

BEFORE THE ENVIRONMENTAL APPEALS BOARD

OF THE

STATE OF DELAWARE

IN RE:)
THE APPEAL OF DRAPER) ORDER
CANNING COMPANY)

A public hearing was held before the Environmental Appeals Board of the State of Delaware on Friday, October 17, 1975 and Saturday, October 18, 1975 at Dover, Delaware, upon the appeal by Draper Canning Company from the decision of the Secretary of the Department of Natural Resources and Environmental Control embodied in Order Number 75-W6, issued June 30, 1975 and effective July 15, 1975. That Order issued national pollutant discharge elimination system permit number DE0000132 (State Permit Number WPCC 3004/75) to Draper.

Board members present at the hearing were Loren H. Frye, Chairman, Patricia Derrickson, Joseph B. Melson, Phyllis Schabinger and Earl B. Tull. Also present were Mark McNulty, Assistant Attorney General, and Robert Graham, State Solicitor, acting as Counsel to the Board; June D. MacArtor, Deputy Attorney General counsel to the Department; Robert Tunnell, Esquire and Richard Stokes, Esquire, Counsel to Draper, and members of the general public.

This is an appeal from the decision of the Secretary regarding an NPDES permit application by Draper and subsequent issuance of that permit.

FINDINGS OF FACT

1. The Findings of Fact, conclusions of law and permit conditions contained in the above mentioned order and permit are adopted by the board to the extent that they are consistent with this Order.
2. Developing a mathematical model is an accepted method of determining the assimilative capacity of a stream in terms of biochemical oxygen demand (BOD) and total oxygen demand. Such models recognize the possibility of error in data input and build an error factor into the formula.

3. Modeling is a means of arriving at a fair waste load allocation. The basis for the model used in establishing the allocation in this permit has been used successfully on similar streams in the northeast.
4. For a stream with the characteristics of the Broadkill River, the one-dimensional model is more appropriate for projecting BOD and total suspended solids than the two dimensional model.
5. The Department has indicated a willingness to increase the flow limitation for discharge 001 from 1.23 mgd to 1.73 mg.d.
6. Fecal coliform is present in the effluent from Draper, apparently of animal origin. This factor is important because coliform is an indicator of pathogenic or disease producing organisms.
7. Draper did not present to the Department below or to the Board product information. This failure to present product information makes it impossible to factor relevant economic and industry standards into the process of formulating effluent limitations.
8. The characteristics of the Broadkill River at the Round Pole Branch (where Draper is located) are different than those lower in the estuary. Industries below Round Pole Branch are not similarly situated to Draper in terms of the effect of their effluent on the stream, because of reduced "flushing" and similar phenomena in the upper reaches of the river.
9. Draper produced no credible evidence which would substantiate its claim of economic or technologic impossibility of meeting the permit limitations.
10. There exist alternative waste load reduction systems, including spray irrigation of all or partial loads curbing expansion at the Round Pole Branch location, improvements to the existing treatment plant or connection to a local sewage district.
11. Both Draper and the public at large have had ample opportunity to present evidence and express opinions as to the permit limitations. At a public hearing held in Milton, Delaware on May 19, 1975 and at the hearing before the Board.

- 28 -

CONCLUSIONS OF LAW AND ORDER

It is the conclusion of the Board that the permit limitations were established in conformity with the Federal Water Pollution Control Act (33 USC §1251 et seq) 7 Del. C., Chapter 60 and relevant federal and State regulations.

It is further the conclusion of the Board that in arriving at those limitations, the Department has not violated the due process and equal protections clauses of the State and Federal Constitutions. The Board is without jurisdiction to determine the Constitutional validity of State and Federal statutes.

It is hereby ordered that the permit be affirmed as issued by the Department, except that the average quantity of effluent discharged at discharge 001(a) is increased from 1.23 mgd to 1.73 mgd. The Department is empowered to amend the permit in accordance with this change.

DATED: October 18, 1975

Loren Frye, Chairman
Phyllis Schabinger
Patricia Derrickson
Earl B. Tull
Joseph B. Melson

