

ILLINOIS POLLUTION CONTROL BOARD
June 19, 1997

IN THE MATTER OF:)
)
PETITION OF THE ENSIGN-BICKFORD) AS 97-4
COMPANY FOR AN ADJUSTED) (Adjusted Standard - RCRA)
STANDARD FROM 35 ILL. ADM. CODE)
703.183)

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

Ensign-Bickford Company (EBCo) filed a petition (Pet.) for an adjusted standard from the Board's regulations at 35 Ill. Adm. Code 703.183(r). Section 703.183(r) provides for the submittal to the Illinois Environmental Protection Agency (IEPA) of topographic maps containing specific information as a part of a Resource Conservation and Recovery Act (RCRA) permit application. EBCo is seeking an adjusted standard so that EBCo need not submit a complete topographic map with a RCRA permit application for EBCo's facility located in Wolf Lake, Union County, Illinois.

EBCo filed its petition on September 3, 1996. The IEPA filed a response (Res.) to EBCo's request on October 15, 1996, recommending that the Board deny the requested adjusted standard. On December 13, 1996, EBCo filed a reply (Rep.) to the IEPA's response. EBCo filed a waiver of hearing, and no requests for hearing were filed. Therefore, the Board did not hold a hearing on this petition.

Based upon the record and upon review of the factors involved in the consideration of an adjusted standard, the Board finds that EBCo has failed to justify its request for an adjusted standard. For the reasons articulated below, the Board accordingly denies EBCo's request for an adjusted standard.

ADJUSTED STANDARD PROCEDURE

The Board's responsibility in this matter arises from the Environmental Protection Act (Act) (415 ILCS 5/1 et seq. (1996)). The Board is charged therein to "determine, define and implement the environmental control standards applicable in the State of Illinois" (415 ILCS 5/5(b) (1996)) and to "grant *** an adjusted standard for persons who can justify such an adjustment" (415 ILCS 5/28/1(a) (1996)). More generally, the Board's responsibility in this matter is based on the system of checks and balances integral to Illinois environmental governance: the Board is charged with the rulemaking and principal adjudicatory functions, and the IEPA is responsible for carrying out the principal administrative duties.

The Act provides that a petitioner may request, and the Board may impose, an environmental standard that is different from the standard that would otherwise apply to the petitioner as the consequence of the operation of a rule of general applicability. Such a

standard is called an adjusted standard. The general procedures that govern an adjusted standard proceeding are found at Section 28.1 of the Act and within the Board's procedural rules at 35 Ill. Adm. Code 106.

Where, as here, the regulation of general applicability does not specify a level of justification required for a petitioner to qualify for an adjusted standard, the Act at Section 28.1(c) specifies four demonstrations that must be made by a successful petitioner:

- 1) Factors relating to that petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation applicable to that petitioner;
- 2) The existence of those factors justifies an adjusted standard;
- 3) The requested standard will not result in environmental or health effects substantially or significantly more adverse than the effects considered by the Board in adopting the rule of general applicability; and
- 4) The adjusted standard is consistent with any applicable federal law.

RULES OF GENERAL APPLICABILITY

EBCo is requesting an adjusted standard from 35 Ill. Adm. Code 703.183(r). Section 703.183(r) provides:

The following information is required in the Part B application for all HWM facilities, except as 35 Ill. Adm. Code 724.101 provides otherwise.

