ILLINOIS POLLUTION CONTROL BOARD
October 21, 1993

THE ROBERTSON-CECO CORPORATION,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 92-90
	)	(Variance)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

CLIFTON LAKE AND NANETTE EVERSON APPEARED ON BEHALF OF THE PETITIONER;

PAUL JAGIELLO APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by G. T. Girard):

On June 15, 1992, Robertson-Ceco Corporation (Robertson-Ceco) filed a petition for variance from the Board's December 20, 1990, order. (Ceco Corporation v. Illinois Environmental Protection Agency, PCB 86-180, 117 PCB 25, hereinafter to be cited as PCB 86-180.) On March 5, 1993, the Illinois Environmental Protection Agency (Agency) filed a recommendation that the variance not be granted. Hearing was held on July 9, 1993, in Bolingbrook, Illinois. Petitioner filed its brief on August 30, 1993, and a reply brief on September 20, 1993. The Agency filed its brief on September 9, 1993.

BACKGROUND

The June 15, 1992, petition for variance seeks relief from the Board's December 20, 1990, order in PCB 86-180. In PCB 86-180, Robertson-Ceco sought Board review of conditions imposed by the Agency on Robertson-Ceco's closure plan for its facility. Therefore, the following is a comprehensive discussion of the factors which were also relevant at that time.

Robertson-Ceco is the corporate successor to the Ceco Corporation (Ceco) which owned and operated a steel production facility in Lemont, Illinois, prior to February 3, 1983. On that date, Ceco sold the steel mill facility to Thomas Steel Company; however, the sales agreement provided that Ceco would retain title to the parcel of real estate on which electric arc furnace dust was stored. (Pet. Br. Attch. I at 2.)[1] Production

[1] The petition will be cited as "Pet. at __"; the petitioner's brief will be cited as "Pet. Br. at __"; the reply brief will be cited as "Rep. at __"; the Agency's brief will be cited as "Ag. Br. at ___"; the Agency's recommendation will be

operations at the facility involved the melting of scrap steel in electric arc furnaces and the fabrication of billet and other steel forms and shapes including concrete reinforcing bar. (Pet. Br. Attch. I at 1.) As a consequence of its operation of electric arc furnaces, Ceco was required to install and operate air pollution control equipment. The air pollution control equipment consisted of a baghouse collector system which removed entrained dust from the furnace exhaust. The collected dust was wetted to facilitate handling and deposited in waste piles on a 25-acre parcel of real estate owned by Ceco adjacent to the steel mill. (Pet. Br. Attch. I at 2.) The greatest portion of the wetted dust was deposited for storage in a single bermed pit; however, some was deposited on other areas of the site and was subsequently covered by other materials, principally slag. (Pet. Br. at 3.)

Electric arc furnace dust (K061) is a listed hazardous waste pursuant to 40 CFR 261.32. In 1980, Ceco applied for and received interim status for a hazardous waste storage site under the Resource Conservation and Recovery Act (RCRA) (40 U.S.C. 3001 et seq.) and the rules implementing RCRA. Ceco did not dispose of K061 at the site after November 19, 1980. (Pet. Br. Attch. I at 2.)

Because Ceco did not wish to maintain a RCRA-regulated hazardous waste storage facility it began removing K061 from the site for disposal at a licensed hazardous waste disposal site. During 1981 and 1982, Ceco removed 10,000 cubic yards of electric arc furnace dust. (Pet. Br. Attch. I at 3.) Ceco also retained NUS Corporation (NUS) as an environmental consultant to develop a closure plan for the site. Based on records and information available, NUS estimated that fifteen percent of the dust stored at the site remained in 1983. (Pet. Br. at 3.)

