

ILLINOIS POLLUTION CONTROL BOARD

April 19, 2001

IN THE MATTER OF:)
)
PROVISIONAL VARIANCES FROM) R01-31
WATER TEMPERATURE STANDARDS:) (Rulemaking - Water)
PROPOSED NEW 35 ILL. ADM. CODE)
301.109)

ORDER OF THE BOARD (by C.A. Manning):

On April 13, 2001, the Illinois Environmental Protection Agency (Agency) filed a proposal to amend the Board's water pollution regulations. The new rules would set forth the factors that the Agency must address when it recommends that the Board grant provisional variances from water temperature standards. The Agency explains that, based on its 20 years of experience in considering provisional variance requests, the proposed rules will help to both clarify what the Agency considers when it recommends the granting of a thermal provisional variance and ensure that when the relief is granted, the environment will be protected. Today, the Board accepts the Agency's proposal for hearing.

The Board would like to receive public comments on the Agency's proposal before proceeding to hearing. The Board anticipates holding hearings in June 2001. To facilitate public comment before hearing, the Board will: (1) further discuss the Agency's proposal in this order, without commenting on the proposal's merits; (2) set forth the Agency's proposed rule language in this order; and (3) place the Agency's Statement of Reasons (Statement) and proposed rule language on the Board's Web site (www.ipcb.state.il.us).

DISCUSSION

In this portion of the opinion, the Board describes: (1) the statutory framework for provisional variances; (2) the Agency's proposal; (3) the Agency's reasons for the proposal; and (4) how the Board will proceed with this rulemaking.

Statutory Framework

The General Assembly amended the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (1998)) in 1980. See Pub. Act 81-1442. The amendment created another mechanism by which the Board could grant short-term relief from regulatory requirements when complying with those requirements would impose an arbitrary or unreasonable hardship. The mechanism is called a provisional variance.

Section 35(b) of the Act provides that, to the extent consistent with the federal Clean Water Act, the Board:

[S]hall grant provisional variances, only upon notification from the Agency that compliance on a short term basis with any rule or regulation, requirement or order of the Board, or with any permit requirement would impose an arbitrary or unreasonable hardship. Such provisional variances shall be issued within 2 working days of notification from the Agency. 415 ILCS 5/35(b) (1998).

Section 36(c) of the Act further provides that any provisional variance that the Board grants:

[S]hall be for a period of time not to exceed 45 days. Upon receipt of a recommendation from the Agency to extend this time period, the Board shall grant up to an additional 45 days. The provisional variances granted to any one person shall not exceed a total of 90 days during any calendar year. 415 ILCS 5/36(c) (1998).

Finally, Section 37(b) of the Act states that:

Any person seeking a provisional variance . . . shall make a request to the Agency. The Agency shall promptly investigate and consider the merits of the request. The Agency may notify the Board of its recommendation. 415 ILCS 5/37(b) (1998).

Under this statutory framework, persons may submit applications for provisional variances to the Agency. After reviewing an application, if the Agency determines that a provisional variance should be granted, the Agency files with the Board a recommendation that the Board grant a provisional variance. In its recommendation, the Agency may suggest that the Board impose certain conditions on granting the provisional variance. Only the Board can grant provisional variances.

Agency's Proposal

The Agency's proposal addresses only provisional variances from "any water temperature standard set forth in 35 Ill. Adm. Code 302.211 or 303 or any other rule, permit, or Board order." The Agency states that its proposal "sets forth how the [Agency] will exercise its provisional variance authority consistent with the Act and the [Agency's] regulations when evaluating requests for provisional variances from water temperature standards." Statement at 2.

The Agency seeks to add one new section to the Board's water pollution regulations at 35 Ill. Adm. Code 301. The proposed new section, Section 301.109, sets forth what the Agency must include in a recommendation that the Board grant a provisional variance from a water temperature standard.

