

ILLINOIS POLLUTION CONTROL BOARD  
September 2, 1982

AMAX COAL CO., )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) PCB 81-203  
 )  
 ) ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, )  
 )  
 ) Respondent. )

R. STEPHEN HANSELL AND ROBERT L. TRIERWEILER APPEARED ON BEHALF OF PETITIONER; AND

LISA ELIN MORENO AND MARY E. DRAKE APPEARED ON BEHALF OF RESPONDENT.

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

This matter involves a petition filed by Amax Coal Co., a division of Amax, Inc. (Amax) for review of NPDES Permit No. IL0060364 issued by the Illinois Environmental Protection Agency (Agency) on November 18, 1981. The facility involved is Amax' Sun Spot Mine located in Fulton County.

All but one of the issues presented for review in the original December 21, 1981 petition have been resolved by the parties. The March 9, 1982 amended petition identifies the sole remaining issue for review as being whether the Agency correctly determined that discharges from and through Discharge Point No. 003 (the Ipava Basin) do not qualify for the "rainfall exemption" of Rule 606 of Chapter 4: Mine Related Pollution (since codified as Section 406.106 "Effluent Standards", Ill. Adm. Code, Title 35, Subtitle D, Chapter 1).

Hearing was held April 21, 1982, following which the parties submitted closing briefs. Amax's main brief was filed June 7, 1982, the Agency's brief on July 8, 1982 and Amax's reply brief on July 28, 1982. In their briefs, the parties have requested review of certain of the Hearing Officer's rulings concerning admissibility of testimony and exhibits, which the Board will address before proceeding to consider the substantive issue.

Amax objects to the Hearing Officer's admission into evidence of the Agency's Group Exhibit 6, and testimony of Agency witness Harry Chappel concerning this exhibit (R. 164-168). Amax requests

that this exhibit, which consists of three Discharge Monitoring Reports (DMR) for three months following granting of the permit, be stricken. The Agency argues that the DMR's are relevant to the issue of whether the Ipava Basin is properly designed and constructed to treat runoff in such manner as to qualify for the rainfall exemption. While agreeing that the DMR's were not before the Agency at the time of the permits' issuance, the Agency essentially argues that, in as much as Amax had stipulated to the admission at hearing of some facts not originally before the Agency (e.g. Joint Ex. 1), that it has waived objections to all such facts. Amax disagrees.

The Board strikes this evidence, finding that Amax has made no such general waiver, and that the relevancy of this information is questionable.

Most of the facts in this case are stipulated. The Ipava Basin is a 30.4 acre sedimentation basin formed by the damming of Francis Creek, and discharges via discharge point 003 to Francis Creek. [Construction of this sedimentation basin was the subject of a prior Board permit appeal proceeding, Amax Coal Co. v. IEPA, PCB 80-63, 64 (December 4 and 19, 1980).] The total area whose run-off is tributary to the Basin is 4068.7 acres, of which 1090 acres are currently permitted for mining operations. The volume of runoff from a 10-year 24-hour precipitation event, calculated to be 4.6 inches/hour, from the entire tributary area is 540.3 acre/feet, and from the permitted area is 170.8 acre/feet. The volume of water actually falling upon the Basin itself is 11.65 acre/feet. The Basin has the capacity to capture and retain about 220 acre/feet (Joint Ex. 1).

It is stipulated that, given the above, the Ipava Basin as designed and constructed has the capacity to contain the volume of runoff from the 1090 acre permitted area and the volume of rainfall falling on the Basin itself, "provided that the runoff from the unaffected area of 2978.7 acres were not tributary to it." The Basin removes suspended solids from the waters it contains by means of natural gravitational settling; no flocculation, aeration, coagulation, or any other chemical or mechanical methods for solids removal are employed (Joint Ex. 1).

