

ILLINOIS POLLUTION CONTROL BOARD
October 5, 1995

THE GALESBURG SANITARY DISTRICT,)	
)	
Petitioner,)	
)	
v.)	PCB 96-46
)	(Variance-Water)
)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by J. Yi):

On August 23, 1995 the Galesburg Sanitary District (District) filed a petition for variance for its wastewater treatment plant located at 2700 W. Main Street, Galesburg, Knox County Illinois. The District is requesting relief from the requirements of 35 Ill. Adm. Code 304.207(b)(1) as this section applies to the District's deoxygenating waste discharges. The District filed the petition pursuant to Section 35 of the Environmental Protection Act (Act). (415 ILCS 5/35 (1994).) Alternatively, the District requests the Board to enter a order which dismisses "...the petition on the basis that the relief requested is unnecessary in that it reflects the Board's intent as to how that rule (35 Ill. Adm. Code 304.207(b)(1)) is to be interpreted." (Pet. at 1.)¹ Essentially the District is requesting the Board to interpret its own rule, and if necessary, based on this interpretation, seeks variance relief.

The Illinois Environmental Protection Agency (Agency) filed a motion to dismiss the petition as being inadequate and insufficient on September 7, 1995. Additionally, the Agency argues that the Board does not have the authority to grant the relief requested by the District in the context of a variance petition. The Agency also filed a motion for extension of time to file its recommendation should the Board not dismiss the District's petition.

In response to the Agency's motion to dismiss the District states "[t]he District does not desire to obtain a variance and if it does obtain a variance, that would imply that the District

¹The petition for variance will be referenced as "Pet. at ", the Illinois Environmental Protection Agency's motion to dismiss will be referred to as "Mot. at ", and the District's response to the motion to dismiss will be referenced as "Resp. at ".

would have been in noncompliance with its site-specific rule since 1984." (Resp. at 1-2.) The District argues that it seeks the dismissal of the variance on the same basis as in Safety-Kleen v. Illinois Environmental Protection Agency, (February 7, 1980), PCB 80-12. (Resp. at 2.)

BACKGROUND

On April 19, 1984 the Board adopted as a final rule Section 304.207(b)(1). (In the Matter of the Petition of the Galesburg Sanitary District to Amend Regulations, R 80-16, (April 19, 1984).) Section 304.307 states in pertinent part:

Section 304.207 Galesburg Sanitary District
Deoxygenating Wastes Discharges

a) The deoxygenating wastes general effluent standards of Section 304.120(c) shall not apply to the Galesburg Sanitary District discharges into Cedar Creek. Such discharges must meet the deoxygenating wastes general effluent standards set below:

* * *

b) The above standard shall apply so long as the Galesburg Sanitary District achieves:

1) by November 1, 1984, compliance with 35 Ill. Adm. Code 302.206 throughout Cedar Creek downstream of the treatment plant outfall, by effluent aeration, in-stream aeration, or other means,

* * *

The Board stated in its opinion concerning the deoxygenating wastes and the dissolved oxygen requirement the following:

Section 304.207(b)(1) requires that the District assure compliance with the downstream dissolved oxygen limitations by November 1, 1984, in order to qualify for relaxed biochemical (sic) oxygen demand (BOD) and suspended solids (SS) limitations. It does not exempt the District from the dissolved oxygen limitations of Section 302.206 with regard to any reach of Cedar Creek.

Rather, the rule is based upon the recognition that upstream dissolved oxygen violations may result from factors over which the district has no control. If, however, dissolved oxygen violations can be found to result from the District (sic) activities, it is subject to enforcement. (In the Matter of Galesburg at 8-9.)

In explanation of the instant variance petition, the District states that "[i]n the spring of 1994, however, the Agency raised the issue of whether the District continued to be entitled to the relief provided by Section 304.207 due to continuing exceedances of the dissolved oxygen standard in Cedar Creek." (Pet. at 2.) Additionally, the District states that it responded to the Agency's position by sending information to the Agency which explained that the Board's intention is that Section 304.207(b)(1) "... should be read in light of Section 304.105 which requires that a discharges not cause or contribute to water quality violations." (Pet. at 2.) The Agency sent a Pre-Enforcement Conference Letter (PECL) to the District dated June 14, 1995. (Pet. at 2, Pet. Attachment C.)