Section 301.109 has two subsections. Subsection (a) imposes four informational requirements on the Agency. First, the Agency recommendation must address each of the items required to be set forth in a provisional variance application under the Agency's rules (35 Ill. Adm. Code 180.202(b)). Section 180.202(b) of the Agency's rules requires applicants before the Agency to, for example: (1) provide information on the nature of the discharge; (2) assess any adverse environmental impacts that the provisional variance may produce; (3) explain why compliance would impose an arbitrary or unreasonable hardship; and (4) discuss alternate methods to comply and the factors influencing the choice to apply for a provisional variance. Second, the Agency recommendation must identify the extent to which, if at all, the arbitrary or unreasonable hardship results from "weather and operational conditions." Third, the Agency recommendation must explain why any such weather and operational conditions "were not reasonably foreseeable based on historical weather patterns and predictable operational conditions." Finally, the Agency recommendation must list any provisional variances issued to the person within the preceding five years with respect to any water temperature standard.

Subsection (b) of Section 301.109 addresses the conditions that the Agency recommends the Board place on granting the provisional variance. First, under subsection (b)(1), the Agency recommendation must provide the Agency's rationale for any condition it recommends. Second, under subsection (b)(2), the Agency recommendation must either include each of five conditions specified in the rules or explain why the Agency does not include the condition.

The five conditions set forth in subsection (b)(2) would require: (1) monitoring intake, discharge, and receiving water temperatures and inspecting for mortalities to aquatic life; (2) documenting environmental conditions and reporting them to the Agency and the Department of Natural Resources; (3) implementing biological activities to characterize how aquatic life responds to the thermal conditions resulting from the provisional variance; (4) immediately notifying the Agency and the Department of Natural Resources of any unusual conditions, including mortalities to aquatic life, and immediately taking action to remedy the problem; and (5) developing and implementing a response and recovery plan to address any adverse environmental impact due to thermal conditions resulting from the provisional variance, including loss and damage to aquatic life. The Agency states that specifying these five conditions in the rules will provide "guidance for the regulated community regarding the minimum appropriate conditions to be included in thermal provisional variances to ensure that no environmental harm will result from the provisional variance from the thermal limits." Statement at 2.

Agency's Reasons for the Proposal

The Agency states that the proposal is needed to codify the Agency's "knowledge and experience that comes with 20 years of considering requests for provisional variances." Statement at 5. The Agency explains the history of provisional variances from water temperature standards to highlight the importance of the proposed rules:

The combination of a severe drought and extremely hot weather, low river flows, elevated ambient river temperatures and decreased heat dissipation have created several emergency situations where power companies have been unable to meet their NPDES permit conditions for the thermal component of their discharges and also meet their obligations to supply reliable power to their customers. Since 1988, the [Agency] has received 23 formal requests for provisional variances from water temperature standards . . . [and] recommended the granting of provisional variances (subject to certain conditions) for 20 of these requests. ***

The most recent emergency conditions which resulted in provisional variance requests from thermal standards occurred in the summer of 1999, when four provisional variances and one extension were granted for relief from thermal requirements. *** Commonwealth Edison Company, Dresden Station, used one 45-day provisional variance plus an extension for an additional 45 days and [another provisional variance] was used by CIPS, Newton Station. *** [T]he Dresden Station had thermal provisional variance needs in 1988, 1992, 1994, 1996, 1997 and 1998. This history was evidence of an apparent need for additional cooling capacity at Dresden Station. *** In addition to taking advantage of the provisional variance, the Newton Station suffered major operational problems because of the prolonged hot period and apparently exceeded maximum discharge levels causing an extensive fish kill in the cooling lake. This incident further supported the apparent need for additional cooling capacity at Newton Station.

