ILLINOIS POLLUTION CONTROL BOARD
December 20, 1989

OLD BEN COAL COMPANY,	)	
	)	
Petitioner	)	
	)	
v.	)	PCB 89-41
	)	PCB 89-42
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	(Permit Appeal)
	)	
	)	
Respondent.	)	

JEFFREY C. CONRAD, APPEARED ON BEHALF OF THE PETITIONER; AND

RICHARD C. WARRINGTON, STAFF ATTORNEY, APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J. Anderson):

This matter comes before the Board on two permit appeal petitions of Old Ben Coal Company (Old Ben), filed on February 24, 1989 and February 27, 1989 respectively, the filing fee for both having been paid on April 20, 1989. In both appeals, Old Ben contests the same permit condition imposed by the Illinois Environmental Protection Agency (Agency) in its reissued NPDES Permit No. IL0000078 for its Mine No. 26 (PCB 89-41) and in its reissued NPDES Permit No. 0049271 for its Mine No. 25 (PCB 89-42).

Hearing was held on August 24, 1989. No members of the public were present. By agreement of the parties, a consolidated hearing was held for PCB 89-41 and PCB 89-42. The only testimony, by the manager of the Agency's Mine Pollution Control program, identified the Board rules which were the basis for imposing the condition at issue in both permits. The Agency filed a single brief for the two proceedings on October 6, 1989, and in similar manner filed a reply brief on October 16, 1989. Old Ben filed two briefs on October 16, 1989, and two response briefs on October 19, 1989.

Because both appeals involve the same issues, the Board hereby consolidates both appeals and will issue a single Opinion and Order.

Old Ben contests the following permit limitation.

> "In addition to the above base flow sampling requirements, a grab sample of each discharge

caused by the following precipitation event(s) shall be taken (for the following parameters) during at least 3 separate events each quarter. For quarters in which there are less than 3 such precipitation events resulting in discharges, a grab sample of the discharge shall be required whenever such precipitation event(s) occur(s)." (Agency Brief, p.2)

Background:

There are no issues of fact in this case. The dispute revolves around the construction of regulatory amendments to the Board's mine regulations in R84-29, effective July 27, 1987 and titled In the Matter of: Proposed Amendments to Title 35, Subtitle D: Mine Related Water Pollution, Chapter 1, Parts 402 and 406. The principal language in dispute is contained in 35 Ill. Adm. Code Part 406.*

Some history of the development of the mine regulations should help clarify the dispute. Prior to the amendments in R84-29, Old Ben's facility was exempt from the effluent limitations in 406.106(b) during precipitation (or equivalent snowmelt) events. Section 406.106 had become effective on July 16, 1984, pursuant to amendments adopted at that time. This Section had allowed, in the now deleted language at 406.106(b)(3), a specific precipitation exemption to the effluent standards as long as (paraphrasing) the ponds were of sufficient size to contain a 10 year, 24 hour storm. It is not disputed that Old Ben's ponds were of sufficient size to qualify, and that the Agency had not been requiring, in Old Ben's prior permit, sampling and monitoring during precipitation events, but rather only under base flow (essentially dry weather) conditions.

In R84-29, the Board deleted the exemption language in 406.106(b) and instead imposed alternate effluent standards to those in 406.106(b) during precipitation events (406.110). The new 406.110 effluent standards controlled only two parameters, as opposed to the nine parameters in 406.110(b). In addition to the SS standard in 406.110, the same pH standard is imposed as in 406.106(b). One essential difference between the 406.106(b) and the 406.110 standards is that the latter effluent standard allows for compliance with settleable solids during precipitation events (SS), which is less stringent than the total suspended solids standard (TSS) for those ponds of insufficient size to qualify for the prior 406.106(b)(3) exemption. Basically, it was compliance with the TSS standard during precipitation events, when sediments were churning, that created the need for larger sedimentation ponds than would otherwise be necessary. In its

* For ease of reading, generally only the numbers of the various sections and subsections will be used instead of repeating the formal 35 Ill. Adm. Code or section or subsection prefixes.

final Opinion in R84-29 (we hereby incorporate by reference the Board's final Opinion and Order of June 25, 1987), the Board stated:

> It is agreed by all participants that adoption of the new regulations would cause an increase in the amount of sediment released from coal mine sedimentation ponds. This agreement stems from an agreed assumption that new ponds would be sized smaller, and therefore that the trapping efficiency of the new ponds would be somewhat less than the trapping efficiency of ponds constructed under the existing regulations.
> R84-29 Opinion, p. 19.

