

ILLINOIS POLLUTION CONTROL BOARD
December 20, 1995

THE GALESBURG SANITARY)
DISTRICT,)
)
Petitioner,)
)
v.) PCB 96-46
) (Variance-Water)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

OPINION AND ORDER OF THE BOARD (by J. Yi):

On August 23, 1995 the Galesburg Sanitary District (District) filed a petition for variance for its wastewater treatment plant located at 2700 W. Main Street, Galesburg, Knox County, Illinois. The District is requesting relief from the requirements of 35 Ill. Adm. Code 304.207(b)(1) as this section applies to the District's deoxygenating waste discharges or that the requested variance is not necessary. The District filed the petition pursuant to Section 35 of the Environmental Protection Act (Act). (415 ILCS 5/35 (1994).) On October 5, 1995 the Board found that we have the authority in a variance proceeding to make a determination as to the interpretation of 35 Ill. Adm. Code 304.207(b)(1), the regulation from which the District is requesting relief, and established a briefing schedule for the parties for that purpose.

Pursuant to that briefing schedule and the Board's order of October 19, 1995, the Agency filed its response on November 16, 1995 and the District filed its reply on November 22, 1995.¹ The sole issue before the Board is the interpretation of our regulation set forth at 35 Ill. Adm. Code 304.207(b)(1). For the reasons stated below the Board interprets Section 304.207(b)(1) to mean that the District's discharge may not alone or in combination with other sources, as set forth in Section 304.105, cause a violation of Section 302.206, in Cedar Creek, downstream of its outfall and that it may come into compliance with Section 304.207(b)(1) by effluent aeration, in-stream aeration, or other means. As we found in our October 5, 1995 order this petition is deficient and therefore we dismiss this matter pursuant to 35 Ill. Ad. Code 125.

¹The District's petition for variance will be referenced as "Pet. at ", the Agency's response will be referred to as "Resp. at " and the District's reply will be referenced as "Reply at ".

Applicable Law

Section 304.207 Galesburg Sanitary District Deoxygenating Wastes Discharges

- a) The deoxygenating wastes general effluent standards of Section 304.120(c) shall not apply to the Galesburg Sanitary District discharges into Cedar Creek. Such discharges must meet the deoxygenating wastes general effluent standards set below:

* * *

- b) The above standard shall apply so long as the Galesburg Sanitary District achieves:

- 1) by November 1, 1984, compliance with 35 Ill. Adm. Code 302.206 throughout Cedar Creek downstream of the treatment plant outfall, by effluent aeration, in-stream aeration, or other means,

* * *

Section 302.201 Scope and Applicability

Subpart B contains general use water quality standards which must be met in waters of the State for which there is no specific designation.

Section 302.206 Dissolved Oxygen

Dissolved Oxygen (STORET number 00300) shall not be less than 6.0 mg/l during at least 16 hours of any 24 hour period, nor less than 5.0 mg/l at any time.

Section 304.105 Violation of Water Quality Standards

In addition to the other requirements of this Part, no effluent shall, alone or in combination with other sources, cause a violation of any applicable water quality standard. When the Agency finds that a discharge which would comply with effluent standards contained in this Part would cause or is causing a violation of water quality standards, the Agency shall take appropriate action under Section 31 or Section 39 of the Act to require the discharge to meet whatever effluent limits are necessary to ensure compliance with the water quality standards. When such a violation is caused by the cumulative effect of more than one source, several sources may be joined in an enforcement action or variance proceeding, and measures for

necessary effluent reductions will be determined on the basis of technical feasibility, economic reasonableness and fairness to all dischargers.

Arguments

The District argues in its petition that Section 304.207(b)(1) means that if it adds "...more oxygen to Cedar Creek than the incremental oxygen demand it adds to the Creek by discharging BOD above the generally applicable levels, it has complied with Section 304.207(b)(1) such that the relief afforded by Section 304.207 continues to apply." (Pet. at 7.) In support of its position the District points to the statements made in a document from the Joint Committee of Administrative Rules (JCAR). (Pet. at 7, Att. B.)² The JCAR document, which was attached to the petition, states that the Board in responding to this issue stated the following:

"...the Board did not require Galesburg Sanitary District to guarantee compliance with any dissolved oxygen (DO) level in Cedar Creek. If Galesburg Sanitary District can prove that any impact its discharges have on DO downstream of its treatment plant outfall is more than offset by in-stream aeration or other means, compliance with Section 302.206 has necessarily been shown, regardless of the actual DO concentration since Galesburg Sanitary District has not caused or contributed to any violation." (Att. B at 11.)

The District concludes that Section 304.207(b)(1) requires it to meet the water quality standard for dissolved oxygen in Cedar Creek downstream of its outfall in that it is not contributing or causing a violation of Section 302.206. (Pet. 13.)

Agency Response

In the first 12 pages of its response the Agency re-argues whether the Board has the authority to interpret its regulations in this case and concludes that any resulting interpretation is void. (Resp. at 1-13.) Since the Board has already decided this issue in our October 5, 1995 order, we will not repeat those arguments here.