After the emergency conditions of the summer of 1999 had subsided, the [Agency] notified the power companies (Commonwealth Edison and Ameren-CIPS) of the need to develop more proactive plans to avoid the reoccurrence of violations and the need for variances. Both of these companies have subsequently installed additional cooling systems to reduce the possibility of permit violations. *** It is expected that these cooling systems will sustain full compliance under extreme weather conditions; however, it is possible that unusual combinations of heat and drought may still create a situation where relief from current permit conditions may be needed in order to prevent a serious failure of the power grid. Therefore, the conditions described above have been proposed in Section 301.109(b)(2) in an effort to further clarify and provide up-front documentation to any future petitioner on the requirements for a provisional variance from any water temperature standard. Statement at 5-7.

Accordingly, the Agency believes that the proposed rules will help to: (1) clarify the types of information that the Agency is to consider when recommending that the Board grant a provisional variance from a water temperature standard; and (2) ensure that when the relief is granted, it is subject to appropriate conditions to protect the environment. Statement at 2, 7.

How the Board Will Proceed

The Board accepts the Agency's proposal for hearing. Pursuant to Section 28 of the Act (415 ILCS 5/28 (1998)), the Board will hold at least two public hearings during this rulemaking. The Board would like to receive public comments on the Agency's proposal before hearing. The Board expects to hold hearings in June 2001. The Board directs the hearing officer assigned to this matter to schedule public hearings and public comment periods. The Board notes that hearing transcripts, hearing officer orders, and the Board's opinions and orders in this rulemaking, including this order, will be available on the Board's Web site. The Board also will place the Agency's Statement and its proposed rule language on the Board's Web site.

AGENCY'S PROPOSED RULE LANGUAGE

To facilitate public comment before hearing, the Board sets forth below the Agency's proposed amendments to 35 Ill. Adm. Code 301. The proposed additions are underlined.

TITLE 35: ENVIRONMENTAL PROTECTION SUBTITLE C: WATER POLLUTION CHAPTER I: POLLUTION CONTROL BOARD

PART 301 INTRODUCTION

Section	
301.101	Authority
301.102	Policy
301.103	Repeals
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301.105	References to Other Sections
301.106	Incorporations by Reference
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301.108	Adjusted Standards
<u>301.109</u>	<u>Provisional Variances from Water Temperature Standards</u>
301.200	Definitions
301.205	Act
301.210	Administrator
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301.220	Aquatic Life
301.221	Area of Concern
301.225	Artificial Cooling Lake
301.230	Basin
301.231	Bioaccumulative Chemicals of Concern
301.235	Board
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301.245	Calumet River System
301.250	Chicago River System
301.255	Combined Sewer
301.260	Combined Sewer Service Area
301.265	Construction
301.270	Dilution Ratio
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301.280	Hearing Board
301.285	Industrial Wastes
301.290	Institute
301.295	Interstate Waters
301.300	Intrastate Waters
301.301	Lake Michigan Lakewide Management Plan
301.305	Land Runoff
301.310	Marine Toilet
301.311	Method Detection Level
301.312	Minimum Level
301.315	Modification
301.320	New Source
301.325	NPDES
301.330	Other Wastes
301.331	Outlier
301.335	Person
301.340	Pollutant
301.341	Pollutant Minimization Program
301.345	Population Equivalent
301.346	Preliminary Effluent Limitation
301.350	Pretreatment Works
301.355	Primary Contact
301.356	Projected Effluent Quality
301.360	Public and Food Processing Water Supply
301.365	Publicly Owned Treatment Works
301.370	Publicly Regulated Treatment Works
301.371	Quantification Level
301.372	Reasonable Potential Analysis
301.373	Same Body of Water
301.375	Sanitary Sewer
301.380	Secondary Contact
301.385	Sewage
301.390	Sewer
301.395	Sludge
301.400	Standard of Performance
301.405	STORET
301.410	Storm Sewer
301.411	Total Maximum Daily Load

301.415	Treatment Works
301.420	Underground Waters
301.421	Wasteload Allocation
301.425	Wastewater
301.430	Wastewater Source
301.435	Watercraft
301.440	Waters
301.441	Water Quality Based Effluent Limitation
301.442	Wet Weather Point Source
301.443	Whole Effluent Toxicity

APPENDIX References to Previous Rules

AUTHORITY: Implementing Section 13 and authorized by Section 27 of the Environmental Protection Act [415 ILCS 5/13 and 27].

