

ILLINOIS POLLUTION CONTROL BOARD
October 25, 1990

BORDEN CHEMICALS AND)	
PLASTICS OPERATING LIMITED)	
PARTNERSHIP,)	
)	
Petitioner,)	
)	
v.)	PCB 90-130
)	(Variance)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter comes before the Board on a petition for extension of variance, filed on July 6, 1990, by Borden Chemicals and Plastics Operating Limited Partnership ("Borden"). Borden seeks an extension of the variance granted on December 5, 1985 in PCB 82-82 and extended by variance granted on October 6, 1988 in PCB 88-90. That variance granted relief from the regulatory restrictions found at 35 Ill. Adm. Code 302.208 and 304.105, which govern the discharge of total dissolved solids ("TDS") and chloride from Borden's facility in Illiopolis, Illinois. The variance expired on October 6, 1990. Borden requests an extension until such time as the Board may issue its Final Opinion and Order granting permanent site-specific relief in R86-14, in which matter the Board issued its Second Notice Opinion and Order on August 30, 1990.

Procedural History

Borden's Petition for Extension of Variance and a Motion to Submit a Reduced Number of Attachments to Petition were filed on July 6, 1990. On July 19, 1990, the Board granted Borden's motion to submit a reduced number of attachments since these were already part of the variance case, PCB 82-82. On August 6, 1990, the Illinois Environmental Protection Agency ("Agency") filed its Recommendation in support of granting the requested extension. On August 17, 1990, a letter of objection was filed. On August 30, 1990, the Board set the matter for hearing, which was held on October 4, 1990 in Illiopolis, Illinois. No members of the public participated at hearing. The Board notes that at hearing the Hearing Officer was inappropriately requested to incorporate by reference the entire record in the two previous variance proceedings and the regulatory proceeding. Tr. at p. 16. The request was also made in the body of Borden's petition. Pet. at p. 5. The Hearing Officer granted the incorporation by reference on the basis of all the documents in the prior proceedings "were

all included in submissions made in this case by the petitioner." Tr. at p. 17. In fact, Borden did not file all the documents in this case.

The Board hereby overrules the Hearing Officer's ruling on incorporation by reference to the extent that it may be construed as incorporating any part of the record in prior proceedings which was not resubmitted to the Board with Borden's variance petition filed on July 6, 1990 in accordance with 35 Ill. Adm. Code 101.106(a). The Board continues to rule that only prior Board Opinions and Orders will be incorporated by reference. Additionally, the Board notes that the petitioner's myriad citations to the records in prior proceedings without any recitation of appropriate supporting arguments has unnecessarily complicated and delayed the Board's decision here. See Pet. at pp. 5-7.

The Facility

Borden's Illiopolis plant produces polyvinyl chloride products, including suspension and dispersion resin, for use by the vinyl film, siding, fabric, flooring, plastic pipe, and wire insulation industries. The facility employs about 280 people. Tr. at p. 8. Borden's TDS and chloride discharges are attributed primarily to two sources: (1) plant intake water obtained from local wells and (2) wastewater from air pollution control equipment which Borden installed at a cost of approximately \$15 million and has operated since 1978. Borden estimates that 70% of the plant's TDS loading is derived from these two sources and that the remaining 30% is caused by production processes. Tr. at pp. 8-10. Borden asserts that it is not feasible to modify its manufacturing process to reduce the 30% of TDS and chloride discharges attributable to production processes. Tr. at p. 11. The plant discharges approximately 800,000 gallons of effluent per day. The maximum TDS concentration may be as high as 2500 mg/l, with the average being below 1200 mg/l. The average chloride concentration is usually less than 700 mg/l. See R86-14, Opinion and Order, February 8, 1990, p. 1.

The facility discharges directly to an unnamed tributary which flows for approximately three miles from the plant to Long Point Slough. Approximately seven-tenths of a mile from that point, Long Point Slough flows into Old River, which joins the Sangamon River approximately 1.3 miles farther downstream. Tr. at p. 11. Borden's 800,000 gallons per day of effluent constitute 90-95% of the tributary's flow during dry weather. See R86-14, Opinion and Order, February 8, 1990, p. 2.

Background

Borden has been operating under a variance granted on October 6, 1988 in PCB 88-90, which allowed Borden to discharge

effluent which would not cause the water quality to exceed monthly average concentrations of 2200 mg/l for TDS and 700 mg/l for chloride. That variance expired on October 6, 1990, and after that date Borden would not be shielded from enforcement actions for discharges which violate the general use water quality standards.

