

ILLINOIS POLLUTION CONTROL BOARD
May 24, 1990

CITIZENS UTILITIES COMPANY)
OF ILLINOIS,)
)
Petitioner,)
)
v.)
)
ILLINOIS ENVIRONMENTAL) PCB 85-95
PROTECTION AGENCY,) (Variance)
)
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. Anderson):

This matter is before the Board on remand from the Third District Appellate Court ("Appellate Court"). The Appellate Court issued its opinion in this matter on February 5, 1987.¹ Citizens Utilities Company of Illinois v. Illinois Pollution Control Board, 152 Ill App. 3d 122, 504 N.E.2d 224 (3rd Dist. 1987). That opinion vacated the Board's April 10, 1986 Opinion and Order in PCB 85-95, denying an extension of a variance that was previously granted in PCB 78-313. The Appellate Court remanded the case to the Board with instructions to grant Citizens Utilities Company of Illinois ("Citizens") a variance consistent with the views expressed in its opinion.

Although the underlying facts are not disputed, the procedural history of this case is convoluted and the factual background of the case is closely intertwined with related issues

¹Although the Appellate Court issued its opinion on February 5, 1987, the Board learned of it when it received a copy of the Court order from the hearing officer in this matter on January 3, 1990. During the drafting of this opinion, however, certain correspondence that referenced the Appellate Court's order was discovered in the file. The Board received the correspondence on June 4, 1987. The Board regrets the delay in this matter.

in R81-19. The Board, therefore, will present a procedural history before it addresses the issues on remand.

Citizens owns and operates a wastewater treatment plant, known as west suburban wastewater treatment plant No. 1 ("WSB Plant No. 1"), located in Bolingbrook, Will County, Illinois. The plant discharges into Lily Cache Creek, which is a tributary to the DuPage River. On March 5, 1981, in PCB 78-313, the Board granted Citizens a variance from the general use water quality standard for ammonia nitrogen as well as the effluent standards for five-day biochemical oxygen demand ("BOD₅"), total suspended solids ("TSS"), and ammonia nitrogen. The Board granted the variance until July 2, 1985, so that the company could seek certain site-specific rule changes in those standards. 41 PCB 11. After the variance was granted, environmental studies were conducted to determine whether less stringent standards would be permissible.

Citizens filed a petition for site-specific regulatory relief on June 12, 1981. The petition was docketed as R81-19. The results of the above-mentioned studies were presented to the Board at a May 5, 1983 hearing held on Citizens' petition. At the conclusion of the hearing, however, the Board dismissed the proceeding for lack of information to support the less restrictive standards. 52 PCB 169. Citizens appealed the Board's determination to the Appellate Court. Citizens Utilities Company of Illinois v. Illinois Pollution Control Board, No. 3-83-0498. After docketing that appeal, Citizens discovered that the Illinois Environmental Protection Agency ("Agency") had commenced a joint study of the DuPage River Basin with the United States Geological Survey for the purpose of developing site-specific standards for discharges into waterways.

Believing that the study would result in less stringent standards, Citizens filed a petition for variance with the Board on August 31, 1983, seeking an extension of the variance granted in PCB 78-313. This variance petition was docketed as PCB 83-124. On April 19, 1984, the Board denied Citizens' request for the variance extension. 53 PCB 61. Citizens appealed the ruling to the Appellate Court. Citizens Utilities Company of Illinois v. Illinois Pollution Control Board, No. 3-84-0412. The Appellate Court consolidated the R81-19 and the PCB 83-124 appeals and, on June 17, 1985, issued its decision on both matters. Citizens Utilities Company of Illinois v. Illinois Pollution Control Board, 134 Ill. App. 3d 111, 479 N.E.2d 1213 (3rd Dist. 1985). The Appellate Court upheld the Board's refusal to extend the variance but remanded the site-specific proceeding to the Board for further proceedings because it concluded that the Board failed to analyze the economic impact of the proposed

site-specific rule.²

On July 1, 1985, Citizens filed another petition for variance with the Board. This variance petition was docketed as PCB 85-95. Citizens, in this petition, sought the following relief:

