

ILLINOIS POLLUTION CONTROL BOARD
April 10, 1986

CITIZENS UTILITIES COMPANY)
OF ILLINOIS,)
)
Petitioner,)
)
v.) PCB 85-95
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)
)
and)
)
VILLAGE OF BOLINGBROOK,)
)
Intervenor.)

MR. DANIEL J. KUCERA OF CHAPMAN AND CUTLER APPEARED FOR PETITIONER; AND

MR. WAYNE WIEMERSLAGE, STAFF ATTORNEY, APPEARED FOR RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J. Theodore Meyer):

This matter comes before the Board on the July 1, 1985 petition for variance, as amended on August 13, 1985, filed by Citizens Utilities Company of Illinois (Citizens). Citizens is requesting relief from the standards for 5-day biochemical oxygen demand (BOD₅) and total suspended solids (TSS). 35 Ill. Adm. Code 304.120(c). In addition, Citizens seeks an exemption from the water quality standards for ammonia nitrogen and dissolved oxygen for periods when creek flow is less than 2 cu.ft/sec. 35 Ill. Adm. Code 302.206, 302.212 and 304.105. This relief is requested to extend until such time as the Board grants Citizens site-specific rule change in R81-19 on remand. If the Board should deny the petition for rule change, variance is requested for a period of three years after final adjudication of R81-19. The Illinois Environmental Protection Agency (Agency) submitted its recommendation to deny the variance on August 8, 1985. Hearing was held on October 16, 1985.

PRELIMINARY MATTERS

On October 22, 1985, six days after hearing, the Village of Bolingbrook filed a motion to intervene and response in this proceeding, asserting that because any Board order may affect the rates and services provided by Citizens to its residents, that the Village has a substantial stake in the proceedings.

The Agency objected to the intervention on October 29, 1985 on the grounds that the Village had failed to comply with 35 Ill. Adm. Code 103.142. This section provides that an applicant for intervention shall serve copies of its petition on the parties and the Board no later than 48 hours prior to the date set for hearing. However, the Hearing Officer may permit intervention at any time prior to the hearing when good cause for delay is shown. The Agency argues that neither of these procedural requirements were fulfilled and further that Bolingbrook has attempted to raise issues which were previously raised at an earlier stage of the proceeding in contravention of 35 Ill. Adm. Code 103.142(c).

Citizens also filed a response to the motion to intervene stating that it had no objection to the intervention. Citizens notes that the Village did appear at the October 16, 1985 hearing where it stated its intention to file its motion to intervene and response with the Board and that no objections to this procedure were voiced at the time. The Board finds that although 35 Ill. Adm. Code 103.142 was not strictly complied with, the Village's intention to move for intervention was made known to both parties at the time of hearing and because no objections to this procedure were made, that the motion should be, and is granted.

FACTS AND HISTORY

Citizens provides public utility water service to approximately 23,000 customers and sanitary sewer service to approximately 22,000 customers in the metropolitan Chicago area. Citizens is an Illinois corporation and a public utility within the meaning of Section 10 of the Illinois Public Utilities Act. One of Citizens' service areas consists of a substantial portion of the Village of Bolingbrook in Will County, Illinois. Citizens provides water and sanitary sewer service to approximately 8,000 connections in this area. Sanitary sewer service is provided through a sanitary sewer collection system and two wastewater treatment plants. This petition concerns Citizens' West Suburban wastewater treatment plant No. 1 (WSB 1). WSB 1 consists of an activated sludge plant, operated in the contact stabilization mode, with a design dry weather flow of 1.28 mgd. The final effluent from the plant is discharged to Lily Cache Creek, an intermittent stream.