The regulatory standard from which Borden seeks relief requires that TDS concentrations shall not exceed 1000 mg/l and concentrations of chloride shall not exceed 500 mg/l. 35 Ill. Adm. Code 302.208. Relief is also needed from Section 304.105, which provides that no effluent, alone or in combination with other sources, shall cause a violation of any applicable water quality standard. In Borden's case the stream has a 7-day/10-year low flow of zero ($7Q_{10} = 0$). Therefore, to assure that Borden's effluent does not cause a violation of the water quality standard, Borden's NPDES permit would set the effluent limitations at the same level as the water quality standard.

In the site-specific rule now proposed for Second Notice, TDS and chloride concentrations have been set at 3,000 mg/l and 900 mg/l, respectively. These levels were found to involve minimal environmental impact, and the costs of compliance (estimated by Borden to be in excess of \$17 million) outweighed any environmental benefit presented in the record. Tr. pp. 12-13 and see R86-14, Opinions and Orders of February 8, 1990, May 24, 1990, and August 30, 1990.

The pending regulatory relief is structured as follows:

Section 303.431 Long Point Slough and Its Unnamed
Tributary

The general use water quality standards for total dissolved solids and for chloride contained in Section 302.208 shall not apply to Long Point Slough and its unnamed tributary, which receive discharges from the Illiopolis, Illinois facility of Borden Chemicals and Plastics Operating Limited Partnership, from the outfall of that facility to the point of the confluence of the unnamed tributary downstream with the Sangamon River. Instead this water shall comply with a total dissolved solids standard of 3,000 mg/l and a chloride standard of 900 mg/l.

Section 304.211 Discharges From Borden Chemicals and Plastics
Operating Limited Partnership Into an Unnamed
Tributary of Long Point Slough

The effluent standards for total dissolved solids and chloride discharged from the Illiopolis, Illinois facility of Borden Chemicals and Plastics Operating Limited Partnership into an unnamed tributary of Long Point Slough shall comply

with the following effluent limitations as measured at the point of discharge to the unnamed tributary:

Total Dissolved Solids 3,000 mg/l daily maximum

Chloride 900 mg/l daily maximum

Discussion

Pursuant to Section 104.121(f) of the Board's regulations, an applicant for a variance must submit a compliance plan since the contemplated relief is only temporary. Borden's plan to achieve compliance in PCB 88-90 was to obtain permanent site-specific relief in R86-14, the still pending regulatory proceeding. Borden had expected to secure site-specific relief by October 6, 1990. Other compliance alternatives were rejected as being technically infeasible and economically unreasonable. The filing of a proposal for site-specific relief is not a compliance plan, since it is a matter of speculation whether such regulatory relief may be granted. See Citizens Utilities Company of Illinois v. IPCB et al., 479 N.E. 2d 1213 (3rd Dist. 1985) aff'g Citizens Utilities v. IEPA, PCB 83-124 (April, 19, 1984, June 14, 1984). However, in certain unusual circumstances, the Board has found that seeking site-specific relief may be acceptable as a basis for variance relief. In Illinois Power Company v. IEPA, 100 PCB 177, 180, 181 the Board explained this situation as follows:

The prospect of filing for site-specific regulatory relief does not obviate the need for a compliance plan in a variance proceeding, however, the Board has recognized that some factual circumstances prompt some flexibility regarding this requirement. (Anderson Clayton Foods v. IEPA, PCB 84-147 (January 24, 1985).) The Board has granted a variance in the absence of a concrete compliance plan where more information regarding new technology needed to be gathered in order to recommend methods of compliance or, alternatively, regulatory changes. (Id.) Similarly, the Board granted a variance even though a petitioner did not present a compliance plan where the technology did not exist for petitioner to reasonably reach compliance. (Mobil Oil Company v. IEPA, PCB 84-37 (September 20, 1984).) The Board concluded that the conducting of research aimed at finding a means of coming into compliance could be accepted as a compliance

plan. (Id.) Lastly, the Board has recognized a rare exception to the compliance plan requirement where the variance requested is of a limited duration, the environmental impact is minimal and petitioner has made good-faith efforts to remain in compliance. (General Motors Corp. v. IEPA, PCB 86-195 (February 19, 1987).)

The Board concludes that, under the instant circumstances, the lack of a concrete compliance plan does not bar the granting of a variance. IPC has experienced conditions at the Station substantially different than those predicted in prior models and, as discussed below, has demonstrated that the expected adverse environmental impact resulting from its proposed limitations is minimal and temporary. Moreover, the parties agree and the evidence demonstrates that it is not reasonable to expect IPC to immediately comply with the current thermal limits.