The PECL set forth the statutory and regulatory requirements and stated the following:

On April 19, 1984, the Pollution Control Board issued its Order adopting an adjusted standard for the Galesburg Sanitary District discharges, but stated that the relaxed standards applied so long as the Galesburg Sanitary District achieved compliance by November 1, 1984 with 35 Ill. Adm. Code 302.206 throughout Cedar Creek downstream of the treatment plant outfall, by effluent aeration, in-stream aeration or other means and also complied with other listed conditions. The Board further stated that if any of these conditions were not met, the deoxygenating wastes ("D.O.") general effluent standards of Section 304.120(c) "shall apply" to the Galesburg Sanitary District into Cedar Creek.² (Pet. Attachment C at 3.)

Based on the PECL and the District's failed attempt to persuade the Agency to refrain from enforcement, the District filed this petition to either, a) receive a variance from Section 304.207(b)(1) or the water quality requirements of Section 302.206 as they apply to Cedar Creek; or b) a determination from the Board that the Board intended that the District's discharges themselves can not violate Section 302.206 when we adopted Section 304.207(b)(1).

STATUTORY FRAMEWORK

In determining whether any variance is to be granted, the Act requires the Board to determine whether a petitioner has presented adequate proof that immediate compliance with the Board regulation at issue would pose an arbitrary or unreasonable

²The Board notes that the Agency designates deoxygenating waste as "D.O." in the PECL but then proceeds to list sample results for dissolved oxygen using the "D.O." as its designation.

hardship. (415 ILCS 5/35(a) (1994).) Furthermore, the burden is on petitioner to show that its claimed hardship outweighs the public interest in attaining immediate compliance with regulations designed to protect the public. (Willowbrook Motel v. Pollution Control Board (1st Dist. 1977), 135 Ill.App.3d 343, 481 N.E.2d 1032). Only with such a showing can the claimed hardship rise to the level of arbitrary or unreasonable hardship. (We Shred It, Inc. v. Illinois Environmental Protection Agency, (November 18, 1993) PCB 92-180 at 3.)

A further feature of a variance is that it is, by its nature, a temporary reprieve from compliance with the Board's regulations, and compliance is to be sought regardless of the hardship which the task of eventual compliance presents an individual polluter. (Monsanto Co. v. Pollution Control Board, 67 Ill.2d 276, 367 N.E.2d 684, (1977).) Accordingly, except in certain special circumstances, a variance petitioner is required as a condition to the grant of a variance, to commit to a plan which is reasonably calculated to achieve compliance within the term of the variance.

DISCUSSION

Jurisdiction

The District is requesting variance relief from a site-specific rule or in the alternative a determination by the Board that the requested variance relief is unnecessary. As the District has noted, the Board has found in prior cases before the Board that a petitioner was in compliance with the regulation from which it requested variance relief and consequently dismissed the variance petition as unnecessary. (See Safety-Kleen.) However, the Board has also found that a variance petition is not an appropriate proceeding for a determination as to whether a certain material was an acceptable alternative for landfill cover. (See Lone Star v. Illinois Environmental Protection Agency, (May 20, 1993), PCB 92-134.) Moreover, the Board made a preliminary determination as to the applicability of the regulations in an adjusted standard proceeding. (See In the matter of Petition of Illinois Wood Energy Partners, L.P. for an Adjusted Standard from 35 Ill. Adm. Code 807 or, in the alternative, a Finding of Inapplicability, (December 1, 1994), AS 94-1.) In doing so the Board reasoned that its jurisdiction in making such a determination is the result of the petitioner seeking relief from a requirement which would result in violation if such relief was not granted. (Id. at 2.) Finally in BTL Specialty Resins Corporation v. Illinois Environmental Protection Agency, (April 20, 1995), PCB 95-98, the Board concluded that the variance proceeding was specifically envisioned by the drafters of the Environmental Protection Act as an appropriate means of deciding whether a determination of the Agency was correct in the

first instance, or in the alternative, granting a limited time to achieve full compliance with the regulation, and that this method of review has been in accepted use for sometime. (Id. at 1.)³