The Board also noted that the Economic Impact Study prepared by the Department of Energy and Natural Resources estimated that about 430 of the 492 coal mining discharges in Illinois would be affected and that the size of the settling ponds would decrease 57% as compared to the size required by the then existing rule. (R84-29 Opinion, p.14).

It should also be noted here that both the old and new existing precipitation event requirements were adopted to maintain ongoing consistency with changing federal regulations related to the NPDES program under the Clean Water Act.

Argument:

There is no dispute that the TSS effluent standards now apply during base flow periods and that the SS standards apply during precipitation events.

At issue is whether the Agency improperly imposed requirements in the NPDES permit to take at each outfall both the 24 hour base flow composite samples plus the up to 3 additional samples per quarter during precipitation events in the same month. Old Ben argues that there is nothing in the Part 406 regulations that requires base flow sampling and reporting in any month where sampling and reporting of the discharges during precipitation events takes place.

Old Ben quotes two provisions in the regulations in support of its argument:

1. Subsection (a) of Section 406.101 Averaging

> Compliance with the numerical standards of this part shall be determined on the basis of 24-hour composite samples averaged over any calendar month. In addition, no single 24-hour composite sample shall exceed two times the numerical standards prescribed in this part nor shall any grab sample taken individually or as an

> aliquot of any composite sample exceed five times the numerical standard prescribed in this part.

(We note that the language of 406.101, including the language quoted above, was not amended in the R84-29 rulemaking except for the addition of 406.101(c) and (d), which prohibited averaging of the SS and pH standards, respectively).

2. Subsection (d) of Section 406.102 Sampling, Reporting and Monitoring

> At a reasonable frequency to be determined by the Agency, the permittee shall report the actual concentration or level of any parameter identified in the state or NPDES permit. Each report submitted pursuant to this subsection shall include at least three samples taken from each pond discharge during three separate periods occurring during that reporting period in which the alternate limitations for precipitation events of Section 406.109 and 406.110 were in effect. If such alternate limitations are in effect on fewer than three separate occasions during a reporting period, one sample shall be taken of each pond discharge during each occasion in that period when the alternate limitations are in effect. The operator shall have the burden of proof that the discharge or increase in discharge was caused by the applicable precipitation event.

(We note that, except for the first sentence, 406.102(d) was new language added in R84-29).

The Agency requires quarterly reporting, so the disputed permit condition requires that over a 3 month period a maximum total of six samples per pond would be required (3 base flow + 3 precipitation).

Old Ben argues that Section 406.101(a) does not govern base flow sampling; this section relates to averaging, rather than prescribing sampling requirements or sampling frequency (Pet. Br. p. 4). Old Ben argues that Section 402.102(d) governs all sampling under Part 406, as is indicated by its title (Pet. Br. p.4)

Old Ben then parses Section 402.102(d). It agrees that the first sentence allows the Agency to require sampling and reporting at reasonable frequencies, in this case once/month composite sampling and reporting quarterly. Old Ben agrees that the second sentence clearly empowers the Agency to require sampling of at least three precipitation event discharges and reporting quarterly.

It is the third sentence that creates Old Ben's dispute. Old Ben acknowledges that if a precipitation event does not occur

during any particular month, then it would have to sample for and report base flow results during that month. However, Old Ben asserts that neither in 406.102(d) nor anywhere else in Part 406 is it required that a permittee sample and report base flow discharges if during that month it samples and reports precipitation event discharges. Thus, it argues, the Agency had no regulatory authority to impose conditions requiring both.