On January 31, 1985, Ceco submitted to the Agency its closure plan for the site. The closure plan described the methodology by which the remaining deposits of electric arc furnace dust would be identified, excavated and disposed of at a licensed hazardous waste facility. (Pet. Br. Attch. I at 3.) The plan included sub-surface investigation to determine the location or existence of the dust as well as a plan for removal. Because of the manner in which the dust was deposited, excavation with earth-moving machinery caused a significant volume of non-hazardous waste to be admixed with the dust. (PCB 86-180 at 117 PCB 26.) Ceco set forth in its plan a system to separate non-hazardous waste from the hazardous waste. On March 29, 1985, the Agency sent a letter to Ceco disapproving the closure plan for certain deficiencies and listing several questions concerning

---

cited as "Ag. Rec. at __"; and the transcript will be cited as "Tr. at __";

those deficiencies. Ceco responded to those comments on April 30, 1985.

On June 13, 1985, the Agency approved the closure plan submitted by Ceco on January 31, 1985, as clarified by the responses to the March 29, 1985, Agency letter. On September 18, 1985, Agency representatives visited the site and observed the excavation and separation processes being carried out. Following the visit, the Agency sent Ceco a Compliance Inquiry Letter on September 27, 1985. (PCB 86-180 at 117 PCB 26.) The Compliance Inquiry Letter expressed concerns over the use of color as an identifier of the electric arc furnace dust at the site, the actual excavation procedures and the separation process. (PCB 86-180 at 117 PCB 27.) A meeting between Ceco and the Agency followed in November 1985; the principal subject discussed was the application of the hazardous waste mixture rule (35 Ill. Adm. Code 721.103) to the material excavated. The Agency stated that its interpretation of the hazardous waste mixture rule requires the inclusion of all material from the separation process unless Ceco could demonstrate that "absolutely no trace" of dust would be contained in admixed material. (PCB 86-180 at 117 PCB 27.)

Due to the increased cost of disposal of all the 32,000 cubic yards of admixed material and the physical impossibility of obtaining the degree of separation which the Agency required, Ceco notified the Agency that it would amend its closure plan. On March 19, 1986, Ceco submitted an amendment to its closure plan to provide for site disposal of the admixed material.

The March 19, 1986, amendment to the closure plan provided for a consolidation of the then excavated admixed waste within a two-acre portion of the former regulated unit which would then be closed pursuant to 35 Ill. Adm. Code 725.358(b). On June 12, 1986, the Agency disapproved the amended closure plan of March 19, 1986. The Agency's disapproval stated that the amended closure plan contained over 18 deficiencies including: 1) "it has not yet been demonstrated to this Agency that all of the waste residues and contaminated soils have been removed"; 2) drawings fail to indicate the outline of the quarry; 3) a description of how the stockpile areas will be cleaned up must be included and 4) a method to identify areas contaminated by wind blown and drifting dust must be included. (PCB 86-180 at 117 PCB 27.)

On July 15, 1986, Ceco submitted a modified closure plan. On September 11, 1986, the Agency notified Ceco that the modified closure plan would not be approved without conditions imposed by the Agency. The letter set forth conditions numbered 1-20.

Ceco appealed the September 11, 1986, modified closure plan and that appeal was the subject of PCB 86-180. Ceco specifically accepted the conditions in the September 11, 1986, letter which

are numbered 2(a)-(c), (f)-(j), 4, 5, 6, 7, 8, 9, 10, 12, 14, 17, and 19. Ceco also accepted condition number 11 as it relates to the requirement of a final cover of four feet over the closed regulated unit. The specific conditions in the September 11, 1986, closure plan which Ceco objected to were: 1, 2(d)-(e), 3, 11, 13, 15(i)-(iii), 16, 18, and 20.

The Board on December 20, 1990, upheld, in part, the Agency's imposition of conditions. The Board only reversed the Agency with regard to condition 2(d) which the Board struck. (PCB 86-180 at 117 PCB 43.) Robertson-Ceco then appealed the Board's decision to the appellate court. The court upheld the Board's decision and affirmed the Agency's conditions. (cite) The Illinois Supreme Court denied *cert* in the subsequent appeal by Robertson-Ceco.

