BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITGO PETROLEUM CORPORATION and PDV MIDWEST REFINING, L.L.C.,	)	ORIGINAL
Petitioners,	)	
v.	)	PCB 12-094 (Variance- Water)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

N O T I C E

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago IL 60601

Jeffrey C. Fort
Dentons
233 South Wacker Drive
Suite 7800
Chicago, Illinois 60606-6404

John Therriault, Assistant Clerk
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the **MOTION TO VACATE BOARD ORDER** of the Illinois Environmental Protection Agency, copies of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: Sara G. Terranova
Sara G. Terranova
Assistant Counsel
Division of Legal Counsel

Dated: June 21, 2013
1021 N. Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
217/782-5544

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITGO PETROLEUM CORPORATION and PDV MIDWEST REFINING, L.L.C.,	)	
Petitioners,	)	
v.	)	PCB 12-094 (Variance- Water)
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MOTION TO VACATE BOARD ORDER

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA" or "Agency"), by one of its attorneys, Sara Terranova, and, pursuant to 35 Ill. Adm. Code 101.500 and 101.904(b)(3), hereby respectfully moves the Illinois Pollution Control Board ("Board") to vacate its October 18, 2012, order granting CITGO Petroleum Corporation and PDV Midwest Refining, L.L.C ("CITGO") a five-year variance extension from 35 Ill. Adm. Code 302.407, in that the United States Environmental Protection Agency ("USEPA") disapproved the variance, effectively rendering it void for purposes of the Clean Water Act and federal law. In support of this motion, the Illinois EPA states as follows:

1. On December 20, 2011, CITGO filed a petition with the Board for extension of its variance from 35 Ill. Adm. Code 302.208(g) and 302.407, provisions of the State of Illinois' water quality standards, for Total Dissolved Solids ("TDS").
2. Under Title IX of the Environmental Protection Act ("Act") (415 ILCS 5/35-38 (2010)), the Board is responsible for granting a variance when a petitioner demonstrates that immediate compliance with the Board regulation would impose an arbitrary or

8. According to the disapproval letter, under USEPA regulations, a state may remove a designated use specified in section 101(a)(2) of the CWA, or a subcategory thereof, only if, among other things, the state demonstrates that it is not feasible to attain the designated use for one of the reasons specified at 40 CFR 131.10(g). Similarly, states can modify criteria necessary to protect designated uses only if the state provides an adequate scientific rationale demonstrating that the revised criteria protect designated uses. The letter continued stating that while Illinois asserted that the variance is justified as a time-limited removal of the indigenous aquatic life designated use, Illinois did not provide appropriate technical and scientific data and analyses to support such a use removal as required by 40 CFR 131.5(a)(4). *See* USEPA letter at 1.
9. The disapproval letter went on to state the impact of the USEPA disapproval is that, notwithstanding the Board's variance decision and for CWA purposes, the indigenous aquatic life designated use and the TDS criterion to protect that use set forth in 35 Ill. Adm. Code 302.407 continue to apply to the Chicago Sanitary and Ship Canal ("CSSC"), including with respect to discharges into the CSSC from the oil refinery owned by CITGO. *See* USEPA letter at 2.
10. Pursuant to Section 35 of the Act, the Board may only grant a variance to the extent it is consistent with federal law. *See* 415 ILCS 5/35. USEPA has determined the Board-ordered variance is inconsistent with federal law. *See* USEPA letter. Therefore, the Board-order granting the variance should be vacated.

WHEREFORE, the Illinois EPA respectfully moves the Illinois Pollution Control Board to vacate its October 18, 2012 order granting CITGO Petroleum Corporation and PDV Midwest

ATTACHMENT

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGIONAL ADMINISTRATOR
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

MAR 15 2013

John M. Kim, Director
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

Dear Mr. Kim:

On November 15, 2012, the Illinois Environmental Protection Agency (Illinois EPA) transmitted a variance, issued by the Illinois Pollution Control Board (IPCB or the Board) to CITGO Petroleum Corporation and PDV Midwest Refining, L.L.C., for review and approval by the U.S. Environmental Protection Agency in accordance with section 303(c) of the Clean Water Act (CWA). IPCB granted the variance from the total dissolved solids (TDS) criterion in Illinois' water quality standards at 35 Ill. Adm. Code 302.407 for protection of Illinois' indigenous aquatic life designated use for the Chicago Sanitary and Ship Canal (CSSC), a segment of the Chicago Area Waterway System. As described below, EPA disapproves the variance.

