ILLINOIS POLLUTION CONTROL BOARD
January 7, 1982

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	PCB 80-214
JAMES JOBE d/b/a PEACOCK COAL COMPANY,	)	
Respondent.	)	

CONCURRING OPINION (by D. Anderson):

I concur in the result finding Respondent in violation of Sections 12(b) and 12(f) of the Act and effluent standards and permit requirements of Chapter 3 and old Chapter 4. However, the industrial ditch exception is not at all applicable to this case, even as an affirmative defense.

The industrial ditch exception originated in a case involving a natural ravine which arose on plant property on a bluff overlooking the Ohio River (Allied Chemical Corp. v. IEPA, PCB 73-382, 11 PCB 379, February 28, 1973). The ditch carried only the plant's effluent and drainage from 45 acres of plant property. The ditch dropped 80 feet in 3000 feet before its confluence with the Ohio River at the plant boundary. The Board held the water quality standards inapplicable to the ditch, because the ravine was an "industrial ditch".

Allied did not claim that it was exempt from permit requirement or the effluent standards because its discharge was to an industrial ditch. The only effect of this classification is to move the point of application of the water quality standards from the actual point of discharge to the plant boundary. Allied was specifically ordered to comply with the effluent standards in the plant ditch. The industrial ditch was treated as though it were a pipe between the final treatment process and the Ohio River. This allowed Allied to take advantage of dilution in the River before application of the water quality standards.

Jobe is charged only with violation of requirements to obtain permits and with violation of effluent standards. The industrial ditch exception can never be used as a defense to

these violations because it relates only to the point of application of the water quality standards.

Jobe is obviously discharging at some point without a permit in violation of the effluent standards. It could be argued that the industrial ditch exception can be used to move the discharge point for purposes of application of the permit requirement and effluent standards. This is also false.

The second paragraph of Rule 401(a) of Chapter 3 reads in part as follows (there is similar language in old and new Chapter 4):

> In any case, measurement of contaminant concentrations to determine compliance with the effluent standards shall be made at the point immediately following the final treatment process and before mixture with other waters, unless another point is designated by the Agency in an individual permit, after consideration of the elements contained in this paragraph.

It is often said that the effluent standards apply at the point of discharge to waters of the state. This is not what Rule 401(a) requires, except in the special case where the final treatment process is immediately adjacent to waters of the state. In the more general case there is some distance between the final treatment and mixture with "other waters." The effluent standards must be met at the beginning of this stretch, not at the point of final discharge to waters of the state. Indeed, Allied Chemical was ordered to comply with the effluent standards at every point between the final treatment and the Ohio River.

The industrial ditch exception cannot be used to contradict the Agency's evidence of discharge and contaminant levels because they are taken at a point which might not be the point of ultimate discharge to waters of the state. The Agency has proved that water is discharging and that nature will carry it to waters which are undoubtedly waters of the state. If the point of discharge is indeed to an industrial ditch, the effluent standards must be met there, and in the entire length of the industrial ditch.

Jobe also has a possible defense that the ditch and pond to which it discharges is in fact a treatment works. This defense is not clearly raised, and it contradicts the "industrial ditch" defense.

Industrial ditches exist only between the point of final treatment and waters of the state. Waters before the point of final treatment fall within the "treatment works" exception to the definition of "waters" in Chapter 3. This is incorporated into old and new Chapter 4 by reference. A claim that something is an "industrial ditch" contradicts any claim that it might be a "treatment works".

Under new Chapter 4 waters from coal operations must pass through sedimentation ponds prior to discharge. Under certain circumstances free flowing streams may be utilized as sedimentation ponds (Amax v. IEPA, PCB 80-63, 64, December 4 and December 18, 1980). However, the new 10 year, 24 hour exception for application of the Chapter 4 effluent standards effectively limits this practice. It is not clear from the facts in this case whether the ponds in this case would be permittable as treatment works under the Amax decision. In any event, the Agency has authority to impose the effluent standards prior to discharge to the sedimentation pond even if it is not waters of the state [§406.102(a)].

Both the "treatment works" and "industrial ditch" exceptions are intrinsically tied to the permit requirement: anyone operating one of these must either have an NPDES permit or a state permit under Subpart B of Part IX of Chapter 3 or under Chapter 4. He should be required to identify these in a permit application. The Board should not allow these to become defenses to enforcement actions. Anyone claiming these as a defense is either operating a treatment works without a permit or is relying on an adjusted discharge point. Rule 401(a) allows adjusted discharge points only by permit. Jobe has acted in bad faith if he did not raise these claims in a permit application.

Jobe seems to be taking the position that the Agency's case has failed because the Agency has failed to demonstrate that the discharge is not to an industrial ditch. The Board should clearly hold that, to the extent it may be a defense, the industrial ditch exception is an affirmative defense to be proved by the Respondent. The Agency's burden is only to show discharge to waters as defined in the Act:

> "All accumulations of water, surface and underground, natural and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this state".

Once this has been shown, the burden shifts to the Respondent to show that some exception applies. The majority has in fact treated this as an affirmative defense, although this is not clearly stated. The "industrial ditch" exception has always

been claimed in the past in the context of a permit appeal or variance, where the burden of proof is always on the person claiming application of the exception. The burden of proof must be clarified if the exception is to be recognized in an enforcement action where the burden is on the Agency in general.

Donald B. Anderson, Board Member

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, do hereby certify that the above Concurring Opinion was filed on the 14th day of January, 1982.

Christan L. Moffett, Clerk
Illinois Pollution Control Board