

ILLINOIS POLLUTION CONTROL BOARD  
March 9, 1989

CITIZENS UTILITIES COMPANY	)	
OF ILLINOIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 85-140
	)	
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by M. Nardulli):

This matter comes before the Board upon a motion for rehearing filed on February 2, 1989 on behalf of the Petitioner, Citizens Utilities Company of Illinois ("Citizens"). The movant is seeking reconsideration and rehearing on the Board's Order of January 5, 1989 in which the Board upheld the Illinois Environmental Protection Agency (Agency) in imposing an NPDES permit condition. With this order, the Board reconsiders its opinion and order of January 5, 1989 in this matter and denies the motion for rehearing.

On February 14, 1989, the Agency filed its response to the motion for rehearing. Citizens filed a reply to the Agency's response to the motion for rehearing. The Board's procedural rules do not make provisions for a reply by the movant to the Agency's response. Because the reply brief was filed more than 35 days from the date of the issuance of the opinion and order and because it was not accompanied by a motion to file instanter or a motion to amend the motion for reconsideration, it cannot be construed as part of the original motion for reconsideration and rehearing. As a result, the movant's reply to the Agency's response will not be considered in this order.

In the underlying case, the Agency imposed a permit condition in a reissued NPDES permit applicable to Citizen's West Suburban Wastewater Treatment Plant No. 2 ("Plant No. 2"). The condition requires Citizens to limit ammonia-nitrogen effluent from the plant to 1.5 mg/l for the months of April through October and 4.0 mg/l for the months of November through March, when the daily maximum ammonia-nitrogen concentration in the stream does not meet the requirements set out in 35 Ill. Adm. Code 302.212. Citizens objected to the condition arguing that the permit condition was not necessary to accomplish the purpose of the Act and because the condition was imposed by the Agency

unreasonably and without any evidentiary basis.

In the Motion for Rehearing, Citizens argues that the Board's order applies an overly stringent burden of proof to Citizens. It is undisputed that the petitioner has the burden to show, by a preponderance of the evidence, that the permit condition is unreasonable and unnecessary. This standard applies to all civil proceedings. Citizens maintains, however, that the Board applied a "criminal case standard" of "beyond all reasonable doubt". On review, the Board maintains that it correctly applied the preponderance of the evidence standard.

The standard for burden of proof used by the Board in this type of proceeding is that the petitioner must show by a preponderance of the evidence, that the Agency's decision was in error because the record before the Agency shows that no violation of the Act or Board regulations would result if the permit condition were not imposed. City of East Moline v. IEPA, PCB 86-218 (Slip Op., September 8, 1988). Section 302.212(a) of the Board's regulations states that "Ammonia-nitrogen shall in no case exceed 15 mg/l. Therefore, the burden on the petitioner is to show by a preponderance of the evidence that there are no circumstances under which the ammonia-nitrogen limit will be exceeded.

In applying this standard, the Board noted the highly probable, and legally allowable, scenario presented by the Agency involving winter days when the composition of the water in the East Branch of the DuPage River comes predominately from the effluent of sewage treatment plants and all of the plants upstream of Plant No. 2 are discharging at their allowable limit for ammonia-nitrogen. The Agency argues that under these conditions it would be necessary for Plant No. 2 to comply with the ammonia-nitrogen limitation in the proposed condition to avoid a violation of 35 Ill. Adm. Code 312.212(a) and (b). The petitioner maintained that the possibility that this scenario would occur was unlikely and failed to address how the ammonia-nitrogen standard could be maintained if these conditions did occur and the permit condition was not imposed.

In making its determination in this matter, the Board held that for the petitioner to show, by a preponderance of the evidence, that the Board's regulations would not be violated, the petitioner would have to prove conclusively "that this situation could never occur" or in the alternative "that the water quality standard could still be met without Citizens adhering to the condition proposed by the Agency." By failing to alleviate concerns about what the Board perceived as a realistic situation under which the Board's regulations would be violated, the petitioner has failed to meet its burden under the preponderance of the evidence standard.