Rule 606(b) establishes mine discharge effluent standards. Footnote 3 to the Rule, provides that

"Any overflow, increase in volume of a discharge or discharge from a by-pass system caused by precipitation or snowmelt shall not be subject to the limitations covered by this footnote. This exemption shall be available only if the facility is designed, constructed and maintained to contain or treat the volume of water which would fall on the areas covered by this subpart during a 10-year, 24-hour or larger precipitation event (or snowmelt or equivalent volume). The operator shall have the burden of demonstrating that the prerequisites to an exemption set forth in this subsection have been met."

It is the Agency's position in this action that, to qualify for this exemption, the Basin would need to have the capacity to contain about 557 acre/feet of water, the volume of run-off from the entire tributary area plus the volume of rain falling upon it. Amax' position is that the Basin's 220 acre/feet capacity, which can contain the volume of run-off from the tributary permitted area plus the volume of rain falling upon the basin itself, is sufficient to so qualify.

The Rule 606(b), note 3, exemption was taken from the federal standard of 40 CFR 434, as adopted December 28, 1979 (44 CFR 76788-76793). Rule 606(b), note 3 was intended, at the time of its adoption, to track then-current federal regulations as closely as possible "In the Matter of: Proposed Amendments to Chapter 4", R76-20, R77-10 (Opinion of July 24, 1980, 39 PCB 196 at 255). While USEPA has proposed changes in its exemption rule (46 FR 3136, January 13, 1981, and 46 FR 28873, May 29, 1981), no final rule has been promulgated to supersede the December 28, 1979 rule.

The dispute here centers around the interpretation of the phrase in 606(b), note 3, "volume of water which would fall on the areas covered by this subpart". Also in dispute is the meaning of the words "contain or treat".

At the time of the adoption of Rule 606, no subparts existed in the Board's rules. Each of the parties has forwarded arguments as to what the word "sub-part" would have been intended to mean in the context of Chapter 4. As use of the word "sub-part" was clearly a drafting error resulting from incorporation of federal language without change, the Board will not outline these arguments. To strain to give a meaningless word meaning would be absurd. As the Board's intent was to track the referenced federal regulations, the scope of the rule's intended coverage should be determined by reference to the federal rule.

40 CFR 434.42(a) establishes effluent limitations; 434.42(b) contains the "rainfall" exemption word for word as contained in Rule 606(b), note 3; 434.42(c) contains a "commingling" provision. The parties agree that the reference of 40 CFR 434.42(a) to "areas covered by this subpart" would be areas covered by Subpart D-- Alkaline Mine Drainage Subcategory, in which the exemption is found (Amax Main Br. p. 5, Agency Br. p. 6). Read together, the definitions contained at 40 CFR 434.11(c, d, g), indicate that Subpart D refers to alkaline water drained, pumped, or siphoned from an active mining area. Drainage from other than active mining areas is thus excluded from the Subpart's coverage by definition.

However, the "commingling" provision of 40 CFR 434.24(c) provides that:

"Drainage which is not from an active mining area shall not be required to meet the limitations set forth in paragraph (a) of this section so long as such drainage is not commingled with untreated mine drainage which is subject to the limitations in paragraph (a) of this section" (emphasis added).

Therefore, the effect of this provision, by its language is to include otherwise unregulated drainage which becomes commingled with drainage from "areas covered by this subpart [D]".

In its "Summary and Basis of Regulations" statement, USEPA explained that:

"Process waste waters generated from coal preparation plants include fine coal and mineral particles such as clays, which may remain suspended in the waste water and cause serious pollution problems for receiving waters. ...The elementary technique for removing suspended solids from mine drainage and preparation plant process waste water involves the use of a sediment basin. ...A sediment pond operates on the principle that as the sediment loaded water passes through the pond, the solid particles will settle to the bottom and be trapped. ...Thus, in order to meet a specific TSS effluent quality, the pond will have to be constructed and operated to detain sediment-laden water long enough to settle all particles of a specific size (and larger). This "detention time" is a critical factor in sediment pond efficiency and effluent quality, and is a function primarily of the pond surface area and flow rate into the pond.

The effectiveness of a given sediment pond will depend upon the specific design features and practices employed to optimize detention time. For example, the pond should be designed and operated to maximize the opportunity for quiescent settling of solids; ...and minimize the potential for "short-circuiting" - that is, the condition where influent to the pond may move rapidly to the discharge point without being detained in the pond long enough to permit optimal settling of solids" (44 FR 76789, Agency Rec. at 107).