PETITION

The petition for variance states that Robertson-Ceco seeks a variance from those provisions of the Board's December 20, 1990, order "which affirm the Agency-prescribed supplemental investigation, specifically Conditions 1, 3, 11, 14, 15 and 16". (Pet. at 5.) Robertson-Ceco contends that compliance with those conditions will impose an arbitrary or unreasonable hardship in that the supplemental investigation would cost approximately $286,000. (Pet. at 5.) Robertson-Ceco maintains that the supplemental investigation would "'prove' a fact that Robertson-Ceco believes has already been demonstrated, *i.e.*, that all furnace dust deposits have been located and removed from the 'clean-closed' portion of the site". (Pet. at 5.)

Robertson-Ceco states in the petition:

> As a realistic and reasonable alternative to compliance with the technically infeasible and economically unreasonable Agency-imposed investigation requirements, Robertson-Ceco proposes, as its 'compliance plan' within the meaning of 35 Ill. Adm. Code 104.121(f), to conduct a different form of supplemental investigation to demonstrate that all furnace dust has been accounted for. Such investigation will substantiate Robertson-Ceco's contention that all electric arc furnace dust has been located and removed from the area of the 25-acre site outside of the new two-acre closure unit. Under the direction of its environmental consultant, NUS Corporation, Robertson-Ceco proposes to excavate, at 300-foot grid-intersect points, across the entire site 25-acre (except where such grid-intersect points fall upon the new closure unit) to the depth of bedrock.

(Pet. at 5.)

Robertson-Ceco also would install a post-closure groundwater monitoring well system in conjunction with the subsurface excavation. This alternative plan will "require an expenditure of $38,200". (Pet. at 6.)

AGENCY RECOMMENDATION

The Agency recommends that a RCRA variance from the Board's order in PCB 86-180 regarding conditions 1, 3, 11, 14, 15 and 16 of the Agency's September 11, 1986, closure plan be denied. The Agency, in sum, states that "the granting of the variance would allow Robertson-Ceco to conduct activities at the site inconsistent with the federal RCRA standards and regulations". (Rec. at 5.) Further, the Agency maintains that the site still poses a threat to human health and the environment (Rec. at 7) and that the economic hardship Robertson-Ceco "complains of is not so unique as to constitute the type of hardship that would support the grant of a RCRA variance". (Rec. at 11.)

The Agency argues that the variance petition is one more attempt to convince the Board to strike conditions from the 1986 modified closure plan. (Rec. at 8.) The Agency finds the proposed compliance plan unacceptable for a number of reasons including the fact that the plan would use only visual inspection criteria to confirm the presence or absence of electric arc furnace dust. (Rec. at 9.) The Agency also objects to the fact that the proposal does not mention surface investigation and would in fact limit the investigation of the site to identification of subsurface deposits of K061. (Rec. at 9.)

PRELIMINARY MATTERS

The Agency presented two objections at hearing which are renewed in the brief. Those objections are to the admittance by the hearing officer of Exhibits 2-A and 2-B and to the seeking of a variance to condition 14 of the closure plan. (Ag. Br. at 2 and 4.) First, with regards to the condition 14, the hearing officer did not rule on that objection as Robertson-Ceco wished to address the issue in its brief. The Board will sustain the Agency objection and finds that condition 14 is not properly a part of this variance petition.

Robertson-Ceco points out that condition 14 deals with submission, by December 11, 1986, of a revised schedule of closure and revised closure and post-closure cost relating to the conditions imposed by the Agency. (Pet. Br. at 7.) Robertson-Ceco argues that as the underlying conditions were challenged in PCB 86-180 compliance with condition 14 was not possible. (Pet. Br. at 7.) Thus, Robertson-Ceco maintains the Agency objection is moot. (Pet. Br. at 7.)

The Board is not persuaded by the Robertson-Ceco argument. Robertson-Ceco specifically accepted condition 14 in the prior proceeding. (See, PCB 86-180 at 117 PCB 27.) Further, this petition is seeking a variance from the Board's order in PCB 86-180. The Board's order did not include condition 14. (See, PCB 86-180 at 117 PCB 43-44.) Therefore, condition 14 is not properly a part of this variance.

