

ILLINOIS POLLUTION CONTROL BOARD  
April 21, 1994

MARVIN DAMRON, )  
 )  
 Petitioner, )  
 )  
 v. ) PCB 93-215  
 ) (Permit Appeal)  
 ILLINOIS ENVIRONMENTAL PROTECTION )  
 AGENCY AND TOMAHAWK GROUP, INC., )  
 )  
 Respondents. )

MR. MARVIN DAMRON APPEARED PRO SE;

MR. RICHARD C. WARRINGTON APPEARED ON BEHALF OF ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

OPINION AND ORDER OF THE BOARD (by G. T. Girard):

On November 10, 1993, Marvin Damron filed a petition for review of a national pollutant discharge elimination system (NPDES) permit (No. IL0069949) granted by the Illinois Environmental Protection Agency (Agency) to Tomahawk Group, Inc. (Tomahawk) (collectively "respondents"). On December 2, 1993, petitioner filed an amended petition for review. Hearing was held before hearing officer Deborah Frank on February 8, 1994, in Kewanee, Henry County, Illinois. The petitioner's brief was received by the Board on March 17, 1994, and the Agency's brief was filed on March 21, 1994. Tomahawk did not file a brief. The Agency also filed a motion to supplement the record on March 21, 1994. The Board grants that motion.

The Board's responsibility in this matter arises from Section 40 of the Environmental Protection Act (Act). [415 ILCS 5/40 (1992).] The Board is charged, by the Act, with a broad range of adjudicatory duties. Among these is adjudication of contested decisions made pursuant to the permit process. More generally, the Board's functions are based on the series of checks and balances integral to Illinois' environmental system: the Board has responsibility for rulemaking and principal adjudicatory functions, while the Agency is responsible for carrying out the principal administrative duties, inspections, and permitting.

Based on a review of the record, the Board affirms the Agency's issuance of the NPDES permit No. IL0069949 to Tomahawk.

BACKGROUND

This is a third-party appeal of the issuance by the Agency of a NPDES permit to Tomahawk Group. Tomahawk applied for a permit from the Illinois Department of Mines and Minerals (IDMM)

to remove coal from Tomahawk's property in Henry County, Illinois. (Ag. Br. at 1; R. at 2.)<sup>1</sup> The Agency reviewed the IDMM application, viewed the site and commented on the application, pursuant to an interagency agreement. (Ag. Br. at 1; R. at 27.) On September 2, 1992, IDMM issued a permit to Tomahawk to remove coal from its property. (R. at 67.)

In August 1992, while the IDMM permit application was pending, Tomahawk filed an application for a NPDES permit for discharges from the surface mine subject to the IDMM permit. (R. at 35-66.) The Agency caused public notice of the permit application to be published and posted. (R. at 123-125.) Upon receipt of a request for a public hearing (R. at 135-136), the Agency held a hearing on August 2, 1993. (R. at 154-344.) On October 15, 1993, the Agency issued a final NPDES permit No. IL0069949 to Tomahawk. (R. at 593-600.)

On November 10, 1993, Mr. Damron filed this permit appeal. Mr. Damron owns property within one mile of the site of the Tomahawk surface coal mine. Mr. Damron participated in the public hearing held August 2, 1993. (Pet. at 1; R. at 185.)

#### REGULATORY FRAMEWORK

##### Board Review of NPDES Permits

Section 39(b) of the Act allows the Agency to issue NPDES permits "for the discharge of contaminants from point sources into navigable waters . . . or into any well". The Agency may include effluent limitations and other requirements established under the Act or Board regulations. (Section 39(b) of the Act.) Section 40 of the Act allows for Board review of an Agency decision regarding a permit. The Board's rules at 35 Ill. Adm. Code 309.105 set forth the conditions under which an NPDES permit may not be issued. Those provisions are:

- a) The permit would authorize the discharge of a radiological, chemical or biological warfare agent or high-level radioactive waste;
- b) The discharge would, in the judgement of the Secretary of the Army acting through the Chief of Engineers, result in the substantial impairment of anchorage and navigation;

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<sup>1</sup>The Agency's Brief will be cited as "Ag. Br. at \_\_\_"; the Agency Record will be cited as "R. at \_\_\_"; the Petition will be cited as "Pet. at \_\_\_"; Petitioners Brief will be cited as "Pet. Br. at \_\_\_"; the Board Hearing Transcript will be cited as "Tr. at \_\_\_".

