

ILLINOIS POLLUTION CONTROL BOARD
April 8, 1976

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

CONCURRING OPINION (by Mr. Young):

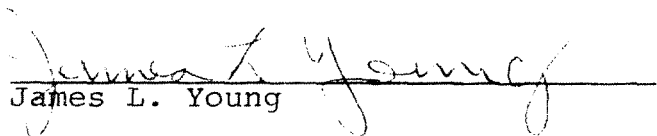
I concur in the denial of this variance petition for the reasons set forth in the Opinion.

Additionally, Section 35 of the Act provides that the Board may grant variances after a finding, based on adequate proof, that compliance with any rule or regulation of the Board would impose an arbitrary or unreasonable hardship to the extent consistent with applicable provisions of the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500), and regulations pursuant thereto [Emphasis added]. P.L. 92-500 Section 301(b)(1)(A) requires that not later than July 1, 1977, effluent limitations shall be achieved for point sources which shall require the application of the best practicable control technology currently available as defined by the Administrator of the USEPA pursuant to Section 304(b) of P.L. 92-500. The petition before us is totally void of any proof that grant of the requested variance would be consistent with the provisions of P.L. 92-500 and the applicable federal regulations and I could not grant it on that basis alone.

In my opinion, it is no longer sufficient for a variance petitioner to address his proof only to the various elements set forth in Chapter 3 of the Board's Rules and Regulations, the Procedural Rules, prior Board decisions and the Environmental Protection Act as in the past. It seems to me that the Board is now constrained, by legislative amendment to Section 35 of the Act (P.A. 78-862), to determine that a grant of a variance would be consistent with the provisions of P.L. 92-500 and the applicable federal regulations and that the petitioner has the burden of establishing such consistency. [c.f. Currie, Enforcement Under Illinois Pollution Law, 70 Northwestern U. L. Rev. 389, 411 (1975)].

I would also note that all Illinois dischargers are required by Section 402 of P.L. 92-500 to obtain a National Pollutant Discharge Elimination System Permit (NPDES Permit) for any point source discharge of pollutants to the waters of the United States which includes all Illinois waters. Each NPDES permit is conditioned upon such discharge meeting all applicable requirements of Sections 301, 302, 306, 307, 308, and 403 of P.L. 92-500 and such other conditions as the Administrator of the USEPA has prescribed to carry out the provisions of the Federal Water Pollution Control Act, as amended, and the federal regulations adopted pursuant thereto. A grant of variance by the Board from a state rule or regulation does not amount to an amendment to a petitioner's federal NPDES discharge permit and, in my opinion, a variance would not provide a shield from any federal prosecution for an NPDES permit violation which might be initiated by any person under Section 505 of the Federal Water Pollution Control Act or by action of the federal enforcement agencies.

While I do not believe that appropriate amendment to an NPDES permit by federal authorities is a condition precedent to the grant of a variance from the Water Pollution Rules and Regulations, I believe petitioner must provide proof that the proposed variance is consistent with applicable federal law and regulations before the Board could grant the petition in addition to petitioner providing proof sufficient to establish the arbitrary and unreasonable burden of compliance required by Section 35 of the Act. If either is missing the variance cannot be granted in my opinion.


James L. Young

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Concurring Opinion was submitted on the 8th day of April, 1976.


Christan L. Moffett, Clerk
Illinois Pollution Control Board