The Agency in its response further argues that the interpretation of the regulation is limited to the Board's

²The attachments to the petition will be referenced as "Att. at ".

opinion associated with that regulation. (Resp. at 14.) The Agency states "[t]he construction and interpretation of administrative rule is governed by the rules of construction and interpretation applicable to statutes in the same field", citing to Shell Oil Co. v. PCB 37, Ill. App. 3d 264, 346 N.E. 2d 212, 200 (1976). (Resp. at 14.) The Agency states it arrived at its interpretation by utilizing the plain and ordinary meaning of the words in the regulation and it "...interprets Section 304.207(b)(1) to mean what it says, i.e., that the general dissolved oxygen water quality standard of Section 302.206 is applicable to Cedar Creek and that the District must treat its discharges, by aeration or other means to achieve (and maintain) the dissolved oxygen standard in Cedar Creek downstream of its outfall." (Resp. at 13-14.) Additionally, citing to People ex. rel. Baher v. Cowlin, 154 Ill 2d 193, 80 Ill.Dec. 738, 740 (1992), the Agency states that if there are ambiguities "...it is proper to resort to the legislative history of an enactment to ascertain intent". (Resp. at 14.) The Agency states the Board in its First Notice Opinion in R80-16, June 2, 1983, on page 7 states:

The Board declines the request to adopt a dissolved oxygen standard for Cedar Creek of zero. None of the hearing participants provided testimony or exhibits to show such a standard would protect existing biological communities and uses of Cedar Creek, or be acceptable to USEPA. The Board affirms that Section 302.206 applies to Cedar Creek and direct (sic) the District in today's order to achieve the standard not later than November 1, 1984, by use of effluent aeration, in-stream aeration or other methods.

The Agency further states that at Second Notice the language was modified by the Board to include the word "downstream" and explained that this was to clarify that the District was responsible for meeting the dissolved oxygen standard of Section 302.206 downstream of its discharge. (Resp. at 15.) In support of its interpretation, the Agency points out that the Board stated pursuant to a motion for reconsideration the following:

"...Section 304.207(b)(1) requires that the GSD [the District] assure compliance with the downstream dissolved oxygen limitations by November 1, 1984, in order to qualify for relaxed biochemical oxygen demand (BOD) and suspended solids (SS) limitations. It does not exempt GSD from the dissolved oxygen limitations of Section 302.206 with regard to any reach of Cedar Creek. Rather, the rule is based upon the recognition that upstream dissolved oxygen violations may result from factors over which the GSD has no control. If, however, dissolved oxygen violations can be found to result from GSD's activities it is subject to

enforcement. (R80-16, February 9, 1984 at 1.)

Furthermore, the Agency argues that the District's interpretation based on the JCAR documents should not be relied upon. (Resp. at 16-17.) The Agency cites to Salich v. Portes Cancer Prevention Center, 158 Ill 2d. 76, 196 Ill. Dec. 655, 658 (1994) and argues that there is no rule of construction which authorizes a court to depart from the plain meaning of the language and the Board "...may not now, 11 years later, read conditions and qualifications into Section 304.207(b)(1) that were not there when the regulation was adopted". (Resp. at 18.) In addition the Agency argues that the JCAR documents may not be relied upon by the Board because "[i]n Illinois, it is the collective expressions of a body, such as floor debates or Congressional Committee Reports, that are recognized as sources of legislative intent; individual expressions by a sponsor or drafter are not". (Resp. at 18.) Finally the Agency argues that since the JCAR documents are not Board documents, they should not be used for purposes of determining the Board's intent. (Resp. at 18.)

District's Reply

In reply to the Agency's argument concerning the interpretation of Section 304.207(b)(1), the District states that it "agrees that there should be no reason to go beyond the plain language of the rule, but it disagrees with the Agency as to what the plain language means."³ (Reply at 3.) However, the District argues that due to the disagreement of the plain meaning, it presented documents that "...may not fall under the definition of 'legislative history' (and the District has not charged that they do), they in no uncertain terms set forth the Board's intent and are evidence of that intent, despite the Agency's characterization of the Second Notice as 'nothing more than an individual expression'". (Reply at 4.) The District argues that 304.207(b)(1) must be read in conjunction with 304.105 and that "...Section 304.207(b)(1) only requires the District to comply with Section 304.105." (Reply at 3-4.) The District states that this "...interpretation is completely consistent with the Board's February 9, 1984 Order in which the Board stated that if 'dissolved oxygen violations can be found to result from [the District's] activities, it is subject to enforcement'". (Reply at 4.) In conclusion the District states that the plain meaning of the regulation is that the District is only obligated to

³The District also discusses whether the Board has the authority to interpret its regulation but since, as we previously stated, that issue has been decided and is not under review in this matter we will not repeat those arguments. (See supra, p. 3.)

ensure that its activities do not cause or contribute to the violation of Section 302.206. (Reply at 5.)

Discussion

The Board adopted the site-specific rule, 35 Ill. Adm. Code 304.207, governing the District's deoxygenating waste discharges in docket R80-16 on April 19, 1984. As part of the Board's grant of site-specific relief from the rule of general applicability for the deoxygenating wastes, the Board included certain conditions which applied to the District's discharge. The condition contained in Section 304.207(b)(1), as stated above, is the subject of this dispute before the Board.

