

ILLINOIS POLLUTION CONTROL BOARD
October 1, 1992

DEPARTMENT OF THE ARMY,)	
)	
Petitioner,)	
)	
v.)	PCB 92-107
)	(Variance)
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by B. Forcade)

This matter comes before the Board on a petition filed on July 20, 1992, for extension of the variance granted in Board order PCB 87-38. The variance was granted in September of 1987, amended on November 8, 1990 (PCB 87-38) and May 21, 1992 (PCB 91-113). The variance expired on September 4, 1992. The Department of the Army (Army), in its petition, waived its right to a hearing and no person filed an objection to the variance, therefore no hearing was held in this matter. The Environmental Protection Agency (Agency) filed its recommendation on August 14, 1992. The Agency recommends that the variance be granted with conditions. No briefs were filed in this matter.

The petition requests that the records, opinions and orders of the prior proceedings be incorporated. In a Board order dated September 3, 1992, the Board held that it would incorporate the opinions and orders from the prior proceedings but would not incorporate the entire record from the prior proceedings. The Board further instructed the Army that it could petition the Board to incorporate additional material by filing a new motion along with copies of the material to be incorporated pursuant to the Board's regulation at Section 101.106. The Army has not filed a subsequent motion for incorporation by reference.

BACKGROUND

The Army requests an extension of the variance granted in PCB 87-38, dated September 17, 1987, as amended by Board order dated November 8, 1990 and as amended in PCB 91-113 (May 21, 1992). In PCB 87-38, the Army was granted a five year variance from 35 Ill. Adm. Code 304.105, Violation of Water Quality Standards, as it applies to the following Sections: 302.203, Unnatural Sludge; 302.206 Dissolved Oxygen; 302.208, Chemical Constituents only to the extent it concerns the standards for total lead, total cadmium and total hexavalent chromium; and 302.212, Ammonia Nitrogen and Un-ionized Ammonia. The variance granted in PCB 87-38 was an extension, with some modifications, of the three year variance previously granted to the Army in PCB 84-86, dated October 25, 1984. The November 8, 1990, order in

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PCB 87-38 extended the Army's deadline to submit plans and specifications, to the Agency, for achieving compliance with the applicable regulations from December 1, 1990 to December 1, 1991. In PCB 91-113, the Board amended some of the testing procedures required by the variance.

The purpose of the variance is to allow the Army to continue its program of maintenance dredging in portions of the Illinois River to ensure that the river remains navigable. The need for maintenance dredging was explained by the Board in PCB 84-86:

...[t]he Illinois River is a main pathway for commerce. When sedimentary material accumulates on the bottom of the River navigation may be impeded. Unless the material is removed the build-up of sediment could stop river commerce. Dredging to remove the sediments may be done by mechanical means, such as clamshell, backhoe, and dragline, or it may be done by hydraulic means, such as cutterhead pipeline. The material dredged from the river (sediments and water) may then be disposed of in the waterway (open water disposal), on the shore (bankline disposal), or in a confined disposal area. Both the dredging operation and the disposal operation may have adverse water quality impacts. Several factors may influence these impacts including characteristics of the material to be dredged (sediment and ambient water), method of dredging, method of disposal, hydrologic and meteorologic conditions. Army contends that it essentially has no control over when and how much dredging will be needed to ensure a safe navigation channel. Army also claims that if channel obstructions occur movement of four billion dollars worth of commodities would be impaired, costing as much as \$150 million annually for alternate transportation.

The Agency believes that the hardship resulting from denial of the variance remains unchanged from previous Board orders.

In its October 25, 1984, opinion and order in PCB 84-86 the Board addressed the environmental impact of past dredging operations:

Dredging on the Illinois River has historically (1952-1982) occurred along 36.5 miles of the 150 mile length. The most relevant water quality monitoring data came from dredging under variances in PCB 82-136 and 83-25. While water quality violations do appear in the data, it does not appear that dredging to date has caused or significantly exacerbated water quality violations (final Report in PCB 83-25, Enclosure 2). While different dredging events will not necessarily follow

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this pattern, the data so far shows minimal water quality impact from dredging. Consequently, on the factual record presented there, [In PCB 84-86] the Board finds that the anticipated adverse environmental consequences are outweighed by the arbitrary and unreasonable hardship that would be imposed if the Illinois River became non-navigable.

Because this variance is an extension of the prior variance the environmental impact is the same.