In this case, in order for the Board to grant variance relief, the Board must determine whether a petitioner has presented adequate proof that immediate compliance with the Board regulation at issue would pose an arbitrary or unreasonable hardship. If the consequence of the Board's interpretation of the rule is that the District is in compliance with the regulation, variance relief need not be granted as it would be unnecessary. For these reasons, the Board finds that it has the jurisdiction to make a determination as to whether a petitioner is in compliance with the regulation from which petitioner is seeking variance prior to ruling on the requested relief. Since the Board has the jurisdiction in this variance proceeding to make a preliminary determination with respect to Section 304.207(b)(1) we will also consider the sufficiency of the petition for these purposes and the Agency's motion to dismiss.

Sufficiency of Variance Petition

Section 104.121 states "[t]o enable the Board to rule on the petition for variance the following information, where applicable, shall be included in the petition." The following is a discussion of the petition's deficiencies as alleged by the Agency.

Section 104.121(a)

A clear and complete statement of the precise extent of the relief sought, including specific identification of the particular provisions of the regulations or Board Order from which the variance is sought.

The District requests that we modify the language of Section 304.207(b)(1) to read:

- b) The above standard shall apply so long as the Galesburg Sanitary District achieves:
 - 1) by November 1, 1984, compliance with Section 304.105 with respect to 35 Ill. Adm. Code 302.206 throughout Cedar Creek downstream of the treatment plant outfall, by effluent aeration, in-stream aeration, or other means,

We do not believe that, in this proposed modification, the

³(See also Container Corporation of America v. Illinois Environmental Protection Agency, (June 2, 1988), PCB 87-183)

District has requested any effective relief from a Board regulation or order.

The District is requesting that 35 Ill. Adm. Code 304.105 be reflected in the language of Section 304.207(b)(1) with respect to Section 302.206. Section 304.105 would apply to the District's discharge whether or not it is included in Section 304.207(b)(1). The Board, when adopting the District site-specific rulemaking, did not specifically exempt the District from Section 304.105. Section 304.105 provides:

In addition to other requirements of this Part, no effluent shall, alone or in combination with other sources, cause a violation of any applicable water quality standard. When the Agency finds that a discharge would comply with effluent standard contained in this Part would cause or is causing a violation of water quality standards, the Agency shall take appropriate action under Section 31 or Section 39 of the Act to require the discharger to meet whatever effluent limits are necessary to ensure compliance with the water quality standards. When such a violation is caused by the cumulative effect of more than one source, several sources may be joined in an enforcement or variance proceeding, and measures for necessary effluent reductions will be determined on the basis of technical feasibility, economic reasonableness and fairness to all dischargers.

The effect of inclusion of a reference to Section 304.105 in Section 304.207(b)(1), then, is identical to that of leaving the reference out.

In addition, the District is requesting the Board to modify the language of a regulation through the variance process instead of requesting a variance from the requirements of the regulation. The variance provisions of the Act do not give the Board the authority to modify regulatory language. Section 35 of the Act allows the Board to give individuals variances from the requirements of a rule or regulation or Board order upon adequate demonstration of proof that compliance with any rule or regulation or order of the Board would impose an arbitrary or unreasonable hardship. Modification of a regulation must be accomplished via a rulemaking pursuant to Section 27 of the Act.

In summary, the Board finds that the District has failed to give a clear and complete statement of the precise extent of the relief sought, including specific identification of the particular provisions of the regulations or Board order from which the variance is sought.

