

ILLINOIS POLLUTION CONTROL BOARD
October 24, 1991

CITIZENS UTILITIES COMPANY)	
OF ILLINOIS,)	
)	
Petitioner,)	
)	
v.)	
)	
ILLINOIS ENVIRONMENTAL)	PCB 85-95
PROTECTION AGENCY,)	(Variance)
)	
Respondent,)	
)	
and)	
)	
VILLAGE OF BOLINGBROOK,)	
)	
Intervenor.)	

MR. DANIEL J. KUCERA OF CHAPMAN AND CUTLER APPEARED FOR PETITIONER; AND

MR. WAYNE WIEMERSLAGE, STAFF ATTORNEY, APPEARED FOR RESPONDENT.

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

This matter is before the Board on remand from the Third District Appellate Court ("Appellate Court"). The Appellate Court issued its opinion in this matter on May 13, 1991. Citizens Utilities Company of Illinois v. Illinois Pollution Control Board, No. 3-90-0585 (3rd Dist. 1991). That opinion vacated the Board's May 24, 1990 Opinion and Order in PCB 85-95, which granted an extension of a variance that was previously granted in PCB 78-313. The Appellate Court remanded the case to the Board with instructions to grant Citizens Utilities Company of Illinois ("Citizens") a variance consistent with the views expressed in its opinion.

Although the underlying facts are not disputed, the procedural history of this case is convoluted and the factual background of the case is closely intertwined with related issues in R81-19. The Board, therefore, will present a procedural history before it addresses the issues on remand.

Citizens owns and operates a wastewater treatment plant, known as west suburban wastewater treatment plant No. 1 ("WSB Plant No. 1"), located in Bolingbrook, Will County, Illinois. The plant discharges into Lily Cache Creek, which is a tributary to the DuPage River. On March 5, 1981, in PCB 78-313, the Board granted Citizens a variance from the general use water quality standard for ammonia nitrogen as well as the effluent standards

for five-day biochemical oxygen demand ("BOD₅"), total suspended solids ("TSS"), and ammonia nitrogen. The Board granted the variance until July 2, 1985, so that the company could seek certain site-specific rule changes in those standards. 41 PCB 11. After the variance was granted, environmental studies were conducted to determine whether less stringent standards would be permissible.

Citizens filed a petition for site-specific regulatory relief on June 12, 1981. The petition was docketed as R81-19. The results of the above-mentioned studies were presented to the Board at a May 5, 1983 hearing held on Citizens' petition. At the conclusion of the hearing, however, the Board dismissed the proceeding for lack of information to support the less restrictive standards. 52 PCB 169. Citizens appealed the Board's determination to the Appellate Court. Citizens Utilities Company of Illinois v. Illinois Pollution Control Board, No. 3-83-0498. After docketing that appeal, Citizens discovered that the Illinois Environmental Protection Agency ("Agency") had commenced a joint study of the DuPage River Basin with the United States Geological Survey for the purpose of developing site-specific standards for discharges into waterways.

Believing that the study would result in less stringent standards, Citizens filed a petition for variance with the Board on August 31, 1983, seeking an extension of the variance granted in PCB 78-313. This variance petition was docketed as PCB 83-124. On April 19, 1984, the Board denied Citizens' request for the variance extension. 53 PCB 61. Citizens appealed the ruling to the Appellate Court. Citizens Utilities Company of Illinois v. Illinois Pollution Control Board, No. 3-84-0412. The Appellate Court consolidated the R81-19 and the PCB 83-124 appeals and, on June 17, 1985, issued its decision on both matters. Citizens Utilities Company of Illinois v. Illinois Pollution Control Board, 134 Ill. App. 3d 111, 479 N.E.2d 1213 (3rd Dist. 1985). The Appellate Court upheld the Board's refusal to extend the variance but remanded the site-specific proceeding to the Board for further proceedings because it concluded that the Board failed to analyze the economic impact of the proposed site-specific rule.¹

¹As previously stated, the Appellate Court remanded the site-specific regulatory proceeding (R81-19) on June 17, 1985. On July 3, 1990, the Board issued an Opinion and Order in the matter, denying Citizen's request for site-specific relief. Citizens appealed the Board's decision and on September 9, 1991, the Appellate Court vacated the Board's July 3, 1990 decision and remanded the matter to the Board for further proceedings. The Board has filed a petition for leave to appeal the Appellate Court's decision with the Illinois Supreme Court.

