

ILLINOIS POLLUTION CONTROL BOARD
June 5, 1997

CENTRAL ILLINOIS PUBLIC SERVICE)
COMPANY (COFFEEN POWER)
STATION),)
)
Petitioner,) PCB 97-131
) (Variance - Water, NPDES)
)
v.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

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

This matter comes before the Board on the petition for variance filed by Central Illinois Public Service Company (CIPS or petitioner) on January 30, 1997 and amended on February 24, 1997. CIPS seeks a five-year variance from the thermal standards applicable to Coffeen Lake which were adopted on March 19, 1982 in PCB 77-158. Coffeen Lake is an artificial cooling lake located at CIPS' Coffeen Station in Montgomery County, Illinois. CIPS waived hearing on the petition and no hearing was held.

On April 21, 1997 the Illinois Environmental Protection Agency (Agency) filed its variance recommendation accompanied by a motion to file *instanter*, which is granted. The Agency recommends that the variance be granted, subject to certain conditions, despite its reservation about the lack of economic information provided by CIPS in the petition.

The Board's responsibility in this matter arises from the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (1994)). The Board is charged therein with the responsibility to "grant individual variances beyond the limitations prescribed in this Act, whenever it is found upon presentation of adequate proof, that compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship." (415 ILCS 5/35(a) (1994).) The Agency is required to appear in hearings on variance petitions. (415 ILCS 5/4(f) (1994).) The Agency is also charged, among other things, with the responsibility of investigating each variance petition and making a recommendation to the Board as to the disposition of the petition. (415 ILCS 5/37(a) (1994).)

For the following reasons, the Board finds that CIPS has presented adequate proof that immediate compliance with the thermal standards for Coffeen Lake would result in the imposition of an arbitrary or unreasonable hardship. Accordingly, the variance is granted, subject to conditions set forth in the attached order.

BACKGROUND

CIPS is an investor-owned electric and gas public utility, providing service to central and southern Illinois. (Am. Pet. at 5.) Electrical service is supplied to 315,000 customers in 557 communities in a 21,000 square mile area. (Am. Pet. at 5.) CIPS employs approximately 2350 people. (Am. Pet. at 5.)

Coffeen Lake is an artificial lake constructed between 1961 and 1963 by CIPS for the purpose of providing cooling water for Generating Units 1 and 2 (350 and 600 megawatts respectively). (Am. Pet. at 1.) The current thermal standards applicable to Coffeen Lake are as follows:

The thermal discharge to Coffeen Lake from Central Illinois Public Service's Coffeen Power Station shall not result in a temperature, measured at the outside edge of the mixing zone in Coffeen Lake, which: 1) exceeds 105 degrees Fahrenheit as a monthly average from June through September and 112 degree Fahrenheit as a maximum for more than three percent of the hours during that same period; 2) exceeds 89 degrees Fahrenheit as a monthly average from October through May and 94 degrees Fahrenheit as a maximum for more than two percent of the hours during the same period.

CIPS is requesting that the current thermal standards applicable for the months of June through September be applicable one month earlier in May and be extended a month later to include October, i.e. that the relaxed summer standard be applicable from May through October. (Am. Pet. at 5.)

Historically, CIPS has been able to meet the applicable thermal standards during May and October because either one or the other of the units at Coffeen were scheduled for extended annual maintenance outages during either May or October. (Am. Pet. at 2.) In the mid-to-late 80's, CIPS converted from a twelve to an eighteen month maintenance schedule to reduce costs. (Am. Pet. at 2.) Consequently, the maintenance outages no longer occur in May and October. (Am. Pet. at 3.) CIPS asserts that compliance with the more restrictive winter standards in the months of May and October is problematic due to the likelihood of warm early season temperatures and high carryover temperatures from a long, hot summer. (Am. Pet. at 2.)

REGULATORY FRAMEWORK

In determining whether any variance is to be granted, the Act requires the Board to determine whether a petitioner has presented adequate proof that immediate compliance with the Board regulations at issue would impose an arbitrary or unreasonable hardship. (415 ILCS 5/35(a) (1994).) Furthermore, the burden is upon the petitioner to show that its claimed hardship outweighs the public interest in attaining compliance with regulations designed to protect the public. (Willowbrook Motel v. IPCB, 135 Ill. App. 3d 343, 481 N.E.2d 1032, (1st

Dist. 1977).) Only with such a showing can the claimed hardship rise to the level of arbitrary or unreasonable hardship.

