioned statutory authority. We hold that the Board has jurisdiction to consider the complaint filed.

The last remaining jurisdictional question relates to the status of the parties. The original complaint was brought against Joliet Army Ammunitions Plant, United States Army Ammunition Procurement & Supply Agency and Uniroyal, Inc., Operating Contractor, a New York corporation. By order of the Board entered July 19, 1972, the parties Respondent were changed to:

> Lt. Colonel Willis S. Rosing, as commanding officer
> Joliet Army Ammunition Plant;
> Brig. General Laurence E. Van Buskirk, as commanding officer
> United States Army Ammunition Procurement and Supply Agency;
> James R. Schlesinger as Secretary of Defense
> United States of America.

This amendment occurred after hearing on the original complaint. We must agree with Respondents that the foregoing designation was not a mere amendment of the complaint to cause it to conform to proofs or the correction of a misnomer. New parties were substituted for those originally complained against and the issue that must be resolved is whether due process considerations mandate their dismissal as no violations have been expressly asserted against them until after the hearing.

We are constrained to hold that to the extent Lt. Col. Rosing, Brig. General Van Buskirk, and James R. Schlesinger, have been designated as parties respondent, the charges against them must be dismissed. The amended complaint alleges that these Respondents, by their actions, have violated the statutory provisions and regulations complained of. Since they were not apprised of this suit until after the hearing, they must be dismissed. Whether they are charged in an individual or representative capacity is not controlling. The Board's order would be directed to them and they have not had an opportunity to respond to the charges asserted. However, we do not believe the same conclusion is necessary so far as the United States of America is concerned. The original proceeding was against the Joliet Army Ammunition plant and the United States Army Proc. & Supply Agency. These agencies are

unquestionably facilities of the United States Government. As stated in Respondent's brief, page 7 "...(R) regardless of the character of the proceedings, an action against an Agency or department of the United States is, in fact, an action against the United States." We feel that so far as the change in pleadings is concerned, the United States of America has been before the Board throughout the entire proceeding and has been represented by counsel. All actions by way of motion and participation in the case by the United States Attorney have been on behalf of the United States of America. Accordingly, we believe that the United States of America has been before the Board throughout the entire proceeding and that the change in caption is not prejudicial to it. No due process questions arise by virtue of this change in designation, so far as the Government is concerned. This is particularly true in view of the relief sought by the complaint. Complainants seek, among other things, the entry of a cease and desist order which could be directed against the United States should we find the allegations of the complaint proven. It may be that if such an order is entered against the United States an ancillary proceeding would be necessary to achieve enforcement, at which time the Board's order would be directed to these individuals specifically mandated with the operation of the facility.

The last remaining issue is whether in view of the special appearance filed by the United States Government and the instrumentalities originally charged, and the failure of the Government to participate in the hearings, we are justified in entering a definitive order on this state of the record should violations be found. Our original order of March 15, 1973 denied the Government's motion to dismiss. The Government moved for reconsideration. Our order was that the motion be taken with the case, manifesting a definite intention on our part that while we would keep the matter of sovereign immunity and jurisdiction open for consideration, we intended that matter proceed to hearing. The Government appeared specially at the hearing, but elected not to participate in the proceeding. We believe that the Government has made its election to stand on the jurisdictional question in the face of Complainant's proof. Opportunity was given to refute the allegations and evidence made by complainants at a hearing in which the Government chose not to participate. We believe on this state of the record, we may move forward for a consideration of the merits of the allegations by complainant and a determination as to whether violations have taken place as charged.

The Joliet Army Ammunition Plant is conceded by all parties to be a facility of the United States of America. Various forms of ammunition, TNT and other explosives are manufactured there.

While Uniroyal, Inc. is alleged to be the operating contractor, the amended complaint asserts no violations attributable to it, and our inquiry will be directed entirely to the ammunition plant facility as a governmental agency. The Environmental Protection Act attaches liability to those causing or allowing pollutional discharges (Sec. 12a). There is no contention that the government does not control the facility or does not possess the capability of limiting the activities occurring on the reservation. Accordingly, such pollutional discharges as do occur are expressly attributable to the United States of America.