The Agency recommends that Army be granted the extension of the variance as requested. The Army was previously granted variances for its dredging operation because the burden on the Army and commerce utilizing the river outweighed the environmental impact avoided if the variance were denied. There is nothing in the record to indicate that the burden or the environmental impact have changed. Therefore, the Board grants the variance subject to certain conditions.

Site-specific Relief

In PCB 87-38 the Board required the Army to file a petition for site-specific relief by July 1, 1988. On June 30, 1988, the Army filed a rulemaking proposal (R88-15) concerning the dredging activities in the Illinois River. The rulemaking proposal was dismissed on January 19, 1991, because the Army was not able to proceed without monitoring data from the dredging activities. The Army was granted leave to re-file a petition and the variance granted in PCB 87-38 was not disturbed in anyway.

A petition for site-specific relief would allow the Board to consider whether the Army's maintenance dredging operations in the river are entitled to permanent relief and to consider the Army's contention that the current regulations are inappropriate for dredging activities. A variance is a mechanism by which a person is temporarily relieved from compliance with regulations or orders of the Board while that person takes action to ultimately achieve compliance. Variances are not to be utilized in succession indefinitely as a means of attaining de facto permanent relief. If the Army is entitled to permanent relief it must seek that relief through site-specific rulemaking.

The Agency has requested that the variance be granted with the condition that the Army file a petition for site-specific relief by September 4, 1992. On September 3, 1992, the Army filed a petition for a site-specific rule¹ (R 92-7) related to

¹ As noted in the Board's order in R 92-17, dated September 17, 1992, this proceeding has been improperly characterized as "site-specific" because the proposed regulation does not apply to

the disposal of dredged material. Therefore, the Board will alter the conditions of the variance to reflect the pending rulemaking procedure. As a condition of the variance the Army will be required to diligently proceed with the rulemaking procedure currently before the Board.

Retroactive Application

As a general rule, in the absence of unusual or extraordinary circumstances, the Board renders variances as effective on the date of the Board order in which they issue. (LCN Closers, Inc. v. EPA (July 27, 1989), PCB 89-27, 101 PCB 283, 286; Borden Chemical Co. v. EPA (Dec. 5, 1985), PCB 82-82, 67 PCB 3,6; City of Farmington v. EPA (Feb. 20, 1985), PCB 84-166, 63 PCB 97, 98; Hansen-Sterling Drum Co. v. EPA (Jan. 24, 1985), PCB 83-240, 62 PCB 387, 389; Village of Sauget v. EPA (Dec. 15, 1983), PCB 83-146, 55 PCB 255, 258; Olin Corp. v. EPA (Aug 30, 1983), PCB 83-102, 53 PCB 289, 291.)

A variance is not retroactive as a matter of law, and the Board does not grant variance retroactivity unless retroactive relief is specially justified.

Deere & Co. v. EPA, (Sept. 8, 1988) PCB 88-22, 92 PCB 91, 94 (citations omitted).

Absent a waiver of the statutory due date, Section 38(a) of the Environmental Protection Act requires the Board to render a decision on a variance within 120 days of the filing of a petition. See Ill. Rev. Stat. 1991 ch. 111 1/2, par. 1038(a) (amended from 90 days by P.A. 84-1320, effective Sept. 4, 1986).

For this reason, a petitioner that wishes a variance to commence by a certain date must file its petition at least 120 days prior to the desired inception date. See EPA v. Citizens Utilities Co. of Illinois (Jan. 12, 1984), PCB 79-142, 56 PCB 1, 4. The Army should have filed its petition by May 7, 1992 in order to file 120 days prior to the desired inception date of September 4, 1992. The Army filed its petition for variance on July 20, 1992.

There are no unusual or extraordinary circumstances in the Army's filing that would justify retroactively applying the variance. The variance will commence on the date of this Board order.

Expiration of Variance

The Army requests that the variance be extended until such

a specific facility or geographic site.

time as the Board has granted site-specific relief or, if denied, a period of two years subsequent to such denial to permit the Army to seek other means to maintain navigation on the Illinois Waterway. Section 36(b) of the Act (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1036(b)) limits the length of a variance to five years. Therefore, the Board cannot grant the variance until the completion of the site-specific rule or, if denied for two years subsequent to the denial. The Agency recommends granting the variance for a three year period. Three years should provide adequate time for the completion of the site-specific rulemaking. Therefore, the Board will grant the variance for a period of three years from the date of this order.

