

ILLINOIS POLLUTION CONTROL BOARD
April 19, 1984

CITIZENS UTILITIES COMPANY)
OF ILLINOIS,)
)
Petitioner,)
) PCB 83-124
v.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY)
)
Respondent.)

MR. DANIEL KUCERA OF CHAPMAN AND CUTLER APPEARED ON BEHALF OF PETITIONER;

MR. PHILIP WILLMAN (ASSISTANT ATTORNEY GENERAL) AND MR. WAYNE WIEMERSLAGE APPEARED ON BEHALF OF RESPONDENT.

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

This matter comes before the Board upon an August 31, 1983 petition for variance filed by Citizens Utilities Company of Illinois (Citizens) requesting either a 5 year extension of the variance granted in PCB 78-313 or requesting that the variance, if granted, expire 3 years after adoption of revised water quality standards applicable to Lily Cache Creek (Creek). Citizens requests relief from 5-day biochemical oxygen demand (BOD₅) and total suspended solids (TSS), 35 Ill. Adm. Code 304.120(c) as well as the ammonia nitrogen water quality standard, Section 302.212. In addition, Citizens requests an exemption for dissolved oxygen, Sections 302.206 and 304.105, and for ammonia nitrogen, Sections 304.105 and 302.212 when Creek flow is less than 2 cu. ft./sec. Furthermore, Citizens asks that the Board order the Illinois Environmental Protection Agency (Agency) to include the Creek in the United States Geological Survey study of the DuPage River basin. Two objections to the variance were filed, one by the Will County Health Department and the other by a concerned citizen. The Agency submitted its recommendation to deny the variance on October 13, 1983. A hearing was held in Bolingbrook, Illinois on January 23, 1984.

HISTORY

On November 5, 1975, the Agency granted Citizens an NPDES permit for their wastewater treatment plant No. 1. This petition for variance is rooted in PCB 78-123 where a 6 month variance was granted to Citizens as later modified by PCB 78-265,

31 PCB 111, July 20, 1978; 31 PCB 711, October 19, 1978. The present variance, which will expire on July 2, 1985, was granted to Citizens in PCB 78-313. 31 PCB 111, March 5, 1981.

Citizens sought site-specific relief in R81-19 but the proceeding was dismissed for lack of information to support less restrictive standards. 52 PCB 169, May 5, 1983. The Board granted a motion for rehearing by Citizens and affirmed the Board's dismissal. 53 PCB 61, July 14, 1983. The regulatory proceeding is being appealed. Citizens Utilities Company of Illinois v. Illinois Pollution Control Board, Gen. No. 3-83-0498, filed July 27, 1983, Illinois Appellate Court, Third District. The appeal is in abeyance until this variance proceeding is decided (Pet. Brief at 4).

FACTS

Citizens is a subsidiary of Citizens Utilities Company. In Illinois, Citizens has 43,000 customers (R3 at 40).¹ Citizens provides sanitary sewer service to approximately 21,000 customers and public utility water service to approximately 22,000 customers in the Chicago metropolitan area. A substantial number of customers are located in Bolingbrook, Illinois, Will County. There are 8,000 connections in this area called the West Suburban service area (Pet. at 2). This petition concerns one of two wastewater treatment plants owned by Citizens, Plant No. 1 (WSB 1). This plant is an activated sludge plant, operated in the contact stabilization mode, with a design dry weather flow of 1.28 million gallons per day (Pet. at 2). It is approximately 20 years old. The WSB No. 1 includes bar screens, comminutor two primary rectangular clarifiers with mechanisms for sludge removal and skimming, contact aeration with spiral roll aeration, reaeration, five rectangular secondary clarifiers, seven day polishing lagoon, chlorine contact tank, two aerobic sludge digesters, eight sludge drying beds and a blower building (PCB 78-313, Pet. at 2). The final effluent is discharged to an intermittent stream called Lily Cache Creek.

Without a variance from the applicable water quality and effluent standards, Citizens will have to upgrade its 20 year old plant. The Board regulations were adopted in 1972 and the compliance date for most of the regulations was December 31, 1973. PCB 78-313 at 41 PCB 19, Concurring Opinion, March 5, 1981.

ENVIRONMENTAL IMPACT

The environmental impact of changing the standards for the Creek was extensively discussed in the Board opinion on R81-19. There has been no new evidence presented that was

¹Because of the incorporation of prior proceedings the Board will follow the Agency record citation method. R1 denotes the record in PCB 78-313; R2 is the record in R81-19, and R3 is the record herein, PCB 83-124.

not before the Board in prior proceedings on this issue and there are no changed circumstances. The Board, therefore, will not repeat the entire environmental discussions in this opinion.

