

ILLINOIS POLLUTION CONTROL BOARD

October 14, 1976

ARCH DEVELOPMENT, INC.,)
)
 Petitioner,)
)
 v.) PCB 76-168
)
 ENVIRONMENTAL PROTECTION AGENCY,)
)
 Respondent.)

Preston K. Johnson, Sr., Attorney, appeared for the Petitioner;
Donald S. Means, Technical Advisor, appeared for the Respondent.

OPINION AND ORDER OF THE BOARD (by Mr. Zeitlin):

The Petition in this matter was filed on June 1, 1976, by Arch Development, Inc. (Arch), seeking relief from the development permit requirement for solid waste management sites. In an addendum to that Petition, filed on June 7, 1976, Petitioner more clearly specified the requested relief as being from Section 21(e) of the Environmental Protection Act (Act) and Rule 201 of Chapter 7: Solid Waste, of this Board's Rules and Regulations. Ill. Rev. Stat., Ch. 111-1/2, §1021(e) (1975); Ill. PCB Regs., Ch. 7, Rule 201. The Environmental Protection Agency (Agency) filed its Recommendation on July 22, 1976. Pursuant to authorization by the Board granted June 3, 1976, a hearing was held in Belleville, St. Clair County, Illinois, on August 19, 1976.

The subject of this Variance is a solid waste management site in Centreville Township, Cahokia, St. Clair County, Illinois, (R. 4). The site, originally a borrow pit utilized in the construction of a levee, was purchased by Petitioner from the Alton & Southern Railroad for \$11,500, (R. 4,5). Arch plans to fill in the 11-acre saucer-shaped borrow pit with demolition wastes from the razing of St. Louis' Pruitt Igoe Public Housing Project and several large hotels in the St. Louis metropolitan area; after filling, the area is to be covered with dirt and used for farming purposes, (R. 4-10). Because the site is located in the flood plain of the Mississippi River, the Agency has refused to issue development or operating permits. Under those circumstances, Petitioner is requesting a Variance from the permit requirements to allow development, operational filling, and final closing of the site (all within approximately one year) without the required permits.

The site in question has been before the Board previously, in EPA v. Arch Development, Inc., PCB 75-474, ___ PCB ___ (May 20, 1976). In that case, Arch admitted to operation on the site without the required permits in violation of Rules 201 and 202(a) of the Solid Waste Rules, and agreed to an \$850 penalty and the discontinuance of all refuse disposal activities by February 19, 1976.

Petitioner claims in support of the requested Variance that it will suffer an irreparable harm if development and completion of the site is not allowed, and that the property on which the site is located will have essentially no value in its present state, entailing a loss of the \$11,500 purchase price, (R. 16). Petitioner has also invested approximately \$51,000 for a Caterpillar tractor, (R. 10), and approximately \$10,000 in other operational improvements, many of which were required to comply with the previous Agency inspections, (R. 10). Since operations on the site ceased in accordance with the Order in PCB 75-474, contributions by individual shareholders have been necessary for Arch's survival, (R. 13).

Petitioner also alleges that no environmental harm would result from the operation of this site without the required permit. To avoid water pollution from a site subject to flooding, Petitioner proposes to accept only demolition of a "clean" nature. Much of the Record in this matter is concerned with Petitioner's attempt to show that because of the "clean" nature of the fill to be deposited at the site, the Board need not worry about various water pollution problems raised by the Agency. These include the use of rubble from buildings with concrete (rather than wooden) floors, and the removal of all metal by Petitioner from those wastes, (e.g., R. 15, 18-20). In addition, Petitioner characterized the soil underlying the site as "gumbo," which Petitioner claims will be impervious, (R. 18). Petitioner has also changed an original plan to cover the site with foundry sand, and will use dirt for that purpose instead, (R. 8).

The Agency's opposition to Arch's development and operation on this site stems largely from the fact that the site, located a few hundred yards east of the Mississippi River (R. 30), is not protected by levees from flooding of the Mississippi. In a recent Technical Policy Statement, the Agency's Division of Land/Noise Pollution Control has essentially stated that no permits will be issued -- regardless of the type of refuse to be deposited -- for any site any portion of which "would lie below the level of the 100-year flood..." (Agency Ex. 12). We need not, however, discuss the validity of that policy. The propriety of an Agency permit denial is not properly before the Board in a Variance matter of this type.

Petitioner's burden here is to show that a Variance is required because arbitrary and unreasonable hardship will be suffered in its absence, and that such hardship substantially outweighs the likelihood of environmental damage resulting from operation under the Variance. This Petitioner has failed to do.

With regard to environmental damage, Petitioner's meager testimony concerning the soil underlying the site is insufficient to show that leachate from this site will not percolate into the groundwater system, and possibly flow into the Mississippi River. Petitioner has not shown the likelihood of flooding with any data as to frequency or severity, although it admits that the site is subject to flooding. Petitioner's testimony as to the soil is vague, and is more than offset by Agency testimony that an adjacent site contains highly permeable soil, (R. 36). Petitioner stated that its employees would remove the metals accompanying the demolition wastes to be landfilled, (R. 21), but also admitted that, "[w]ell, there are going to be pieces of metal that are going to go in too," (R. 20).

It is apparent that most of the expenditures relied on by Petitioner in terms of hardship occurred during operations without the necessary permit. Such hardship is unquestionably self-imposed. Self-imposed hardship may not form the basis for a Variance.

Petitioner has simply failed to provide this Board with facts sufficient to justify the grant of a Variance. Although the Agency failed to present strong justification for the denial of the requested Variance, such is not the Agency's burden in the absence of an adequate showing by Petitioner justifying a Variance grant.

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

ORDER

IT IS THE ORDER OF THE POLLUTION CONTROL that the Petition for Variance of Arch Development, Inc., in this matter be denied.

Mr. Jacob D. Dumelle concurred separately.
Mr. James Young dissented.

I, Christian L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 14th day of October, 1976, by a vote of 4-1.


Christian L. Moffett, Clerk
Illinois Pollution Control Board