The Agency argues that 406.101(a) "Averaging" cannot be ignored. That subsection requires composite samples to be averaged over a calendar month, just as 406.101(b) requires grab samples to be averaged over a calendar month for permittees electing to use this methodology. The Agency asserts that these provisions obviously refer to monthly performance during base flow conditions, unless Old Ben's mine operations are subject to unusual and unreported continual rainfall, and that this assertion is supported by the very definition of base flow at 402.101, which by its terms excludes precipitation. The Agency asserts that, when the Board substituted the alternate effluent limitations for those of 406.106(b), it is clear that those alternate limitations apply only during the limited time periods caused by precipitation. The Agency asserts that, while Old Ben admits that 406.101(a) explains how to prove compliance with the effluent standards of Part 406, Old Ben omits the long existing effluent standards of 406.106(b), and such an omission cannot repeal them. In actuality, the Board did not repeal the 406.106(b) standards; it added 406.110, which contains different standards (settleable solids) for precipitation events. Nor did the Board repeal 406.101; it added three samples of the increased discharge for precipitation events per reporting period of 406.102(d). In effect, the Agency argues, the Board substituted effluent limitations, and that Old Ben is instead trying to make one believe that the Board substituted sampling, not effluent limitations, and in the process repealed 406.106(b). (Agency Reply Br. pp.1,2)

The Agency asserts that the rules on their face provide base flow limitations at 406.106(b) with sample averaging at 406.101, and provide for precipitation event limitations at 406.110 with sampling at 406.102(d). In R 84-29, there is no mention of substituting samples, but only effluent standards. The rulemaking added 3 samples of precipitation events per quarterly reporting in 406.102(d) and deleted the prior exemption in old subparagraph 406.106 (b)(3). The Board did not repeal 406.101 or 406.102 or add any language providing for substitution of samples. The Agency argues that Old Ben's "substituted" samples argument is even less credible, considering that the samples to be taken are for total suspended solids under 406.101 and 406.106 and for settleable solids under the newly provided language in 406.102(d) and 406.110.(Agency Reply Br.p.3).

The Agency also makes the following points. The Chapter ! of Subtitle D: Mine Related Water Pollution, which includes Part 406, were initially promulgated and amended under the authority

of the Board since 1980 and Agency verbatim application of these rules is not a rulemaking. Next the Agency notes its permissive authority under Section 39 of the Act to include NPDES limitations derived from federal and state regulations. The Agency then notes that the USEPA has added, at 40 CFR 434.63, the alternate effluent limitations which the Board has followed in adopting R 84-29; thus the Act allows the Agency to incorporate into NPDES permits both sets of standards. (Agency Reply Br. pp. 4,5) Finally, the Agency argues that consolidation of the sampling schedules would leave no proof that the discharge is in compliance with the other parameter for any month; the purpose of monitoring is to demonstrate continued compliance, and prompt notice of need for corrective action could be absent for months.

Board Conclusions:

At the outset, the Board finds that the Agency properly implemented the Board regulations at issue here in establishing Old Ben's permit conditions, and generally agrees with the Agency's reasons for construing the regulations as it did.

The Board finds nothing in the case law cited by Old Ben regarding Agency or Board authority (See Pet. Br. pp.7-11 and Pet. Resp. Br. 2,3) or in the Act or in the regulations themselves that support Old Ben's challenge. At no point in the Board's Opinion in R 84-29 enunciating the history of the rulemaking, from initial proposal by the Illinois Coal Association through First Notice and the Agency's alternate proposals and the Economic Impact Study, and through Second Notice and Final adoption, is there any indication that the new standards, sampling protocols and reporting requirements for precipitation events was intended to supplant the existing standards, sampling protocols and reporting requirements for non-precipitation events. The language changes that were not made, as well as those that were made, in that proceeding make this quite clear.

Old Ben's arguments basically rest on two concepts, both unacceptable. Old Ben first attempts to rely on section titles to supersede what these sections actually say. Even though the section titled "Averaging" explicitly states that, where averaging is allowed, it is to be averaged over any calendar month for compliance purposes, it has been rendered nonexistent under Old Ben's reasoning because that language is not included under the section titled "Sampling, Reporting and Monitoring".

