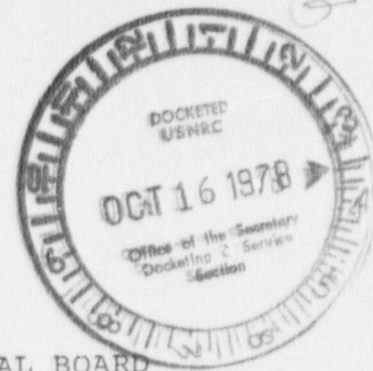


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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

IN THE MATTER OF)	
)	DOCKET NOS. STN 50-556
PUBLIC SERVICE COMPANY OF)	STN 50-557
OKLAHOMA, ASSOCIATED ELECTRIC)	
COOPERATIVE, INC., and WESTERN)	
FARMERS ELECTRIC COOPERATIVE,)	
INC.,)	
)	
(Black Fox Station, Units 1 and)	
2))	

INTERVENORS' MOTION FOR ORDER STAYING LWA PENDING APPEAL

Intervenors request that this Board issue an order staying the LWA pending appeal and ordering all work to cease. The reason for this request is that the Limited Work Authorization is not legally authorized because it was issued in violation of the requirement for Section 401 certification [33 U.S.C.S. §1341(a)(1)].

The Applicant's sole argument and the position of the Licensing Board is that there has been a waiver. (See, Partial Initial Decision, paragraphs 52-55).

There has not been a waiver according to EPA.

At the public hearing held by EPA on the NPDES Permit on March 23, 1978, Mr. Michael M. Gibson, Attorney, Enforcement Division, United States Environmental Protection Agency, Dallas, Texas, stated:

"You made a comment that the State at this point has not granted 401 certification to this permit and this is true." (Emp. added, Tr. p. 161)

The public notice dated July 15, 1978, accompanying the NPDES permit stated:

"It is the agency's determination to issue the modified permit(s) unless the state certifying agency denies certification prior to the effective date of the permit". (August 15, 1978)

A copy of this notice is attached as Exhibit A.

The NPDES Permit is subject to an adjudicatory hearing. The public notice of the granting of this hearing dated September 16, 1978, stated:

"Any State with certification rights under Section 401 of the Act must certify or deny certification within 30 days after it is notified that a proposed permit has been amended after a request for an adjudicatory hearing has been granted. Failure to certify or deny certification shall be deemed a waiver of such certification rights."


A copy of this notice is attached as Exhibit B.

This matter has been raised as an issue on appeal. An extract from the Brief is attached as Exhibit C and incorporated by reference.

The Licensing Board has refused to grant the relief requested.

WHEREFORE, Intervenors request that this Board issue its order staying the LWA and ordering all work to cease.

Dated this 12th day of October, 1978



ANDREW T. DALTON, JR.
Attorney for Intervenors
1437 South Main Street, Room 302
Tulsa, OK 74119

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing instrument was mailed, postage prepaid, to the following this 12th day of October, 1978.

Isham, Lincoln & Beale
Attention: Mr. Paul Murphy
One First National Plaza, 42nd Floor
Chicago, IL 60603

Mr. Joseph Gallo
1050 117th Street N.W.
7th Floor
Washington, D.C. 20036

Mrs. Carrie Dickerson, Chairman, C.A.S.E.
P.O. Box 924
Claremore, OK 74017

Secretary
Attention: Chief, Docketing & Service Section
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Chief Hearing Counsel
Office of the Executive Legal Director
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Alan S. Rosenthal, Chairman
Atomic Safety and Licensing Appeal Board
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555


Dr. W. Reed Johnson
Atomic Safety and Licensing Appeal Board
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

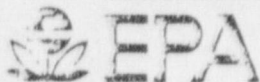
Jerome E. Sharfman
Atomic Safety and Licensing Appeal Board
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. T. N. Ewing
PSO, Box 201
Tulsa, OK 74102

Mrs. Ilene H. Younghein
3900 Cashion Place
Oklahoma City, Oklahoma 73112

Mr. Vaughn Conrad, PSO
P. O. Box 201
Tulsa, Oklahoma 74102

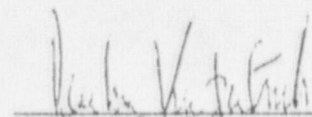

ANDREW T. DALTON, JR.