Complainant's case is premised essentially on the application for permit to discharge or work in navigable waters, dated June 25, 1971 and amended in October, 1972 with respect to Outfalls 006, 007 and 008, to reflect effluent measurements based on water samples taken July 27, August 3 and August 10, 1972 (Comp. Ex. 2).

Complainant's witness Bohner made an analysis of the permit data with respect to the effluent discharge applicable to each outfall located on the subject property and tributary to the Des Plaines and Kankakee Rivers (R. 113 and following). His methods of computation and analysis are reflected in the record. A summary of his testimony is graphically depicted in the following chart:

CONSTI-UENT			BOD	TDS	TSS	IRON	LEAD	MERCURY	OIL & GREASE	pH
STATE EFFLUENT STANDARDS	M/L Rule		20 R.404(b)	3500 R.408	27 R.404(b)	.20 R.408	0.1 R.408	0.0005 R.408ci	15.0 R.408	5-10 R.408
OUTFALL	Creek	Tributary To River								Min. Av
001	Jackson	Desplaines	Max.4 Daily Av. 3	995 641	36 21	1.200 1.133	0.004 0.002	0.001 0.000	8.4 5.3	
002	Jackson	Desplaines	Max.4 Daily Av. 3	714 515	95 52	1.300 1.003	0.012 0.005	0 0	9.2 5.2	
003	Grant	Desplaines	Max.8 Daily Av. 4	4467 2636	285 105	2.500 1.617	0.048 0.044	0 0	15.7 7.6	
004	Grant	Desplaines	Max.16 Daily Av.13	538 461	129 66	1.100 0.900	0.013 0.005	0 0	5.0 4.5	
005	Grant	Desplaines	Max.18.8 Daily Av.15	1556 1228	155 74	1.100 0.733	0.025 0.019	0 0	7.0 4.4	2.5 4.3/
006	Prai-rie	Kankakee	Max.32 Daily Av.20	834 780	350 230	3.100 1.507	0.170 0.110	0.00083 0.00038	1.0 1.0	
007	Jorden Lake Doyal	Kankakee	Max.60 Daily Av.35	564 548	254 186	1.400 0.900	0.170 0.120	0.00045 0.00254	1.0 1.0	
008	Prai-rie	Kankakee	Max.15 Daily Av.12	930 884	1784 658	8.000 4.200	0.170 0.130	0.0195 0.00658	1.0 1.0	

COMMENT

002 TSS Max. pounds per day 5567 Av/ pounds 2375 per day.
003 TDS Max P/d 1796, Av P/d 987 TSS 117 37
004 TSS Max P/D 5727 Av. P/D 2416
005 BOD Max P/D 1204, TSS Max P/D 5066 Av. P/D 2027 Av. P/D 202 pH violation
006 Mercury violation potential
007 Mercury violation potential
008 Mercury violation

In addition, the evidence of witness Denning (Compl Ex. 6) evidences characteristics of turbidity particularly in Grant Creek. From the foregoing evidence, uncontested by the government, it is manifest that complainant has established its burden of proof with respect to water pollution, deoxygenating waste and mercury violations alleged in the complaint. Water pollution violations are established by the quantities of BOD and suspended solids discharged daily into the tributaries of the Kankakee and Des Plaines Rivers. Complainant's witness Bohner (R. 141) testified to the following maximum and daily discharges of BOD, TDS and TSS in pounds per day into the Kankakee and Des Plaines River:

