ILLINOIS POLLUTION CONTROL BOARD
September 16, 1971

FARMERS OPPOSED TO EXTENSION OF THE ILLINOIS TOLLWAY et al.	)	
v.	)	# PCB 71-159
ILLINOIS STATE TOLL HIGHWAY AUTHORITY et al.	)	

Norman J. Barry of Chicago, for Farmers
Gordon C. Adler of Bloomington, Ill., for Illinois State Toll Highway

Opinion of the Board (by Mr. Currie):

This citizen complaint seeks an order preventing construction of a proposed extension of the East-West Tollway from Aurora to the Rock River. We ordered a response and briefs on the question of our jurisdiction. After considering the briefs and pleadings we dismiss the complaint with leave to amend in certain respects.

We are required to hold a hearing unless we find the complaint "duplicitous" or "frivolous," Environmental Protection Act, Section 31(b). Duplicitous it is not; we have had no other cases on this matter. As we said in an earlier opinion in this case, we will hold a complaint "frivolous" if we could not grant relief even were all the allegations proved, since in such a case a hearing would only waste time and money. In other words, a motion to dismiss as frivolous is the equivalent of a demurrer.

Such a motion is before us, and to the allegations of the complaint we turn.

The first eight paragraphs describe the parties, the actions allegedly taken by the respondents, and the area through which the proposed extension is to run: "some of the most productive land in the State and in the Nation" and "relatively free of air, water and noise pollution." Paragraph 9 alleges that the respondents have failed to study the environmental consequences of their proposed action, a claim that will be discussed in connection with related paragraphs below.

Paragraphs 10 thru 13 allege that the extension will result in air pollution because of emissions from vehicles using the new road. Several gases emitted by vehicles are listed, and it is alleged that each adversely affects agriculture. Respondents reply, among other things, that "a road itself is incapable of causing pollution" and that the solution to vehicular emissions is to take action agains

vehicle manufacturers or owners,not to halt highway construction. We think the respondents' arguments go too far; as the complainants argue, the construction of a road can certainly be a contributing cause of pollution from automobiles, and if the problem is severe enough and alternative solutions impracticable, preventing highway construction--say in an area already exceeding applicable air-quality standards and likely to continue doing so despite foreseeable vehicular controls--might very well be an appropriate sanction.

Nor are we persuaded that we are ousted of jurisdiction of any of the issues in this case by the statutory provision, Ill. Rev. Stat., ch. 121, sec. 100-32, that "all determinations made by the Authority in the exercise of its discretionary power. . . including. . . the location. . . of any toll highway, . . . and the plans and specifications thereof, . . . shall be conclusive and shall not be subject to review by the courts or by any administrati agency." The law is clear that the Authority is exempt from review only so long as it obeys the law, People v. Illinois State Toll Highway Comm., 3 Ill. 2d 218, 120 N.E. 2d 35, 44 (1954). Nothing in any statute gives the Authority "discretion" to violate the Environmental Protection Act, and serious constitutional questions would arise if the issue of such violation were removed from judicial and quasi-judicial scrutiny. The Act makes clear its applicability to the State, and indeed the special responsibility of the State to set an example of compliance in its own activities (Section 47(a)). This Board has jurisdiction to entertain claims against the Authority for pollution.

A more difficult question is the adequacy of the allegation that the extension will result in air pollution. We have often held that conclusory allegations do not suffice; there must be allegations specific enough to enable us to determine whether there is any point in holding a hearing. The only specific facts alleged here are that vehicles without complete exhaust controls will use the road; that certain gases will be emitted; and that those gases are harmful to agriculture. These facts are not denied, but their admission is not enough to enable the complainants to win their case. If it were we should have to forbid the construction of all new roads in the State in the face of an explicit legislative decision that additional roads are desirable. See Ill. Rev. Stat., ch. 121, Sec, 100-1. Even in the absence of such a declaration we could not hold that the emission of the stated contaminants, regardless of their quantity or of surrounding conditions, would constitute air pollution, for the statute and sound policy require us to balance the degree of pollution against the costs of its prevention (Environmental Protection Act, Secs. 3(b), 31(c), 33(e)).

