

ILLINOIS POLLUTION CONTROL BOARD
January 9, 1992

AMEROCK CORPORATION,)
)
Petitioner,)
)
v.) PCB 87-131
) (Variance)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

MARK J. STEGER, McBRIDE BAKER AND COLES, APPEARED ON BEHALF OF PETITIONER; and

THOMAS DAVIS APPEARED ON BEHALF OF RESPONDENT.

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

This matter is before the Board on Amerock Corporation's (Amerock) August 24, 1987 petition for variance extension. Amerock seeks extension of its variance from the effluent limitations for hexavalent chromium, total chromium, copper, cyanide, zinc, and total suspended solids (TSS). (35 Ill.Adm.Code 304.124.) The Board previously granted Amerock a variance for those pollutants on September 20, 1985, as modified on November 21, 1985. (PCB 84-62.) That variance expired on September 1, 1987.

The Board received two letters of objection to the grant of the instant requested variance. On January 4, 1988, the Illinois Environmental Protection Agency (Agency) filed its recommendation that the requested variance be denied. A hearing was held in Rockford, Illinois on March 31, 1988. One member of the public attended the hearing and presented testimony. Several post-hearing motions were raised by both Amerock and the Agency. All of those motions have been previously ruled upon, and the only issue remaining before the Board is the merits of Amerock's requested variance.

Background

Amerock owns and operates a facility in Rockford, Illinois which manufactures high-quality decorative hardware products. The facility includes a wide variety of manufacturing operations necessary to convert alloys of steel, zinc, and copper, as well as plastics, into finished products for the home. Manufacturing operations at the plant include sheet metal fabrication, zinc diecasting, plastic molding, burnishing, buffing, cleaning,

electroplating, coloring, painting and lacquering, assembling, packaging, and shipping. Amerock employs approximately 1600 people at its Rockford facility. (Pet. at 2; pet. brief at 1.)

Most work areas in which dust or metal-containing particles are generated are vented to the outside air. Amerock states that this venting is done to comply with the requirements of the federal Occupational Safety and Health Act, and to otherwise ensure employee health and safety. (Pet. brief at 1.) Amerock states that all of its air emission sources are in compliance with the Board's air pollution regulations. However, some of the material exhausted to the atmosphere (primarily metal-containing particulate) settles on the roof of the facility and is washed into the roof drainage system by rain and snow melt. The roof drainage system is routed to eight separate outfalls (numbered 000-007 in Amerock's NPDES permit) which discharge into North Kent Creek. (Pet. brief at 1-2.)

In May 1984 Amerock discovered that effluent discharges from the eight stormwater outfalls exceed, from time to time, effluent limitations for chromium (both hexavalent and total), copper, cyanide, zinc, and TSS. Amerock petitioned this Board for a variance for those parameters, and the Board granted variance on September 20, 1985, in PCB 84-62. As modified on November 21, 1985, the variance expired on September 1, 1987. It is that variance which Amerock seeks to extend.

Compliance Plan

As a condition of the previous variance, Amerock was required to investigate possible means of compliance with the effluent standards. (PCB 84-62, September 20, 1985, p. 5.) Amerock hired Lancy International, Inc. to study the problem and recommend control options. Lancy's report gave five alternative control options: collection and treatment, abatement at the source, sanitary sewer discharge, combination with cooling water discharge, and retention after collection for slow release into the cooling water discharge. (Pet., Ex. 1, App. B.) Amerock evaluated the options, and concluded that the two options which involve the mixture of the roof run-off with the cooling water discharges would violate the non-dilution principle of the Board's regulations. (35 Ill. Adm. Code 304.102.) After further evaluating the three remaining control options, Amerock felt that those options were economically unreasonable in light of Amerock's conclusion that the discharges have a minimal environmental impact. (Pet. at 3.) Therefore, Amerock prepared and filed a petition for site-specific rulemaking which would raise the applicable effluent limitations and change the limitations from concentration-based to mass-loading in pounds discharged per month. That site-specific petition, docketed as R87-33, is currently pending before the Board.

Amerock states that its proposed compliance plan is to pursue the site-specific rulemaking petition. Therefore, Amerock seeks a variance until the Board grants the site-specific rule. In the event that the Board denies the site-specific rulemaking request, Amerock asks that the variance continue for one year after final action on the site-specific, in order to implement one of the three control options. (Pet. at 3-4; pet. brief at 4-5.) If the site-specific rule request is denied, Amerock originally stated that it will undertake one or a combination of the three control options. Amerock states that these options range in cost from \$140,000 to \$1.4 million. (Response to more information order at 1.) At hearing, and in its post-hearing brief, Amerock stated that it anticipates implementing the sanitary sewer discharge option if the site-specific rule is denied, and estimated that one year would be necessary to construct the necessary retention pond. (Tr. at 5-6; pet. brief at 5-6.)

