

ILLINOIS POLLUTION CONTROL BOARD
February 7, 1972

HAYES BRANCH DRAINAGE DISTRICT)
OF DOUGLAS COUNTY, ILLINOIS)
)
 and) PCB 71-356, 71-357
)
DRAINAGE DISTRICT NO. 4 OF THE)
TOWN OF TUSCOLA, DOUGLAS COUNTY,)
ILLINOIS)
)
 v.)
)
ENVIRONMENTAL PROTECTION AGENCY)

Messrs. John H. Armstrong and Craig Van Meter appeared for the
Petitioners

Mr. Delbert D. Haschemeyer appeared for the Environmental Protection
Agency

OPINION OF THE BOARD (by Richard J. Kissel):

The Drainage District No. 4 of the Town of Tuscola (District No. 4) and the Hayes Branch Drainage District of Douglas County (Hayes District) originally filed a variance petition before the Pollution Control Board ("Board") in July, 1971. Both Districts sought a variance from the Environmental Protection Act and from the Rules and Regulations Governing the Control of Air Pollution ("Rules") in order to dispose of wood and vegetable matter. (PCB 71-175, 71-180). The Board ordered that hearings be held on each petition. Such a hearing was held on August 23, 1971 in the Douglas County Courthouse. On September 2, 1971, with the Board's adoption of the Open Burning Regulations, R 70-11, the Board dismissed the variance petitions in PCB 71-175, 71-180. The Board directed the petitioners to proceed under the permit provisions contained in the new regulations. (See Section 404 of R70-11). Both Districts subsequently filed a permit application with the Division of Air Pollution Control of the Agency. On November 10, 1971, the Agency refused the Districts a permit, stating that the request "does not meet the requirements or the intent of the open burning regulations."

On November 12 and 15, 1971, District No. 4 and the Hayes District filed a variance petition with the Board. No hearing was scheduled and the Board instead sought an Agency recommendation. On January 26, 1972, the Agency filed its recommendation and asked that the variance requests be denied.

District No. 4 and the Hayes District are both quasi-municipal corporations organized for the purpose of providing an adequate outlet for surface and subsurface drainage of agricultural lands. On June 22, 1970, the Circuit Court of Douglas County entered an Order directing the District No. 4 to reconstruct its open drain in accordance with plans and specifications prepared by the Soil Conservation Service and the U.S. Department of Agriculture. This Circuit Court Order included the clearing and removal from the channel and banks of the ditch of trees, brush, logs, rubbish and debris. The District No. 4 project covered 2.03 miles, containing approximately 5 acres. A similar project was ordered by the same Circuit Court on April 23, 1971 for the Hayes District; it covered 13.65 miles, containing about 40 acres. Both Districts proposed to dispose of the wood and vegetable matter by open burning on one day. The District No. 4 matter had already been removed as of November, 1971, and was merely waiting disposal; that of the Hayes District is still being removed. The evidence to be considered by the Board in determining whether a variance should be granted consists of the record in the proceedings PCB 71-175 and PCB 71-180 and several aerial photographs submitted with the variance petition.

The District No. 4 project consists in removing about 18,300 yards of silt and clearing the brush from the channel. (R. 17) The project covers two miles of the channel. The lower half mile and the upper mile of the channel is covered with trees. Brush is blocking the channel itself. (R. 21) The District's engineer estimated that about 750 tons of material would have to be removed from within and near the channel. (R. 46) The District investigated the use of an Air Curtain Destructor as an alternative means of disposal; total estimated cost for such a method of burning was about \$12,000. (R. 48) Total cost of the District No. 4 project is estimated at about \$36,000; use of an Air Curtain Destructor would raise such cost to \$48,000.

The Hayes District project covers 11.4 miles of channel improvement. This work involves the removal of a non-merchantable type of brush. The brush is blocking the channel at present. (R. 15) The Hayes District project involves the removal of 241,000 yards of dirt. (R. 16) This channel is heavily covered from bank to bank with shrub trees and underbrush. (R. 21) The trees vary in diameter from 2 to 10 inches and cover all but a half mile of

the riverbed. The Hayes District similarly investigated the use of an Air Curtain Destructor as a means of disposal; total estimated cost for the use of this method, including the expense of digging the holes, would be approximately \$100,000. (R. 42) Use of the destructor would involve 64 burning sites. (R. 89) The District engineer also investigated the burial of the brush and trees; he found such a method to be objectionable. (R. 42) The material removed from the channel could not be piled densely in a burial trench since it is difficult to pack down. It then must be covered with earth for the farmer to get any use from the soil banks. If the farmer is not able to use the land, the brush grows up wild again. In addition, with burial there is a void among the branches and limbs which eventually results in the ground subsiding when the wood begins to decay. Sink holes are then created over each burying pit. This then creates substantial hazards when the field is farmed such that a tractor or other such vehicle could just slip into the sink hole. The witness admitted however that there may be room on the existing right-of-way to bury the debris, but that it might prove difficult because channel widening is to occur in the near future. (R. 44) No cost analysis was conducted to determine the economic feasibility of burial. (R. 90) To haul the debris out of the area and bury it elsewhere would involve trucking it over agricultural land, an expensive and detrimental practice since it results in packing the ground. (R. 90) The District did not look into further hauling and termed it "inconceivable." (R. 75)