	DAILY MAXIMUM	DAILY AVERAGE
BOD	1205	424
TDS	1796	987
TSS	17562	7286

In addition, Complainant's witness Denning of the Illinois EPA testified to his observations of Grant Creek below Respondent's discharge observing excessive turbidity and high discoloration (Complainant's Ex. 6) and noting that there were no other discharges into Grant Creek than those of Respondent. It was his belief that the pink discoloration was attributable to Alpha TNT (Complainant's Ex. 8) manufactured and discharged by Respondent upstream from the point of discoloration. We believe that the average daily discharges of BOD and suspended solids are of a sufficient magnitude and character, which when coupled with the turbidity and discoloration above stated, constitute violation of Section 12(a) of the Environmental Protection Act in the causing or allowing the discharge of contaminants so as to cause or tend to cause water pollution as therein defined. The Board finds that Respondent's BOD discharge from Outfall 007 are in excess of the limits found in Section 404(a). Additionally, the Board finds that suspended solids discharged from all of Respondent's outfalls except 001 exceed the limit of Section 404(a). Complainant did not allege a violation of Section 404(a), therefore, the Board cannot find a violation of Section 404(a). However, the Board finds that such discharges in excess of Section 404(a) cause or tend to cause water pollution and thus constitute a violation of Section 12(a) of the Environmental Protection Act.

Complainant in paragraph 4 of the Amended Complaint alleges that Respondent has discharged deoxygenating wastes in violation of Section 404(b) which regulates effluents with an untreated waste load of 10,000 population equivalents (PE) or more subject to certain exceptions. While the discharge from Outfall 007 is in violation of Section 404(a), it has not been shown to be in violation of 404(b) because Complainant has failed to prove it represents a waste load

of 10,000 PE. Respondent's Outfalls 002, 004, and 005 discharge in excess of 10,000 PE of suspended solids per day and therefore are subject to Section 404(b); but Complainant failed to allege a violation of Section 404(b) as to suspended solids. For these reasons the allegations found in paragraph 4 of the Amended Complaint are not proven.

Mercury discharges from Outfall 008 are greatly in excess of relevant limits constituting violation of Section 408(c)(1), and sustain the allegations of paragraph 5 of the Amended Complaint.

While not subject to express regulatory limits since the parameters are not measured in pounds, but rather in mg/l, it is, nevertheless, noted that witness Bohner testified that Respondent's plant discharges an average of 7,268 pounds of suspended solids and a maximum of 17562 pounds of solids each day (R. 142). Complainant's Exhibit 10 substantiates paragraph 6 of the Amended Complaint, which asserts that Respondent has failed to comply with Section 501(a) requiring the filing of operating reports. Furthermore, the above summary of effluent data confirms that Respondent is discharging concentrations of suspended solids, iron, oil, dissolved solids, lead and pH in concentrations exceeding the limits of Section 408, which require the filing of a project completion schedule. No schedule has been filed. The Board finds this to constitute a violation of Section 1002(b)(i).

From the foregoing, it will be seen that Respondent, Joliet Army Ammunition Plant, a facility of the United States Government has violated the relevant statutory provisions and regulations as asserted in the complaint. Obviously, the objective of this proceeding is not to impose a monetary penalty but to assure compliance. In addition, evidence of the alleged violations is premised almost entirely on data furnished by Respondent. We will direct that Respondent, United States Government, in the operation of the Joliet Army Ammunition Plant, cease and desist the continuing violation of the statute and regulations, found to have been violated in this proceeding.

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:

1. Respondents, Lt. Colonel Willis S. Rosing, Brig, General Laurence E. Van Buskirk and James R. Schlesinger, are discharged from the complaint.

2. The United States of America, in the operation of its Joliet Army Ammunition Plant, shall on or before December 1, 1973, cease and desist from violation of the following statutory provisions and regulations:

a. Section 12(a) of the Environmental Protection Act with respect to the causing or allowing of the discharge of effluent so as to cause or tend to cause water pollution.

b. Section 408(c)(i) of the Water Pollution Regulations respecting discharges of mercury in concentrations in violation of said section.

c. Section 501(a) of the Water Pollution Regulations requiring the filing of operating reports.

3. The United States of American, in the operation of its Joliet Army Ammunition Plant, shall file a Project Completion Schedule in compliance with Section 1002 of the Water Pollution Regulations, within 120 days from the date of this Order.

Mr. Henss dissents.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order was adopted on the 18th day of October, 1973 by a vote of 4-1.

Christan L. Moffett, Clerk
Illinois Pollution Control Board