1. an extension of the variance granted in PCB 78-313 that would take effect on July 1, 1985, and remain in effect until the Board granted site-specific rule relief in R81-19 on remand or, if the Board denied the relief, for a period of three years after final adjudication of R81-19,
2. an extension of the compliance schedule provided for in the PCB 78-313 variance, in the event the Board denied site-specific relief on remand, so that the deadlines for permit application, commencement of work, and compliance with applicable effluent limitations would be six months, one year, and three years after final adjudication of R81-19, respectively,
3. a modification of the variance in PCB 78-313 as to the ammonia-nitrogen water quality standard contained therein so that, instead of the general use water quality standard for ammonia nitrogen contained in 35 Ill. Adm. Code 304.105, Lily Cache Creek, for a distance of eight miles downstream of the point of discharge of WSB Plant No. 1, meets a water quality standard for ammonia nitrogen of no greater than 15 milligrams per liter ("mg/l"),
4. a variance, for the period of time specified in number 1 above, from the general use water quality standard for dissolved oxygen so that instead of the general use standard for dissolved oxygen contained in 35 Ill. Adm. Code 302.206, Lily Cache Creek, for a distance of eight miles downstream of the point of discharge of WSB Plant No. 1, meets a water quality standard for dissolved oxygen of no less than 4 mg/l,
5. an exemption from the ammonia nitrogen and dissolved oxygen water quality standards when creek flow is less than 4.9

²As stated above, the Appellate Court remanded the site-specific regulatory proceeding (R81-19) on June 17, 1985. As of the date of this opinion, the Board has not made a final determination in the matter. The Board expects to make a determination in the matter in the near future. Although the Board regrets any unnecessary delay, it notes that a portion of the delay can be attributed to the numerous motions, responses and objections to motions, and other documents filed by the parties during the course of the proceeding on remand.

million liters per day or 2 cubic feet per second ("cfs"), and

6. a requirement that the Agency modify its NPDES permit consistent with the above requests.

The Agency filed its variance recommendation on August 8, 1985, recommending a denial of variance. Citizens filed an amended petition on August 13, 1985, requesting the Board to set the matter for hearing and alleging that it and its Bolingbrook customers would suffer an arbitrary and unreasonable hardship if the requested variance extension were not granted. On April 10, 1986, the Board denied the relief requested. 69 PCB 34. Citizens appealed the Board's ruling to the Appellate Court. Citizens Utilities Company of Illinois v. Illinois Pollution Control Board, 152 Ill. App. 3d, 504 N.E.2d 224 (3rd Dist. 1987). It is the Appellate Court's opinion in that case that is the subject of this Opinion and Order.

As previously stated at the beginning of this opinion, the Appellate Court vacated the Board's April 10, 1986 Opinion and Order in PCB 85-95 denying Citizens an extension of the variance granted in PCB 78-313. The Appellate Court then remanded the case with instructions to grant Citizens a variance consistent with the views expressed in the opinion. Specifically, the Appellate Court stated:

Consequently, an extension of the variance involved is necessitated until such time as either the current, more stringent standards are deemed applicable or until the results of of the present study become final and applicable.

152 Ill. App. 3d at 122,
504 N.E.2d at 224

The Board notes that the Appellate Court misstated its prior holdings when it summarized the procedural history of the case. Specifically, the Appellate Court stated that it upheld the Board's refusal to grant site-specific relief in R81-19 and that it had remanded the Board's denial of Citizens' request for variance extension in PCB 83-124. This, in fact, was the exact opposite of what the Appellate Court actually did. Because the Appellate Court stated that it remanded PCB 83-124, one can construe the Appellate Court's mandate as an order to the Board to extend the variance in PCB 83-124. Because there was no variance granted in PCB 83-124, however, the Board must interpret the Appellate Court's order to mean that it should extend the variance granted in PCB 78-313.

The Board recognizes that it must grant a variance extension. The Appellate Court, however, did not provide the

Board with any guidance with regard to the variance extension other than that mentioned above. As a result, the Board has determined that it should strictly construe the Appellate Court's mandate. There are several issues, however, that must be resolved before the Board can determine the scope of the relief that it will grant.

Citizens, in its variance petition in PCB 85-95, requested more than just an extension of the variance granted in PCB 78-313. The Board will analyze Citizens' request for relief, in the order in which it was presented on page 3 of this Opinion, in order to determine the actual scope of the relief that it should now grant.

1. Although the Board will grant Citizens' request for extension of the variance in PCB 78-313, it must determine when the relief will become effective, when it will terminate, and what variance conditions will be imposed.