There is no statement in the January 5, 1989 Opinion and Order that implies that the Board is holding the petitioner to a

standard other than the preponderance of the evidence standard. The Board statements relied on by the movant in claiming a higher standard was being employed clearly state that the Board was of the opinion that the petitioner needed to prove show that a violation would not occur under this one scenario presented if it were to carry its burden of proving, by a preponderance of the evidence, that the condition was unnecessary or unreasonable. Failing to conclusively dismiss this scenario, the petitioner has failed to meet its burden of proof.

The movant argues that the disputed numerical effluent limitation has no evidentiary basis and that the Agency has a burden of proof to provide adequate evidentiary support for the condition. As pointed out by the Agency in its response to the motion, the issue was fully addressed by the Agency in its March 16, 1988 brief in opposition to the permit appeal. The Board also discussed this issue in its Opinion and Order of January 5, 1989 on page 4. The Board holds that this issue has been fully examined in its opinion and that the Agency has shown an evidentiary basis for the numerical effluent limitation.

The next argument presented by the movant is that the Board failed to make findings of fact as to each issue because the Board's order did not find that the permit condition at issue is necessary and reasonable. The January 5, 1989 Opinion and Order clearly states that "[b]ased on the record, the Board finds that the condition was properly imposed by the Agency and may be properly enforced against a permittee." The Board stands by this statement as its finding of fact as to the issue in this matter.

The movant also continues the argument that it presented in the permit appeal that the permit condition is not necessary. To support this argument Citizens presented new information, not previously available in the record of this case. The Board cannot review this additional information in this reconsideration.

The scope of the Board's review is limited to the record as it existed before the Agency at the time of the Agency's permit decision. The Board does not consider information submitted after the permit application is denied. IEPA v. IPCB, et al, 118 Ill. App. 3d 772, 776-780 (1983); IEPA v. IPCB, 138 Ill. App. 3d 550, 486 N.E. 2d 293 (1985); IEPA v. IPCB, 115 Il. 2d 65, 503 N.E. 2d 343. This new information becomes the province of a new permit application.

Disregarding the additional information supplied in the motion, the Board finds that the movant has presented no new basis for a review of the necessity of the permit condition. All of his remaining arguments as to necessity have been amply addressed in the January 5, 1989 opinion and order. Similarly, the Board stands by its statements concerning the reasonableness of the permit condition and the reasons it will not consider evidence presented by Citizens concerning the cost and hardship

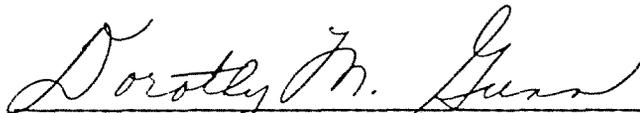
of compliance with the disputed permit conditions.

The Board notes that the Agency's response states that "... the company has not met its statutory burden of proving that the Agency's decision to impose the contested condition is against the manifest weight of the evidence." (Agency response at 6 and 7). For the record, the Board wishes to clarify that its standard for review in NPDES permit appeal cases is not the manifest weight standard of a reviewing court, but the preponderance of the evidence standard employed in civil litigations for a de novo hearing. Under Sections 39(c) and 40(a)(1) of the Act, the Agency is not required to conduct hearings with procedures that guarantee the applicant an opportunity to challenge the validity of the information the Agency relies on in denying the permit. The hearing before the Board is intended to safeguard the due process rights of the applicant. Therefore, the Board, not the Agency, is the party that determines whether or not the permit is issued. IEPA v. IPCB, (1986) 115 Ill. 2d 65, 503 N.E. 2d 343, 345. The Board makes the decision by reviewing the record before the Agency at the time the Agency denied the permit and allows the applicant to attempt to show, by a preponderance of the evidence, that no violation of the Act or the Board regulations would result if the permit were issued or if the permit condition were not imposed. Alton Packaging Corp. v. IPCB and IEPA, 162 Ill. App. 3d 731, 516 N.E. 2d 275 (1987).

Based on the preceding review, the motion for rehearing is hereby denied.

IT IS SO ORDERED.

I, Dorothy M Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 9<sup>th</sup> day of March, 1989, by a vote of 7-0.

  
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Dorothy M. Gunn, Clerk,  
Illinois Pollution Control Board