A further feature of a variance is that it is, by its nature, a temporary reprieve from compliance with the Board's regulations and compliance is to be sought regardless of the hardship which the task of eventual compliance presents an individual polluter. (Monsanto Co. v. IPCB, 67 Ill.2d 276, 367 N.E.2d 684, (1977).) Accordingly, except in certain special circumstances, a variance petitioner is required, as a condition to grant of variance, to commit to a plan which is reasonably calculated to achieve compliance within the term of the variance.

COMPLIANCE PLAN

No additional thermal controls are planned at the Coffeen Station. (Am. Pet. at 6.) Assuming that the requested variance is granted, CIPS intends to petition the Board to have the interim variance limits established as permanent site-specific standards at the end of the variance period. (Am. Pet. at 6.) No later than three years after the variance becomes effective, CIPS will request that the thermal standards of the variance be adopted in a site-specific rule. (Am. Pet. at 3.) CIPS maintains that the variance is necessary prior to filing of a petition for a site-specific rule to allow collection of data so that the Board need not rely on speculative presentations on the impact on the fisheries in reviewing the site-specific rule. (Am. Pet. at 3.) CIPS contends that the field data collected during the variance period will form the basis for a more compelling demonstration. (Am. Pet. at 4.) In addition, CIPS observes that seeking a site-specific rule without the variance would mean that it would be at least two years before the lake could be operated at the higher temperature. (Am. Pet. at 4.)

In recent years, CIPS has employed additional operational constraints to remain in compliance with current standards. (Am. Pet. at 8.) These constraints include making the Coffeen units the last to be called upon to meet increased demands and the first to be backed off when the demand drops, curtailing interchange sales, and cycling off the units on weekends and longer periods. (Am. Pet. at 8.)

CIPS evaluated the thermal performance of Coffeen Lake and various alternatives that would allow for higher generation levels. (Am. Pet. at 8.) Four cooling tower options were reviewed after the evaluation. (Am. Pet. at 8.) However, due to high initial capital costs and ongoing operating and maintenance expenses, all of the alternatives were rejected. (Am. Pet. at 8.) CIPS believes that these costs were not practical considering the infrequent and unpredictable nature of when they would be needed. (Am. Pet. at 9.)

HARDSHIP

CIPS claims that there is nothing in the record from PCB 77-158 that supports the applicability of the more restrictive winter standards in May and October. (Am. Pet. at 9.) CIPS maintains that no other CIPS power station is required to meet the most restrictive standards for May and October, and that at Newton Lake (another CIPS artificial cooling lake) there is a single, uniform monthly limit that applies year-round. (Am. Pet. at 9.)

CIPS maintains that the operational constraints employed to assure compliance result in substantial costs. (Am. Pet. at 9.) CIPS believes that the limitations restrict CIPS' ability to market the full capacity of the Coffeen Station. (Am. Pet. at 10.) As a result, CIPS asserts that it cannot fully participate in a market that would benefit both ratepayers and shareholders. (Am. Pet. at 10.) CIPS argues that this is an unreasonable and unnecessary deprivation of utility assets. (Am. Pet. at 10.)

The Agency argues that it cannot agree or disagree with CIPS' contention that the costs incurred by taking Unit 2 out of service are substantial, since documentation of these costs are not included in the petition. (Am. Pet. at 3.) The Agency also observes that CIPS failed to further explain its statement that continuing to meet the applicable thermal standards imposes an arbitrary and unreasonable hardship on CIPS and its ratepayers. (Am. Pet. at 3.) The Agency also points out that while CIPS references the year-round standard applicable to Newton Lake to support its variance request, CIPS has filed a variance for the thermal standards applicable to Newton Lake (PCB 97-159).