- c) The proposed permit is objected to in writing by the Administrator of the U.S. Environmental Protection Agency pursuant to any right to object given to the Administrator under Section 402(d) of the CWA;
- d) The permit would authorize a discharge from a point source which is in conflict with a plan approved under Section 208(b) of the CWA; or
- e) The applicant has not provided proof to the Agency that he will meet any schedule of compliance which may be established, in accordance with the Act and regulations, as a condition of his permit.

#### Standing in Third Party Appeals

The Board's rules allow for third-party appeals in an NPDES permit proceeding. (See, 35 Ill. Adm. Code 105.102.) Of particular relevance in this case are subsections (b)(3) and (b)(8). Specifically, Section 105.102(b)(3) allows that "any person other than the applicant who has been a party to or a participant at an Agency hearing with respect to the issuance or denial of an NPDES permit by the Agency . . . may contest the final decision of the Agency." The Board has consistently interpreted the provisions of Section 105.102(b)(3) to allow third-party NPDES permit appeals as proper under the Board's rules and the Act. (See, Village of Sauget and Monsanto v. IEPA, 71 PCB 38, PCB 86-57 and 86-62, (July 11, 1986); Village of Gilberts v. Holiday Park Corporation and the IEPA, 65 PCB 283, PCB 85-96 (August 15, 1985); and Citizens Utilities Company of Illinois and Village of Plainfield v. IEPA and Village of Bolingbrook, PCB 93-101, \_\_\_ PCB \_\_\_ (June 17, 1993), Appeal pending, No. 3-93-0736. (Third District).)

Mr. Damron has demonstrated that he participated at the hearing held by the Agency on the NPDES permit application. Therefore, pursuant to Section 105.102(b)(3), Mr. Damron has standing to appeal the Agency's decision.

#### Standard and Scope of Review

When reviewing an Agency determination regarding the issuance or non-issuance of an NPDES permit, Section 105.102(b)(8) provides:

The hearings before the Board shall extend to all questions of law and fact presented by the entire record. \* \* \* If any party desires to introduce evidence before the Board with respect to any disputed issue of fact, the Board shall conduct a de nova

hearing and receive evidence with respect to such issue of fact.

Section 105.102(b)(8) has been interpreted to allow review at hearing of evidence beyond the scope of the Agency record providing it was relevant. (See, City of East Moline v. PCB, 188 Ill. App.3d 349, 544 N.E.2d 82 (3d Dist. 1989) and Citizens Utilities Co. V. PCB, 193 Ill. App.3d 93, 549 N.E.2d 920 (3d Dist. 1990).) Thus, the Act and the Board's rules allow third-party appeals and de novo review of the record in reviewing an Agency determination regarding an NPDES permit.

Although the scope of review is unique in an NPDES permit proceeding, the standard of review remains the same. The petitioner bears the burden of proof in a permit appeal. When the applicant is the petitioner, the petitioner must establish that the application, as submitted to the Agency, would not violate the Act or the Board's regulations if the requested permit were issued. This standard of review was enunciated in Browning-Ferris Industries of Illinois, Inc. v. Pollution Control Board, 179 Ill. App. 3d 598, 534 N.E. 2d 616, (Second District 1989) and reiterated in John Sexton Contractors Company v. Illinois (Sexton), PCB 88-139, February 23, 1989. In this case the petitioner, a third-party, is challenging the issuance of the permit by the Agency. Therefore, the petitioner, in this case, must show that the permit, as issued by the Agency, would violate the Act or the Board's regulations.

#### DISCUSSION

Mr. Damron challenges the issuance of the NPDES permit alleging that:

- 1) Tomahawk group failed to submit an application which satisfied state requirements;
- 2) The Agency failed to exercise its authority and fulfill its obligations sufficiently to prompt Tomahawk to meet those requirements or withdraw its application; and
- 3) Operation of the proposed Tomahawk mine on the terms established under this permit would result in violation of Section 12(a) and (d) of the Act. (Pet. Br. at 1.)