NPDES DETERMINATION

After considering the facts and the requirements and policies expressed in PL 95-217 and implementing regulations, I have determined that proposed Permit No. OK0034614, Public Service Company of Oklahoma shall be modified and issued as indicated in a Public Notice of modification, subject to timely certification (or waiver thereof) by the state certifying agency, provided however, that any condition(s) contested in a request for an Adjudicatory Hearing submitted within 10 days from receipt of this determination shall be stayed if the request for a Hearing is granted.

Dated: July 14, 1978



Howard G. Bergman
Director
Enforcement Division (6AE)

U. S. ENVIRONMENTAL PROTECTION AGENCY

PUBLIC NOTICE

JULY 15, 1978

The purpose of this notice is to indicate substantial changes to the proposed permit(s) identified on the attached list, under the authority of the Clean Water Act of 1977, Public Law 95-217.

It is the Agency's determination to issue the modified permit(s) unless the state certifying agency denies certification prior to the effective date of the permit.

Any person may submit a request for an adjudicatory hearing within 10 days from receipt of the Agency's determination to reconsider the permit(s). The contested provisions of the proposed permit(s) shall be stayed pending final action of the Agency pursuant to 40 CFR 125.36.

Requirements which must be satisfied prior to the granting of a request for an adjudicatory hearing or for request to be party at an adjudicatory hearing may be obtained from 40 CFR 125.36(b), or from available fact sheets. Further information may be obtained by writing:

Ms. Carol Young
Environmental Protection Agency
Permits Branch (6AEPAP) Region VI
First Int'l Bldg., 1201 Elm Street
Dallas, Texas 75270

or by telephone (214) 767-2765, between 8:00 a.m. and 4:30 p.m.
Monday through Friday.

ADJUDICATORY HEARING

PUBLIC NOTICE

OF

September 16, 1978

The United States Environmental Protection Agency (EPA) has granted a request submitted on behalf of Citizens' Action for Safe Energy, Inc. (CASE), P.O. Box 924, Claremore, Oklahoma 74017 for an adjudicatory hearing on the National Pollutant Discharge Elimination System (NPDES) permit No. OK0034614 proposed to be issued to Public Service Company of Oklahoma, for its Black Fox Station steam electric generating facilities located near Inola, Oklahoma.

Under the provisions of the Clean Water Act (P.L. 95-217) Public Service Company of Oklahoma applied for an NPDES permit for a proposed discharge of industrial and sanitary wastewater to the Verdigris River at Latitude 36 degrees, five minutes, 51 seconds North, and Longitude 95 degrees, 33 minutes, 27 seconds West. Public notice of this application and EPA's tentative determination to issue a permit was circulated to appropriate persons on the EPA mailing list and was published in the Tulsa World on October 29, 1977.

On July 27, 1978, Citizens' Action for Safe Energy, Inc. petitioned EPA for an adjudicatory hearing on the permit as proposed. The request was timely, and conformed with the procedural requirements of Title 40, Section 125.36(b) of the Code of Federal Regulations. The EPA Regional Administrator determined that the request set forth material issues as to whether the permit should be issued and to the appropriate permit conditions.

Accordingly, an adjudicatory hearing was granted. Among the issues which were raised which may be considered at the adjudicatory hearing are:

a. Whether the permit conditions which would allow the permittee to choose to meet state water quality standards (prior to development of quantitative waste load allocations by the State of Oklahoma) by controlled release of pollutants in accordance with the assimilative capacity of the Verdigris River should be modified;

b. Whether weight limitations should be assigned to certain pollutants instead of or in addition to other parameters presently assigned;

c. Whether EPA is required to determine the water quality impacts that may result from the discharge under the regulatory two-year return frequency, seven-day average conditions, before issuing the permit;

d. Whether EPA must determine that a permittee will be able to meet the conditions of the permit before issuing the permit;

e. Whether certain permit conditions are adequate to meet the State of Oklahoma water quality standards for the Verdigris River.

f. Whether the State of Oklahoma waived its right of certification under 40 CFR 125.15.

At this time, requests for an adjudicatory hearing on this permit have also been granted to two other parties. Additional issues raised by those parties may also be considered at the adjudicatory hearing. Those parties are:

Public Service Company of Oklahoma
P.O. Box 201
Tulsa, Oklahoma 74102

Citizens' Against Radioactive Exposure
1532 East 60th Street
Tulsa, Oklahoma 74105

The adjudicatory hearing is an administrative proceeding that closely resembles a court hearing. The presiding officer will be an Administrative Law Judge, who will conduct the necessary pre-hearing proceedings, officiate at the hearing, and submit proposed findings and conclusions of the parties to the Regional Administrator of the U.S. Environmental Protection Agency, Region 6, after the hearing.