IPC v. IEPA, PCB 88-97, 100 PCB 177, 181.

In Borden's unique circumstances, the pending regulatory relief may serve as a substitute for the customarily required compliance plan. However, the variance would be conditioned upon a requirement that if the site-specific request is denied, a compliance plan must be submitted within a relatively short time frame. This, in fact, is how Borden's variance was structured in PCB 88-90.

Section 35 of the Environmental Protection Act ("Act") requires that a petitioner for temporary variance relief show that compliance would create an arbitrary and unreasonable hardship. The Agency has agreed with Borden's assertions that undue hardship would result from requiring the installation extremely costly equipment for very little environmental benefit. The Agency also agrees with Borden that the TDS and chloride concentrations in Borden's effluent involve minimal environmental impact. Ag. Recom. at p. 1; see also PCB 88-90, Opinion and Order of October 6, 1988 at pp. 3-4. Borden has resubmitted the environmental impact study prepared by the Academy of Natural Sciences of Philadelphia in support of its claim that the biota of the unnamed tributary are minimally affected. R86-14 Petition, Ex. A.

Consistency with Federal Law

Neither Borden nor the Agency has raised any issue concerning whether the extension of variance may be granted

consistent with current federal law. Borden's petition makes reference to earlier findings that the variance was consistent with federal law, and the record gives no indication of any conflict with federal law.

Conclusion

The Board concludes that Borden has presented adequate proof that immediate compliance with the general use water quality standards for TDS and chloride would continue to impose an arbitrary and unreasonable hardship for Borden at its Illiopolis facility. For this reason the Board will grant the requested relief in a form substantially as recommended by the parties. However, the Board notes that it is unwilling to leave the variance open-ended, that is, without a date certain for termination, even though the regulatory matter is in the Second Notice stage.

ORDER

Borden Chemical and Plastics Operating Limited Partnership (Borden) is hereby granted an extension of the variance granted in PCB 88-90, Opinion and Order of October 6, 1988, from 35 Ill. Adm. Code 302.208 "Chemical Constituents" and 35 Ill. Adm. Code 304.105 "Violation of Water Quality Standards", but only as they relate to the total dissolved solids (TDS) and chloride standards. This variance applies only to Borden's Illiopolis, Illinois facility. The extension of variance is subject to the following conditions:

1. Borden's discharge shall not cause the water quality in the unnamed ditch, Long Point Slough, or Old River to exceed a monthly average concentration level of 2200 mg/l TDS or 700mg/l chloride, based upon the sampling frequency contained in Borden's NPDES permit.
2. This variance will expire on the earlier to occur of:
 - (a) October 6, 1992, or
 - (b) upon the date of adoption by the Board of a final order granting specific relief in R86-14, or
 - (c) if Borden is denied relief in the site-specific proceeding, this variance will extend for an additional twenty-four months from the date of decision in the site-specific proceeding provided Borden complies with the following schedule:

<u>Items</u>	<u>Completion Date</u>
Submit compliance plan and specifications to the Agency for permit review	6 months from date of final Board Order in the site-specific proceeding R86-14
Receive permits	12 months from date of final Board Order in R86-14
Complete construction of improvements and be in compliance	24 months from date of final Board Order in R86-14

3. Borden shall monitor the TDS and chloride levels in its effluent and in the unnamed ditch above and below Borden's discharge.
4. Within 45 days after the date of this Opinion and Order Borden shall execute and send to:

Illinois Environmental Protection Agency
Division of Water Pollution Control
Compliance Assurance Section
2200 Churchill Road, P. O. Box 19276
Springfield, Illinois 62794-9276

a certificate of acceptance of this variance by which it agrees to be bound by the terms and conditions contained herein. This variance will be void if the Petitioner fails to execute and forward the certificate within the 45 day period. The 45 day period shall be in abeyance for any period during which the matter is appealed. The form of the certification shall be as follows:

CERTIFICATION

I, (We), _____, having read the Opinion and Order of the Illinois Pollution Control Board, in PCB 90-130, dated October 25, 1990, understand and accept the said Opinion and Order, realizing that such acceptance renders all terms and conditions thereto binding and enforceable.

Petitioner

By: Authorized Agent


Title

Date

Section 41 of the Environmental Protection Act (Ill. Rev. Stat. 1987, ch. 111 1/2 par. 1041) provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 25th day of October, 1990 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board