The monthly composite and grab sample averaging provisions apply only to the list of effluent standards in Section 406.106(b) (except for pH). The two precipitation event parameters in 406.110, pH and SS cannot be averaged. For all practicable purposes, this means that all those 406.102(b) parameter limits, not just the total suspended solids limits, would no longer be enforceable on a monthly basis, since the permittee need not demonstrate compliance, weather permitting.

Thus, the enforceability of those dry weather effluent limits would depend completely on a meteorological Act of God. This also means that all permittees would have different compliance demonstration requirements in any month, depending on how lucky or unlucky they are with the weather patterns and amounts of rainfall in the area of the State where they are located. This is an absurd result.

Old Ben puts forth another concept to buttress its contention. It essentially asserts that, as long as the regulations don't say this can't be done, it can. On the contrary, unless the regulations explicitly say this can be done, it can't. Old Ben ignores the fact that no language changes were made to the existing language in 406.102 except as related to precipitation events. The precipitation language was added at the same time the precipitation standard was removed from 406.106, a new standard was added at 406.110, and the "no averaging" provisions were added to 406.101 as regards settleable solids and pH (see 406.101(c) and (d). Ironically, at First Notice, 406.102 (d) did not contain any added language. A newly proposed provision at 406.102(i) would have required one sample to be taken from each pond during each precipitation event, without limit. The Board was persuaded by the Illinois Coal Association that this requirement may be an onerous burden, so the Board deleted 406.102(i) and added the "no more than three" sampling requirement language to 406.102(d), thus linking the less stringent frequency of the precipitation sampling requirements to the quarterly reporting requirements established by the Agency, pursuant to the Agency's authority in the unamended first sentence to establish reporting frequencies as a permit condition.(R84-29 Opinion p. 25,26) If the Board had intended to alter the reporting requirements of the calendar month sampling and averaging directives in Section 406.101, it would have had to explicitly add such "exception" language, in order to restrict the Agency's authority, as it did for precipitation events.

Finally, Old Ben offered two ancillary arguments.

One is that the contested permit requirement is not necessary to accomplish the purpose of the Environmental Protection Act because the Agency, during the R84-29 rulemaking, entered an alternate proposal that all ponds provide 24 hours of detention for a 10 year-24 hour precipitation event, with no monitoring and reporting required; thus, since Old Ben's ponds allegedly are of the proposed size, the "EPA does not require sampling and monitoring of <u>any</u> discharges from these ponds." (Pet. Resp. Br. p.4) Needless to say, the Agency's option was not adopted, so any construction of the Board's regulation based on this argument would tend to run counter to Old Ben's.

The second is that, from the time that 406.102(d) became effective in July, 1987, until February 24, 1989, the effective date of the permit, Old Ben did not submit samples of base flow

and precipitation event dischargers, and that the Agency never informed Old Ben that its NPDES permit sampling or monitoring reports were in violation of 406.102(d). (Pet. Resp. Br. p. 4) Thus, for reasons similar to those in the preceding paragraph, Old Ben asserts that the contested permit condition is imposed unreasonably. Old Ben seems to be arguing that, because the Agency did not make Old Ben comply fast enough, Old Ben should not ever have to comply. We have the following observations. The possession of a permit is not a defense to a violation of a Board regulation (Landfill, Inc. v. IPCB) 387 N.E.2d 258 (1978) Illinois Supreme Court, and the burden is on the permittee to comply with those regulations. In any event, we reject any argument that construction of a Board regulation is in any way related to the pace of Agency permit or enforcement activities, or to the manner in which a permittee decides to react to the regulation.

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

ORDER

The Board hereby affirms the contested condition imposed by the Illinois Environmental Protection Agency in reissuing NPDES Permit Nos. IL0000078 and IL0049271 to Old Ben Coal Company.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1987 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.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 20th day of December, 1989, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board