ILLINOIS POLLUTION CONTROL BOARD
September 20, 1979

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

MR. THOMAS F. LINN, ATTORNEY AT LAW, APPEARED ON BEHALF OF THE PETITIONER.

MR. STEPHEN GROSSMARK, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF THE RESPONDENT.

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

This matter comes before the board upon a petition for review filed January 8, 1979 by Petitioner Peabody Coal Company (Peabody). The petition seeks, pursuant to §40 of the Environmental Protection Act (Act) and Procedural Rule 504(b), review of conditions of NPDES Permit No. IL 0059480 which the Agency granted Petitioner for four discharges from a proposed underground coal mine near Tilden in St. Clair and Randolph Counties. Petitioner originally objected to the inclusion or exclusion of fifteen conditions. The Agency subsequently agreed to modify the permit with regard to four conditions (Ex. 6). Petitioner did not include in its brief any argument with regard to seven others, six of which are standard NPDES conditions. These are deemed waived. The four conditions in dispute are summarized below.

1. Discharge monitoring reports are to be retained for six months and be mailed and received by the Agency biannually 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 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 would result from a 10 year, 24-hour precipitation event (Pet. 1; Ex. 2).

A hearing was held at Nashville on April 24, 1979. Peabody presented two witnesses and exhibits. The Agency cross-examined but presented no evidence. The issue in a Section 40 petition 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. A hearing before the Board is available in the event there is a disputed issue of fact, for instance if the Petitioner wishes to present evidence that his activity will not cause a violation in spite of the Agency's conclusion that it will. Oscar Mayer & Co. v. EPA, 30 PCB 397. In this hearing Peabody's evidence largely concerned its difficulty in complying with the permit conditions. Although this would be relevant in a variance or rulemaking proceeding, it is irrelevant in a permit appeal.

REPORTING

The permit special condition number six requires that the discharge monitoring report (DMR) forms "shall be mailed and received" according to the stated schedule which provides that they are to be sent twice each year fifteen days after the close of each six month period. In the petition, Peabody contends that this requires that the forms be mailed and received on the same day, which it contends is impossible and therefore unreasonable, arbitrary and capricious. However, the language is subject to at least two alternative interpretations: The DMR's are to be received according to the stated schedule and are to be sent by mail; or, the DMR's are to be mailed according to the stated schedule so long as they eventually are received. Neither of these is unreasonable on its face.

At the hearing and in its brief, Peabody objected not to the language chosen, but to the requirement of mailing and receiving in fifteen days (R. 66, Brief 27). Testimony was presented to the effect that some hardship could result if Peabody were required to report in fifteen days, but that twenty-eight days was fine (R. 67). The Agency contends that during the permit process Peabody did not indicate any preference on reporting date or period, did not object to the date and actually indicated that the date was acceptable at some point. In its comments mailed to the Agency on December 16, 1978 Peabody listed twenty-nine objections to the draft permit (Agency Record). It did not object to the reporting date or interval. Even if this objection is properly raised in the petition, it was waived by failure to object to it in the draft permit.

In its brief the Agency suggests that Petitioner's claims of hardship should be raised in a variance proceeding. The Board suggests that the reporting requirements are discretionary with the Agency and could be handled by a supplemental permit application.

EXPIRATION DATE

On August 9, 1978 the Agency sent a draft permit and public notice to Peabody. These specified that the permit would be for "approximately five years." On August 21, 1978 Peabody responded with several objections to the draft and notice. On September 15, 1978 the Agency apparently sent Peabody a second public notice which specified that the length of permit was "approximately two years." On October 16, 1978 Peabody responded with extensive comments on the draft permit. These do not include any objection to the two year expiration date (Agency Record).

Peabody now contends that it was arbitrary and capricious for the Agency to change the expiration date without notice, reason or opportunity to comment, even though the second public notice sent to Peabody contained the altered expiration date and this was prior to Peabody's second set of comments. However, the Agency apparently concedes that Peabody had no notice or opportunity to comment. The Board will therefore proceed on the assumption that there was no such notice or opportunity to comment.

The Agency made no explanation for the change prior to the filing of the instant petition. However, the Agency now cites the Federal Register dated December 11, 1978 as requiring that coal mine permits expire on December 31, 1980 (40 CFR 124.46; 43 FR 58066). Peabody responds that its permit specifies that it was effective November 8, 1978 or December 8, 1978, in either event prior to the effective date of the regulation.

The comments to the amendment specify that it is not retroactive and the Agency apparently concedes that it had the authority to issue the permit for the full five year period but elected to shorten the period for administrative convenience knowing of the impending rule change. The Agency position is that the question is moot because regardless of whether the regulation was in effect when the permit was issued, it is in effect now and will be applied if the Board orders reissuance of the permit at this time. The Board rejects this argument. Although the Board ordinarily considers regulatory changes in its deliberations, it would be possible to order the Agency to issue the permit as required by the regulations in effect on the date of the final Agency action.