We do not intend by these remarks to lay down a rule requiring paralyzing detail in every pleading. But our procedural rule 304(c) (2) requires a degree of specificity not found in the present claim in order to avoid unnecessary hearings. From the complaint we have no reason to suspect that the proof will show this proposed extension to present any special problems of air pollution beyond those of any other highway. While we share the widespread concern that means should be found to avoid undue reliance on the automobile, we see no chance that we would forbid all highway construction and no sufficient allegation that this is a special case. The question whether this highway is needed would of course be relevant in any close case as to whether the new contamination is unreasonable under the statute, and it is alleged that this road is unnecessary. But the question of necessity is not one on which we would be free to ignore entirely the findings of the Authority, which is specifically authorized to make that decision within the bounds of law. We do not think an allegation that a highway is unnecessary, in the face of such a finding to the contrary, is sufficient in itself to make resultant emissions unreasonable. We would not, by analogy, be willing to interdict a new foundry for air pollution simply on the ground that foundries do emit contaminants and that there are plenty of other foundries. In other words, we will not substitute our judgement for the Authority's as to the desirability of the road from a traffic point of view where there is no allegation of a special pollution problem.

The short of this is that the allegations regarding air pollution, as they stand, are insufficient even if proven to support a finding of air pollution, and therefore they are dismissed. However, because the degree of specificity required could not have been known in advance, we grant leave if desired to file an amended complaint containing allegations that would support a finding of air pollution.

Much the same can be said with regard to paragraph 14, alleging that the extension will result in water pollution. The specific allegations are that salt used to prevent icing will pollute the waters and that the road will interfere with drainage, causing runoff to become stagnant and to lower water quality. Again we are not prepared to find water pollution on the basis of anything inherent in highways. The specifics here go further, alleging that this highway has been designed without proper regard to drainage and that it will be improperly operated by employing salt for de-icing. If significant interference with the use of waters were shown as a result of these alleged acts or omissions, under our precedents the burden would shift to the respondents to show that the harm could not practicably be avoided; for significant harm that can practicably be avoided constitutes pollution. Moody v. Flintkote Co., #70-36 (September 2, 1971).

Once again, however, we do not find the present allegations sufficient. That some salt, "other chemicals," or "stagnant water" may reach the streams does not necessarily mean they will do so in sufficient concentrations or quantities to be detrimental. Before going to the expense and trouble of a hearing we must have allegations--and not mere conclusions--to that effect. Moreover, if at such a hearing the use of salt were shown to be the only practicable means of avoiding winter accidents, the case would fall. And if avoidable water pollution were proved, in all probability the appropriate remedy would be to forbid the use of salt, not to prevent the building of the road. We dismiss the water pollution counts with leave to amend.

Paragraph 15 alleges that the proposed extension threatens "grave damage to the environmental balance. . . by changing the use, character and appearance of over 140 square miles of land now primarily devoted to agricultural, residential and recreational use" and that many acres will be made unsuitable for such uses. The problem of increasing consumption of rural lands for housing developments, parking lots, highways, and the like is a real one to which governments must turn increasing attention. The Institute plans for creating machinery at the state level to deal more effectively with this problem. But we are not entrusted with direct authority over questions of land use policy, and we must therefore dismiss this claim--not for want of merit, for we have no statutory scales in which to balance the competing values--but for want of jurisdiction.

Paragraph 16 alleges that the highway will result in noise, which according to paragraph 21 would unreasonably interfere with the enjoyment of life in violation of Section 24 of the Act. But the Act makes clear that it is not self-executing in this regard. Unlike the air and water pollution sections, the noise provision expressly requires noise that violates Board regulations. The Board is required, for better or worse, to explore the noise question fully as a rule-making matter before attempting to hammer out guidelines on a case-by-case basis. The Institute has set up a task force that will soon recommend a first set of noise regulations; any citizen group may do so as well. Until such regulations are adopted we have no jurisdiction over noise complaints, and the count is therefore dismissed.

Paragraph 17 alleges the lack of need for the highway, which is not an independent count but has been dealt with above.

Paragraph 18 alleges that the foregoing conduct violates Section 2 of the Act, but that section is a mere statement of policy and legislative findings explaining the need for specific prohibitions elsewhere in the Act. It creates no enforceable duty. Cf. EPA v. Clay Products, Inc., # 71-41 (June 23, 1971).

Paragraphs 19, 20, and 21 specify sections of the statute allegedly violated with respect to air and water pollution and noise and have been dealt with above.

