

ILLINOIS POLLUTION CONTROL BOARD  
April 12, 1990

|                        |   |            |
|------------------------|---|------------|
| LACLEDE STEEL COMPANY, | ) |            |
|                        | ) |            |
| Petitioner,            | ) |            |
|                        | ) |            |
| v.                     | ) | PCB 90-29  |
|                        | ) | (Variance) |
| ILLINOIS ENVIRONMENTAL | ) |            |
| PROTECTION AGENCY,     | ) |            |
|                        | ) |            |
| Respondent.            | ) |            |

ORDER OF THE BOARD (by R. C. Flemal):

This matter comes before the Board upon a motion to dismiss Petitioner's petition for variance filed March 22, 1990 by the Illinois Environmental Protection Agency ("Agency"). On April 2, 1990, Laclede Steel Company ("Laclede") filed its response requesting the Board deny the Agency's motion.

On March 5, 1990, Laclede filed a petition for variance for relief from 35 Ill. Adm. Code 302.102 (mixing zones and ZIDS), 302.208 (Numeric Standards for Chemical Constituents), 302.210 (the narrative standard), and Subpart F (Procedures for Determining Water Quality Criteria), as each rule was amended in the Board's Toxics Control regulatory proceeding, R88-21(A), January 25, 1990, effective February 13, 1990.

The Agency requests that the Board dismiss Laclede's variance petition because it believes the petition is premature because the Toxics Control rules promulgated by the Board in R88-21(A) are currently on appeal in the Fifth District Appellate Court. The Agency then proceeds to explain its perceived impact which the appeal may have upon the variance proceeding, including the possibility of an appellate court stay of the effective date of the rules.

The Board finds that the filing of this variance petition is not premature simply by virtue of its filing while appeals of the new regulation are pending. There is nothing in the Act which precludes a petitioner from simultaneously seeking variance relief from the Board and an appeal in the courts. Furthermore, the Act provides that persons may appeal rules adopted by the Board (Ill. Rev. Stat. Ch. 111½, par. 1029). However, Laclede's belief that variances filed within 20 days of the effective date of any new rule automatically stays the effectiveness of the rules pursuant to Section 38(b) is erroneous. Section 38(b) of the Act provides for an automatic stay of some newly effective rules if a petition for variance is filed within 20 days, but

specifically excludes rules implementing an NPDES program. The water toxics rules implement an NPDES program, and can accordingly be stayed only by Order of court.

In the alternative, the Agency submits that the variance petition is inadequate under Board procedural rule Section 104.121. The Agency alleges that Laclede has provided insufficient data and that Laclede has not described the nature and extent of its present failure to meet the numerical standards or particular provisions from which variance is sought, again citing more alleged deficiencies in data presented.

As to the issue of a showing of a present violation, Laclede submits that the Agency is incorrect that Laclede must prove a present violation, stating that rather, a petitioner need only show that it cannot demonstrate compliance; i.e., to show a "present failure" to meet a regulation, pursuant to Section 104.121(e). Laclede points to data which it believes indicates its inability to show compliance with the new standards.


As to the Agency's contentions concerning insufficient data, Laclede basically points to certain information on these issues which it believes satisfies the requirements of the procedural rule, adding essentially that should the Board believe more information is required, an order seeking more information would be more consistent with past precedents rather than dismissal.

The Board observes that most of the contentions contained in the Agency's motion are of the type which are normally contained in a recommendation. Therefore, much of the discussion contained in the motion and response goes to the merits of the petition. The Board notes that several other petitions for variance, as well as petitions for adjusted standards, have been filed seeking relief from the R88-21A water toxics rules. (PCB 90-27, PCB 90-28, PCB 90-30, AS 90-2, AS 90-3, AS 90-4, AS 90-5.) The Agency has requested dismissal due to asserted informational deficiencies in each case, save for AS 90-5. Given the nature of the water toxics amendments and the fact that there is no previously established benchmark for judging the sufficiency of a petition in this arena, the Board is not prepared at this time to dismiss this petition as deficient. However, since Laclede bears the burden of proof, it is obvious that to the extent additional information is necessary for such proof, such information should be submitted during the course of the proceeding, and in advance of hearing.

The Board accordingly denies the Agency's motion to dismiss.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 12<sup>th</sup> day of April, 1990, by a vote of 7-0.

  
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Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board