ILLINOIS POLLUTION CONTROL BOARD
May 1, 1980

PEABODY COAL COMPANY, Petitioner,	)	
v.	)	PCB 78-296
ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

OPINION AND ORDER OF THE BOARD (by Dr. Satchell):

On October 24, 1979 Peabody Coal Company (Peabody) filed a motion for rehearing and other relief which requested reconsideration of the Board's Opinion and Order of September 20, 1979 (35 PCB 379). On November 29, 1979 the Board agreed to reconsider and requested additional briefs (36 PCB 159). On December 8, 1979 Peabody filed its additional brief. On January 28, 1980 the Environmental Protection Agency (Agency) filed a motion to strike the brief and on February 1, 1980 Peabody filed a response. In an Order entered February 7, 1980 the Board stated that it would consider the motion to strike in this Final Order on the motion to reconsider. On March 5, 1980 the Agency filed its reply brief.

This matter came before the Board upon a petition for review of conditions of NPDES Permit No. IL 0059480 which the Agency granted Peabody for four discharges from a proposed underground coal mine near Tilden in St. Clair and Randolph Counties. The four conditions in dispute are summarized below:

1. Discharge monitoring reports (DMR's) are to be retained for six months and mailed and received by the Agency bi-annually on the fifteenth of the month following the end of the six month period (Pet. 3; Ex. 2).

2. The expiration date of the final permit is December 31, 1980; whereas, the draft permit was for "approximately five years" (Pet. 7; Ex. 1).

3. The effluent concentration of total dissolved solids (TDS) is limited to a level that will not cause the receiving stream to exceed the water quality level for total dissolved solids (Pet. 2).

4. The daily maximum concentration of 7 mg/l for iron (total) is not subject to an exception for bypass discharge from facilities designed to contain or treat the pit pumpage and surface runoff which could result from a 10-year, 24-hour precipitation event (Pet. 1; Ex. 2).

PERMIT DENIAL LETTER

Peabody contends that the Agency erred by failing to comply with the provisions of Section 39(a) of the Act which require the Agency to transmit to the applicant a detailed statement as to the reason the application was denied. Although Section 39(a) does not itself apply to NPDES permits, the Board has by regulation required the Agency to comply with these provisions [Procedural Rule 502(b)(1)]. Peabody contends that, since the Board has by regulation expanded the right to appeal to include not only permit denial but also grant with objectionable conditions, the Board must necessarily expand the requirement of a letter of denial. This ignores an essential difference between denial and grant of a permit: whereas a single violation of the Act or rules is sufficient to justify permit denial, a statement of reasons for granting a permit with certain conditions and not others would be indefinitely long. Furthermore, the Procedural Rules which expand the right of appeal to include permit grants and expand the denial letter to cover NPDES permits preserve the distinction between denial and grant of a permit [Procedural Rule 502(b)]. The Board in adopting these rules did not intend to expand the requirement of the letter of denial to grant of an NPDES permit with conditions.

ISSUE ON PERMIT APPEAL

A hearing was held at Nashville on April 24, 1979. Peabody presented two witnesses and exhibits. The Agency cross-examined but presented no evidence. At the hearing Peabody's evidence largely concerned its difficulty in complying with the permit conditions. In the Opinion of September 20, 1979 the Board stated that, although this would be relevant in a variance or rulemaking proceeding, it is irrelevant in a permit appeal. The Board held that the issue in a petition under Section 40 of the Environmental Protection Act (Act) is whether or not, based upon the facts of the application, the applicant has provided proof that the activity in question will not cause a violation of the Act or of the regulations. Oscar Mayer & Co. v. EPA, 30 PCB 397. Oscar Mayer involved a permit denial. Peabody contends that the issue is different on appeal of a permit granted with conditions to which the Petitioner objects.

NPDES permit conditions are issued exclusively under Section 39(b). The second paragraph of Section 39(b) of the Act provides: "All NPDES permits shall contain those terms and conditions . . . which may be required to accomplish the purposes and provisions of this Act." The third paragraph provides for inclusion of effluent limitations and other requirements established under Board regulations and the FWPCA. Permit conditions which are included under the third paragraph of Section 39(b) of the Act will be referred to as "mandatory conditions." All other permit conditions are "discretionary conditions."*

The mandatory conditions of the third paragraph of Section 39(b) are not expressly made subject to the requirement of the second paragraph that they be required to accomplish the purposes of the Act. Conditions required under the FWPCA can be imposed upon the discharger regardless of the Act because of federal supremacy. It is the policy of the Act to provide for a single federal/state permit system (Section 11 of the Act). The Board therefore holds that mandatory conditions included in an NPDES permit under the provisions of the third paragraph of Section 39(b) of the Act are not subject to the language of the second paragraph of Section 39(b). However, on appeal of a permit grant, the permittee may seek to show that a discretionary condition is not required to accomplish the purposes and provisions of the Act.

