

ILLINOIS POLLUTION CONTROL BOARD
March 26, 1992

WHITE COUNTY BOARD,)
)
 Petitioner,)
)
 v.) PCB 91-119
) (Variance)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

OPINION AND ORDER OF THE BOARD (by J.C. Marlin):

This matter comes before the Board upon a December 9, 1991 second amended petition for variance filed by the White County Board ("County"). The County requests variance for a period of five years from 35 Ill.Adm.Code 406.106 (Effluent Standards) and 406.108 (Non-point Source Mine Discharges) to develop a pilot program for the use of covered mine waste as roadway embankment core material. On that same date, the Board found the variance petition deficient in several areas and ordered the County to submit additional information. The Illinois Environmental Protection Agency ("Agency") filed its Amended Recommendation ("Rec.") in this matter on March 10, 1992, and recommended that variance be granted to the County subject to conditions. Petitioner waived its right to a hearing on the petition and no hearing was held.

PROCEDURAL HISTORY

Petitioner was previously granted variance from 35 Ill.Adm.Code 406.106 and 406.108 in a Board Opinion and Order dated March 27, 1986 (PCB 85-174) and a Supplemental Opinion and Order dated June 5, 1986. The petitioner alleges that the original variance was not used because the mine waste material was too wet and not suitable for road construction. The mining company recently installed equipment which "de-waters" the waste material so that it is suitable for roadway construction purposes. (Am.Pet., par. 33) Where appropriate this Opinion and Order follows the reasoning contained in our original and supplemental Opinions and Orders dated March 27 and June 5, 1986 respectively.

BACKGROUND

Petitioner is a governmental entity which provides public services, including the maintenance of a county-wide transportation network for a population of more than 17,000 county residents and more than 1,000 industrial, commercial and business customers serviced by Petitioner. The County employs approximately 90 persons and expends approximately \$3.5 million as a consequence of its operations. (Am.Pet., par. 9)

The County is seeking variance relief in this case in order to construct a roadway embankment utilizing mine refuse as core

material. The proposed project is located on County Highway 12 in White County, Illinois. The project begins 336 feet north of the intersection of County Highway 12 and State Highway 14, and continues north along County Highway 12 a distance of 2290 feet. Petitioner proposes to use approximately 18,900 cubic yards of mine refuse from White County Coal Company as the core material for the embankment, which is being built in order to raise County Highway 12 above the high water elevation. The coal company currently disposes of this refuse by burying it. Approximately 5,400 cubic yards of soil will be utilized as a two foot "cover" over the mine refuse and as a vegetative growth medium. (Am. Pet., par. 10)

The County originally submitted an application for a mining permit to the Illinois Department of Mines and Minerals. Permits of this nature are subject to the approval of the Agency, and it was the Agency that first notified the County (by letter dated August 20, 1985) that the nature of the County's proposed actions would require variance from certain of the Board's mine related water pollution regulations. (Am.Pet., p. 13)

APPLICABLE LAW AND REGULATIONS

The County is seeking variance for a five year period from 35 Ill.Adm.Code 406.106 and 406.108. Section 406.106 provides that:

Section 406.106 Effluent Standards for Mine Discharges

- a) The effluent limitations contained in 35 Ill.Adm.Code 304 shall not apply to mine discharges or non-point source mine discharges.
- b) Except as provided in Section 406.109 and 406.110, a mine discharge effluent shall not exceed the following levels of contaminants:

Constituent	Storet Number	Concentration
Acidity	00435	(Total acidity shall not exceed total alkalinity)
Iron (total)	01045	3.5 mg/l
Lead (total)	01051	1 mg/l
Ammonia Nitrogen (as N)	00610	5 mg/l
pH	00400	(range 6 to 9)
Zinc (total)	01092	5 mg/l
Fluoride (total)	00951	15 mg/l
Total suspended solids	00530	35 mg/l
Manganese	01055	2.0 mg/l

- 1) The ammonia nitrogen standard is applicable only to an operator utilizing ammonia in

wastewater treatment.

- 2) The manganese effluent limitation is applicable only to discharges from facilities where chemical addition is required to meet the iron or pH effluent limitations. The upper limit of pH shall be 10 for any such facility that is unable to comply with the manganese limit at pH 9. The manganese standard is not applicable to mine discharges which are associated with areas where not active mining, processing or refuse disposal has taken place since May 13, 1976.
- c) New source coal mines shall be subject to a total iron limitation of 3.0 mg/l in addition to the requirements of subsection (b) above.

