

ILLINOIS POLLUTION CONTROL BOARD
April 8, 1976

CATERPILLAR TRACTOR COMPANY,)
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 Petitioner,)
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)
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 v.) PCB 75-499
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 ENVIRONMENTAL PROTECTION AGENCY,)
)
 Respondent.)

OPINION OF THE BOARD (by Mr. Dumelle):

This Opinion is in support of an order entered March 25, 1976 which dismissed the petition for variance.

This matter comes before the Board on a petition for variance filed December 23, 1975 by Caterpillar Tractor Company (Caterpillar), seeking relief from Rules 404, 408(a), 602(c)(2) and 602(d)(3) of Chapter 3: Water Pollution, of the Board's Rules and Regulations. A Recommendation from the Environmental Protection Agency (Agency) was filed on February 19, 1976.

Petitioner manufactures heavy equipment and employs 18,500 people at its East Peoria, Illinois facility, Petitioner's facility has a combined storm and wastewater treatment system capable of retaining all dry weather flows and additional flows up to three times the average dry weather flow. Caterpillar's combined storm and wastewater sewer system has 14 overflow discharge points. During heavy rainstorms the combined storm and industrial wastewater bypasses the existing interceptor sewer and waste treatment plant, and is discharged through the 14 outfalls into four waterways, all of which are tributary to the Illinois River.

Caterpillar's petition, in summary, asks the Board to find the arbitrary and unreasonable hardship required for a grant of variance on the basis of the following five allegations; quotations from the petition are underlined, followed by the Board's comments:

First, Caterpillar has been diligently working on a method to meet the requirements of Rule 602.

The implementation date for Rule 602 was December 31, 1975; this petition was filed December 23, 1975, one week before compliance was due and proposed a delay of three years in compliance. Rule 602 was adopted March 7, 1972 and became effective April 16, 1972. The petition indicates that during the period from the effective date of the regulations until some unspecified date after the third calendar quarter of 1974, a period of longer than 2 years, some \$1,000 of engineering time and \$23,100 had been expended to equip one building with a trial roof runoff and flume system. Approximately one year after the trial system was found wanting, an engineering consultant was engaged on November 4, 1975, less than 60 days prior to the compliance date, to produce a preliminary design for submission to the Agency by July 1, 1976, six months after the compliance date had passed.

While we have no doubt that the Caterpillar personnel involved worked diligently on their assignment, the facts as set forth in the petition could support a logical conclusion that compliance with Rule 602 by December 31, 1975 was far from a high priority concern on the top management agenda.

An examination of Petitioner's schedule now proposed for bringing the facility into compliance indicates that the Board's implementation date as originally promulgated was capable of achievement by Petitioner had he initiated, on the effective date of Rule 602, the compliance program he now proposes.

Second, The requirement for a variance until December 31, 1978 is a reasonable term for design, installation and testing of the holding lagoons.

As discussed just above, were the required implementation date December 31, 1978, the schedule may indeed be reasonable, given a November 4, 1975 employment date for a design consultant. However, there is absolutely no preliminary design information in the petition concerning the proposed project which would allow either the Board or the Agency to verify that the time schedule proposed represents a reasonable time within which the constructions inherent in such a project should be completed.

We are supplied a small scale (1" = 1000') plot plan with four lagoons approximately located thereon with an admonition in the text of the petition that the exact number and location of the lagoons may change as the design phase continues. Similarly we are told that the lagoons will be designed to

handle at least 10 times the average dry weather flow but nowhere is the amount of dry weather flow given. No cost estimate of any nature is furnished and the schedule proposed is conditioned to include possible further delays necessitated by design and procurement of materials, labor disputes, acts of God or occurrences beyond the control of Caterpillar. Additionally, no cost or schedule comparisons of any alternative methods of compliance are set forth in the petition.

The petition is devoid of any proof that the schedule proposed is reasonable; nor are sufficient facts presented from which the Board might draw such an inference.

Third, During the period for which the variance is sought, there will not be any significant environmental harm due to the fact that bypasses can be expected to occur quite infrequently, i.e., at an estimated rate of only 12 times per year.