IPCB granted the variance in accordance with a state statute that allows the Board to grant regulatory relief when "compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship." The variance effectively removed for a time-limited period the indigenous aquatic life use and removed the TDS criterion necessary to protect that use for that period of time.

The CWA and federal regulations do not allow states to remove designated uses or modify criteria simply because a state believes that such standards "would impose an arbitrary or unreasonable hardship." Instead, under EPA's regulations, a state can only remove a designated use specified in section 101(a)(2) of the CWA, or a subcategory thereof, if, among other things, the state demonstrates that it is not feasible to attain the designated use for one of the reasons specified at 40 CFR 131.10(g). Similarly, states can only modify criteria necessary to protect designated uses if the state provides an adequate scientific rationale demonstrating that the revised criteria protect designated uses.

While Illinois EPA asserts that the variance is justified as a time-limited removal of the indigenous aquatic life designated use, Illinois did not provide appropriate technical and scientific data and analyses to support such a use removal as required by 40 CFR 131.5(a)(4).

If you have any questions regarding this matter, please contact me or your staff may contact Linda Holst, Chief, Water Quality Branch, at (312) 886-6758.

Sincerely,

Susan Hedman
Regional Administrator

Enclosure

cc: Marcia Willhite, Illinois EPA
John Therriault, Illinois Pollution Control Board, Clerk's Office

EPA's regulations at 40 CFR Part 131 interpret and implement sections 101(a)(2) and 303(c)(2)(A) of the CWA through a requirement that water quality standards include the uses specified in section 101(a)(2) of the CWA, unless those uses have been shown to be unattainable, in which case a state can adopt subcategories of the uses specified in section 101(a)(2) which require less stringent criteria. *See* 40 CFR 131.5(a)(4), 131.6(a), and 131.10(j), and 131.20(a); *see also Idaho Mining Association v. Browner*, 90 F.Supp. 2d 1078, 1092 (D. Id. 2000); 68 Fed. Reg. 40428, 40430-31 (July 27, 2003). 40 CFR 131.10(g) provides that, once a state designates the uses specified in section 101(a)(2) of the CWA or subcategories thereof for a specific water body, the state can only remove the designated use if, among other things, "the [s]tate can demonstrate that attaining the designated use is not feasible [for at least one of the six reasons set forth at 40 CFR 131.10(g)]."

When a state adopts designated uses that include the uses specified in section 101(a)(2) of the CWA or subcategories thereof, the state must also adopt "water quality criteria that protect the designated use." 40 CFR 131.11(a). "Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use." *Id.* Unlike with designated uses, nothing in the CWA or EPA's regulations allows states to relax or modify criteria, based on concepts of attainability, to levels that are not protective of the designated use. Instead, if criteria are not attainable, the CWA and EPA's regulations allow states to (1) remove the current designated use after demonstrating, among other things, that attaining the current designated use is not feasible for one of the 40 CFR 131.10(g) reasons, and replace it with a subcategory of use and, then, (2) adopt new, potentially less stringent, criteria necessary to protect the new designated use.

B. Variances

EPA has long recognized that, where a state satisfies all of the requirements in 40 CFR Part 131 for removing designated uses (or subcategories of uses), including demonstrating that it is not feasible to attain the designated use for one of the reasons specified at 40 CFR 131.10(g), EPA could also approve a state decision to limit the applicability of the use removal to only a single discharger, while continuing to apply the previous use designation and criteria to other dischargers. Such a state decision, which is often referred to as a "variance," can be approved as being consistent with the requirements of the CWA and 40 CFR Part 131. This is because the state's action in limiting the applicability of an otherwise approvable use removal to a single discharger and to a single pollutant is environmentally preferable and would be more stringent than a full use removal; and states have the right to establish more stringent standards under section 510 of the CWA. *See* 58 FR 20802, 20921-22 (April 16, 1993).