The Board notes that the conclusions that it reaches based upon the record of the variance proceeding do not necessarily reflect on the merits of any site-specific rulemaking. The burden of proof and the standards of review in a rulemaking (a quasi-legislative action) and a variance proceeding (a quasi-judicial action) are distinctly different. (Cf. Titles VII and IX of the Act; see also Willowbrook Development v. Pollution Control Board (2nd Dist. 1981), 19 Ill.App.3d 1074, 416 N.E.2d 385.) The Board cannot lawfully prejudge the outcome of a pending regulatory proposal in considering a petition for variance. (City of Casey v. IEPA (May 14, 1981), PCB 81-16, 41 PCB 427.)

This variance does not impose any new conditions on the Army's dredging operation. The conditions of this variance are identical to the conditions of the previous variance as modified by prior Board orders. The conditions of this variance are the conditions suggested by the Agency in its recommendation with the exception of condition 7 concerning the pending rulemaking procedure.

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

ORDER

The Board hereby grants the Department of Army, Rock Island District, Corps of Engineers (Army) variance from 35 Ill. Adm. Code 304.105, Violation of Water Quality Standards, as it applies to the following Sections: 302.203, Unnatural Sludge; 302.206, Dissolved Oxygen; 302.208, Chemical Constituents only to the extent it concerns the standards for total lead, total zinc, total copper and total mercury; 302.212, Ammonia Nitrogen and Unionized Ammonia.

1. This variance will begin on October 1, 1992 and expire on October 1, 1995, or upon the date on which Army achieves compliance with applicable water quality standards or upon the issuance of a rule change by the

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Board concerning effluent requirements for dredging operations, whichever shall occur first.

2. This variance will apply only to violations of water quality standards that may occur as a result of discharge of dredged material coming from maintenance dredging of sediments not meeting Illinois EPA 401 certification # C-157-82, and only within the 25 sites on the Illinois River Waterways between river miles 80.2 and 230.2, as specified in Attachment No. 1 to the amended petition for Variance filed on May 6, 1983, in PCB 83-25 which is incorporated into this order. The four pages listing the sites are also attached to the order. For purposes of this order dredging activities of this type, shall be known as Condition No. 2 dredging events.
3. Prior to beginning any dredging event, Army shall obtain sediment core samples at locations and depths within the reach of the proposed dredge cut which are representative of that cut, for the purpose of determining whether such cut is a Condition No. 2 dredging event based upon an elutriate test performed in accordance with Condition 10. Sampling and analysis of the sediments shall include analysis for parameters listed in Condition 9(d). This requirement will be fulfilled if the site has previously been sampled as pursuant to Condition 9(a) within the 12 months prior to the dredging event.
4. Army shall conduct a Condition No. 2 dredging event only where necessary to ensure safe navigation, and the length, width and depth of any such event shall be reduced as much as feasible, consistent with providing safe navigation.
5. For any Condition No. 2 dredging event, Army shall consider and evaluate the use of mechanical dredging with bankline disposal, as opposed to hydraulic dredging, for any such event under which less than 50,000 cubic yards will dredged.
6. For any Condition No. 2 dredging event, Army shall use all reasonable efforts, other than upland confined disposal, to reduce the volume and character of discharges which might cause water quality violations. Open water disposal is prohibited.
7. Petitioner shall diligently pursue relief through its pending rulemaking procedure (R92-7).
8. In advance of any necessary Condition No. 2 dredging

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event, Army shall notify the Agency of the day that the dredging project is scheduled to begin.