Paragraph 22 presents an interesting question of statutory interpretation. Section 47 of the Act requires state agencies to submit to the Environmental Protection Agency by December 1 of each year two items. The first is an assessment of "the extent to which its operations are in violation of this Act or of regulations. . . ., the progress made in eliminating such violations, and the steps to be taken in the future to assure compliance". The second is "complete plans, specifications and cost estimates for any proposed installation or facility that may cause a violation. . . ." The complainants argue that these provisions require the Authority to prepare an assessment of the environmental impact of a highway project and submit it to the Agency as a precondition to construction, by analogy to the federal Environmental Policy Act, and that because no such statement has been filed the project must be terminated.

The policy of the federal act is an appealing one. It attempts to assure, first, that those who plan construction projects fully consider any possible adverse environmental effects, and, second, that the relevant information as to such effects be made available to the public and to environmental agencies to facilitate outside evaluation of the project. Our statute clearly owes its origin to the federal, embodying the policy of internal environmental assessment to facilitate both internal correction and outside review. It goes beyond the federal by requiring assessment and correction of existing pollution problems, and it approaches the federal by requiring the submission of plans for proposed projects for outside evaluation. Yet it is not identical to the federal, as close inspection will show. Section 47(b) appears to look backward, not forward; to require annual review of existing operations with a view toward correcting them. This conclusion is buttressed by the fact that such reports are to be submitted only once a year, not whenever a new project is ready for evaluation or construction. It is also supported by the existence of a separate paragraph, Section 47(c), specifically directed toward proposed facilities and requiring the submission not of a full environmental assessment but only of "plans, specifications, and cost estimates." We hold that neither section creates the duty to file an environmental assessment as a condition precedent to construction of a new facility. This does not mean such assessments should not be made.

We take official notice that an extensive environmental study of the kind requested by the complainants has been undertaken by the state in connection with the projected new airport on the Illinois side of the St. Louis area. Such a study cannot help but enable the state to avoid many unnecessary environmental problems

and is in full conformity to the spirit of the statute, and we encourage other agencies to follow this example. We would also suggest consideration of the desirability of filling the statutory gap by requiring that such assessments be made, but we cannot find such a requirement in the present statute. We stress, however, that other duties are specifically imposed by Section 47 and urge all affected agencies to comply promptly and completely. The state must set a good example if it expects others to obey the law.

Complainants argue that we should interdict this construction because, as is conceded, no plans or specifications were submitted to the Agency before December 1, 1970. We agree with the complainants that a highway is a "facility" within Section 47(c); the term was used to indicate the breadth of the statutory requirement affecting all construction that may cause a violation. Nor is the duty to file abrogated if the constructing agency itself believes there will be no violation, for plans are required if the facility "may" cause a violation. The very purpose of submitting plans is to enable others to make an intelligent decision as to environmental effects, and the constructing body is not the judge of whether or not there will be air or water pollution. But the paragraph is not drafted so as to make such filing a condition precedent to construction, for plans they need be submitted only "by December 1 of each year." We disagree with the respondents' contention that the statute requires submission only of specifications in the technical sense of engineering details that are unavailable until after the bonds are sold; at that point it is likely to be too late for an environmental assessment to have much impact unless the project is to be considerably delayed. We think the statute requires each construction agency to examine its drawing boards as of each December 1 and to report on what is in the planning stage in as much detail as is practicable, so that the Environmental Protection Agency will have a chance before things have progressed too far to comment upon the environmental aspects of the proposal. But we do not find the requirement a condition of construction, since the dates of submission are inconsistent with that reading. Once again we suggest the possible desirability of a statutory amendment to make the section more effective.

Finally, the complainants in paragraph 23 allege that the highway would violate their "absolute statutory right to drainage of their lands." This is an issue that can be raised in proceedings relating to the condemnation of land; the state has power to take property upon payment of compensation. In any event it is not an issue within our jurisdiction, as our powers are concerned solely with pollution, not with flooding per se.

In summary, then, we hold that we have no jurisdiction over the claims regarding noise, land use, and drainage, except as the last relates to water pollution; that there is no statutory requirement that an environmental assessment be filed as a condition precedent to construction; that we will not find air or water pollution simply on the basis that every highway causes the discharge of contaminants or that the highway in question may not be in our view essential; and that the complaint may be amended to allege specific facts showing that the highway in question will have special problems of air or water pollution.

ORDER

Upon full consideration of the pleadings and briefs of the parties, it is hereby ordered that the complaint be dismissed on the ground that complainants would not be entitled to relief even if all facts alleged were proved. This dismissal is without prejudice to the filing of an amended complaint within thirty days with regard to air and water pollution in accordance with the Board's opinion.

I. Regina E. Ryan, Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion this 16 day of September, 1971.

Regina E. Ryan