On July 1, 1985, Citizens filed another petition for variance with the Board. This variance petition was docketed as PCB 85-95. Citizens, in this petition, sought the following relief:

1. an extension of the variance granted in PCB 78-313 that would take effect on July 1, 1985, and remain in effect until the Board granted site-specific rule relief in R81-19 on remand or, if the Board denied the relief, for a period of three years after final adjudication of R81-19,
2. an extension of the compliance schedule provided for in the PCB 78-313 variance, in the event the Board denied site-specific relief on remand, so that the deadlines for permit application, commencement of work, and compliance with applicable effluent limitations would be six months, one year, and three years after final adjudication of R81-19, respectively,
3. a modification of the variance in PCB 78-313 as to the ammonia-nitrogen water quality standard contained therein so that, instead of the general use water quality standard for ammonia nitrogen contained in 35 Ill. Adm. Code 304.105, Lily Cache Creek, for a distance of eight miles downstream of the point of discharge of WSB Plant No. 1, meets a water quality standard for ammonia nitrogen of no greater than 15 milligrams per liter ("mg/L"),
4. a variance, for the period of time specified in number 1 above, from the general use water quality standard for dissolved oxygen so that instead of the general use standard for dissolved oxygen contained in 35 Ill. Adm. Code 302.206, Lily Cache Creek, for a distance of eight miles downstream of the point of discharge of WSB Plant No. 1, meets a water quality standard for dissolved oxygen of no less than 4 mg/L,
5. an exemption from the ammonia nitrogen and dissolved oxygen water quality standards when creek flow is less than 4.9 million liters per day or 2 cubic feet per second ("cfs"), and
6. a requirement that the Agency modify its NPDES permit consistent with the above requests.

The Agency filed its variance recommendation on August 8, 1985, recommending a denial of variance. Citizens filed an amended petition on August 13, 1985, requesting the Board to set the matter for hearing and alleging that it and its Bolingbrook customers would suffer an arbitrary and unreasonable hardship if the requested variance extension was not granted. On April 10,

1986, the Board denied the relief requested. 69 PCB 34.

Citizens appealed the Board's ruling to the Appellate Court and the Appellate Court issued its opinion on February 5, 1987. Citizens Utilities Company of Illinois v. Illinois Pollution Control Board, 152 Ill App. 3d 122, 504 N.E.2d 224 (3rd Dist. 1987). That opinion vacated the Board's April 10, 1986 Opinion and Order in PCB 85-95 and remanded the case to the Board with instructions to grant Citizens Utilities Company of Illinois ("Citizens") a variance consistent with the views expressed in its opinion. Specifically, the Appellate Court stated:

Consequently, an extension of the variance involved is necessitated until such time as either the current, more stringent standards are deemed applicable or until the results of of the present study become final and applicable.

152 Ill. App. 3d at 122,
504 N.E.2d at 224

The Board recognized that it had to grant a variance extension. The Appellate Court, however, did not provide the Board with any guidance with regard to the variance extension other than that mentioned above. As a result, the Board decided to strictly construe the Appellate Court's mandate. Accordingly, on May 24, 1990, the Board issued an Opinion and Order extending the variance granted in PCB 78-313.

Citizens appealed the Board's May 24, 1990 ruling. On May 13, 1991, the Appellate Court vacated the Board's May 24, 1990 Order and directed the Board to abide by the dictates of its February 5, 1987 Opinion. In light of the Appellate Court's May 13, 1991 Opinion, it appears that the Court intended that the Board grant Citizens the relief that they requested in PCB 85-95 rather than an extension of the PCB 78-313 variance. Accordingly, the Board hereby grants Citizens' request for variance with two caveats.

With regard to the issue of the termination date, the Board notes that Citizens requested that the variance extension remain in effect until three years after final adjudication of R81-19, in the event that site-specific relief is denied. The Appellate Court, however, ordered the Board to grant the variance extension until "... such time as either the current, more stringent standards are deemed applicable or until the results of the present study become final and applicable." In its May 24, 1990 Opinion and Order, the Board interpreted the above language to mean that it was to grant the variance until either: a) the Board denied site-specific relief in R81-19, or b) if the Board grants such relief, the date when the site-specific rule becomes final and applicable (the date when the rule is filed with the Office

of Secretary of State). Based upon the Appellate Court's most recent mandate, it appears that we should have granted variance until either a) until the current, more stringent standards are deemed applicable (i.e. when Citizens or the Board have exhausted their appeal rights, in the event that the Board denies site-specific relief in R81-19), or b) if the Board grants such relief, the date when the site-specific rule becomes final and applicable (the date when the rule is filed with the Office of Secretary of State).

The Board notes that if it grants the requested relief until the time specified by the Appellate Court, it would be granting relief that would extend beyond the Environmental Protection Act's ("Act") five year time limit for variances. (See Section 36(b) of the Act.) Because the Board is a creature of statute, it can act only in accordance with the Act. Therefore, the Board can grant the variance extension only for a maximum period of five years.