Citizens filed its petition for variance in PCB 85-95 on July 1, 1985, requesting the Board to grant a variance extension beginning on July 1, 1985. The Board notes that this petition was filed the day before the expiration date of the PCB 78-313 variance. Ordinarily, the Board expects a petition for variance extension to be filed at least 120 days (the Board's decision time clock) before the prior variance terminates.³ This case is unusual, however, in that the Appellate Court has ordered the Board to grant Citizens' request for a variance extension. Thus, the Board will specify that the requested relief should commence on July 2, 1985, the date that the previous variance in PCB 78-313 expired.

With regard to the issue of the termination date, the Board will not grant Citizens' request that the extension remain in effect until three years after final adjudication of R81-19, in the event that site-specific relief is denied. The Appellate Court ordered the Board to grant the variance extension until "... such time as either the current, more stringent standards are deemed applicable or until the results of the present study become final and applicable." In other words, the Appellate Court ordered the Board to grant the variance until either: a) the Board denies site-specific relief in R81-19, or b) if the Board grants such relief, the date when the site-specific rule becomes final and applicable (the date when the rule is filed with the Office of Secretary of State).

Even if the Board grants the variance extension until the time specified by the Appellate Court, it could be granting

³In 1985, the Board had 90 days to make its decision in variance cases.

relief that would extend beyond the Environmental Protection Act's ("Act") five year time limit for variances. (See Section 36(b) of the Act.) Because the Board is a creature of statute, it can act only in accordance with the Act. Therefore, the Board can grant the variance extension only for a maximum period of five years. Thus, the Board will specify that the variance extension will terminate on either July 2, 1990, or on one of the dates specified by the Appellate Court, whichever occurs first.

The Board recognizes that the variance extension could terminate before the time specified by the Appellate Court and that this would be inconsistent with the Appellate Court's mandate. In light of the unusual circumstances of this case and the Appellate Court's mandate, the Board, concurrently with its order in this matter and upon its own motion, will extend this variance if the Board does not make a decision in R81-19 by June 21, 1990 (see variance condition 2 of the accompanying order). If the Board did not grant another variance extension at this time, Citizens would then have less than two weeks to file another petition for variance extension. This extension will become effective on July 2, 1990, and will terminate on either one of the dates specified by the Appellate Court or on July 2, 1995, whichever occurs first. All other variance conditions will remain the same.

The Appellate Court did not state what conditions, if any, the Board was to impose on the variance extension. Because the Appellate Court ordered the Board to grant Citizens' request for a variance extension, the Board will impose, wherever possible, variance conditions similar to those imposed in PCB 78-313.⁴ The Board, however, must modify or delete some of the PCB 78-313 variance conditions. We have already discussed the time parameters of the variance extension earlier in this opinion. Variance condition 1 in PCB 78-313 has been amended to reflect the new time parameters (see variance conditions 1 and 2 of this order). The Board has determined that it must delete variance conditions 4, 5, 6, and 7 in PCB 78-313 because it cannot impose a retroactive compliance schedule upon Citizens. If the Board incorporated such a schedule as a condition to the grant of this variance extension, Citizens would have already violated the order in this matter. The Board will amend variance condition 8 in PCB 78-313 to include ammonia nitrogen because the condition requires Citizens to act in a manner that is consistent with applicable variance effluent limitations, ammonia nitrogen being one such limitation. The Board will update the Agency's address that is contained in variance condition 11 in PCB 78-313. Finally, the Board will cite the current Board rules, as codified, rather than the old rules that are contained in the PCB

⁴The Board has appended its order in PCB 78-313 to this Opinion and Order for comparison purposes.

78-313 order.

2. The Board will not grant Citizens' request to extend the deadlines for permit application, commencement of work, and compliance to six months, one year, and three years after final adjudication of R81-19, in the event that it denies site-specific relief, because the dates go beyond the Appellate Court's mandate and could even extend beyond the Act's five year time limit for variances.

