

ILLINOIS POLLUTION CONTROL BOARD  
April 12, 1990

SHELL OIL COMPANY, )  
 )  
 Petitioner, )  
 )  
 v. ) PCB 90-27  
 ) (Variance)  
 ILLINOIS ENVIRONMENTAL )  
 PROTECTION AGENCY, )  
 )  
 Respondent. )

ORDER OF THE BOARD (by R. C. Flemal):

This matter comes before the Board upon a motion to dismiss Petitioner's petition for variance filed March 26, 1990 by the Illinois Environmental Protection Agency ("Agency"). On April 3, 1990, Shell Oil Company ("Shell") filed its response requesting the Board deny the Agency's motion.

On March 5, 1990, Shell filed a petition for variance for relief from 35 Ill. Adm. Code 302.102 (mixing zones and ZIDS), 302.208 (Numeric Standards for Chemical Constituents), 302.210 (the narrative standard), and Subpart F (Procedures for Determining Water Quality Criteria), as each rule was amended in the Board's Toxics Control regulatory proceeding, R88-21(A), January 25, 1990, effective February 13, 1990. Shell also requests relief from 35 Ill. Adm. Code 302.211 (temperature) and 302.212 (ammonia nitrogen). These two sections were not amended by R88-21(A).

The Agency in its motion asserts that Shell's petition is deficient because it lacks the information for a variance petition required by 35 Ill. Adm. Code 104.121. The Agency points out certain information which it believes is lacking in the petition, including data deficiencies pertaining to Section 302.208, and 302.102. The Agency then asserts that a variance may not be granted from a rule for which a petitioner is not presently in violation. The Agency points to the requirements of Subpart F, as well as Sections 302.210, 302.211 and 302.212, where the Agency asserts Shell has not demonstrated a present violation. Lastly, the Agency states that no hardship for compliance can be demonstrated since compliance for Shell's discharge is already compelled by a recent court order (Fed. Dist. Ct. No. 87-5249) and by its NPDES permit.

Shell responds that the Agency's motion be denied as its petition meets the requirements contained in the Board's procedural rules. Shell points out that the Agency raises a variety of technical issues which could be raised in the Agency's

recommendation, which would then be the subject of findings of fact by the Board.

As to the issue of the showing of a present violation, Shell submits that the Agency is incorrect that Shell must prove a violation, stating that rather, a petitioner need only show that it cannot demonstrate compliance; i.e., to show a "present failure" to meet a regulation, pursuant to Section 104.121(e). Shell points to reports which it believes show probability of violations and further submits (presumably regarding those regulations which were recently promulgated through R88-21(A)) that there is no requirement that a petitioner prove long term violation of a rule which has never been applicable to it.

The Board notes that Shell also clarifies that it is not seeking variance from any iron water quality standard in this petition.

The Board observes that most of the contentions contained in the Agency's motion are technical discussions which are of the type normally contained in a recommendation. Therefore much of the discussion contained in the motion and response goes to the merits of the petition. Regarding the issue of the court order and NPDES permit, as Shell correctly points out, the Agency does not state how the court order or permit impacts upon the requested relief. This further shows that issues raised by the Agency pertain to the merits of the petition. The Board notes that several other petitions for variance, as well as petitions for adjusted standards, have been filed seeking relief from the R88-21A water toxics rules. (PCB 90-28, PCB 90-29, PCB 90-30, AS 90-2, AS 90-3, AS 90-4, AS 90-5.) The Agency has requested dismissal due to asserted informational deficiencies in each case, save for AS 90-5. Given the nature of the water toxics amendments and the fact that there is no previously established benchmark for judging the sufficiency of a petition in this arena, the Board is not prepared at this time to dismiss this petition as deficient. The parties have raised issues which the Board can best address after they have been further aired at hearing. However, since Petitioner bears the burden of proof, it is obvious that to the extent additional information is necessary for such proof, such information should be submitted during the course of the proceeding, and in advance of hearing.

The Board accordingly denies the Agency's motion to dismiss.

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 124 day of April, 1990, by a vote of 7-1.

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