ENVIRONMENTAL IMPACT

CIPS does not anticipate that any significant environmental impact will result from the variance. (Am. Pet. at 9.) However, during the period of the variance, lake temperature data for May and October will be closely monitored and compared to historical data. (Am. Pet. at 9.) In addition, the annual fish surveys will be reviewed by the Department of Natural Resources (DNR) to verify that there is no significant impact. (Am. Pet. at 9.) CIPS agrees to revert back to the current limits if at any time the data shows, or the Agency or DNR believe, that the thermal standards of the variance are causing a significant adverse impact. (Am. Pet. at 9.)

The Agency does not believe that any adverse environmental impact will result from the variance. (Ag. Rec. at 4.) The Agency submits that DNR will continue to monitor the status of the fishery and provide biological information to CIPS. (Ag. Rec. at 4.)

CONSISTENCY WITH FEDERAL LAW

CIPS maintains that the Board has the authority to grant the requested relief consistent with the Clean Water Act (33 U.S.C. 1251 *et seq.* (1972)), United States Environmental Protection Agency (USEPA) effluent guidelines and standards, and all other Federal regulations or USEPA approved management plans. (Am. Pet. at 10.) Under Section 316(a) of the Clean Water Act, Illinois is authorized to set thermal limits to protect shellfish, fish and wildlife. (Am. Pet. at 11.)

The Agency concurs that there are no applicable federal laws or regulations that preclude the granting of this variance. (Ag. Rec. at 4.)

DISCUSSION

The party requesting the variance has the burden of establishing that the hardship resulting from denial of a variance outweighs any injury to the public or the environment from a grant of the variance. (Caterpillar Tractor Co. v. IPCB, 48 Ill.App.3d 655, 363 N.E. 2d 419 (3rd Dist. 1977).) The petitioner must go further and show that the hardship it will encounter from the denial of the variance will outweigh any injury to the public or environment from the grant of the variance. (City of Geneva v. IEPA (March 22, 1990), PCB 89-107.)

In Marathon Oil Co. v. IEPA, 242 Ill. App. 3d 200, 610 N.E. 2d 789 (5th Dist. 1993) the appellate court found that Section 35(a) of the Act does not require that petitioner demonstrate that it is out of compliance with the rule or regulation prior to seeking a variance. It found that "evidence presented was 'adequate proof' that continued compliance with the current water-quality standards will impose an arbitrary or unreasonable hardship." In so finding the appellate court stated that when the petitioner presents "unrefuted" evidence that it will violate the Board's rule in conducting or increasing its normal business, a hardship is established requiring the Board to determine if such hardship outweighs any injury to the environment. (Marathon Oil, 242 Ill. App. 3d 200, 610 N.E. 2d 789 at 794.) When deciding whether to grant or deny a variance request, the Board is required to balance the hardship of continued compliance on the business against the adverse impact the variance will have on the environment.

The Board agrees with the Agency that the record could have contained more economic information, but nonetheless finds that CIPS has presented adequate proof of the existence of a hardship. Such economic information would have quantified the alleged hardship that CIPS asserts it would encounter were it required to continue to comply with the thermal standard for May and October. However, the Board will not require CIPS to supplement the record with additional economic information at this point in the proceeding. The Board finds the record sufficient to support CIPS' assertion that continued compliance with the thermal standards for May and October prohibits CIPS from fully utilizing the station's capacity and limits CIPS from increasing its business resulting in a hardship.

Having determined that CIPS has presented adequate proof of a hardship, the Board must weigh that hardship against the environmental impact of the variance. The record demonstrates that the grant of the variance should not result in any adverse environmental impact. The variance only affects the thermal standards for the months of May and October. The thermal standards for the remaining ten months are not affected. Throughout the period of the variance, CIPS along with the Agency and the Department of Natural Resources will monitor the fishery for any impact from the variance. If any impact is noticed, CIPS will be required as a condition of the variance to revert to the thermal standards as established in PCB 77-185.

Based upon the record, the Board finds that immediate compliance with the current thermal standards for the months of May and October at the Coffeen Station is an arbitrary and unreasonable hardship. Further, the Board finds that CIPS' hardship outweighs any

anticipated impact on the environment from the variance. Therefore, the Board grants the requested variance with conditions.