Any interested person may file a request to be admitted as a party to the hearing within 30 days of the date of issuance of the notice; any such request must meet the requirements of 40 CFR 125.36(b)(2) and should be filed with the Regional Hearing Clerk at the EPA office at 1201 Elm Street, First International Building, Dallas, Texas 75270, pursuant to 125.36(c).

Any person admitted as a party may submit additional material issues for consideration at the adjudicatory hearing within 30 days of the date of issuance of the notice;

Any party may at any time prior to the hearing submit any documents or written evidence or testimony which he intends to introduce at the hearing;

After 30 days have elapsed following the date of the notice, the presiding officer may set a time and location of a pre-hearing conference and will so notify all parties.

The proposed permit may be amended by the Regional Administrator prior to or after the adjudicatory hearing and any person interested in the particular proposed permit must request to be a party in order to preserve any right to appeal the final administrative determination.

Any State with certification rights under Section 401 of the Act must certify or deny certification within 30 days after it is notified that a proposed permit has been amended after a request for an adjudicatory hearing has been granted. Failure to certify or deny certification shall be deemed a waiver of such certification rights.

EPA regulations (40 CFR 125.36) establish the general rules for adjudicatory hearings relating to filing and service of documents, computation of time, additional parties, consolidation, representation, duties and authorities of the presiding officer, the pre-hearing conference, exchange of witness lists and documents, the rules of evidence, the record, the decision, and decision upon appeal. The Environmental Protection Agency strongly urges interested persons to review these regulations carefully.


Interested persons may obtain additional information on the hearing procedures, including the hearing date and location, and request a copy of the fact sheet by contacting:

Ms. Ann Banks
Environmental Protection Agency
Region 6, Enforcement Legal Branch (6AEL)
1201 Elm Street, First International Building
Dallas, Texas 75270

Telephone: (214) 767-2760

The application, comments received, proposed permit and other related documents may be inspected at the Legal Branch offices between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday.

Please bring the foregoing to the attention of persons who you know will be interested in this matter.



PROPOSITION XVI. AS A MATTER OF LAW THE BOARD HAS NO POWER TO DETERMINE WAIVER OF "401 CERTIFICATION" AND AS A MATTER OF FACT NO WAIVER OCCURRED.

(Exception 27)

It is undisputed that "401 certification" has not been given. This certification, pursuant to Section 401 of PL 92-500, is required and in its absence no permit, LWA or Federal authorization may be given unless the EPA has determined that a waiver exists.

It is undisputed that neither Staff nor Applicant made application to EPA for determination that a waiver exists. Further, the NPDES determination specifically states that the permit is issued "subject to timely certification (or waiver thereof) by the state certifying agency." Applicants' NPDES permit No. OK0034614, July 14, 1978.²⁴

Notwithstanding these facts, and without citation of authority, the Board usurped the power of the EPA and found that a "waiver" had occurred (Dec. ¶'s 48 et seq.).

A. The Board had no jurisdiction to make this finding.

The Commission, through its Appeal Board, has consistently recognized that the control of water pollution is vested exclusively with the EPA. Public Service Company of N.H. (Seabrook 1 and 2) ALAB 366, 5 NRC 39 (1977). This view has been confirmed by Court rulings. New Hampshire v. AEC,

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This determination predates the decision by two weeks. Applicant and Intervenors have requested adjudicatory hearing.

406 F.2d 170 (CA 1, 1968); see Cities of Statesville v. AEC,
441 F.2d 962 (CA DC 1969).

The Seabrook decision discusses the history and rationale of this result at pages 49-51 of the decision. The Board traced the history of the scope of inquiry under prior water pollution laws, the expansion of the inquiry under NEPA and the Calvert Cliffs decision, and the reduction after enactment of PL 92-500. In paragraph one of the headnote states that a CP may not issue without having in hand a 401 certificate. 25

The statute is quite plain in its requirement. For example, Section 511(C)(2) (33 U.S.C.S. 1371) specifically prohibits the NRC from reviewing the adequacy of the permit.

