

ILLINOIS POLLUTION CONTROL BOARD
September 8, 1983

DEPARTMENT OF THE ARMY,)
)
 Petitioner,)
)
 v.) PCB 83-25
)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by J.D. Dumelle):

On August 29, 1983, the Department of the Army, Rock Island District, Corps of Engineers ("Army Corps") moved for reconsideration and modification of the Board's July 26, 1983, Opinion and Order in this matter. In that action the Board granted the Army Corps, subject to certain conditions, a variance from certain water quality standards that might be violated during potential dredge and disposal operations on the Illinois River. On September 1, 1983, the Illinois Environmental Protection Agency ("Agency") filed a Response to Motion for Reconsideration. The Army Corps' motion for reconsideration is granted.

The Army Corps and Agency request two modifications to the July 26, 1983, Order. First they request that the duration of the variance be increased from one year to the three years originally requested. Second, they request the prohibition on open water disposal be deleted. For the reasons below these two modifications are denied and the July 26, 1983, action of the Board is reaffirmed.

As reasons for extending the time period the Army Corps urges that, "...there is a high probability that dredging the Illinois River may not be required during the period of the variance," and "only in a dredging year will meaningful, during-dredging data be collected from the proposed sampling and monitoring program". Thus, the one-year variance is too short to allow development of "the information contemplated by the Board in its order" (Mot. pp. 1-2). The Army Corps misinterprets the Board's Order.

The Board has no information in this record concerning the generalized impacts on water quality for each potential method of dredging, each potential method of disposal, and each potential method of discharge.* A statement that water quality impacts will depend on the characteristics of the dredged material, hydrologic and meteorologic conditions, and the disposal option (Am. Pet., p. 6) does not fulfill the requirements of 35 Ill. Adm. Code 104.121(d), (e) and (g). Before issuing long-term variances to water quality standards the Board must know what factors influence water quality impacts and what conditions the Board could reasonably impose to reduce those impacts. On that basis the July 26, 1983, Order required a report on the factors in dredging, disposal, and discharge that affect water quality, and methods of reducing such impacts (Order, ¶ 9a, 9b, 9c, 9d). This information was to be drawn from current practices in the navigable waters of the United States, not just the Illinois River. Paragraph 9(f) required submission of "all testing results obtained" for the Illinois River; if no results are obtained, no information need be provided. Sufficient information on water quality impacts of dredging, disposal and discharge operations elsewhere in the U.S. should provide the Board an adequate information base for further variance decisions unless the Illinois River is fundamentally different from all other U.S. waters. If the Army Corps does not presently know what factors in a dredging operation affect water quality, and how to minimize adverse impacts, that information must be developed. One year is an adequate time for preparing such a report.

The Army Corps and Agency request that the prohibition on open water disposal (Order, ¶. 6) be deleted. Open water disposal was neither specifically requested nor explained in the Amended Petition. There is no claim of clerical error, newly discovered evidence, fraud, or a void order 35 Ill. Adm. Code 103.241. The best information available in the record indicates each open water disposal may result in the discharge of 137 million gallons of contaminated sediments and waters, to the Illinois River (Am. Pet., p. 5). Absent more information the Board cannot approve such actions. The report under paragraph 9 of the Order provides the best mechanism for acquiring such information.

The Army Corps' request for a "face-to-face" meeting with the Board is denied. A variance petition initiates an adjudicatory proceeding 35 Ill. Adm. Code 104.201 and 35 Ill. Adm. Code Part 103. As the Army Corps and Agency are in agreement, oral argument to the Board would serve no useful purpose: A meeting for argument with the Board is not allowed.


* The Board notes the Army Corps' arguments that the Board had essentially waived informational deficiencies because of the Board's request that two specific legal issues be addressed at hearing. In a variance proceeding the burden of supplying sufficient information is on the petitioner. The Board cannot and should not be expected to pre-judge a variance petition to determine at such an early stage in the case all information which may be relevant. This is particularly true where a hearing will be held in the case.

Should the Army Corps find the terms and conditions of the variance onerous it need not sign the certification. The variance petition would therefore be denied and its conditions rendered unenforceable. Citizens Utilities Company v. Illinois Pollution Control Board, 9 Ill. App. 3rd 158, 289 N.E. 2nd 642 (1972), Flintkote Co. v. Pollution Control Board, 53 Ill. App. 3 665, 368 N.E. 2nd 984, 11 Ill. Dec. 376 (1977). All options concerning a new variance petition would still be available to the Army Corps.

Accordingly, the motion for modification is denied.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 8th day of September, 1983 by a vote of 5-0.



Christan L. Moffett, Clerk
Illinois Pollution Control Board