3. Citizens next requested a modification of the variance granted in PCB 78-313 from the general use water quality standard for ammonia nitrogen. Specifically, Citizens requested that the Board specify that Lily Cache Creek, for a distance of eight miles downstream of the point of discharge of WSB Plant No. 1, meet a water quality standard for ammonia nitrogen of no greater than 15 mg/l. The Board notes that, when it granted variance in PCB 78-313, it gave Citizens a variance from Rule 402 of the Board's rules as it applied to the ammonia nitrogen water quality standard of Rule 203(f).⁵ Rule 402 prohibited violations of water quality standards, and Rule 203(f) set the maximum allowable water quality standard for ammonia nitrogen at 1.5 mg/l. After the Board issued its decision in PCB 78-313, however, it deleted the ammonia nitrogen water quality standard from Rule 203(f) and placed a revised ammonia nitrogen water quality standard in 35 Ill Adm. Code 302.212 (see R81-23). Section 302.212 sets forth a range of concentration limits for ammonia nitrogen. The limits vary according to certain combinations of water pH and temperature. Many of the limits are less than 15 mg/l but, in no case, do they exceed 15 mg/l. The Board recognizes that Citizens, pursuant to 35 Ill. Adm. Code 302.212, may now be subject to a maximum allowable concentration that is equal to or lower than the 15 mg/l limit. The Board, however, will give a complete variance from the ammonia nitrogen water quality standard because it did so in PCB 78-313.

4. The Board will not grant Citizens' request for a variance from the general use water quality standard for dissolved oxygen because it did not give a variance from the standard in PCB 78-313.

5. The Board also will not grant Citizens' request for a complete exemption from the ammonia nitrogen and dissolved oxygen water quality standards when creek flow is less than 4.9 million liters per day or 2 cfs. Again, the Board did not provide for such relief in PCB 78-313 and does not believe the Appellate Court's mandate requires the consideration of new relief.

⁵Rule 402 and 203(f) are now codified at 35 Ill. Adm. Code 304.105 and 302.208, respectively.

6. Finally, the Board will grant Citizens' request that it order the Agency to modify Citizens' NPDES permit consistent with the relief granted herein because it granted similar relief in PCB 78-313.

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

ORDER

Petitioner Citizens Utilities Company of Illinois is granted a variance from 35 Ill. Adm. Code 304.120(c), 304.301, and 304.105, only as it applies to the ammonia nitrogen water quality standard of 35 Ill. Adm. Code 302.212, subject to the following conditions:

1. This variance will become effective on July 2, 1985.
2. This variance will expire on one of the following dates:
 - a) on July 2, 1990, or
 - b) on the date that the Board denies site-specific relief in R81-19 on remand, or
 - c) if the Board grants site-specific relief in R81-19 on remand, on the date that the site-specific rule becomes final and applicable (the date that the rule is filed with the Office of Secretary of State),

whichever occurs first.

In the event that the Board does not make a decision in R81-19 by June 21, 1990, the Board hereby grants another variance extension. The variance extension will be subject to the same condition set forth in this order except that variance conditions 1 and 2 will be modified to read as follows:

1. This variance will become effective on July 2, 1990.
2. This variance will expire on one of the following dates:
 - a) on July 2, 1995,
 - b) the date that the Board denies site-specific relief in R81-19 on remand, or,
 - c) if the Board grants site-specific relief in R81-19 on remand, the date that the site-specific rule becomes final and applicable (the date that the

rule is filed with the Office of Secretary of State),

whichever occurs first.

3. This variance applies to effluent discharges from Petitioner's West Suburban Wastewater Treatment Plant No. 1 (WSB Plant No. 1) located at the intersection of Glengary Drive and Briarcliff Road in the Village of Bolingbrook.

4. Petitioner shall meet the following interim effluent limitations for five day biochemical oxygen demand (BOD₅), total suspended solids (TSS), and ammonia nitrogen measured as N.

	<u>Monthly Average</u>	<u>Flow-weighted Daily Composite (Maximum)</u>
BOD ₅	20 mg/l	40 mg/l
TSS	25 mg/l	50 mg/l
Ammonia Nitrogen	15 mg/l	30 mg/l

5. Petitioner shall operate WSB Plant No. 1 in such a manner as to minimize the total quantities of BOD₅, TSS, and ammonia nitrogen discharged, consistent with applicable NPDES permit and variance effluent limitations.

6. Petitioner shall on a continuous basis monitor the flow that is diverted from WSB Plant No. 1 to the polishing pond and the flow diverted to WSB Plant No. 2. Petitioner shall keep in operating condition flow meters necessary to perform this monitoring. Records of these flows shall be maintained for the period of this variance. Flow results shall be submitted to the Agency on a monthly basis at the same time as and together with the discharge monitoring reports required by its NPDES permit.

7. The Agency, pursuant to 35 Ill Adm. Code 309.184, shall modify NPDES permit IL0032727 consistent with the conditions set forth in this Order.