* * *

- r) A topographic map showing a distance of 1000 feet around the facility at a scale of 2.5 centimeters (1 inch) equal to not more than 61.0 meters (200 feet). Contours must be shown on the map. The contour interval must be sufficient to clearly show the pattern of surface water flow in the vicinity of and from each operational unit of the facility. For example, contours with an interval of 1.5 meters (5 feet), if relief is greater than 6.1 meters (20 feet), or an interval of 0.6 meters (2 feet), if relief is less than 6.1 meters (20 feet). Owners and operators of HWM facilities located in mountainous areas shall use larger contour intervals to adequately show topographic profiles of facilities. The map must clearly show the following:
 - 1) Map scale and date;
 - 2) 100-year floodplain area;
 - 3) Surface waters including intermittent streams;

- 4) Surrounding land uses (residential, commercial, agricultural, recreational);
- 5) A wind rose (i.e., prevailing windspeed and direction);
- 6) Orientation of the map (north arrow);
- 7) Legal boundaries of the HWM facility site;
- 8) Access control (fences, gates);
- 9) Injection and withdrawal wells both on-site and off-site;
- 10) Buildings: treatment, storage or disposal operations; or other structures (recreation areas, runoff control systems, access and internal roads, storm, sanitary and process sewage systems, loading and unloading areas, fire control facilities, etc.);
- 11) Barriers for drainage or flood control;
- 12) Location of operational units within the HWM facility site, where hazardous waste is (or will be) treated, stored or disposed (include equipment cleanup areas);

(Board Note: For large HWM facilities, the Agency shall allow the use of other scales on a case by case basis.)

FACILITY DESCRIPTION

EBCo operates a facility at Wolf Lake, Union County, Illinois. (Pet. at 4.) The 486 acre site consists of numerous service roads, buildings for the production and manufacture of explosives products, storage areas, previously-closed non-RCRA surface impounds, and land for agricultural purposes. (*Id.*) At the Wolf Lake plant, EBCo manufactures cast boosters (a Division 1.1 explosive) used in the mining industry and assembles Primadet® nonelectric delay detonators. (Pet. at 5.) The manufacture of cast boosters involves melting and mixing trinitrotoluene (TNT) and pentaerythritol tetranitrate (PETN) and then pouring the melt into molds or canisters. (*Id.*) Small quantities of Cyclonite (RDX) and Comp B (RDX and TNT) are also used in the manufacturing process. (*Id.*) The assembly of the nonelectric delay detonators involves crimping blasting caps to shock tube which has been appropriately coiled and tagged. (*Id.*) EBCo has been granted interim status to burn explosives waste generated from the manufacturing process and has applied for a RCRA Part B permit for the operation. (Pet. at 6.)

During the manufacturing and assembly process, waste explosives and explosives contaminated materials are generated in the form of off-specification product, explosive contaminated materials, packaging materials, explosive contaminated waste water treatment

sludge and explosive contaminated spent activated carbon. (Pet. at 5.) Other than blasting caps, these wastes are burned on-site to ensure that the public is not exposed to potentially explosive waste which might accidentally detonate. (*Id.*) After the waste explosives and contaminated material have been rendered non-reactive through open-burning, the residual wastes are removed for proper off-site disposal. (*Id.*)

RELIEF REQUESTED

EBCo is requesting an adjusted standard that would allow EBCo to maintain on-site for IEPA review a complete topographic map. A complete map would divulge the location and description of explosives operating buildings and processes, explosives storage locations and descriptions and the locations and descriptions of in-plant roads leading to these locations. (Pet. at 9.) EBCo is concerned that providing the IEPA with a topographic map containing such detailed information would be a threat to public safety. EBCo believes a threat to public safety exists from the threat of terrorist activity.

EBCo requests that it be able to submit to the IEPA a version of the topographic map which would include all general information required at 35 Ill. Adm. Code 703.183(r)(10), but would exclude sensitive locations and descriptions. (Pet. at 9.) The specific language that EBCo is asking the Board to adopt is:

EBCo shall be allowed to maintain on-site its complete topographic map prepared under 35 Ill. Adm. Code 703.183(r)(10) and containing all required elements of that section for review by the Illinois Environmental Protection Agency as an element of EBCo's Part B application dated June, 1996, which application may, from time to time, be amended, and to instead submit to the Illinois Environmental Protection Agency a sanitized version of the topographic map required under 35 Ill. Adm. Code 703.183(r)(10) which does not include the location and description of explosives operating and/or process buildings, explosives storage buildings and in-plant roads which lead or show access to such locations.