Section 406.108, which relates to non-point source mine discharges, states that:

Surface drainage from the affected land of a coal mine, including disturbed areas which have been graded, seeded or planted, shall be passed through a sedimentation pond or a series of sedimentation ponds before leaving the facility.

The Board found, as a threshold matter, in its March 27, 1986 Opinion and Order that, absent variance relief, Petitioner would indeed need to comply with Section 406.106 as that section is applicable to the activity being undertaken by the County in this instance. Section 406.106 sets out effluent standards for "mine discharges". "Mine discharges" are defined by Section 402.101 as:

Any point source discharge, whether natural or man-made, from a mine-related facility. Such discharges include...seepage from mine or mine refuse areas...

Section 402.101 defines "Mine Refuse Area" as:

Any land used for dumping, storage or disposal of mine refuse (emphasis added)

Thus, Section 406.106 must be applied to the use of mine refuse as a construction material. The Board's regulations, as described above, clearly define seepage from mine refuse areas as a point source discharge subject to the effluent limitations of Section 406.106.

Section 406.108 requires that surface drainage from the affected land of a coal mine be passed through a sedimentation pond. Section 402.101 defines "affected land" as:

Any land owned or controlled or otherwise used by the operator in connection with mining activities except the surface area above underground mine workings that is not otherwise used for mining activities. The term

does not include off-site office buildings and farming operations or recreational activities on undisturbed land. Land described in a certificate of abandonment issued by the Agency under Section 405.110(e) is no longer part of the affected land.

Section 402.101 defines "Operator" as "a person who carries out mining activities". That section defines "affected land" as "any land owned or controlled or otherwise used by the operator in connection with mining activities..." Section 402.101 defines "mining activities" as:

all activities on a facility which are directly in furtherance of mining, including activities before, during and after mining... The term includes, but is not limited to... Construction of mine related facilities which could generate refuse, result in a discharge or have the potential to cause water pollution... Ownership or control of a mine related facility... Generation or disposal of mine refuse..." (emphasis added).

Section 402.101 in turn defines "mine related facility" as

portion of a facility which is related to mining activities. The term includes, but is not limited to... Mine refuse area(s)..." (emphasis added).

As we held in our June 5, 1986 supplemental Opinion and Order, as a consequence of the construction activity proposed by petitioner, the County will, for the purposes of Board regulations, become an operator engaged in mining activities. The construction site at issue here is thus most properly viewed as "affected land", meaning that the County must receive variance relief from 406.108 in order to proceed with the project.

ENVIRONMENTAL IMPACT

The petitioner asserts that any environmental impact resulting from petitioner's activity will occur only during the period of construction of the embankment, which the County proposes to undertake during the normally drier summer months. The County estimates needing less than six months to complete construction, and has proposed several measures to reduce any adverse environmental impact stemming from the project. (Am.Pet., pars. 25, 26)

First, during construction the County intends to move the mine refuse directly from the mine to placement in the embankment. No additional mine refuse storage or disposal will occur at the construction site. Second, petitioner proposes to utilize a series of hay or straw ditch checks to control runoff from the affected area. (Am.Pet., par 24) Drainage from the area is by ditches tributary to Seven Mile Creek, the Skillet Fork, the Little Wabash and the Wabash River, sequentially. Finally, after the embankment is raised, two feet of soil will be placed over the mine refuse and the area will be fertilized,

seeded and mulched to promote vegetative growth. The top of the embankment will be roadway, an impervious material.

Petitioner believes that variance relief in this instance would impose no adverse environmental impact on human life, plant or animal life. (Am.Pet., par. 20) In addition the Agency has concluded that "Little if any of the contaminants in the mine refuse will affect ground or surface water". (Rec., par. 16) The Agency cites the findings of the leachate test conducted on samples of the mine refuse material (see Petitioner's Exhibit F) as support for its belief that the leachate will not likely exceed effluent standards. (Rec., par. 11)

It should be noted that although the County states that environmental impact will result only during the construction period of six months or less, petitioner requests variance relief for a five-year period. The petitioner requests the additional time be granted so as to allow, during the variance term, the petitioner to fully analyze and review the effect of using two alternative methods of compliance consisting of construction of sedimentation ponds or diversion of run-off surface water.