C. Water Quality Standard Submission Requirements and EPA Review Authority

40 CFR 131.6 provides that states must submit, among other things, the following to the EPA for review when they adopt new or revised designated uses and criteria:

> (a) Use designations consistent with the provisions or section 101(a)(2) and 303(c)(2) of the Act.

milligrams per liter (mg/L) set forth at 35 Ill. Adm. Code 302.407. The indigenous aquatic life use and associated criteria applicable to the CSSC were approved previously by EPA[1]

B. Variances Pertaining to the CITGO Petroleum Corporation and PDV Midwest Refining, L.L.C. oil refinery in Lemont, Illinois

The IPCB first granted to CITGO Petroleum Corporation and PDV Midwest Refining, L.L.C. a variance from the TDS criterion on April 21, 2005. *See CITGO Variance Decision* at 3. The variance effectively eliminated the applicability of the TDS criterion of 1,500 mg/L for purposes of deriving a water quality based effluent limit (WQBEL) for TDS in CITGO's National Pollutant Discharge Elimination System permit. The IPCB extended the variance on May 15, 2008, *id.*, and again on October 18, 2012, *id.* at 20. Illinois did not submit either the IPCB's original 2005 variance decision or 2008 extension decision to EPA for review and approval under section 303(c) of the CWA. Consequently, the original 2005 variance and the 2008 extension have never been applicable water quality standards for purposes of the CWA. *See* 40 CFR 131.21(c)(2). On November 15, 2012, Illinois EPA submitted IPCB's October 18, 2012, variance decision to EPA for approval in accordance with section 303(c) of the CWA.

The basis for the variance decision in each instance was IPCB's conclusion that compliance with a WQBEL derived from the TDS criterion "would impose an arbitrary or unreasonable hardship." The variance effectively removed for a time-limited period the indigenous aquatic life designated use and removed the TDS criterion necessary to protect that use for that period of time. Despite statements by Illinois EPA and IPCB that the variances are consistent with federal law (*see* CITGO variance at 17), nothing in the CWA or EPA's water quality standards regulations allows states to remove designated uses or modify criteria on this "hardship" basis alone. Instead, as described above, water quality standards can be revised where it can be demonstrated that it is not feasible to attain a designated use for one of the reasons specified at 40 CFR 131.10(g) (and other requirements are also met); or where criteria are revised based on sound scientific rationale and are protective of applicable designated uses in accordance with 40 CRF 131.6(c) and 131.11(a). As described below, there is no indication in IPCB's 2005, 2008 or 2012 decisions that, in granting and extending the variance, IPCB ever evaluated the feasibility of attaining the indigenous aquatic life use designation in the CSSC utilizing any of the factors in 40 CFR 131.10(g). There also is no indication in IPCB's decisions that removal of the TDS criterion is based upon a sound scientific rationale demonstrating that the indigenous aquatic life designated use would be protected.

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[1] EPA first approved the indigenous aquatic life use applied to the CSSC in 1974 and the adoption of the applicable TDS standard in 1979. In 2011, Illinois revised aspects of its water quality standards pertaining to the Chicago Area Waterway System to update certain designated recreational uses. The revisions also impacted some aspects of the indigenous aquatic life designated use and criteria. On May 16, 2012, EPA approved portions of those revisions and disapproved others. Illinois' 2011 revisions, and EPA's May 16, 2012, action, did not result in any substantive change to either the indigenous aquatic life designated use for the CSSC or the criteria for protection of that use at 35 Ill. Adm. Code 302.407. *See* EPA's May 16, 2012, letter and supporting documents, *available at* http://www.epa.gov/region5/chicagoriver.

submission to EPA whether, and to what extent, the state believes that TDS discharges from the oil refinery are one of the "sources" that prevent attainment of the designated use. In sum, Illinois has not adequately identified the "human caused conditions or sources of pollution [that] prevent the attainment of the use."

Once a state identifies with specificity the "human caused conditions or sources of pollution [that] prevent the attainment of the use," then, to justify removing a designated use under 40 CFR 131.10(g)(3), the state must also demonstrate either that the conditions or sources "cannot be remedied" or that implementation of the remedy "would cause more environmental damage to correct than to leave in place." One way that states can make such a demonstration would be to present information on the cost and technical feasibility of a reasonable range of potential remedial measures that could be implemented so that those "conditions or sources of pollution" no longer prevent the attainment of the use. The state must then demonstrate either that it is not feasible to implement such remedial measures (thereby demonstrating that the "human caused conditions or sources of pollution cannot be remedied") or that implementation of such remedial measures would "cause more environmental damage to correct than to leave in place." Here, the state administrative record only includes information regarding the cost, technical feasibility and environmental impacts of remedial measures for one of the sources of pollution – the oil refinery – into the CSSC. The state has not identified – much less evaluated the costs, technical feasibility and environmental impact of – remedial measures for the other sources that the state asserts prevent attainment of the use: *i.e.*, the sources responsible for winter de-icing activities.[4] Nor has Illinois demonstrated in any other way that the "human caused conditions or sources of pollution" cannot be remedied or that implementation of such a remedy "would cause more environmental damage to correct than to leave in place."