The purpose of the amendment is to cause permits for various industry categories, including coal mining, to expire on the dates on which new best available control technology effluent guidelines are expected to be promulgated. Contrary to its assertion, a five year permit will not enable Peabody to plan ahead upon the assumption that it will not have to meet any more stringent limitations for five years. Paragraph twenty-seven of the permit would require modification or revocation of the permit when new effluent limitations are issued, assuming that the limitation is different in conditions or more stringent or controls a pollutant not limited by the permit. It appears that the maximum possible injury to Peabody from the change in expiration date is the cost and administrative inconvenience of applying for a permit in 1980 even if the new guidelines do not require any modification of its permit.

Rules 905 through 909 of Chapter 3: Water Pollution (Water Rules), provide for issuance of a draft permit and public notice. Implicit in this procedure is a requirement that the final permit bear some relation to the draft permit and comments. However, Rule 905 does not require that the draft permit specify the expiration date. The date is discretionary with the Agency and the applicant has no right to demand any particular date. Although there is a limit to the Agency's right to unilaterally modify the draft permit without issuing a new draft or providing some other opportunity for comment, this limit has not been reached here. The Board holds that the Agency may vary the expiration date from that in the draft permit without providing the applicant an opportunity to comment where it does in fact have a rational reason for the change.

WATER QUALITY RELATED EFFLUENT STANDARD FOR TDS

The permit contains 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 objects to the inclusion of this condition. At the hearing considerable evidence was given concerning the difficulty of meeting this standard. Contrary to Peabody's contention, it is possible to monitor flow and concentration of waste and receiving stream to assure compliance. Instantaneous TDS concentration can be accurately estimated by a properly calibrated conductometric instrument. However, this is not properly before the Board on a permit appeal. The information was not before the Agency when it issued the permit and, furthermore, does not relate to the question at issue on permit appeal.

Rule 402 of Chapter 3: Water Pollution and Rule 605 of Chapter 4: Mine Related Pollution (Water Rules and Mine Rules, respectively) specify that no effluent shall cause a water quality violation. The permit condition restates these 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 and the limitation is therefore more stringent than the federal limitation, contrary to Peabody's contention. The Agency is free to include a more stringent state limitation in the permit [Water Rule 910(a)]. Peabody also contends 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. The Agency clearly has the authority to make this determination under Section 39 of the Act. The Board will not hold that the Agency must include the entire body of water law in the language of the permit. To do so would defeat an obvious purpose of the permit system: to spell out with particularity the law applicable to a given facility.

Peabody further argues 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: "In any case in which an NPDES Permit applies any more stringent effluent limitation based upon applicable water quality standards, a waste load allocation shall be prepared to ensure that the discharge authorized by the permit is consistent with applicable water quality standards" [Water Rule 910(b)]. In its Opinion accompanying the adoption of this rule, the Board said that it provided that the Agency " . . . must conduct wasteload allocations in any case where more stringent standards are applied to a discharge pursuant to Rule 910(a)(1), (2), and (3). . . ." (14 PCB 674). The comment does not mention Water Rule 910(a)(4) which provides for limitations adopted pursuant to state water quality regulations. However, although the first sentence of Rule 910(b) refers explicitly to Rules 910(a)(1), (2) and (3), the second sentence appears to refer to Rule 910(a)(4). The Agency offers no interpretation of these rules in its brief, but from its actions the Board can infer that it believes the waste load allocation is optional in this case.

As the permit is written, Peabody is virtually unregulated during high stream flow, but must restrict its discharge during low flow to avoid causing a water quality violation. If the Board were to determine that the waste load allocation is mandatory in this case, it would not necessarily order the condition excised, but could order the Agency to make a wasteload allocation. At the

very least 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. Even though Peabody apparently demands this, the Board is reluctant to interfere with an Agency interpretation which seems to adequately protect the environment and which avoids what may well be a harsh result. The Board therefore holds that Water Rule 910(b) does not mandate a waste load allocation for a water quality related TDS effluent standard.

Peabody also objects that inclusion of the TDS water quality condition in the NPDES permit subjects it to greater possible penalties than violation of the water quality standards of Rule 203. Although the penalties for 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 objects that the daily maximum concentration for iron is not subject to an exception for bypass discharge from facilities designed to contain a 10 year, 24-hour precipitation event. The permit included the following effluent limitations:

	30 Day Average	Daily Maximum
Total Suspended Solids (TSS)	35 mg/l*	70 mg/l*
Manganese (Total) (Mn)	2.0*	4.0*
Iron (Total) (Fe)	3.5*	7

The parameters marked with an asterisk are subject to the 10 year, 24-hour precipitation exception. 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). Although hardship might be relevant in the context of a variance or rule change, it is not at issue on permit appeal. Peabody also objects that the permit does not provide for "meaningful excursions" from a 10 year, 24-hour event. Peabody has not referred the Board to any law which requires such an excursion or that it be meaningful if given.