The Creek has an historical 7-day-10-year low flow which causes it to be classified as intermittent. (Exh. C to petition in R81-19, Envirosphere Study at 1). Due to Citizen's discharge, the Creek has a continuous flow downstream of the Citizen's outfall (R2 at 491). WSB 1 is 15 miles upstream from the mouth of the Creek. Id. Three miles downstream from WSB 1 are 2 tributaries which join the Creek. Id. at 2. Mink Creek joins the Creek 2 miles above the DuPage River confluence, which is 12.5 miles from WSB 1. Id. at 2, 3. Additional Creek input comes from drainage tiles, culverts, and man-made ditches. Id. at 2.

Citizens in prior proceedings has relied on the Envirosphere Study cited above to argue that land use and intermittent flow are limiting factors for the diversity of stream organisms and the stream productivity. R81-19, 52 PCB 169 at 172. The same study alleged that the Creek was extremely degraded and its value as a natural resource was extremely limited (R81-19, Exh. C). Citizens also stated that there will be no degradation to the stream if the variance is granted because the quality of the effluent will be the same as under the current variance. (PCB 83-124, Pet. at 13-14).

Agency experts testified that there was diverse aquatic habitat but that the effluent was a limiting factor (R1 at 548-78). The Creek could be used as a spawning and feeding ground by fish if there was improved water quality (R1 at 578). Another witness testified that 3 park district sites border the Creek (R1 at 511).

The purpose of the water pollution control laws in Illinois is to "restore, maintain and enhance the purity of the waters of this State..." Ill. Rev. Stat. 1983, ch. 111 $\frac{1}{2}$, par. 1011. Citizens argues that the existing water quality in the Creek is adequate given the circumstances presented in its petition. Citizens' argument that it should be allowed to maintain the status quo of the stream ignores the purposes of the Act and of Board regulations.

Citizens states that the USGS is studying the DuPage River Basin and that the Agency will propose revised water quality standards for some streams in the Basin based on this study (R3 at 29). Citizens wants to put off plant modification until the stream study is completed and new standards, if any, are proposed (R 3 at 24). Citizens believes that new standards may be filed late in 1984 or early spring 1985 (R3 at 31-32).

Citizens' prayer for relief is based on speculation that the Creek will be reclassified in the future resulting in less stringent standards. Citizens quotes the following dictum from the majority Order:

That there is an ongoing study does not serve to establish that there is sufficient evidence to support the proposal. Rather it serves to establish that at some future time there may be. As such, it may be relevant in the context of a variance proceeding, but it is not relevant here [in the regulatory proceeding].

(PCB 83-124, Pet. Brief at 10, citing R81-19, 53 PCB 61 at 62, July 14, 1983 Order). Citizens is relying on pure dictum to support its position. If the Board accepted Citizens' argument with respect to postponement of compliance with regulations adopted in 1972 pending regulatory revisions, the State's environmental control enforcement machinery would be halted. Every water proceeding before the Board could be halted by arguing that water quality standards could be revised in the future based on river basin studies. Although revisions to standards do occasionally occur, the Board cannot grant variances based on a petitioner's hope that a particular set of standards will be changed in the future. It is particularly speculative to assume a future lessening of the standards for this particular Creek. An Agency expert pointed out that the standards should not be downgraded (R1 at 392). Citizens' argument must necessarily fail.

Citizens seeks an exemption from dissolved oxygen and ammonia nitrogen limitations at a Creek flow of less than 2 cu. ft./sec. The EnviroSphere study did address both parameters, but failed to measure ammonia nitrogen levels. (R81-19, Exh. C to petition, p. 10-16). Nowhere in the record is there sufficient evidence upon which to base the requested relief. Without a sufficient showing by Citizens, this request is denied.

HARDSHIP

It is undisputed that the technology exists for Citizens to meet the applicable water quality and effluent standards. The issue that has been argued in the past and at present is whether compliance is economically feasible. It is undisputed that Citizens has the money to comply. (R2 at 18-19). The equipment cost has been estimated by Citizens as \$3.6 million with an annual operation and maintenance cost of \$1.34 million. (Chardavoyne Study, PCB 78-313, updated R81-19, Exh. 4; R3 at 88-9, 97). According to Citizens this would cost the WSB 1 area customers \$411 additional per year (R2 at 146; R 3 at 97). While Citizens argues that the cost should only be spread over WSB 1 customers, the Board noted in R81-19 that the costs for construction at WSB 2 were passed on to both WSB 1 and WSB 2 customers. 52 PCB 169 at 175. A witness for Citizens testified that if the costs were passed on to the entire Bolingbrook service area, the per capita increase would be \$167 (R2 at

170-1). Testimony in R81-19 indicated that this cost would be as low as \$106 additional per year. 52 PCB 169, 176. The cost could also be "apportioned among the total number of customers receiving wastewater treatment from Citizens" (R2 at 172). Again, these issues were addressed by the Board in R81-19. In addition, the Agency argues that the \$3.6 million includes costs which are actually for the 20 year old plant's maintenance rather than additional pollution control equipment to meet the legal standards (R2 920-3).