In presenting his arguments, Mr. Damron pointed to alleged unacceptable application responses to support his challenges under points #1 and #2 above. Several additional insufficiencies were alleged by Mr. Damron in support of his assertion that

Section 12(a) and (d) of the Act would be violated by the issuance of the permit. Section 12(a) and (d) prohibit water pollution in Illinois.

#### Alleged Unacceptable Application Responses

Mr. Damron argues that the permit application "contained unacceptable responses to a number of questions". (Pet. Br. at 2.) Mr. Damron alleges that the responses were either "a blank space or inappropriate or unsupported or contradictory or inaccurate". (Pet. Br. at 2.) Mr. Damron supports his allegations by citing to the record at several points. (R. at 35-36; 41; 45; 46; 49; 50; and 51.)

Mr. Damron argues that the application questions regarding abandoned mines in the area and the number of wells in the area were "incorrect". Mr. Damron points to Board hearing testimony which established that an abandoned drift mine exists within a short distance of the proposed Tomahawk minepit (Tr. at 182-184; Pet. Br. at 6-7) and testimony which establishes that Tomahawk failed to list 22 wells which exist within one mile of the proposed site. (Tr. at 27; Pet. Br. at 7.)

The Agency maintains that the permit application and the hearing conducted by the Agency prior to the issuance of the permit provided sufficient information for the Agency to issue an NPDES permit. (Ag. Br. at 7.) The Agency states that the application forms contain questions to identify many items of information that may be useful in reviewing any mining applications. (Ag. Br. at 7.) Any deficiencies in information were made up at hearing and with information provided before the issuance of the final permit according to the Agency. (Ag. Br. at 7.) Thus, the Agency argues that Mr. Damron's concerns regarding the sufficiency of answers to the questions about wells and abandoned mines is not "relevant to establishing discharge limitations for this application". (Ag. Br. at 7.)

The Agency also argues that the record establishes that the flow of shallow groundwater in the area indicates that the groundwater flows into the stream, and not from the stream into the ground. (Ag. Br. at 5-6.) Thus, the discharge into the stream is unlikely to contaminate the groundwater. (Id.) The Agency further asserts that the abandoned mine in the area is approximately 200 feet away from the proposed excavation and no evidence was submitted which would indicate that contamination would approach or enter the abandoned mine shaft. (Id.)

After reviewing the application submitted to the Agency by Tomahawk and reviewing the record of hearing, the Board finds that the failure to respond to all the questions on the permit application did not require withdrawal of the application. It is clear that Tomahawk made the pertinent information available at

the public hearing. (R. at 403 and 260.) Further, the NPDES permit establishes limitations on effluent discharges, and the direction of the shallow groundwater flow in the area make it clear that the additional wells are not in danger of contamination. Nor does the existence of the abandoned mine indicate that contamination of groundwater could occur. Therefore, the Board finds that the Agency was supplied sufficient information to determine whether or not a violation of the Board's rules or the Act would occur if the permit were issued.

#### Additional Alleged Insufficiencies in Application

Mr. Damron has challenged the permit issuance by questioning the adequacy of the settling pond, the possibility of acidic discharge and the placement of overburden piles. First, Mr. Damron argues that the settling pond is inadequate. (Pet. Br. at 3.) The inadequacy arises, according to Mr. Damron, because Tomahawk's estimate of ninety thousand gallons of water likely to enter the proposed exploratory mine pit in a day is "one-third of the minimum" estimated by IDMM. (Pet. Br. at 4.) Petitioner argues that IDMM's figures were arrived at using a "professionally approved method, but Tomahawk's figure comes without evidence of derivation". (Id.) The petitioner further argues that "accepting IDMM's figures" the daily pit-pumpage would overwhelm the holding pond and negate the pond's ability to serve as a settling basin, thereby, resulting in discharge of contaminated water into the receiving stream. (Pet. Br at 3-4.)