9. Army shall conduct sampling and testing as follows:

- a) On an annual basis, a survey of existing sediment quality at the 11 sites identified in Attachment #1 to the amended petition for variance in PCB 83-25 with a historical dredging frequency average of once every ten years or less. No less than three sediments core samples shall be taken from each of the sites in the areas and to the depths most likely to be dredged; the actual number of core samples to be obtained shall be determined by the Army and the Agency based on the size and shape of the area to be dredged; sediment samples shall be analyzed for grain size, and an elutriate test, performed in accordance with Condition 10, shall be employed to analyze for parameters listed in Condition 9(d).
- b) The sampling and testing requirements of Condition 3 of this order.
- c) During any dredging project, whether a Condition No. 2 dredging event or not, water quality impacts and discharge character shall be monitored as follows:
 - 1) Army shall sample the following parameters at all sampling points listed under Condition 9(c)(4): specific conductance; turbidity, oil and grease; dissolved oxygen; total suspended solids; total dissolved solids; volatile suspended solids; total ammonia nitrogen as N; pH; water temperature; lead (total); zinc (total); copper (total); and mercury (total).
 - 2) Sampling at the sampling points listed in Condition 9(c)(4) shall be at mid-depth and bottom elevations between mid-channel and the bank on which disposal occurs, or at point representative of the discharge. Each sample shall consist of two aliquots collected over a six hour period.
 - 3) Sampling at the sampling point listed in Condition 9(c)(4) shall be done:
 - A) On two consecutive days per week if a 12-inch dredge is used;

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- B) Daily, but not to exceed five consecutive days per week, if a 20-inch dredge is used;
 - C) For use of any other size dredge, sampling shall be performed at a frequency in proportion to the amount of the discharge, but not less than two consecutive days per week nor more than five consecutive days per week.
- 4) Sampling shall be done at the following points:
- A) At a point upstream of the influence of the dredging, but no more than one-half mile;
 - B) At a point within tributaries entering the dredge cut, if any, upstream of backwater effects but as close to the confluence as possible;
 - C) At six points downstream of the disposal site:
 - 1) Two sites located approximately 100' downstream from the disposal site; one 25' off shore and one approximately 150' off shore but not beyond the navigation channel.
 - 2) Two sites located approximately 300' downstream from the disposal site; one 25' off shore and one approximately 200' off shore but not beyond the navigation channel.
 - 3) Two sites located approximately 1,000' downstream from the disposal site; one 25' off shore and one approximately 250' off shore but not beyond the navigation channel.
 - D) Two samples at the disposal site; one representative of the discharge and one composite representative of the return water.
- d) Sediment samples taken under Condition 9 shall be analyzed for the following parameters with the results of all chemical analyses being expressed

on a dry weight basis: grain size (based on a U.S. #230 sieve), oil and grease, total volatile solids, ammonia nitrogen, five-day biochemical oxygen demand, copper, mercury, lead, and zinc.

10. All sampling and analytical methods to be employed during the variance period shall follow procedures established by Standard Methods for the Examination of Water and Wastewater, 16th Edition and Chemistry Laboratory Manual for Bottom Sediments and Elutriate Testing, March 1979. In addition to the above requirements the elutriate test shall consist of a 30-minute mixing period with a zero (0)-hour settling period. Army in its discretion may also analyze additional samples utilizing a longer settling period. Both sampling and laboratory analyses shall provide for replicate testing. Field analyses shall be performed by trained personnel under direct supervision; laboratory analyses shall be performed by Agency certified laboratories.
11. Petitioner shall submit to the Agency annually by February 1, the results of sampling under Conditions No. 3 and No. 9, the results of any evaluations under Condition No. 5 and a status report on the rulemaking procedure in Condition 7.
12. Petitioner shall submit yearly, data concerning the amount of material that was dredged during the past year on February 1, to the Agency.
13. Within forty-five (45) days of the date of the Board's order, Army shall submit the following certification of acceptance to:

Illinois Environmental Protection Agency
Charles Feinen
Division of Legal Council
2200 Churchill Road
P.O. Box 19276
Springfield, IL 62794-9276

The 45-day period will be held in abeyance during any period that this matter is being appealed. Failure to execute and forward this certificate within 45 days shall render the variance null and void. The form of the certificate shall be as follows:

CERTIFICATION

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I, (We), _____, having read and fully understanding the order in PCB 92-107 dated October 1, 1992, hereby accept that order and agree to be bound by all of its terms and conditions.

Petitioner

Authorized Agent

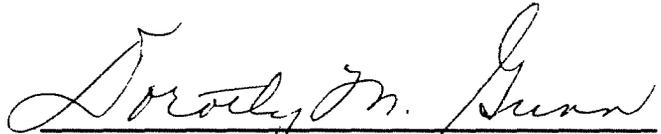
Title

Date

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1991 ch. 111 1/2 par. 1041, provides for appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also 35 Ill. Adm. Code 101.246 "Motions for Reconsideration" and Castenada v. Illinois Human Rights Commission (1989), 132 Ill.2d 304, 547 N.E.2d 437.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 1st day of October, 1992, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board