IEPA RESPONSE

The IEPA opposes granting EBCo's request for adjusted standard. The IEPA believes that the submission of a map without buildings and roadways would not provide the IEPA permit reviewer with complete information necessary to issue a RCRA Part B permit for the facility. (Res. at 2.) The IEPA also believes it would be impractical to require a permit reviewer to travel to EBCo's site to review a complete map every time the reviewer needed to examine a map during the permit process. (Res. at 4.)

The IEPA maintains that the a complete map could be submitted and EBCo could ask that the map be held confidential pursuant to the IEPA's regulations. (See, 35 Ill. Adm. Code 1827; Res. at 2 and 5.) The IEPA believes that a claim of confidentiality would sufficiently protect public safety. (Res. at 5.)

The IEPA also expresses a concern that providing the IEPA with a complete map to be used only during the review process would not satisfy the requirements of the State Records Act (5 ILCS 160/11 (1996)). The IEPA maintains that it “does not have the authority to return a topographic map submitted to it as part of EBCo’s RCRA Part B permit application” pursuant to the State Records Act. (Res. at 3.) Section 11 of the State Records Act provides:

All records made or received by or under the authority of or coming into the custody, control or possession of public officials of this State in the course of their public duties are the property of the State and shall not be mutilated, destroyed, transferred, removed or otherwise damaged or disposed of, in whole or in part except as provided by law.

The IEPA maintains that once the IEPA has “custody, control or possession” of the map, the IEPA may not return it. (Res. at 3.)

COMPLIANCE ALTERNATIVES

EBCo delineates three alternatives for compliance with 35 Ill. Adm. 703.183(r). Those alternatives are:

1. supplying to the IEPA a sanitized version of the topographic map which does not contain buildings, structures access and internal roads and the like but which does contain the location of the treatment units which are the subject of EBCo’s Part B application and retaining a complete map satisfying the requirements of 35 Ill. Adm. Code 703.183 at the plant which would be made available to the IEPA for review on-site at it requests;
2. supplying the above-described sanitized topographic map and bringing the complete map to the IEPA for its review upon request (same day), then returning to the plant with that map; or
3. supplying the above-described sanitized topographic map and allowing to the IEPA to borrow a complete map for review so long as such map is kept separate and in a locked location and returned to EBCo within a reasonable (short) time period.

(Pet. at 8.)

EBCo, in its reply, believes that the best of these three is to supply a “sanitized” map for retention by the IEPA and to provide a complete map for use by the IEPA during the review process. (Rep. at 4.)

The IEPA in its response, does not believe that any of the alternatives would be appropriate. With the first alternative, the IEPA believes it is not practical to visit the site each time a complete map must be examined. (Res. at 4.) Further, the “sanitized” map does not provide enough information for a permit reviewer to complete an evaluation of a permit

application. (*Id.*) As for the second and third alternatives, the IEPA reiterates that it does not believe the IEPA can return the map pursuant to the State Records Act. (*Id.*)

EBCo, in its reply, indicates that the IEPA would accept the third alternative, if the Board believes the map can be returned pursuant to the State Records Act. (Rep. at 4.)

HEALTH AND ENVIRONMENTAL EFFECTS

EBCo maintains that granting the adjusted standard would have “little, if any adverse environmental effect.” (Ret. at 9.) EBCo explains that the complete information has been generated and does exist. (Pet. at 9.) The material is available for IEPA review. (*Id.*) The adjusted standard would only change the way in which the information is retained by the IEPA. (Pet. at 10.) EBCo also asserts that the adjusted standard is more protective of human health because fewer persons would have access to the sensitive information on the maps. (Rep. at 5.)

The IEPA “does not take issue” with EBCo’s assertion that the adjusted standard would have little environmental impact. (Res. at 5.) The IEPA does not agree that the standard would be even more protective of human health. (*Id.*) The IEPA states that there is no evidence that EBCo’s map is any safer at EBCo’s facility than if the same map were held by the IEPA. (Res. at 5-6.)