Section 401 provides for the permit and conditions licensing upon having the certification. If state agencies do not have procedures to grant certification, then the certificate shall be from the administrator of EPA. 26

The statute then provides (in the next sentence) that "If the State, interstate agency, or administrator AS THE CASE MAY BE fails or refuses to act on a request for certification..." then it shall be waived. There has been

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The preface to the NRC Reporter advises that headnotes are given weight.

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In footnote 7, page 31 of the Decision the Board, relying on Applicant and not the Oklahoma agency even though a witness was present, alluded to the lack of procedure. Apart from the fact that the best evidence would be from the agency, the fact remains that no one has applied to EPA for a waiver even to this date. (Tr. p. 2313).

no request to EPA. If, as Applicant testified, there are no state procedures, the Applicant has the duty to go to EPA.

The Board ignored the clear statutory provisions and ruling decisions. The only thing the Board could possibly do is either have in hand a certification or an official determination (by the State or EPA) of waiver. The Board had neither and, therefore, was without power to grant the LWA.

B. There were no facts upon which to find a waiver.

Applicant's witness testified that an application for an Oklahoma Wastewater discharge permit and a request for Section 401 (PL 92-500) certification was filed with the Oklahoma Water Resources Board on October 21, 1975 (R. p. 2301). As late as August 15, 1977, Applicant again requested either a certification or a waiver (R. p. 2305).

A representative of the Oklahoma Water Resources Board testified that the Board had received a copy of the base Environmental Report but had received the FES only on August 22, 1977. He further stated that until all information necessary to issuance of a permit or certification was furnished the Oklahoma Water Resources Board was not able to act (R. p. 2089).

There had been eight amendments (the last filed July 15, 1977) to the ER. There is no evidence that the

amendments were supplied to the Oklahoma Water Resources Board (R. p. 2325).²⁷ There have been amendments to the FES during this hearing. The result of this hearing is an amended FES. No request for certification or waiver determination has been made to EPA (R. p. 2313).

Clearly the "401" certification had not been obtained prior to the close of the record. The Applicant, however, takes the position that there has been a waiver. This position cannot be accepted. [Applicant does not assert or rely upon a "negative certification" (R. p. 2316, lines 20-21)].

For there to be a "waiver" there must be a "failure or refusal" of the certifying agency to act within a reasonable time not to exceed one year upon a request for certification. PL 92-500, Section 401(a)(1).

To begin, there is no evidence of a refusal to act. The evidence is to the contrary (R. p. 2089).

The use of the term "waived" in the law (PL 92-500) is a word of art. In this instance for there to be a waiver by the State there must be a voluntary, intentional relinquishment of the right to certify based upon full knowledge of the facts.

On the other hand, the term "waived" may mean that while a right is given, under Federal law, to States nevertheless the right is withdrawn if not exercised. This definition would apply in the administrative sense, i.e., that other

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The record does not reflect that the agency has ever been supplied the data.

activities, including those involved with water quality, will not be delayed.

In either case the waiver must be upon a "request for certification". Such a "request" must obviously be more than a simple asking for a certification which is all that Applicant has done (Appl. Exh. 24; R. p. 2088-89).

Applicant has not made a meaningful request for certification. The information, which is necessary for the Oklahoma Water Resources Board to act, was not supplied within a reasonable time prior to the commencement of these hearings.

It follows that there has not been a "failure" to act. In fact, the Oklahoma Water Resources Board is acting (R. p. 2089). There cannot be a "failure" to act when there is nothing, or an incomplete thing, to act upon.

Next, it is clear from the evidence that state water quality standards, particularly sulfate, will be violated. The Board cannot assume that the State of Oklahoma will certify that there are no violations when, in fact, there are violations.

In all events the State has not denied certification. Applicant, EPA and the Staff were notified of the denial by letter from the Oklahoma Water Resources Board dated November 10, 1977. In a letter to this Board from the Oklahoma Water Resources Board dated November 22, 1977, the State of Oklahoma reiterated that it did not waive certification and did deny certification.²⁸

The Board (Dec. ¶54) did not view these letters as a denial of certification. However, there is no question that the state denies that a waiver has been given.

The Board appeared to find comfort in the qualified statement that a conditional certification may be given. The statute (Section 401) does not provide for conditional certifications.

The discharge either will or will not comply with applicable provisions. The purpose of FWPCA is to stop pollution and no "maybes" are attached to the law.