In PCB 78-313, the Board included many factors in its decision to grant a variance. One factor was that Citizens would file for site-specific relief (41 PCB 11 at 14) and that it would

prosecute its regulatory proceeding on a timely and expeditious basis. Citizens Utilities will do such design, engineering, procurement, contracting and construction as may be necessary to bring the plant into compliance with whatever effluent limitations are effective and applicable on July 2, 1985. Citizens Utilities will commence work no later than July 1, 1983. Id. at 15

The Agency states that Citizens has violated the Board Order in PCB 78-313 (Agency Brief at 7 citing 41 PCB 11 at 17). The Board agrees that to date, Citizens has failed to submit a permit application by January 2, 1983 for upgrading WSB 1. Citizens has not commenced design, engineering, procurement, contract letting and construction by July 1, 1983. They have not executed and forwarded a performance bond acceptable to the Agency (R at 80). Citizens tendered a draft performance bond, but it was not acceptable to the Agency. The Board agrees that Citizens has indeed violated the Board order in PCB 78-313.

Again, in PCB 78-313: "The parties are in agreement that the variance should be conditioned upon diligent pursuit of the regulatory change." Id. Furthermore the Board stated

"[A]lthough the grant of this variance contemplates a site specific regulation, the Board does not in any way intend to infer that it has agreed to adopt any regulation which Citizens Utilities may propose. This will be treated as any other site specific regulation. In the event the Board rejects the regulatory proposal, Citizens Utilities will be expected to comply with the generally applicable standards by the 1985 date.

The Board notes that compliance with the regulations involved in this proceeding was required many years ago. If Citizens Utilities had commenced upgrading before these deadlines had passed, the Board would be more receptive to claims of hardship. The hardship

now alleged is self-imposed to the extent that it is occasioned by delays, including the dilatory prosecution of this case. However, since the Citizens Utilities has agreed to a compliance plan with definite dates, the Board will grant the variance. The Board finds that it would impose an arbitrary and unreasonable hardship to deny Citizens Utilities a variance under these circumstances." Id. at 16

At the time the variance was granted, it appeared a solution was imminent. Citizens subsequently filed a site-specific regulatory proceeding. The regulatory proceeding was dismissed for lack of information to support less restrictive standards. 52 PCB 169. Citizens knew that they were to be in compliance by July 2, 1985. The language in PCB 78-313 was that if the site-specific action failed, they would have to meet more stringent standards. The site-specific action did fail and now Citizens wants an extension of an extension of a variance by relying on the dictum in R81-19.

A variance is only temporary relief, not permanent. Olin Corp. v. Pollution Control Board, 54 Ill. App. 3d 480, 486 (1977); Celotex Corp. v. Pollution Control Board, 65 Ill. App. 3d 776, 778, 382 N.E. 2d 864, (1978). The permanent relief Citizens could not obtain in the site-specific proceeding they are attempting to obtain through a series of extended variances. In the concurring opinion to PCB 78-313 Chairman Dumelle stated, "Compliance in this case will come by July 2, 1985, almost 12 years late." 41 PCB 11, 19. Now Citizens wants an additional 5 years. At some point Citizens must come into compliance as have other Illinois communities which chose to meet standards rather than pursue every possible means of delay.

Lacking a sufficient amount of evidence to support their variance petition, Citizens requests that the Board order the Agency to have the USGS include the Creek in its DuPage River basin study. This request is not supported by any legal authority (Pet. Brief at 11). The Board notes that the duties of the Agency and Board are adequately set out in Ill. Rev. Stat. 1983, ch. 111½, pars. 1004, 1005. These sections define their respective duties and are not supportive of Citizens' request. The Board further questions its jurisdiction over the USGS and the authority of either the Board or the Agency to order the USGS to perform any study. This request, therefore, is denied.

In summary, there has been no new testimony and no changed circumstances. The deadline is near and Citizens is basing its prayer for relief on a study which may or may not propose new water quality standards for certain streams. Their reasoning is purely speculative. Citizens has violated a prior Board Order. It was Citizens' burden to show an arbitrary or unreasonable hardship in complying with the applicable standards. The evidence shows that compliance is both technically and economically feasible. The Board finds that Citizens has not shown arbitrary

or unreasonable hardship. The variance is denied.

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

ORDER

Citizens Utilities Company of Illinois' petition for variance from 35 Ill. Adm. Code 302.206, 302.212, 304.105 and 304.120(c) is denied.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 19th day of April, 1984 by a vote of 6-0.



Christan L. Moffett, Clerk
Illinois Pollution Control Board