The second objection by the Agency involves the inclusion in this record of two exhibits which deal with groundwater monitoring data for the two-acre RCRA closure site as identified by Robertson-Ceco. The Agency maintains that the two-acre RCRA cell is within the 25-acre site that the Agency believes is the regulated site. (Ag. Br. at 5.) Thus, the Agency argues that the data is not relevant to this proceeding. (Ag. Br. at 4.)

The Board disagrees that the information is not relevant. Therefore, the Board affirms the hearing officer's admittance of the information. The Board does agree that the information has limited value in this proceeding as the monitoring wells are only for the two-acre site.

DISCUSSION

The Agency sets forth several arguments in opposition to the granting of the requested variance. The specific arguments are:

1. That Robertson-Ceco's petition for variance seeks permanent rather than temporary relief;

2. That Robertson-Ceco has not met its burden of showing that claimed hardship outweighs the public interest in attaining compliance with regulations designed to protect the public;

3. That Robertson-Ceco has not met its burden of showing that the cost of compliance constitutes an arbitrary or unreasonable hardship; and

4. That the compliance plan is inadequate.

Robertson-Ceco petition for variance seeks permanent rather than temporary relief

The Agency claims that the petition and the testimony at hearing make it clear that Robertson-Ceco does not intend to comply with the conditions of the closure plan for the facility which were upheld by the Board in PCB 86-180. (Ag. Br. at 10.) The Agency points out that in the petition Robertson-Ceco state that its compliance plan is "to conduct a different form of supplemental investigation to demonstrate that all furnace d has been accounted for". (Ag. Br. at 10; Pet. at 5.) Furt

the Agency states that "Mr. Lake, Robertson-Ceco's counsel, and Mr. Gardner, Robertson-Ceco's witness, agreed that Robertson-Ceco does not intend to follow the subsurface investigation which is a part of the approved closure plan for the Robertson-Ceco site". (Ag. Br. at 10; Tr. at 67-68.)

The Agency argues that the "concept of a variance which permanently liberates a polluter from the dictates of a board [sic] regulation is wholly inconsistent with the purposes of the Environmental Protection Act". (Ag. Br. at 11, citing Monsanto Company v. Pollution Control Board, 67 Ill. 2d 276, 10 Ill. Dec. 231, 367 N.E.2d 684 (1977).)

Robertson-Ceco maintains that it is not seeking permanent relief. Rather, Robertson-Ceco is asking the Board for a variance to perform its own supplemental investigation. (Rep. at 5.) Robertson-Ceco argues that:

> Because Robertson-Ceco does not seek a variance from any substantive control requirement, the substitution of Robertson-Ceco's proposed supplemental investigation for that of the Agency would not result in a "permanent" variance under the case law, nor would it in any manner be inconsistent with the purposes of the Environmental Protection Act. (Rep. at 5.)

Robertson-Ceco also argues that its investigation is "superior" to that developed by the Agency and that Robertson-Ceco is not seeking any less stringent substantive control requirement or standard. (Rep. at 5.)

The Board may grant relief from its Board orders in the form of variance. (415 ILCS 5/35(a).) However, in this case, Robertson-Ceco is asking to be allowed to perform a site investigation which Robertson-Ceco's consultants have argued is "superior" to the investigation recommended by the Agency. This investigation is very similar to the investigation Robertson-Ceco argued for in PCB 86-180. Further, Robertson-Ceco will never comply with the requirements of the Board's order in PCB 86-180. Robertson-Ceco argues that it is not seeking a less substantive control requirement; however, the effect of granting permanent relief in this case would be a lessening of requirements. The Board found, in PCB 86-180, that the conditions imposed by the Agency were "necessary to insure that the Act and the Board's rules will not be violated". (PCB 86-180 at 117 PCB 43.) Therefore, granting permanent relief from those "necessary" conditions could result in lessening the standard imposed under the Act and the Board's regulations.

Robertson-Ceco has not met its burden of showing that claimed hardship outweighs the public interest in attaining compliance with regulations designed to protect the public.