Environmental Impact

Amerock contends that the environmental impact of granting this variance will be minimal. Amerock states that it has analyzed upstream and downstream water quality in North Kent Creek since September 1984, and maintains that this data indicates that Amerock's stormwater discharges are not causing water quality violations. Amerock also contends that biological studies performed by Huff & Huff, Inc. indicate that Amerock's discharges have no effect whatsoever on downstream biota. Amerock concludes that the observed differences in variety and number of aquatic species are attributable to the channelization of the creek downstream.¹ (Pet. at 3; Ex. 1, App. D; Exs. 2 & 3.)

In its recommendation, the Agency questions Amerock's statements on environmental impact. As to Amerock's contention that its discharges do not cause water quality violations, the Agency contends that because of the limited number of samples, few conclusions can be drawn as to the impacts on water quality. The Agency concedes that Amerock's claim that there have been no adverse biological impacts is better documented. However, although the Agency admits that it has no data to support or refute that finding, the Agency believes it is surprising that a more diverse aquatic community is found downstream, since the upstream portion of the creek is not channelized. (Rec. at 9-10.) Additionally, Mrs. Betty Johnson, a resident of Rockford, presented testimony in which she expressed concerns about the impact of Amerock's discharges on the creek. (Tr. at 15-25.)

¹ A portion of North Kent Creek, beginning inside Amerock's property line from the east (downstream), was channelized by the U.S. Army Corps of Engineers in 1984 as part of a flood prevention project.

Consistency With Federal Law

The Agency states that the Board may grant the variance consistent with federal regulations. (Rec. at 11.)

Hardship

Amerock contends that it will suffer an arbitrary or unreasonable hardship if its request for variance extension is denied, especially in light of its position that Amerock's stormwater discharges cause no significant adverse impact on water quality. (Pet. at 4.) Amerock notes that during the course of the proceeding both the hearing officer and the Agency expressed the view that the record was deficient because Amerock had not provided sufficient economic information. In response, Amerock states that economic hardship is not an issue in this proceeding, because Amerock can in fact "afford" to implement its alternative control strategy. (Pet. brief at 6.) Instead, Amerock asks the Board to balance the "significant" cost of the retention pond, Amerock's diligence in attempting to achieve compliance with the regulations, and Amerock's two viable compliance plans, against the "virtually unmeasurable" impact of Amerock's stormwater discharges on North Kent Creek. Amerock maintains that the arbitrary or unreasonable hardship which would be imposed by denial of the variance would be exacerbated if the Board grants the site-specific rule, rendering control equipment unnecessary. (Pet. brief at 8.)

The Agency apparently questions whether denial of the requested variance would impose an arbitrary or unreasonable hardship. The Agency contends that without some discussion of the direct economic impacts of the compliance options and the affordability of those options, it is difficult to prove hardship. The Agency states that several industrial facilities in Illinois presently collect and treat roof and surface water runoff. (Rec. at 10.) The Agency characterizes Amerock's position as a belief that Amerock should be allowed to discharge the runoff without treatment as long as water quality standards are maintained. The Agency cites several Board decisions in site-specific rulemakings for the proposition that compliance with effluent standards may not be excused merely because there is compliance with the water quality standards. (Agency brief at 2-5.)

Conclusions

After a review of the record, the Board finds that immediate compliance with the effluent standards for hexavalent chromium, total chromium, copper, cyanide, zinc, and total suspended solids, found at 35 Ill. Adm. Code 304.124, would impose an arbitrary or unreasonable hardship. Although there is not a great deal of sampling information in the record of this proceeding, the Board believes that the information which does exist indicates that any impact of Amerock's current discharges on water quality and biota

is minimal. The Board finds that Amerock has demonstrated satisfactory progress towards compliance, although compliance has not yet been obtained. The minimal environmental impact, together with Amerock's satisfactory progress towards compliance and the fact that compliance expenditures may not be necessary if a site-specific rule is granted, lead the Board to conclude that immediate compliance with the applicable effluent standards would result in an arbitrary or unreasonable hardship. The Agency's arguments on the issue of hardship are applicable to the issues in a rulemaking, not the criteria for a variance. Simply because a variance request and a petition for site-specific rulemaking involve the same facility and the same facts does not mean that the criteria for decision are the same. Therefore, the Board will grant the variance.