Rules 910(e) and 910(f) of Chapter 3 require the Agency to issue permits for fixed terms and to require reporting and monitoring. They do not, however, mandate the particular conditions in this permit which require biannual DMR's and a December 31, 1980 expiration date. These details are within the Agency's discretion and are subject to the limitation that they be "required to accomplish the purposes and provisions of this Act." Under some circumstances evidence of cost or difficulty in complying with a discretionary permit condition may be relevant to this issue. Since the Board's previous opinion did not recognize this, it is withdrawn. However, the Board has examined the evidence which Peabody presented and concludes that it is insufficient to establish that either the expiration date or the reporting requirements are not required to accomplish the purposes and provisions of the Act.

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*By applying the label "discretionary" to a condition the Board does not mean to infer that the condition is in fact within the Agency's discretion. "Discretionary conditions" include those which are not mandatory and are arguably within the Agency's discretion.

The Board will strike pages four through ten of the additional brief pursuant to the Agency's motion of January 28, 1980, since it advances arguments which are inconsistent with those of the motion for reconsideration. In the stricken parts of the additional brief and in other places Peabody complains that the Agency has failed to offer any evidence in support of the permit conditions. This ignores Section 40 of the Act which provides that in a permit appeal the burden of proof is upon the petitioner.

WATER QUALITY RELATED EFFLUENT STANDARD FOR TDS

The permit contained the following condition: "The effluent concentration of TDS shall be limited to a level that will not cause the receiving stream to exceed the water quality limit in Rule 203(f) Illinois Pollution Control Board Rules and Regulations, Chapter 3: Water Pollution" (Permit, 3). Peabody objected to the inclusion of this condition. At the hearing testimony was given concerning the difficulty of meeting this standard.

Rule 605 of Chapter 4: Mine Related Pollution specifies that no effluent shall cause a water quality violation. The permit condition restates this as applied to TDS. These rules were adopted by the Board after proper notice and comment and not by the Agency as Peabody contends. TDS is not regulated by the United States Environmental Protection Agency. The Agency must include the more stringent state limitation in the permit under the provisions of Section 39(b) of the Act and Rule 910(a) of Chapter 3. Evidence of hardship in complying with a mandatory permit condition is not relevant in a permit appeal. Peabody is free to seek a variance or rule change.

Peabody also contended that it is arbitrary and capricious for the Agency to single out TDS as the only water quality related effluent standard included in the permit. The Board assumes that the Agency determined that there was a possibility of Peabody causing a TDS water quality violation but that the possibility of other water quality violations was too remote to warrant inclusion in the permit.

Peabody contends that the Board went outside the record to explain the Agency's action. However, under Section 40 of the Act the burden of proof is upon the petitioner. The Agency's actions in issuing a permit are correct unless the petitioner proves them otherwise. Where the Agency offers no explanation of its action, the Board will uphold it if there is a conceivable basis. It would impose an impossible burden on the Agency to require it to document and fully explain the entire decision process involved in a routine action such as permit issuance.

Peabody further argued that under the second sentence of Water Rule 910(b) the Agency should have made a waste load allocation in imposing a water quality related effluent standard. The Agency offers no interpretation of this rule in its brief, but from its actions the Board can infer that it believes the waste load allocation is optional in this case. This would be another limitation on Peabody's permit, and it could be a very restrictive limitation if the Agency is to be obliged to specify a number which Peabody must meet at all times to avoid causing a water quality violation during times of low flow. The Board therefore holds that Water Rule 910(b) does not mandate a waste load allocation for this water quality related TDS effluent standard. Peabody will be granted leave to file a supplemental permit application requesting a waste load allocation.

Peabody also objected that inclusion of the TDS water quality condition in the NPDES permit subjected it to greater possible penalties than violation of the water quality standards of Rule 203. Although the penalties of NPDES permit violation are greater than for violation of the Act and rules, the penalties are provided by statute. Furthermore, one of the purposes of the permit system is to put the discharger on full notice of its cleanup responsibilities so there is no question as to inadequate notice or confusion regarding the law's requirements. [NRDC v. Train, 396 F. Supp. 1393, 1400 (1975)]. The permit condition in question furthers this policy of notice and specificity.

CATASTROPHIC RAIN

Peabody objected that while the thirty day average maximum concentration for iron was subject to an exemption for bypass discharges from facilities designed to contain a 10-year, 24-hour precipitation event, the daily maximum concentration was not. At the hearing Peabody presented evidence that sound engineering practice and federal mine safety regulations require that holding ponds be designed to bypass a 10-year, 24-hour precipitation event (R. 31). An engineer offered an opinion that, unless the iron daily maximum were also excepted, it would be impossible to design to so bypass (R. 26). Hardship is not at issue on appeal of a mandatory permit condition.

The iron permit condition was based on effluent standards contained in Rule 606 of Chapter 4 and United States Environmental Protection Agency (USEPA) regulations found at 40 CFR 434.42. The Illinois standard is 7 mg/l which is applicable at all times unless treatment is provided. The federal standard is 3.5 mg/l on a thirty day average and 7.0 mg/l on a daily maximum. The federal standard is subject to an exemption for 10-year, 24-hour precipitation events.