The Agency states that "Robertson-Ceco's alternative investigation proposes to identify K061 dust by a method which has already been held to be inadequate by the Board in PCB 86-180". (Ag. Br. at 12.) The Agency maintains that Robertson-Ceco intends to use visual characteristics to identify K061, the same method which was subject of litigation in PCB 86-180. (Ag. Br. at 13.) The Agency points to testimony by Mr. Gardner in support of this argument. (Tr. at 62-63.) The Agency further bolsters its argument by pointing to the Board's opinion in PCB 86-180. (Ag. Br. at 15.)

The Agency also states:

> All of the arguments raised by Robertson-Ceco in its Petition For Variance, including hardship resulting from what Robertson-Ceco considers to be "technically infeasible and economically unreasonable Agency-imposed investigation requirements" were raised, argued, litigated, considered by and decided upon by the Illinois Pollution Control Board and the Appellate Court.

(Ag. Br. at 16.) Thus, the Agency argues that Robertson-Ceco has failed to prove that the claimed hardship outweighs the public interest in attaining compliance. (Ag. Br. at 16.)

Robertson-Ceco argues that the opinion and order in PCB 86-180 did not decide the issues raised in this proceeding. (Pet. Br. at 8.) Robertson-Ceco maintains that in this proceeding the Board must determine whether compliance with the PCB 86-180 order would cause an arbitrary or unreasonable hardship for Robertson-Ceco. (Pet. Br. at 8.) In the PCB 86-180 case, the standard of review was whether the conditions were necessary to demonstrate compliance with the Act and Board regulations. (Pet. Br. at 8.) Thus, Robertson-Ceco argues, the Board has not decided the issue before it in this proceeding.

Robertson-Ceco agrees that the investigation it seeks to use by the granting of this variance would include the identification test utilized by NUS in 1985, except that it will not be using color to identify potential K061 dust with its proposed investigation. Rather, Robertson-Ceco maintains that it will "identify any material, regardless of color, which appears in the subsurface in a fine-grained, densely-packed layer, as electric arc furnace dust". (Pet. Br. at 9; Rep. at 6.)

Robertson-Ceco also argues that the chemical analysis required in the PCB 86-180 order is inadequate and futile. (Pet. Br. at 9.) Robertson-Ceco also maintains that the use of groundwater monitoring will substantiate that the site poses no threat to human health or the environment. (Pet. Br. at 10.) Robertson-Ceco contends that "together, these two approaches are

more than adequate to satisfy a reasonable and rational inquiry as to whether all furnace dust has been removed". (Pet. Br. at 10.)

The Board stated in PCB 86-180 that "the record does indicate that color was not the sole criterion used by Robertson-Ceco in identifying K061". (PCB 86-180 at 117 PCB 33.) The Board went on to identify other areas of concern regarding the methodology used by NUS and Robertson-Ceco in the site investigation. (PCB 86-180 at 117 PCB 33, 35 and 37.) The Board finds that this variance petition contains no additional information which alleviates the concerns the Board expressed in PCB 86-180. Therefore, the Board finds that Robertson-Ceco has not demonstrated that the claimed hardship outweighs the public interest in attaining compliance.

Robertson-Ceco has not met its burden of showing that the cost of compliance constitutes an arbitrary or unreasonable hardship.

The Agency also argues that Robertson-Ceco has placed the cost of compliance with the Agency-imposed investigation requirements of the September 11, 1986, closure plan in issue by claiming that the cost of compliance constitutes an arbitrary or unreasonable hardship. (Ag. Br. at 16.) The Agency maintains that Robertson-Ceco did not present any evidence regarding its financial status to prove that the cost of the Agency-required investigation would constitute a hardship. (Ag. Br. at 17.) In fact Mr. Gardner testified that he did not have any financial information regarding Robertson-Ceco. (Ag. Br. at 17; Tr. at 79.) Thus, the Agency asserts Robertson-Ceco failed to prove hardship and cites to Allaert Rendering, Inc. v. Pollution Control Board, 91 Ill. App. 3d 160, 46 Ill. Dec. 613, 414 N.E.2d 497 (Third Dist. 1980). In that case, the court stated:

> For reasons previously stated, there was no evidence admitted as to Allaert's financial condition. Therefore, Allaert could not show the alternatives were economically infeasible and, therefore, failed to prove hardship.