SOURCE: Filed with the Secretary of State January 1, 1978; amended at 3 Ill. Reg. 25, p. 190, effective June 21, 1979; amended at 5 Ill. Reg. 6384, effective May 28, 1981; codified at 6 Ill. Reg. 7818; amended in R88-1 at 13 Ill. Reg. 5984, effective April 18, 1989; amended in R88-21(A) at 14 Ill. Reg. 2879, effective February 13, 1990; amended in R99-8 at 23 Ill. Reg. 11277, effective August 26, 1999, amended in R01-__ at __ Ill. Reg. _____, effective _____.

Note: Capitalization denotes statutory language.

Section 301.109 Provisional Variances from Water Temperature Standards

- a) An Agency recommendation to the Board under 415 ILCS 5/35(b) regarding a request for a provisional variance from any water temperature standard set forth in 35 Ill. Adm. Code 302.211 or 303 or any other rule, permit, or Board order must specifically address each of the contents required of any application for a provisional variance under 35 Ill. Adm. Code 180.202(b). The Agency recommendation must:
- 1) Identify the extent to which the arbitrary or unreasonable hardship results from weather and operational conditions;
 - 2) Explain why the conditions in subsection (a)(1) of this Section were not reasonably foreseeable based on historical weather patterns and predictable operational conditions; and
 - 3) List any provisional variances that the Board issued to the petitioner within the preceding five calendar years with respect to any water temperature standard.

- b) The Agency in its recommendation described in subsection (a) of this Section must:
- 1) Specifically address the Agency's rationale for recommending conditions on the provisional variance; and
 - 2) Impose or explain why it does not impose the following conditions upon the provisional variance:
 - A) Requiring the petitioner to continuously monitor intake, discharge and receiving water temperatures and to visually inspect intake and discharge areas at least three times daily to assess any mortalities to aquatic life;
 - B) Requiring the petitioner to document environmental conditions during the term of the provisional variance, including the activities described in subsection (b)(2)(A) of this Section, and to submit the documentation to the Agency and the Department of Natural Resources within 30 days after the provisional variance expires;
 - C) Requiring the petitioner to immediately implement biological activities to characterize how aquatic life respond to the thermal conditions resulting from the provisional variance; to document these activities; and to submit the documentation to the Agency and the Department of Natural Resources within 30 days after the provisional variance expires;
 - D) Requiring the petitioner to immediately notify the Agency and the Department of Natural Resources of any unusual conditions, including mortalities to aquatic life; to immediately take action to remedy the problem; to investigate and document the cause and seriousness of the unusual conditions while providing updates to the Agency and the Department of Natural Resources as changes occur until normal conditions return; to notify the Agency and the Department of Natural Resources when normal conditions return; and to submit the documentation to the Agency and the Department of Natural Resources within 30 days after normal conditions return; and

- E) Requiring the petitioner to develop and implement a response and recovery plan to address any adverse environmental impact due to thermal conditions resulting from the provisional variance, including loss and damage to aquatic life.

(Source: Added at __ Ill. Reg. _____, effective _____.)

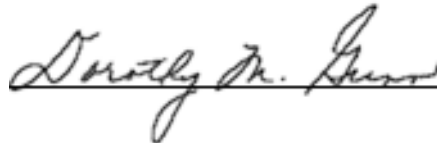
CONCLUSION

The Agency has proposed that the Board amend 35 Ill. Adm. Code 301 to address Agency recommendations on provisional variances from water temperature standards. The Board accepts the Agency's proposal for hearing. The Board makes no comment on the merits of the Agency's proposal at this time.

Before hearings, which the Board expects to hold in June 2001, the Board would like to receive public comments on the Agency's proposal. The hearing officer assigned to this rulemaking will soon issue an order scheduling these matters.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 19th day of April 2001 by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board