The Agency applied the more stringent federal limitation of 3.5 mg/l on a thirty day average. However, with respect to the daily maximum, the Agency took the position that the Illinois standard of 7 mg/l was more stringent than the federal standard of 7.0 mg/l because the former was not subject to the 10-year, 24-hour precipitation event exception. The Agency therefore included the following "hybrid standard" in the permit:

	30 Day Average	Daily Maximum
Iron	*3.5 mg/l	7 mg/l

*Subject to 10-year, 24-hour precipitation event exception.

Rule 910(a) of Chapter 3 and Section 301(b)(1)(C) of the FWPCA require inclusion of any more stringent limitation established pursuant to state law or regulations. The Agency's position is that this requires it to write a permit condition which will ensure that neither federal nor state law pertaining to a parameter can be violated without a violation of the permit condition. An alternative interpretation is that the Agency is to look at state law, determine if state regulation of a parameter is more stringent than federal regulation, and if so, write a permit condition which is based on state law, but otherwise ignore the state law.

Peabody contends that the creation of a hybrid standard contained in the permit condition amounts to substantive rulemaking by the Agency in excess of the authority delegated to it by the Act. However, if the Agency's interpretation of Section 39(b) is correct, then it has been authorized by the Act to write permit conditions more stringent than either the federal or state effluent limitations in this situation. The Board will therefore address the issue as one of interpretation of Section 39(b) of the Act.

The phrase "any more stringent limitation" is compatible with the interpretation that the Agency is to examine state limitations, determine whether they are more stringent than the federal guidelines and, if so, apply them verbatim (Rule 910(a) of Chapter 3 and Section 301(b)(1)(C) of the FWPCA.) It is also compatible with the Agency's interpretation. The Agency's explanation assumes that there are two Illinois iron standards: a daily maximum standard and a thirty day average standard. The effluent standards are not written that way. Rule 606 of Chapter 4 sets a standard of 7 mg/l for iron. Rule 601 sets forth the averaging rule. Since Peabody

provides no treatment other than impoundment the 7 mg/l standard must be met at all times. Application of logic is required to derive the result that Illinois has a daily maximum standard of 7 mg/l and a thirty day average standard of 7 mg/l. These "standards" are not actually found in the rules.

Because the averaging rule for mine waste iron where no treatment is provided is very simple, it is possible to derive the thirty day average and daily maximum with confidence. Other parameters have more complicated averaging rules. There is no guarantee that it will always be possible to derive Illinois standards which can be compared directly with the federal standards.

The Board in its rulemaking implicitly weighed the cost savings to industry from the higher thirty day average versus the expenses involved in not having a 10-year, 24-hour precipitation event exception. The Board adopted the looser regulation of the thirty day average while USEPA decided on a tighter thirty day average with an exception more favorable to industry. Under the Agency interpretation the industry is denied the looser thirty day average it got from the Board and the more favorable exception it got from USEPA. The cost of compliance with the hybrid standard is greater than either the Board or USEPA regulations and neither the Board nor USEPA actually intended this result.

The exceptions associated with the effluent standards often cover unusual situations beyond the discharger's control. Ten-year, 24-hour precipitation events will occur on the average once every 3652.5 days whether the parameter is exempted or not. Writing permit conditions to cover such situations absorbs an inordinate amount of staff time while accomplishing very little in terms of environmental protection. It adds a level of complexity to the law which generates uncertainty and numerous permit appeals.

The fact that the Board and USEPA did not arrive at precisely the same regulation is not surprising considering the many trade-offs involved. However, each regulation is presumed to provide sufficient environmental protection alone regardless of isolated circumstances under which one but not the other might be violated.

Having considered these factors along with the language of the Act, FWPCA, Chapter 3 and Chapter 4, the Board concludes that the preferable construction is that in writing NPDES permit conditions for parameters governed by both federal guidelines and state effluent standards, the Agency is to examine the state effluent standard and decide if it is more stringent than the federal guideline as applied to the facility in question. If the state effluent

standard is more stringent it is to be applied, otherwise the permit condition is to be based on the federal guideline without further consideration of the state effluent standard.

Since the Agency has not determined whether federal or state regulation or iron effluents is more stringent, this case must be remanded for further action not inconsistent with this Opinion. Peabody will be given leave to file a supplemental permit application requesting inclusion of specific permit terms. The Agency will consolidate any such application with this remand.

This Opinion supplanting the Opinion of September 20, 1979 constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

1. The Order of September 20, 1979 is vacated.

2. Pages four through ten of Petitioner Peabody Coal Company's additional brief are stricken.

3. The permit appeal is remanded to the Environmental Protection Agency for a determination as to whether state effluent standards or federal guidelines for iron are more stringent and for further action not inconsistent with the Board's Opinion.

4. The remaining permit conditions are affirmed provided that Petitioner is given leave to file a supplemental permit application requesting specific modifications.

5. The Agency shall consolidate any such supplemental permit application with this remand.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 1st day of May, 1980 by a vote of 5-0.

Christan L. Moffett
Christan L. Moffett, Clerk
Illinois Pollution Control Board