HARDSHIP

Without variance relief from Section 406.106, the County would be required to comply with the effluent limitations of that section. Such compliance might of practical necessity require petitioner to install a sedimentation pond as the only means of complying with 406.106. Petitioner alleges that the use of a sedimentation pond for this project is impractical due to the cost involved. The County submitted cost estimates for two alternative sedimentation pond designs. Routing the entire drainage area through a single sedimentation pond is envisioned to cost \$140,000, while routing only the project drainage through the sedimentation pond and rerouting the rest of the drainage areas around the project would cost \$45,000. The County alleges that if variance relief is not provided, the additional cost of compliance will make the project too expensive to undertake. The Agency concedes that construction of a sedimentation pond would be ineffective anyway, since the project area is low lying and subject to flooding; thus, any pond constructed at the site would be subject to inundation.

CONCLUSION

The Board finds that White County Board has presented adequate proof that compliance with Section 406.106 and 406.108 of the Board's regulations would impose an arbitrary or unreasonable hardship. Such hardship would not be justified by any anticipated environmental impact resulting from construction of the embankment. Moreover, the project will put to productive use a material that had only been refuse previously. The Board will therefore grant petitioner variance relief from Sections 406.106 and 406.108, subject to conditions.

The Board further finds that, given the circumstances of the case, five years is an appropriate variance period. The construction phase of this project is scheduled to last only six

months. However, given the uncertainties the County faces regarding the date construction will begin, it is reasonable for the Board to allow the County some leeway in the duration of the variance period. From the environmental perspective, the impact of the project will be the same regardless of whether construction takes place in the summer of 1992 or the summer of 1997.

Finally, the Board will impose a semiannual sampling requirement upon the petitioner. Petitioner's request is a pilot project to demonstrate a technology never before tried in Illinois. Therefore, the Board believes it prudent that petitioner sample as set forth in the terms of the Order for a period of 5 years.

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

ORDER

The White County Board is hereby granted variance from 35 Ill. Adm. Code 406.106 and 406.108 until March 26, 1997 or until completion of the roadway embankment which is the subject matter of this variance proceeding, whichever occurs first, subject to the following conditions:

1. The operation plan submitted with the project permit application shall be implemented as submitted.
2. After completion of phase 1, all disturbed areas shall be mulched or erosion control blankets supplied. All disturbed areas that will not be redisturbed during phase 2 shall be mulched and seeded.
3. In consultation with the Agency, a semiannual surface water and sediment sampling program shall be implemented. At a minimum one sample each of surface water and sediment shall be collected from each stream determined to be subject to the runoff from the project. A chemical analysis of iron, lead, pH, zinc, fluoride, TSS and manganese shall be performed as appropriate for each sample. A description of the sampling techniques, sampling locations, and the results of chemical analysis shall be included in the quarterly project report identified in condition 4. This sampling shall be performed for the duration of the variance.
4. Quarterly project reports shall be submitted to the Agency until project completion. Reports shall include general progress and sediment control structure maintenance work completed during the quarter and sampling. Project reports shall be submitted to the address in condition 5.
5. Petitioner shall submit the quarterly project reports and execute a certificate of acceptance in the following form:

Within forty-five (45) days after the date of the Board Order the Petitioner shall execute and send to:

Joyce Munie
Mine Waste Program
Illinois Environmental Protection Agency
2200 Churchill Road
Springfield, Illinois 62706

a Certificate of Acceptance and agreement to be bound to all terms and conditions of the granted variance. This forty-five (45) day period shall be held in abeyance for any period during which this matter is being appealed. Failure to execute and forward the Certificate within 45 days renders this variance void and of no force and effect. The form of the certification shall be as follows:

CERTIFICATION

I (We), _____, hereby accept and agree to be bound by all of the terms and conditions of the Order of the Pollution Control Board in PCB 91-119, March 26, 1992.

White County Board

Petitioner

Authorized Agent

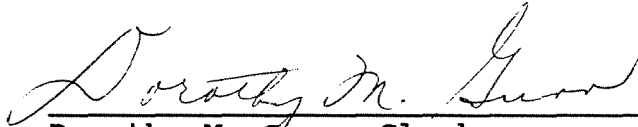
Title

Date

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court 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 26th day of March, 1992, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board