We realize that this initial variance extension terminated on July 2, 1990, and thus, before the time specified by the Appellate Court (because the Board did not issue its ruling in R81-19 until July 3, 1990). In order to comply with the Appellate Court's mandate, however, the Board, concurrently with its order in this matter and upon its own motion, will extend the initial variance. The Board will specify that this extension became effective on July 2, 1990, and will terminate on either one of the dates specified by the Appellate Court or on July 2, 1995, whichever occurs first. In the event that this matter is not resolved as of July 2, 1995, the Board will grant another variance at such time.

Second, the Board cannot grant Citizens' request to extend the deadlines for permit application, commencement of work, and compliance to six months, one year, and three years after final adjudication of R81-19, in the event that it denies site-specific relief, because it would risk going beyond the Appellate Court's February 5, 1987 mandate to grant the requested relief until "such time as either the current, more stringent standards are deemed applicable or until the results of the present study become final and applicable".

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

ORDER

Petitioner Citizens Utilities Company of Illinois is granted a variance from 35 Ill. Adm. Code 302.206, 304.120(c), 304.301, and 304.105, only as it applies to the ammonia nitrogen water quality standard of 35 Ill. Adm. Code 302.212, subject to the following conditions:

1. The initial phase of this variance became effective on July 2, 1985 and expired on July 2, 1990.
2. The Board hereby grants another variance extension. The variance extension will be subject to the same condition set forth in this order except that:
 - a. This variance will become effective on July 3, 1990.
 - b. This variance will expire on one of the following dates:
 - 1) on July 2, 1995,
 - 2) pursuant to the Appellate Court's February 5, 1987 Opinion, the date on which "the current, more stringent standards are deemed applicable", or
 - 3) if the Board grants site-specific relief in R81-19 on remand, the date that the site-specific rule becomes final and applicable (the date that the rule is filed with the Office of Secretary of State),

whichever occurs first.

3. This variance applies to effluent discharges from Petitioner's West Suburban Wastewater Treatment Plant No. 1 (WSB Plant No. 1) located at the intersection of Glengary Drive and Briarcliff Road in the Village of Bolingbrook.

4. Petitioner shall meet the following interim effluent limitations for five day biochemical oxygen demand (BOD₅), total suspended solids (TSS), and ammonia nitrogen measured as N.

	<u>Monthly Average</u>	<u>Flow-weighted Daily Composite (Maximum)</u>
BOD ₅	20 mg/l	40 mg/l
TSS	25 mg/l	50 mg/l
Ammonia Nitrogen	15 mg/l	30 mg/l

5. Petitioner shall assure that Lily Cache Creek, for a distance of eight miles downstream of the point of discharge of WSB Plant No. 1, meets a water quality standard for ammonia nitrogen of no greater than 15 milligrams per liter ("mg/L").

6. Petitioner shall assure that Lily Cache Creek, for

a distance of eight miles downstream of the point of discharge of WSB Plant No. 1, shall meet a water quality standard for dissolved oxygen of no less than 4 mg/L.

7. Petitioner shall be exempt from the ammonia nitrogen and dissolved oxygen water quality standards when creek flow is less than 4.9 million liters per day or 2 cubic feet per second ("cfs").

8. Petitioner shall operate WSB Plant No. 1 in such a manner as to minimize the total quantities of BOD₅, TSS, and ammonia nitrogen discharged, consistent with applicable NPDES permit and variance effluent limitations.

9. Petitioner shall on a continuous basis monitor the flow that is diverted from WSB Plant No. 1 to the polishing pond and the flow diverted to WSB Plant No. 2. Petitioner shall keep in operating condition flow meters necessary to perform this monitoring. Records of these flows shall be maintained for the period of this variance. Flow results shall be submitted to the Agency on a monthly basis at the same time as and together with the discharge monitoring reports required by its NPDES permit.

10. The Agency, pursuant to 35 Ill Adm. Code 309.184, shall modify NPDES permit IL0032727 consistent with the conditions set forth in this Order.

11. Within forty-five days of the date of this Order, Petitioner shall execute and forward to the Illinois Environmental Protection Agency, Compliance Assurance Section, Division of Water Pollution Control, 2200 Churchill Road, Springfield, Illinois 62794-9276, a Certificate of Acceptance and Agreement to be bound to all terms and conditions of this variance. This forty-five day period shall be held in abeyance for any period this matter is being appealed. The form of the Certificate shall be as follows:

CERTIFICATION

I, (We), _____, having read and fully understanding the Order in PCB 85-95 on remand, hereby accept that Order and agree to be bound by all of its terms and conditions.

SIGNED

TITLE

DATE

IT IS SO ORDERED.

Board Member B. Forcade concurred.

Board Member R. Flemal abstained.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 24th day of October, 1991, by a vote of 6-0.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board