Because Illinois has not provided sufficient information identifying the "human caused conditions or sources of pollution prevent[ing] attainment of the use," and has not provided sufficient information demonstrating that such human caused conditions or sources of pollution "cannot be remedied or would cause more environmental damage to correct than to leave in place," Illinois has not demonstrated that attaining the designated indigenous aquatic life use is not feasible under 40 CFR 131.10(g)(3).

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[4] CITGO appended testimony to its variance request that was presented in a separate rulemaking effort before IPCB in IPCB Docket No. R2008-09(C) regarding the attainability of proposed revisions to the aquatic life use designation and associated chloride criteria that IPCB is considering adopting for the CSSC. Specifically, CITGO appended testimony that "[a]ttainment of chloride criteria [being considered as being necessary to protect the revised aquatic life use designation being considered by IPCB] requires a 50% reduction of deicing salt use," and that attainable reduction goals could be up to 30%, citing one municipality. However, no such information or analysis is given for the TDS, the pollutant at issue here.

standards or Illinois EPA's rationale to remove the TDS criterion from future aquatic life use designations for the Chicago Area Waterway System.

There is opinion evidence in the state administrative record from 2005 indicating that incremental increases in TDS levels in the CSSC resulting from operation of an air pollution control wet gas scrubber at the refinery would have no impact on the receiving stream. *See* PCB 05-85 Opinion and Order, April 25, 2005 at 13. The basis for that opinion appears to be evidence presented by the petitioners that (1) even with the incremental TDS increases, the TDS levels outside of the mixing zone in the CSSC during most times of the year would still be substantially below the 1,500 mg/l TDS criterion, and (2) in the rare instances where deicing activities cause TDS levels in the CSSC to exceed 1,500 mg/l at the refinery's discharge point, the incremental increases in the in-stream TDS levels are so small that there is no further adverse impact beyond any adverse impacts resulting from the fact that the TDS levels already exceed 1,500 mg/l. However, nothing in that testimony addresses the question of whether there is a sound scientific rationale for removing the TDS criterion when chloride and sulfate criteria do not replace the existing TDS criterion.

D. Summary of EPA's action to disapprove the CITGO variance

IPCB's variance effectively removed for a time-limited period the indigenous aquatic life designated use and effectively removed the TDS criterion necessary to protect that use for that period of time. EPA disapproves Illinois' variance based upon EPA's conclusion that it was not based upon appropriate technical and scientific data and analyses as required by 40 CFR 131.5(a)(1), 131.5(a)(4), 131.5(a)(5) and 40 CFR 131.10. Furthermore, to the extent that the variance modified Illinois' criteria for protection of the indigenous aquatic life designated use by effectively eliminating the applicable TDS criterion, EPA disapproves the modification in accordance with 40 CFR 131.5(a)(2) and (5) because no adequate scientific rationale demonstrating that removal of the TDS criterion would be protective of the indigenous aquatic life designated use has been provided as required by 40 CFR 131.6(b), (c) and (f) and 131.11(a).

E. Effect of EPA's Action on Endangered and Threatened Species

EPA is disapproving the IPCB's variance decision as explained in this document. This disapproval does not cause any change to Illinois' federally-applicable water quality standards under the CWA. Because there is no change to the State's federally-applicable water quality standards, there is no effect on listed species or their designated habitat. Therefore, Endangered Species Act consultation is not required.

F. Tribal Consultation

On May 4, 2011, EPA issued the "EPA Policy on Consultation and Coordination with Indian Tribes" to address Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments." The EPA Tribal Consultation Policy states that "EPA's policy is to consult on a government-to-government basis with federally recognized tribes when EPA actions and decisions may affect tribal interests."

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Respondent.	)	

PROOF OF SERVICE

I, the undersigned, state that I have served the attached **MOTION TO VACATE BOARD ORDER** upon the persons to whom it is directed, by placing a copy in an envelope addressed to:

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago IL 60601

Jeffrey C. Fort
Dentons
233 South Wacker Drive
Suite 7800
Chicago, Illinois 60606-6404

John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph Street
Chicago, IL 60601

and mailing it from Springfield, Illinois on June 21, 2013, with sufficient postage affixed as indicated above.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: Sara G. Terranova

Sara G. Terranova
Assistant Counsel
Division of Legal Counsel

Dated: June 21, 2013
1021 N. Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
217/782-5544