The federal regulations cited in the record are based on best practicable control technology currently available. More stringent

new source performance standards have been promulgated for the coal mining point source category. The record is silent as to why these were not applied to Peabody's new mine. The Board assumes that the Agency is correct as to the applicable federal law. The following table is a summary of the federal and state effluent limitations (Mine Rule 606 and 40 CFR 434.42).

	Federal		Illinois
	30 Day Average	Daily Maximum	
TSS	35 mg/l*	70 mg/l*	50 mg/l[1,2]
Mn (Total)[3]	2.0*	4.0*	-----
Fe (Total)	3.5*	7.0*	7[1]

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

[1]Applicable at all times unless treatment is provided [Mine Rule 601(d)(2)].

[2]Applicable at all times except during a rainfall which is demonstrated to have caused violation of the standard; in which event 150 mg/l is applicable.

[3]Applies only to acid mine drainage (40 CFR 434.30). Prior to the hearing the Agency agreed to delete the manganese limitation because Peabody's drainage will be alkaline. Manganese is included in this table only for purposes of discussion.

In writing an NPDES permit, the Agency must apply the more stringent of the federal or state limitations [Water Rule 910(a) and Sections 301(b)(1)(c) and 510 of the Federal Water Pollution Control Act (FWPCA)]. In Peabody's permit it appears that the Agency has applied the federal limitations to all the parameters except iron (total) on a daily maximum, where it has applied the state standard of 7 mg/l with no 10 year, 24-hour exception.

Part of Peabody's complaint is that the Agency has applied federal law to two parameters but state law to the third. Apparently the Agency has determined that the federal limitation is more stringent than the state with regard to TSS and manganese. Peabody does not object to this conclusion but contends that application of a more stringent federal limitation to one parameter implies that the remaining parameters are also subject to federal law. The Board rejects this argument. In writing a permit, the Agency must divide the permit into sections, determine section by section whether state or federal regulation is more stringent and apply the more stringent rule to that section. The Agency has apparently done this.

The record in this case presents a further question of to what extent the permit should be subdivided in application of Water Rule 910(a). Although the parties have not briefed this question, it merits discussion.

Since Peabody will apparently provide no treatment other than impoundment, the Illinois standard of 7 mg/l for iron (total) is applicable at all times (R. 10). Therefore Illinois requires that the thirty day average and daily maximum also not exceed 7 mg/l. If this conclusion is accepted, the federal and state standards for iron can be compared:

	30 Day Average	Daily Maximum
Illinois	7 mg/l	7 mg/l
Federal	3.5*	7.0*
Permit Condition	3.5*	7

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

If a mine discharged for thirty consecutive days a uniform 5.0 mg/l of iron, it would violate the federal standard but not the Illinois rule. It appears then that the federal rule is usually more stringent. However, in the event of a discharge of 8 mg/l for a one day period during a 10 year, 24-hour precipitation event, the Illinois standard would be violated but not the federal standard. The Agency's position is that the federal standard is more stringent on a thirty day average, but the state standard is more stringent on a daily maximum because it is not subject to the exception. The Agency has written a permit condition which includes part of both the state and federal rules. The permit condition has been made sufficiently stringent so that compliance with it assures that there will not be a violation of either the federal or state standard under any circumstance.

In the case of manganese there is no question but that the federal standard is always more stringent than the state standard. However, this is not so clear in the case of TSS. The Agency has permitted discharge of a daily maximum of 70 mg/l TSS. This could be a violation of the state standard of 50 mg/l which must be met at all times.

With regard to iron the Agency has combined the standards and written a permit condition which is more stringent than either the state or federal limitation. However, in the case of TSS the Agency has apparently determined that the federal regulation is more stringent and then applied the federal averaging rule and exception, ignoring possible violations that could result from application of the Illinois averaging rule. The different treatment of iron and TSS raises a further question of the proper interpretation of "more stringent limitation." The Board will defer decision since the parties have not addressed this issue in the briefs.

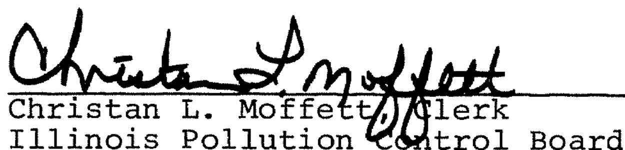
The Board has examined Peabody's contentions and finds them without merit as grounds for a permit appeal. A related regulatory proceeding is before the Board (R76-20 and R77-10, consolidated). There is a proposal for an interim regulation relaxing the TDS effluent limitation in water quality limited situations. In the same proceeding the Agency proposes to change the mine effluent standard for iron to conform with the federal regulation.

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

ORDER

It is the Order of the Pollution Control Board that the Agency's grant of NPDES Permit No. IL 0059480 to Peabody Coal Company is affirmed with conditions as written.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 20th day of September, 1979 by a vote of 5-0.



Christan L. Moffett, Clerk
Illinois Pollution Control Board