8. Within forty-five days of the date of this Order, Petitioner shall execute and forward to the Illinois Environmental Protection Agency, Compliance Assurance Section, Division of Water Pollution Control, 2200 Churchill Road, Springfield, Illinois 62794-9276, a Certificate of Acceptance and Agreement to be bound to all terms and conditions of this variance. This forty-five day period shall be held in abeyance for any period this matter is being appealed. The form of the Certificate shall be as follows:

CERTIFICATION

I, (We), _____, having read and fully understanding the Order in PCB 85-95 on remand, hereby accept that Order and agree to be bound by all of its terms and conditions.

SIGNED

TITLE

DATE

IT IS SO ORDERED.

Board Member R. Flemel abstained.

Board Member B. Forcade concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 24th day of May, 1990, by a vote of 1-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

ORDER

Petitioner Citizens Utilities Company of Illinois is granted a variance from Rules 404(c), 402.1(b) and 402 as it applies to the ammonia nitrogen standard of Rule 203(f) of Chapter 3, subject to the following conditions:

1. This variance will expire on July 2, 1985.

2. This variance applies to effluent discharges from Petitioner's West Suburban Wastewater Treatment Plant No. 1 (WSB Plant No. 1) located at the intersection of Glenqary Drive and Briarcliff Road in the Village of Bolingbrook.

3. Petitioner shall meet the following interim effluent limitations for five day biochemical oxygen demand (BOD), total suspended solids (TSS) and ammonia nitrogen measured as N.

	<u>Monthly Average</u>	<u>Flow-weighted Daily Composite</u>
BOD ₅	20 mg/l	40 mg/l
TSS	25 mg/l	50 mg/l
Ammonia Nitrogen	15 mg/l	30 mg/l

4. On or before January 2, 1983 Petitioner shall submit to the Illinois Environmental Protection Agency a permit application including plans and specifications for upgrading WSB Plant No. 1 to meet Chapter 3 limitations.

5. On or before July 1, 1983 Petitioner shall commence such design, engineering, procurement of major equipment items, contract letting and construction as may be necessary for WSB Plant No. 1 to be in compliance with then applicable effluent limitations before July 2, 1985.

6. On or before July 2, 1985 Petitioner shall be in compliance with applicable effluent limitations for five day biochemical oxygen demand, total suspended solids and ammonia nitrogen. Compliance with this condition before July 2, 1985 shall be excused by delays arising from acts of God or causes not within control of the Petitioner.

7. Within ninety days of the date of this Order, Petitioner shall execute and forward to the Illinois Environmental Protection Agency a performance bond in a form acceptable to the Agency conditioned upon compliance with paragraph 6 above.

8. Petitioner shall operate WSB Plant No. 1 in such a manner as to minimize the total quantities of BOD₅ and TSS discharged, consistent with applicable NPDES permit and variance effluent limitations.

9. Petitioner shall on a continuous basis monitor the flow which is diverted from plant No. 1 to the polishing pond and the flow diverted to WSB Plant No. 2. Petitioner shall keep in operating condition flow meters necessary to perform this monitoring. Records of these flows shall be maintained for the period of this variance. Flow results shall be submitted to the Agency on a monthly basis at the same time as and together with the discharge monitoring reports required by its NPDES permit.

10. The Agency, pursuant to Rule 914 of Chapter 3: Water Pollution, shall modify NPDES permit IL0032727 consistent with the conditions set forth in this Order.

11. Within forty-five days of the date of this Order, Petitioner shall execute and forward to the Illinois Environmental Protection Agency, Variance Section, 2200 Churchill Road, Springfield, Illinois 62706, a Certificate of Acceptance and Agreement to be bound to all terms and conditions of this variance. This forty-five day period shall be held in abeyance for any period this matter is being appealed. The form of the Certificate shall be as follows:

CERTIFICATION

I, (We), _____, having read and fully understanding the Order in PCB 78-313, hereby accept that Order and agree to be bound by all of its terms and conditions.

SIGNED _____

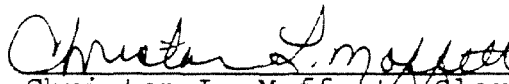
TITLE _____

DATE _____

IT IS SO ORDERED.

Mr. Jacob D. Dumelle concurs.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board hereby certify that the above Opinion and Order were adopted on the 5th day of March, 1981 by a vote of 5-0.



Christan L. Moffett, Clerk
Illinois Pollution Control Board