On May 2, 1980 (prior to the Board's July adoption of Chapter 4) USEPA, by letter, issued "Guidance for Establishing Relief from Effluent Limitations for the Coal Mining Point Source Category" (Agency Rec. Item 17, p. 112). In this guidance, USEPA makes clear that:

1. The words "contain" and "treat" are not synonymous and that "treat" means "the addition of flocculants in addition to physical settling" (Id. p. 116);

2. In determining a basin's capacity to "contain", the operator and the permitting authority need not consider the actual "volume of water which would fall on the [relevant] areas" as stated in the regulations, since "[o]bviously, all rainfall does not go into runoff" (Id. p. 117), and

3. In determining a basin's capacity to "contain", the area to be included is the runoff from any "drainage area which is commingled with the drainage area from the active mining area" (Ibid.), including, by way of example drainage, from "virgin land and land undergoing reclamation" (Id. p. 118).\*

(The Board notes that this "Guidance" has been proposed, but not yet adopted, as an Agency rule pursuant to Chapter 4 as Ill. Adm. Code Title 35, Subtitle C, Chap. II, Subchap. b, Subpart D §450.401-405; 5 Ill. Reg. 5113, 5123-5129, 1st Notice, May 8, 1981).

To effectuate the Board's intent in adopting the "rainfall" exemption to a) "track" federal regulations, and b) provide relief from strict effluent standards while minimizing adverse environmental effect, the Board interprets the Rule 606(b), note 3 exemption as requiring a sedimentation basin to contain or treat the surface runoff from the entire area tributary to the basin, as well as the rainfall falling upon the basin. To hold otherwise would be to defeat the purpose of insuring that contaminated drainage be retained in a basin for sufficient time to permit settling of solids to the greatest extent practicable even under unusually heavy precipitation conditions.

Having exercised its quasi-legislative power of defining the scope of its regulation [IEPA v. IPCB (cite)], the Board may easily adjudicate this particular case. As Amax stipulates that it does not "treat" waters collected in the Ipava basin by means of flocculation, and that the Basin has capacity to capture and retain only about 220 of the 557 acre/feet of the runoff tributary to it and rainfall falling upon it, the Board upholds the Agency's permitting decision that Discharge Point No. 003 does not qualify for the Rule 606(b) exemption.

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\*In USEPA's subsequent January, 1981 proposal to modify the exemption because of the confusion arising from the options to either "contain" or "treat", the "treat" option was proposed to be eliminated to make the design criteria more clear (46 FR 3144, Agency Rec. p. 134). In its May, 1981 proposal, USEPA noted that the January proposal would have required a basin to contain all surface waters draining into it "including waters from the undisturbed (virgin) areas and inactive (reclaimed) area, in addition to the active mining area". The May proposal was to require containment only of water volumes from active and reclaimed areas (46 FR 28874, Agency Rec. p. 150).

The Board notes that Amax has presented arguments based on testimony that it did not rely upon the USEPA "Guidance" in designing its Basin, and that it is physically impossible to separate the run-off tributary to the Basin from unaffected areas and from permitted areas (R. 77-77, 98), and on Agency testimony that the Agency was having difficulty in interpreting the exemption "not only...in Amax's case but in other cases" during the period (R. 146) of review of Amax permit application. Such arguments, which are certainly appropriate in the context of a petition for relief by way of variance or site-specific rule, may not be recognized by the Board in this permit appeal proceeding.


This Opinion constitutes the finding of facts and conclusions of law of the Board in this matter.

ORDER

The Agency's November 18, 1981 determination in NPDES Permit No. IL0060364 that Discharge Point No. 3 does not qualify for the Chapter 4, Rule 606 "rainfall exemption" is sustained.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 2<sup>nd</sup> day of September, 1982 by a vote of 5-0.

  
 Christan L. Moffett, Clerk  
 Illinois Pollution Control Board