Citizens was originally granted a six month variance for this plant in PCB 78-123, which was later modified in PCB 78-265. 31 PCB 111, July 20, 1978; 31 PCB 711, October 19, 1978. The most recent variance was granted in PCB 78-313 and expired on July 2, 1985. 41 PCB 11, March 5, 1981. Citizens had previously sought extension of the variance granted in PCB 78-313 on the grounds that a study of the Du Page River Basin was likely to result in the adoption of revised water quality standards applicable to Lily Cache Creek. The Board denied this variance extension request in PCB 83-124. 57 PCB 423, April 19, 1984.

Concomitantly with its variance requests, Citizens has pursued site-specific regulatory relief in R81-19. This proceeding was originally dismissed by the Board for lack of information to support the less restrictive standards. 52 PCB 169, May 5, 1983. Citizens appealed this dismissal as well as the denial of the variance extension in PCB 83-124 to the Third District Appellate Court. Citizens Utilities Company of Illinois v. Illinois Pollution Control Board, No. 3-84-0412 and No. 3-83-0498, consol. (June 17, 1985). The court upheld the denial of variance but remanded the site-specific proceeding for an economic determination by the Board.

The parties have stipulated to incorporation of the records from PCB cases 78-123, 78-265, 78-313 and 83-124 as well as the record in R81-19. (R. at 4). Virtually no new evidence has been provided in this proceeding.

ENVIRONMENTAL IMPACT

The environmental impact of Citizens' effluent and a change in the water quality standards has been hotly debated in previous proceedings before the Board.

Lily Cache Creek has an historical 7 day - 10 year low flow of zero and is therefore classified as intermittent. Citizens maintains that urban and agricultural run-off coupled with the intermittent nature of the creek are limiting factors for the diversity of stream organisms and the stream productivity. A study commissioned by Citizens alleges that the creek is extremely degraded and that its value as a natural resource is extremely limited. (R81-19, Exh. C). The Agency, however, maintains that there exists a diverse aquatic habitat along the creek but that Citizens' effluent is a limiting factor. (PCB 78-313, R. at 548-70)

A review of the contradictory and conflicting evidence leading to these two positions was made by the Board in R81-19. As no changed circumstances are alleged in this proceeding, the Board must conclude now, as it did then, that the "data is insufficient to support the conclusion that nonpoint source loadings are equivalent to WSB 1 discharge loadings, as Citizens contends, and even if it is, that is not sufficient to demonstrate that the WSB 1 discharge is not a significant factor in limiting the aquatic life in the Creek." (R81-19, 52 PCB at 174).

Petitioner has the burden of proving that any hardship is arbitrary or unreasonable and demonstrating the degree of environmental harm. Citizens maintains simply that there will be no degradation to the creek if the variance is granted because the effluent will remain the same as under the current variance.

In this connection, the Board points out that the requested exemption from the dissolved oxygen and ammonia nitrogen

standards has never been granted by the Board previously. Moreover, there is no evidence in the record to support the conclusion that there will be a minimal environmental impact should these parameters be allowed to degrade. In fact, the Agency believes that relaxation of these parameters would certainly allow degradation of the creek and limit its beneficial uses. Ag. Brief at 9. Accordingly, this relief must be denied.

As to the remaining parameters, the Board notes that under the Environmental Protection Act and Board regulations compliance was called for almost 13 years ago. (See PCB 78-313, concurring opinion by J. Dumelle at 41 PCB 19). Further maintenance of the status quo is in direct contradiction with the statutorily declared purpose of the State's water pollution control laws which is to "restore, maintain and enhance the purity of the waters of this state . . ." Ill. Rev. Stat. 1985, ch. 111-1/2, par. 1011.