We must then turn to the question of whether the variance should be granted. In order for a petitioner to be granted a variance by the Board he must prove that compliance with the law will create an arbitrary or unreasonable hardship. (See Section 35 of the Act). This Board has consistently held that the question of determining whether an arbitrary or unreasonable hardship exists is determined by a balancing process, that is, balancing the benefits to the petitioner and the public in granting the variance versus the harm to the public and the petitioner in denying the variance. This is not an equal balance; the benefits to be obtained by the public and the petitioner must be significantly greater in allowing the variance, then the harm caused by denying it. Open burning has been prohibited in Illinois for several years and such a ban was reaffirmed with the passage of the Environmental Protection Act. (See Section 9(c)). In this case, we do not believe that the two Districts have demonstrated that compliance with the Act and the Rules would impose an arbitrary or unreasonable hardship.

In general, before beginning a channel project, the District will determine that the benefit to be derived from the project is at least \$15 per acre. (R. 80) Costs for the project at present are about \$9 per acre. To add an Air Curtain Destructor on the Hayes District project would cost about \$10 per acre more. This would raise the effective cost of the project plus disposal with an Air Curtain Destructor in excess of \$15, thereby destroying the cost-benefit ratio. The costs are not quite as dramatic for the District No. 4 project; the addition of an Air Curtain Destructor would raise the expense by about one-third. Assuming again that the present cost is \$10 per acre, the effective cost would then be raised to something in excess of \$13 per acre with the use of an Air Curtain Destructor. Though such computations may make an Air Curtain Destructor an unfeasible technique for disposing of the wood and debris, the various other alternatives were never adequately explored by the Districts. Burying was disregarded because a tractor might ultimately slip into a sink hole which might result in the future. With hauling, the trucking across the field would lead to packing; it is not clear to the Board how packing down by trucks can be any different from packing down by tractors used to remove the growth from the channel. Further, no cost estimates were conducted of either of these latter alternatives; rather, they were dismissed as "inconceivable." No consideration was given to constructing one Air Curtain Destructor, as opposed to the 64 sites proposed for the Hayes District project. With construction minimized, costs would surely be reduced. Note instead, the extension study of alternatives undertaken in Hardwick Brothers Company v. Environmental Protection Agency, PCB 71-17 and Willow Creek Drainage District v. Environmental Protection Agency, PCB 71-131. There is not even a proposed schedule and procedure for open burning in this case except to say "one time only". For all intents and purposes then, the Districts may well decide to do everything on one day or may spread it piecemeal over a whole year.

To allow such open burning will impose a hardship upon the residents of Tuscola. Several of the proposed burning sites are within one mile of the Tuscola city limits; several others are not far distant therefrom. The Districts give no indication that they would only burn when the prevailing wind conditions would drive the smoke away from the town. With the use of a Destructor, burning for the Hayes District would take 1170 hours, for District No. 4, 150 hours. Thus, though the Destructor is a more efficient burning process, it would still take 1320 hours.

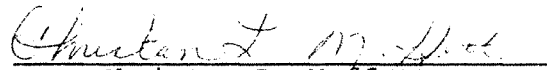
In variance cases, the burden of proof falls on the petitioner. Both Districts have failed to show that adoption of alternative means of disposal would impose an arbitrary or unreasonable hardship upon their operations. The variance is hereby denied.

This denial will not foreclose the Districts from coming to the Board with new evidence on the alternative means of disposal as compared to the harm caused by the burning. We recognize that the time grows short if the Districts are to be allowed to open burn, and we suggest, therefore, that if the Districts wish to file a new petition that it be done soon and contain all the facts, under oath, consistent with this decision, on which the Board can make a proper decision.

This opinion constitutes the findings of fact and conclusions of law of the Board.

Samuel Aldrich dissents from the opinion of the Board.

I, Christan L. Moffett, Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion and Order this 7th day of February, 1972, by a vote of 4-1.



Christan L. Moffett,
Clerk of the Board