JUSTIFICATION

Section 28.1 of the Act sets out four factors to be used in justifying a request for an adjusted standard. (*See infra* 2.) The following is a discussion of each of these factors as they relate EBCo’s facility.

Substantially and Significantly Different Factors

EBCo asserts that factors relating to it are substantially and significantly different than the factors relied upon by the Board in adopting 35 Ill. Adm. 703.183(r). (Pet. at 10) EBCo maintains that most hazardous waste management facility Part B applicants do not have explosives on-site. (*Id.*) EBCo does have explosives on-site. (*Id.*) EBCo argues that with the “increase in acts of terrorism” keeping confidential location of explosives, operating buildings and the routes leading to them is even more critical. (Pet. at 10-11.)

The IEPA “does not take issue with” EBCo’s assertion that the factors relating to EBCo are different than those relied upon by the Board in adopting 35 Ill. Adm. Code 703.183(r). (Res. at 6.)

Existence of Factors Justifies an Adjusted Standard

EBCo believes that the fact that it has explosives on site is a significant factor and warrants the adjusted standard. (Pet. at 10-11.) EBCo maintains that the difference is so significant that it has developed a corporate policy “to minimize the national security risk.” (Rep. at 5.)

The IEPA does not believe that this factor is sufficient to warrant an adjusted standard. (Res. at 6.) The IEPA asserts that at least two other similarly situated entities have submitted complete topographic maps as a part of the permit applications process. (Res. at 1.) In addition, EBCo itself submitted a complete map as a part of its 1994 application and in 1992 the IEPA prepared a RCRA facility assessment which included a complete topographic map and aerial photographs of EBCo's facility. (Res. at 5.) EBCo has not claimed confidentiality for those items. (*Id.*)

Environmental and Health Effects

EBCo and the IEPA agree that there would be little adverse environmental effect if the adjusted standard is granted. They disagree on whether the adjusted standard may be more protective of human health, but neither suggests the adjusted standard is less protective.

Consistency with Federal Law

EBCo argues that the adjusted standard is consistent with federal law. (Pet. at 11.) In support, EBCo points to 40 CFR 270.14(a) which provides:

If owners and operators of HWM facilities can demonstrate that the information prescribed in part B cannot be provided to the extent required, the Director may make allowance for submission of such information on a case-by-case basis.

EBCo argues that it has demonstrated that it cannot provide the information to the extent required. (Pet. at 12.) Therefore, EBCo believes the adjusted standard is consistent with federal law.

The IEPA disagrees. (Res. at 6.) The IEPA points out that the map is required pursuant to 40 CFR 270.14(b)(19)(x). (Res. at 6.) The IEPA agrees that pursuant to 40 CFR 270.14(a) an applicant may demonstrate that it cannot provide the information. However, the IEPA maintains that EBCo's demonstration that the complete map cannot be provided "is an assertion, without substantiation," that the IEPA confidentiality procedures could break down. (Res. at 6-7.)

DISCUSSION

Section 28.1 of the Act allows the Board to adopt an adjusted standard if the factors relating to an applicant are substantially different from those relied upon by the Board in adopting a rule of general applicability and those factors warrant an adjusted standard. The Board must also examine environmental and health effects and consistency with federal law. Based on these factors, the Board finds that EBCo has not justified the granting of the requested adjusted standard.

The Board is not convinced that the factors relating to EBCo are substantially different than those considered when adopting 35 Ill. Adm. Code 703.183. The Board may not have explicitly examined explosives manufacturers and their sites when adopting Section 703.183, but certainly there are a number of sites in Illinois where explosive materials are located. Any

fertilizer or fuel manufacturing or storage facility could make some of the same arguments regarding a terrorist threat as EBCo.