Mr. Damron further asserts that there are no provisions against an acidic discharge from the pit except "testing and reporting" requirements. (Pet. Br. at 5.) Mr. Damron contends that the process of testing and reporting would not be complete until after exploratory mining was completed; thus, he alleged that the permit does not protect the receiving stream. (Pet. Br. at 5.)

Mr. Damron next argues that the placement of overburden piles and surface runoff are potential problems as well. (Pet. Br. at 5-6.) Mr. Damron maintains that the overburden piles are shown on maps in and near the pond which would reduce the capacity of the pond for a settling basin. (Pet. Br. at 5.) The overburden would further contaminate the pond and "this added pollution would reach the receiving stream when the minepit was pumped at a rate sufficient to make extraction of coal practicable". (Pet. Br. at 5-6.) According to Mr. Damron, the surface runoff from storage piles and other parts of the minesite "is to be directed to the minepit, thence to be pumped into the settling pond" and that this will lead to contaminated water discharges into the receiving stream. (Pet. Br. at 6.)

The Agency states that Tomahawk has provided analyses of the

well water currently present at the site and such well water "would be likely to give water similar in quality to that expected to be pumped out during mining operations". (Ag. Br. at 3.) The Agency admits that the water is slightly alkaline and the alkalinity/acidity measurements indicate that the discharge would be classified as alkaline mine drainage. (Ag. Br. at 3.) The Agency therefore included the Board's effluent limitations for alkaline mine drainage in the NPDES permit issued to Tomahawk. (Ag. Br. at 4-5; R. at 593-600.)

The Agency further maintains that the sedimentation pond does not have to contain the pit drainage, but rather it must detain the pit pumpage to allow for settleable solids to settle in the slower moving water of the pond. (Ag. Br. at 4.) The Agency notes that use of the pond for treatment of mine drainage was authorized by the Board in a prior case. (Amax v. IEPA, PCB 80-63,64, Dec. 4 and 18, 1980.) The Agency asserts that in this case it will take over twenty four hours for the pit pumpage to traverse the pond and be discharged into the receiving waters. (Id.) Further, the pumpage rate is controlled by Tomahawk, which may vary the rate as necessary to allow additional settling time, and in no case may the discharge exceed the effluent limits established in the Board's regulations or the NPDES permit. If Tomahawk exceeds those limits, Tomahawk would be subject to the penalty provisions of the Act. (Ag. Br. at 4-5.)

For each issue raised, as detailed above, the Agency has pointed to adequate information in the record which demonstrates that the Act or Board regulations would not be violated if the permit were issued. Mr. Damron has failed to persuade the Board that Tomahawk's NPDES permit application was fatally deficient.

#### CONCLUSION

The Agency is authorized (Section 39(b) of the Act) to issue NPDES permits to allow for discharge of effluents into waters of the state. The Board's rules (35 Ill. Adm. Code 309.105) and the Act (Section 39(b)) set stringent standards for NPDES permits and the effluent limitations related to those permits. The fundamental issue in a permit application is whether the applicant demonstrates that the facility will not violate the Act or Board regulations. Damron has challenged the Agency's issuance of NPDES permit No. IL0069949 to Tomahawk on a variety of grounds. However, the petitioner's arguments do not establish that the permit as issued would violate the Act or Board regulations. Therefore, based on a review of the record, the Board affirms the Agency's granting of NPDES permit No. IL0069949 to Tomahawk.

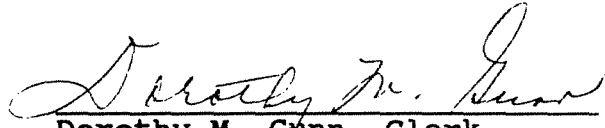
ORDER

The Board affirms the issuance of NPDES permit No. IL0069949 by the Illinois Environmental Protection Agency to Tomahawk Group, Inc.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/40.1) provides for the appeal of final Board orders within 35 days of service of this decision. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also, 35 Ill. Adm. Code 101.246, Motions for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 21<sup>st</sup> day of April, 1994, by a vote of 6-0.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board