However, the Board cannot grant the variance until the conclusion of the site-specific rulemaking, or, in the event the site-specific rule is denied, for one year after the final decision on the rulemaking, as Amerock requests. Section 36(b) of the Environmental Protection Act (Act) (Ill.Rev.Stat. 1989, ch. 111 1/2, par. 1036(b)) limits the length of a variance to five years. Therefore, the Board will grant the variance for a five-year period beginning on December 21, 1987. The December date is 120 days after the instant petition for variance was filed (August 24, 1987). Section 38 of the Act requires the Board to make decisions on variance petitions within 120 days. Although Amerock asks that this variance begin on September 1, 1987 (the date the original variance expired), it did not file its petition in sufficient time to allow for the Board's decisionmaking process before the expiration of the first variance. This variance begins on December 21, 1987, and expires on December 21, 1992. Additionally, the Board will impose conditions on the variance which are intended to assure that more complete information on the environmental impact of the discharges will be gathered.

Finally, the Board notes that the conclusions it reaches based upon the record of this variance proceeding do not necessarily reflect on the merits of Amerock's site-specific rulemaking proposal, currently pending before the Board in R87-33. The burdens of proof and the standards of review in a rulemaking (a quasi-legislative action) and a variance proceeding (a quasi-judicial action) are distinctly different. (Cf. Titles VII and IX of the Act; see also Willowbrook Development v. Pollution Control Board (2d Dist. 1981), 92 Ill.App.3d 1074, 416 N.E.2d 385.) The Board cannot lawfully prejudge the outcome of a pending regulatory proposal in considering a petition for variance. (City of Casey v. IEPA, 41 PCB 427, 428 (PCB 81-16, May 14, 1981).)

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

ORDER

Amerock Corporation (Amerock) is hereby granted a variance from the following effluent standards located at 35 Ill. Adm. Code 304.124: hexavalent chromium, total chromium, copper, cyanide, zinc, and total suspended solids. This variance applies to Amerock's facility located at 4000 Auburn Street, Rockford, Illinois, and is subject to the following conditions:

1. This variance begins on December 21, 1987, and expires on the earlier of: December 21, 1992, or the date of final action on any grant of Amerock's requested site-specific rule, currently pending before the Board in R87-33.
2. During the period of the variance, Amerock's discharges shall not exceed the following limits:

<u>Constituent</u>	<u>Limitation (lbs/month)</u>
chromium (hexavalent)	1.0
chromium (total)	4.0
copper	20.0
cyanide (total)	3.0
zinc	60.0
total suspended solids	300.0

3. In addition to the sampling required by Amerock's NPDES permit, Amerock shall inspect each discharge location during and shortly after periods of rainfall. Amerock shall obtain one sample from each discharge per month. The samples from Outfalls 001, 002, 004, and 005 shall be analyzed for the parameters required by the NPDES permit, and the samples from the three unpermitted outfalls shall be analyzed for the parameters listed in the NPDES permit for Outfalls 001 and 004. The results of these analyses shall be attached to Amerock's DMR's and submitted to the Agency.
4. Amerock shall take a grab sample the water of North Kent Creek, and a sediment sample, once each month upstream and downstream of each of its discharges, at a time when discharges are occurring. However, even if no discharges occur in a given month, Amerock shall take the monthly samples. These samples shall undergo a complete biological and chemical analysis. The results of the analyses shall be attached to Amerock's DMR's and submitted to the Agency.
5. Amerock shall continue to conduct a biological examination of the bottom of North Kent Creek, upstream

and downstream of each of its discharges, twice a year. The results of these examinations shall be submitted to the Agency's Compliance Assurance Section, Water Pollution Control Division, 2200 Churchill Road, P.O. Box 19276, Springfield, Illinois 62794-9276.

- 6. Within forty-five days of the date of this order, Amerock shall execute and forward to:

Lisa Moreno
Division of Legal Counsel
Illinois Environmental Protection Agency
P.O. Box 19276
2200 Churchill Road
Springfield, Illinois 62794-9276

a certificate of acceptance and agreement to be bound to all terms and conditions of the granted variance. The 45-day period shall be held in abeyance during any period that this matter is appealed. Failure to execute and forward the certificate within 45-days renders this variance void. The form of certificate is as follows.

Certificate of Acceptance

I (We), _____, hereby accept and agree to be bound by all terms and conditions of the Order of the Pollution Control Board in PCB 87-131, January 9, 1992.

Petitioner

Authorized Agent

Title

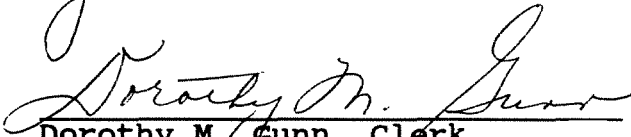
Date

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (Ill. Rev. Stat. 1989 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.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on, the 9th day of January, 1992, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board