

ILLINOIS POLLUTION CONTROL BOARD
September 11, 1986

IN THE MATTER OF:)
)
SITE-SPECIFIC RULEMAKING) R85-7
FOR CENTRAL ILLINOIS LIGHT)
COMPANY)

CONCURRING OPINION (by B. Forcade):

While I agree with the outcome and opinion expressed by the majority, there is another profound reason to deny the requested relief. While the Board may be free to adopt or reject the requested regulatory relief under state law, those changes, if adopted, would be expressed by changing the effluent limitations in an NPDES permit. Federal law precludes those changes.

NPDES permits issued by the state must comply with existing federal regulations. One of those federal provisions, 40 CFR 122.44 (1), is affectionately known as the anti-backsliding provision and states as follows:

- (1) Reissued permits. (1) Except as provided in paragraph (1)(2) of this section when a permit is renewed or reissued, interim limitations, standards or conditions must be at least as stringent as the final limitations, standards, or conditions in the previous permit (unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under Section 122.62).
- (2) When effluent limitations were imposed under Section 402(a)(1) of CWA in a previously issued permit and these limitations are more stringent than the subsequently promulgated effluent guidelines, this paragraph shall apply unless:
 - (i) The discharger has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous ef-

fluent limitations. In this case the limitations in the renewed or reissued permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by the subsequently promulgated effluent limitation guidelines);

- (ii) In the case of an approved State, State law prohibits permit conditions more stringent than an applicable effluent limitation guideline;
- (iii) The subsequently promulgated effluent guidelines are based on best conventional pollutant control technology (section 301(b)(2)(E) of CWA);
- (iv) The circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under Section 122.62; or
- (v) There is increased production at the facility which results in significant reduction in treatment efficiency, in which case the permit limitations will be adjusted to reflect any decreased efficiency resulting from increased production and raw waste loads, but in no event shall permit limitations be less stringent than those required by subsequently promulgated standards and limitations.

Clearly, CILCO cannot justify relaxation under condition (2)(i), because CILCO was able to achieve the previous effluent limitations from 1974 to 1979. CILCO cannot justify relaxation under condition (2)(ii), because Illinois has no State Law precluding effluent limitations more stringent than Federal minimums. CILCO cannot justify relaxation under condition (2)(iii) because there are no best conventional pollutant control technology (BCPT) guidelines affecting CILCO's facility. Since there have been no material and substantial changes to the facility, CILCO cannot justify relaxation under condition (2)(iv). Lastly, there has been no increased production which results in signifi-

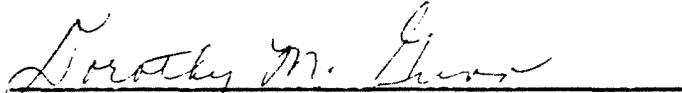
cant reduction in treatment efficiency, so CILCO cannot justify relaxation under condition (2)(v).

A strong argument can be made that proper operation and maintenance of a fly ash pond requires periodic removal of accumulated solids that have settled to the bottom. CILCO has not met that argument in a manner that would satisfy state law or in a manner that would satisfy the above quoted federal law. Therefore I concur in the decision to deny relief for the reasons of the majority and the additional reasons cited above.



Bill S. Forcade
Member of the Board

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Concurring Opinion was submitted on the 7th day of October, 1986.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board