As far as the statements made in the JCAR documents supplied by the District we agree with the Agency in that they should not be relied upon in determining the intent of the Board's regulations. Pursuant to Section 5(a) of the Act the Board may only make a final determination by quorum of the Board. (415 ILCS 5/5(a) (1994).) There is no indication that the expressions attributable to the Board in the JCAR document meet this requirement.

As the Agency states in its arguments, in Section 304.207(b)(1) the Board intended to apply the water quality standard for dissolved oxygen to Cedar Creek; that the District must be in compliance with that standard downstream of its outfall in order for the deoxygenating waste site-specific relief of Section 304.207(a) to apply to the District's discharge. The Board specifically stated that it declined the request of the District to adopt a dissolved oxygen standard for Cedar Creek of zero. It further stated that there was no evidence presented which demonstrated that such a standard would protect existing biological communities and uses of Cedar Creek. The Board affirmed that Section 302.206 applies to Cedar Creek and directed the District to achieve the standard not later than November 1, 1984, by use of effluent aeration, in-stream aeration or other methods. (R80-16, June 2, 1983, at 7-8.)

In R80-16, the Agency filed a motion for reconsideration after the Board went to First Notice due to its concern that the language contained in the condition set forth in 304.207(b)(1) by implication would void the water quality standard for dissolved oxygen upstream of the District's outfall. (R80-16, February 9, 1984) In response the Board stated the District must assure "...compliance with the downstream dissolved oxygen limitations by November 1, 1984, in order to qualify for relaxed biochemical oxygen demand (BOD) and suspended solids (SS) limitations..." and did not exempt the District from the dissolved oxygen limitations of Section 302.206 with regard to any reach of Cedar Creek. (R80-16, February 9, 1984, at 1.) The Board further stated that

the rule is based upon the recognition that upstream of the District's outfall the dissolved oxygen violations may result from factors over which it has no control, but goes on to say that if the dissolved oxygen violations can be found to result from the District's activities it is subject to enforcement. (R80-16, February 9, 1984 at 1.)

Although the language of Section 304.207(b)(1) may be inelegantly drafted, we recognize that to implement the water quality standard for dissolved oxygen against the District we must utilize Section 304.105. Section 304.105 was adopted by the Board as Rule 402 in Docket R70-8 on January 2, 1972 as a part of the effluent regulations. As more fully stated on page two of this order, Section 304.105 states "...no effluent shall, alone or in combination with other sources, cause a violation of any applicable water quality standard and if the Agency finds that a discharge which would comply with the effluent standards contained in this Part would cause or is causing violation of water quality standards, the Agency shall take appropriate action under Section 31 or Section 39 of the Act to require the discharger to meet whatever effluent limits that are necessary to ensure compliance with the water quality standards".

The Board stated that Section 304.105 sets forth the principle that discharges causing violations of water quality standards, alone or in combination with other sources, are forbidden, and prescribes basic considerations for determining which of a number of contributors to an overloaded stream must take measures to abate the problem. (R70-8, January 6, 1972 at 5.) In addition Section 304.105 sets forth the principle that a discharger may be in violation of a water quality standard even though that discharger may be in compliance with the applicable effluent standards.

Therefore in reading the language of Section 304.207(b)(1) along with Section 304.105, the Board's intent in its adoption of the language contained in Section 304.207(b)(1) was that the District's discharge of deoxygenating waste may not alone or in combination with other sources, as set forth in Section 304.105, cause, or in combination with other sources cause a violation of Section 302.206 in Cedar Creek downstream of District's its outfall and that the District may come into compliance with Section 304.105, and thus 304.207(b)(1) by effluent aeration, in-stream aeration, or other means.

Conclusion

The Board interprets Section 304.207(b)(1) to mean that the District's discharge may not alone or in combination with other sources, as set forth in Section 304.105, cause a violation of Section 302.206, in Cedar Creek, downstream of its outfall and

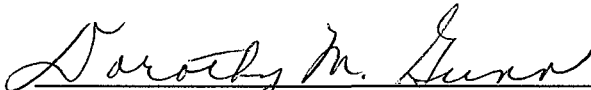
that it may come into compliance with Section 304.207(b)(1) by effluent aeration, in-stream aeration, or other means. As we found in our October 5, 1995 order this petition is deficient and therefore we dismiss this matter pursuant to 35 Ill. Ad. Code 125.⁴ If the District chooses to pursue variance relief it may do so by filing a new variance petition which meets the statutory and Board procedural requirements. This matter is dismissed and the docket is closed.

This opinion and order constitutes the Board's findings of fact and conclusions of law in this matter.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/40.1) provides for the appeal of final Board orders within 35 days of service of this decision. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also, 35 Ill. Adm. Code 101.246, Motions for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 20th day of December, 1995, by a vote of 7-0.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board

⁴The statutory decision deadline in this matter is December 21, 1995. The October 5, 1995 order envisioned adequate time for the District to amend its petition curing the deficiencies prior to the running of the statutory decision deadline.