Even if this factor is different, the Board is not convinced that EBCo has demonstrated the factor warrants an adjusted standard. The IEPA and the Board both have rules on handling confidential and trade secret materials. (2 Ill. Adm. Code 1827, 2175; 35 Ill. Adm. Code 120.) Thus, if a map must be submitted to the IEPA according to the rules, there are procedures to keep sensitive information confidential and not accessible to public requests. For example, the IEPA has procedures which allow a party to claim that an article is a trade secret by identifying the item as a trade secret and submitting a justification to the IEPA. If the IEPA determines the material is not a trade secret the decision is appealable to the Board. (See, 2 Ill. Adm. Code 1827.201-1827.205.) The Board's rules at 35 Ill. Adm. Code 120 allow a party to claim information as trade secrets. If a trade secret determination is made the information is held in locked cabinets with limited access by the IEPA and the Board. The IEPA also has procedures whereby an article may be claimed as confidential. (See, 2 Ill. Adm. Code 1827.501-1827.503.) An applicant would provide a claim letter and justification which would include the steps taken by the claimant to hold the information confidential.

The Board finds that the granting of an adjusted standard will not have an adverse environmental or health effect. However, the Board cannot determine if the adjusted standard is consistent with federal law. The Board has adopted a provision at 35 Ill. Adm. Code 703.182 which corresponds to 40 CFR 270.14(a). Thus, the IEPA has some discretion regarding the filing of a complete topographic map with a RCRA Part B permit application. In fact, EBCo noted in its petition that this provision exists and indicated that "if the Board agrees with EBCo's position [that the information cannot be provided to the extent required], adjusted standard relief is unnecessary, and EBCo would welcome the dismissal of this matter on that basis." (Pet. at 2.) The Board will not make any finding on this issue in this proceeding. The record does not provide the Board with information sufficient to make this determination. Further, such a determination regarding EBCo's ability to submit the information to the extent required is more appropriately a part of the permit process and any decision by the IEPA would be reviewable by the Board within the permit process..

EBCo argues that its request for an adjusted standard is consistent with federal law because of 40 CFR 270.14(a). However, the record does not indicate if 40 CFR 270.14(a) or Section 703.182 have been complied with. Therefore the Board cannot determine if the requested adjusted standard is consistent with federal law.

CONCLUSION

The Board denies EBCo's request for an adjusted standard from 35 Ill. Adm. Code 703.183. EBCo failed to justify the granting of the adjusted standard. Even though the Board finds that there would be no adverse environmental or health effects, the remaining factors in Section 28.1 of the Act do not support the granting of an adjusted standard. The factor relating to EBCo were not substantially different from those factors the Board relied on in accepting 35 Ill. Adm. Code 703.183. Further, even if the Board considered the factors

substantially different, the factors would not justify an adjusted standard. The Board also cannot determine that granting the adjusted standard would be consistent with federal law. Therefore, the adjusted standard relief is denied. However, the Board shares the concerns expressed by both EBCo and the IEPA that sensitive information, such as specific locations of explosives, should not be available for general public distribution. The Board agrees with the IEPA that there are sufficient rules in place to protect confidential and trade secret materials when proper demonstrations are made to the IEPA.

This opinion constitutes the Board findings of facts and conclusion of law.

ORDER

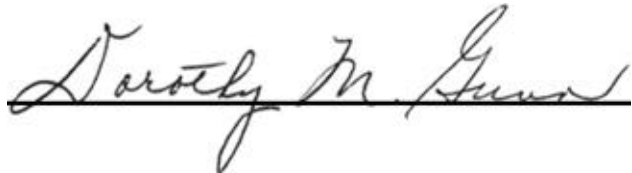
The Board hereby denies the request by Ensign-Bickford Company for an adjusted standard from 35 Ill. Adm. Code 702.183.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246 "Motions for Reconsideration.")

IT IS SO ORDERED.

Board Member J. Theodore Meyer dissents.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 19th day of June 1997, by a vote of 5-1.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board