HARDSHIP

Variances are to be granted upon a showing of arbitrary or unreasonable hardship and considering any environmental harm. The purpose of a variance is to allow a period of time, not to exceed five years, for the variance petitioner to achieve compliance. Ill. Rev. Stat. 1985, ch. 111-1/2, pars. 1035(a) and 1036(b). Citizens' variance request contains no compliance plan but asserts only that it would be an arbitrary or unreasonable hardship to require compliance at this time while R81-19 is still pending before the Board. Citizens contends that the Board may agree that it is economically unreasonable to require compliance and grant Citizens' relief in R81-19. In this event, any expenditures made to come into compliance in the interim would be allegedly unreasonable and irresponsible. Should the Board deny the rule change, Citizens believes the Board may be overturned on appeal and is thus asking for variance relief for three years after final adjudication of R81-19, meaning until all appeals have been exhausted. The Board notes that this request is patently contrary to law in that it could result in variance for longer than five years.

On the question of the economic hardship to Citizens, the records in previous proceedings reveal that an expenditure of approximately \$3.6 million would be necessary to come into compliance. Citizens has updated this cost to \$4.15 million assuming a midpoint of construction in 1989. Citizens does not argue that the necessary measures are technically infeasible or that they pose an economic burden to the company itself, but that the expenditures would pose an arbitrary or unreasonable hardship on its customers. In fact, Citizens admits that it currently has the financial resources at its disposal to effectuate the necessary plant modifications but that it would immediately seek a rate increase.

The amount of this increase is alleged to be approximately \$411 per user per year. However, this increase assumes that the expenditures will be apportioned only among users of WSB 1. The Board noted in R81-19, however, that local per capita costs for construction of WSB 2 were spread over both the WSB 1 and WSB 2 areas, and that apportionment among only WSB 1 users may be unacceptable to the Commerce Commission. (R81-19, 52 PCB at 175). If costs are apportioned over both plant service areas, the per capita increase would be only about \$167 per year per customer.

The Board does not find this increase to be an unreasonable or arbitrary hardship. Many Illinois communities have been faced with similar increases and have long since come into compliance with the state's environmental laws. The Board has previously stated that "[at] some point Citizens must come into compliance as have other Illinois communities which chose to meet standards rather than pursue every possible means of delay." PCB 83-124, 57 PCB at 428.

The Board notes that Citizens present variance request is remarkably similar to that denied by the Board in PCB 83-124. In that case, Citizens based its prayer for relief on a study which possibly might or might not propose new water quality standards for certain streams. The Board's denial of that variance request based on a speculative change in the regulations was upheld on appeal. This variance similarly seeks relief based on a petition for a site-specific rule change which may or may not succeed at the Board and court level. On this point, the court's opinion on appeal is extremely apt: "if the speculative prospect of future changes in the law were to constitute an arbitrary or unreasonable hardship, then the law itself would be emasculated with variances, as there is always prospect for future change." Slip op. at 5. This very principle has been consistently enunciated by the Board. Accordingly, the conclusion that "the Board cannot lawfully prejudge the outcome of a pending regulatory proposal in considering a petition of variance" remains unshakeable. City of Casey v. EPA, PCB 81-16, 41 PCB 427, May 14, 1981.

In summary, a petition for variance must demonstrate an arbitrary or unreasonable hardship, and such that it outweighs any environmental harm. The burden of this demonstration lies with the petitioner. The Board finds, however, as it did in PCB 83-124, that compliance is both technically feasible and economically reasonable. The prospect of a loosening in the standards cannot lawfully serve as the basis for a claim of hardship. Thus, Citizens has failed to demonstrate a sufficient hardship claim considering the environmental harm. Simple maintenance at the status quo for over 12 years does not rise to a demonstration of no environmental harm, since had compliance been achieved, by now substantial benefits might have accrued to the Creek. The variance is denied.

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

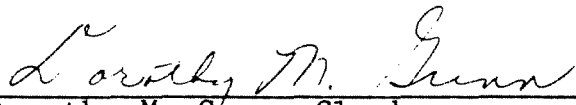
ORDER

Citizens Utilities Company of Illinois' petition for variance from 35 Ill. Adm. Code 302.206, 302.212, 304.105 and 304.120(c) is hereby denied.

IT IS SO ORDERED.

R. Flemal abstained.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 10th day of April, 1986, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board