Robertson-Ceco maintains that the cost of compliance with the order in PCB 86-180 is $286,000, which could be higher if groundwater sampling indicates elevated concentrations of heavy metals. (Pet. Br. at 12.) Robertson-Ceco also maintains that its financial position is irrelevant to this proceeding. (Rep. at 8.) Robertson-Ceco states:

> In the present case, Robertson-Ceco does not claim that compliance with the Agency-mandated supplemental investigation should not be required because Robertson-Ceco cannot afford to pay $286,000 to perform such investigation. It contends that because there is a better and substantially less expensive alternative which will achieve the intended

goal of the Agency's supplemental investigation, for Robertson-Ceco to be required to perform the Agency's investigation would be both an "arbitrary" and "unreasonable" hardship. (Rep. at 7-8.)

The Board disagrees that the financial status of a petitioner seeking a variance is irrelevant. The law is well settled that the financial resources of a petitioner are relevant to a determination of arbitrary or unreasonable hardship. (Citizens Utilities Company of Illinois v. PCB, (Third Dist., 1985) 134 Ill. App.3d 111, 479 N.E.2d 1213, 89 Ill.Dec. 207; Allaert.) Although, the Board does agree that an equivalent manner of compliance which is less expensive could be the proper subject of a variance. However, the Board has stated that it does not believe the requested variance is equivalent. Therefore, the lack of financial information makes it impossible for the Board to find an arbitrary or unreasonable hardship.

The compliance plan is inadequate.

The Agency finally argues that the compliance plan is inadequate because it proposes to identify electric arc furnace dust by a method held to be inadequate by the Board in PCB 86-180. (Ag. Br. at 18.) Further the Agency maintains that Robertson-Ceco's proposed plan fails to address the surface investigation required by condition 3 of the Board's order in PCB 86-180. (Ag. Br. at 19.)

Robertson-Ceco argues that the surface areas of concern to the Agency were excavated and deposited in the RCRA closure unit and that the surface of the site has since 1988 been covered over with the constant gradual accumulation of steel mill by-product material. (Rep. at 8.) Further, Robertson-Ceco maintains that the surface investigation required in PCB 86-180 would be "unavailing" and that the "geochemical conditions which exist at the site would prevent groundwater contamination by heavy metals from any former surface dust deposits". (Rep. at 8.)

The Board agrees that the compliance plan is inadequate. The Board has previously ruled that the conditions imposed on Robertson-Ceco's closure permit were necessary to insure compliance with the Act and the Board's regulations. This proceeding has presented no additional information which would lead the Board to conclude that the alternative investigation first suggested by Robertson-Ceco in 1985 is adequate to insure compliance with the Act and the Board's regulations.

CONCLUSION

After a careful review of the information provided by the petitioner, the Board finds that a variance from the Board's order in PCB 86-180 is inappropriate for three major reasons.

First, the petitioner has sought permanent relief from the Board's order through a variance proceeding, which by the very nature of a variance is inappropriate relief in this case. Second, the petitioner failed to show that the order in PCB 86-180 imposes an arbitrary or unreasonable hardship. Third, the compliance plan is inadequate to insure compliance with the Act and Board regulations. The Board must look to compliance with the Act and Board's regulations, since the relief being sought is a substitution of the proposed compliance plan for the conditions affirmed in PCB 86-180. Therefore, the Board denies Robertson-Ceco request for variance from the Board's order in PCB 86-180.

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

ORDER

The Board denies the variance requested by Robertson-Ceco from the Board's order in Ceco Corporation v. Illinois Environmental Protection Agency, PCB 86-180, 117 PCB 25 (December 20, 1990) for the site located in Lemont, Illinois.

IT IS SO ORDERED

Section 41 of the Environmental Protection Act (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1041) provides for the appeal of final Board orders within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 21st day of October, 1993, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board