Finally, the Board notes that the conclusions it reaches based upon the record of this variance proceeding do not prejudice merits of any petition for site-specific rulemaking that CIPS may file in the future. The burdens of proof and the standards of review in a rulemaking (a quasi-legislative action) and a variance proceeding (a quasi-judicial action) are distinctly different. (#Cf. Titles VII and IX of the Act; see also Willowbrook Development v. Pollution Control Board, 92 Ill. App. 3d 1074, 416 N.E.2d 385, (2d Dist. 1981).) The Board cannot lawfully prejudice the outcome of a regulatory proposal in considering a petition for variance. (City of Casey v. IEPA (May 14, 1981), PCB 81-16, 41 PCB 427, 428.)

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

ORDER

Central Illinois Public Services Company is hereby granted a variance from the thermal standards applicable to Coffeen Lake as established on March 19, 1982 in PCB 77-158 subject to the following conditions:

- (A) The variance commences on June 5, 1997 and terminates on June 5, 2002.
- (B) During the period of the variance, the thermal discharges to Coffeen Lake from the Coffeen Power Station may not result in a temperature, measured at the outside edge of the mixing zone in Coffeen Lake, that:
 1. Exceeds 105 degrees Fahrenheit as a monthly average from May through October, and a 112 degrees Fahrenheit as a maximum for more than 3% of the hours during that same period.
 2. Exceeds 89 degrees Fahrenheit as a monthly average from November through April, and a 94 degrees Fahrenheit as a maximum for more than 2% of the hours during that same period.
- (C) Within sixty (60) days after the variance is granted, CIPS shall submit a monitoring plan to the Illinois Environmental Protection Agency that demonstrates how CIPS, in conjunction with the Illinois Department of Natural Resources will continue to study the thermal effects on the fishery in Coffeen Lake. If the Illinois Department of Natural Resources cannot conduct the study, then CIPS shall provide a contingency plan demonstrating how the study of the fishery will continue.
- (D) CIPS shall petition the Board for permanent site-specific relief within three (3) years of the granting of this variance. If a petition for site-specific relief is not

filed within three (3) years or if site-specific relief is denied, CIPS shall revert back to complying with the thermal limits set out in PCB 77-158.

- (E) If the Illinois Environmental Protection Agency or Illinois Department of Natural Resources determine that the thermal standards of the variance are causing an adverse impact to Coffeen Lake or adverse conditions such as a fishkill result, CIPS shall adhere to the standards set out in PCB 77-158. .
- (F) During the variance period, CIPS shall continue to operate its facility so as to produce the best effluent practicable.

CERTIFICATION

If CIPS chooses to accept this variance subject to the above order, within forty-five days of the date of this order, CIPS shall execute and forward to:

Margaret P. Howard
 Illinois Environmental Protection Agency
 Division of Legal Counsel
 2200 Churchill Road, P.O. Box 19276
 Springfield, Illinois 62794-9276

a Certificate of Acceptance and agreement to be bound to all terms and conditions of the granted variance. The 45-day period shall be held in abeyance during any period that this matter is appealed. Failure to execute and forward the certificate within 45-days renders this variance void and of no force and effect as a shield against enforcement of rules from which this variance is granted. The form of the certificate is as follows.

I (We), _____, hereby accept and agree to be bound by all terms and conditions of the order of the Illinois Pollution Control Board in PCB 97-131, June 5, 1997.

Petitioner

Authorized Agent

Title

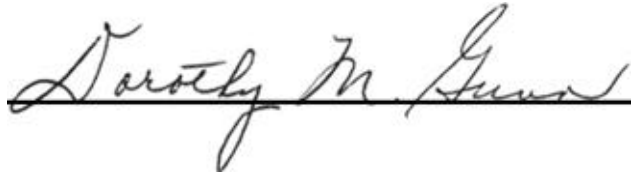
Date

IT IS SO ORDERED.

Board Member K.M. Hennessey abstained.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246 "Motions for Reconsideration.")

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 5th day of June, 1997, by a vote of 6-0.

A handwritten signature in cursive script that reads "Dorothy M. Gunn". The signature is written in black ink and is positioned above a solid horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board