The petition contains no estimate of the quantity and nature of the overflows except to state that oils and suspended solids are the only pollutants expected to be discharged. Agency grab-samples of effluent from Petitioner's treatment works establish the presence of chromium, phenol, iron, zinc and cyanide and lead to the inescapable conclusion that they are present in the combined sewer system in addition to the oil and grease and suspended solids and all are subject to bypassing. No estimates of the quantity and nature of the discharge from the overflow points were given to us because Petitioner "feels that any such estimate would be of highly questionable validity." While we can appreciate the factors mitigating against precision in such an estimate, the following information, readily available, could be evaluated to assist in a determination of the possible environmental impact of the discharges:

- (a) Measured dry weather flow to the existing treatment works;
- (b) Identification of contaminants present in treatment works influent;
- (c) Average concentration of contaminants present in treatment works influent;
- (d) Measured dry weather flow in the collection system compared to design average dry weather flow;
- (e) Stream flow data, biologic status and water quality sampling of those water courses receiving the combined sewer overflows from Petitioner's plant site.

Since none of the above information appears in the petition, the Board is simply unable to make any conclusion regarding the environmental impact of Petitioner's discharges on the receiving stream and can make no estimate of the benefit to the public by Petitioner's immediate compliance with Rule 602.

Fourth, Without a variance, Caterpillar may be subject to an enforcement case which would jeopardize its operation and affect the livelihood of its 18,500 employees at the East Peoria facility.

Fifth, Caterpillar contributes to the tax base of the community and the State of Illinois, and contributes substantially to the gross income of the community by employing 18,500 persons at the East Peoria facility.

It is clear from the petition that the cost of compliance with the regulation is not in issue here and that the hardship complained of is solely of the need for a delay during which compliance can be achieved. The two preceding allegations would be useful in ascertaining the social and economic value of the pollution source under Section 33(c) of the Act. The Board is required by Section 33(c) of the Act to consider, in an enforcement action, the social and economic value of a pollution source, as well as other factors, in determining the reasonableness of a discharge which is found to have violated the Act. However, consideration of the particular criteria established by Sections 33(b) and (c) of the Act, including the social and economic value of the pollution source, are applicable to enforcement cases and then by way of mitigation; other forms of action before the Board such as variance, permit denial appeal and regulatory proceedings are controlled by different provisions of the statute, although some of the same factors may be involved.

The scope of a variance order is limited by the provisions of Sections 35 and 36 of the Act and the order of the Board disposing of a variance petition can only:

- (a) Dismiss the petition; or,
- (b) Grant the requested variance; or,
- (c) Grant a variance subject to conditions imposed by the Board, however, such a conditioned variance would not be binding until accepted by the Petitioner (Citizens Utilities Co. v. PCB, 289 NE 2d 642, 646-648 (2 Dist. 1972)).

Simply stated, Petitioner is not faced with a shutdown order in this proceeding. As the Board has previously held, denial of a variance is not a shutdown order (Norfolk and Western Ry. v. EPA, 1 PCB 281, 284 (1971)). An order denying a variance, however, is a refusal by the Board to provide the Petitioner with the defense of a variance to a subsequent enforcement action.

In Norfolk, supra, the Board stated, at 282:

We recognize the importance of railway operations to the general welfare and economy of the region... . But Section 37 of the Environmental Protection Act makes plain that Petitioner must prove that the pollution caused by its continued violation is not so great as to justify the hardship that immediate compliance would produce.

In the instant petition the Petitioner has completely failed to meet its burden of proof. We have not been provided any cost or schedule comparison of alternative methods of compliance; to the contrary we have been provided no estimate of the cost of compliance by any method. We have absolutely nothing before us from which we can adequately assess the pollution resulting from the overflows from the combined sewer system as they now exist. Without sufficient facts regarding both, it would not be possible to determine if there is an arbitrary and unreasonable hardship imposed upon the Petitioner by compliance with the regulation even if we were able to satisfy ourselves from Petitioner's proof that the hardship was not self imposed, which we cannot.

The Board's denial of a variance is not an order shutting down all or any part of the Petitioner's operations; in fact, we would be pleased to consider a new petition for variance which furnishes the information which does not appear in the record now before us in this matter.

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

Mr. Young Concur.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion was adopted on the 8th day of April, 1976 by a vote of 5-0.


Christan L. Moffett, Clerk
Illinois Pollution Control Board