Section 104.121(e)

Data describing the nature and extent of the present

failure to meet the numerical standards or particular provisions from which the variance is sought and a factual statement of why compliance with the Act and regulations was not or cannot be achieved by the required compliance date;

The District states that "...since it has been adding more oxygen to Cedar Creek than the incremental oxygen demand it adds to the Creek (sic) by discharging BOD above the generally applicable levels, it has complied with Section 304.207(b)(1) such that relief afforded by Section 304.207 continues to apply." (Pet. at 7.) Therefore the District believes it is complying with Section 304.207(b)(1). However, the District also states that if the Agency is correct, in that it has not met the requirements of Section 302.206 and therefore is not in compliance as required by Section 304.307(b)(1), it "...cannot meet the applicable standards with its present plant, as the discharge data presented demonstrates." (Pet. at 7.) The Agency argues that since the District believes that it is in compliance, the District has failed to provide information describing the nature and extent of its present failure to meet the requirements. (Mot. at 4.)

The Board finds that, at this point in this proceeding the District has met the informational requirements of Section 104.121(e). The District has supplied the information necessary to describe the nature and extent of the present failure to meet the numerical standards of a particular provisions if the Board were to determine that the District has failed to meet the requirements of Section 304.307(b)(1).

Section 104.121(f)

A detailed description of the existing and proposed equipment or proposed method of control to be undertaken to achieve full compliance with the Act and regulations, including a time schedule for the implementation of all phases of the control program from initiation of design to program completion and the estimated costs involved for each phase and the total cost to achieve compliance;

The District asserts that it is uncertain of its compliance plan for several reasons, including whether they are actually in violation, whether the relief being requested in AS 94-20, In the Matter of: The Galesburg Sanitary District Petition for an Adjusted Standard from 35 Ill. Adm. Code 304.105 is granted, and what effects closure of other facilities discharging to the creek and to the plant will have to the water quality on the creek and its discharge. (Pet. at 8-9.)

The District offers a compliance plan which concludes with

it either building the necessary treatment facilities as required based on further studies or seeking adjusted standard relief. (Pet. at 9-10.) However, the plan does not contain specific information and only estimates the costs for installation of the digester supernatant treatment and partial nitrification. (Pet. at 9-10.) The Agency argues that since the plan fails to have specific information the variance petition is deficient. (Mot. at 5-6.)

The Board finds that, in this case and at this point in the proceeding, the District's variance petition is sufficient concerning the requirements of Section 104.121(f). Although the District has not given many specifics, the Board has granted variances for studies to be conducted to determine the necessary compliance plan with a commitment by petitioner's to the eventual implementation of such plan. (See Mobil Oil Corp. v. Illinois Environmental Protection Agency, (March 3, 1994), PCB 93-151.) Additionally the Board has accepted as part of a compliance plan the petitioner seeking adjusted standard relief in very unique situations such as where petitioner has exhausted compliance options, petitioner is actively pursuing permanent relief, the term of variance is for the limited time necessary to resolve the matter of permanent relief, and hardship of immediate compliance clearly outweighs impact of grant of the variance. (See Akzo Chemicals, Inc. v. Illinois Environmental Protection Agency, (May 5, 1994), PCB 94-76.)

Section 104.121(g)

An assessment, with supporting factual information, of the environmental impact that the variance will impose on human, plant, and animal life in the affected area, including, where applicable, data describing the existing air and water quality which the discharge may affect;

The District asserts that the "...requested relief will have no adverse impact upon the environment in that the District is not seeking any relief from the dissolved oxygen standard in Cedar Creek which is the water quality characteristic of concern in this matter." (Pet. at 10.) The District also states that, if it is not in compliance and is required to achieve the generally applicable standards concerning BOD₅ and suspended solids, it would no longer be required to operate the aerators which would actually increase both in "magnitude and frequency" the violation of Section 302.206. (Pet. at 10.) The Agency argues that the District's petition fails to provide an evaluation of the impact of the requested relief. (Mot. at 7.) The Agency argues that the requested relief adds "...an additional hoop the Agency would have to jump through to pursue enforcement" and that "[a]lthough it may be hard to quantify, contrary to Galesburg's statement, the Agency believes that such

requested relief would have an adverse environmental impact." (Mot. at 7.)

At this point of the proceeding, the Board finds that the impact information is sufficient to meet the requirements of Section 104.121(g) considering the unique posture of this case. The District states that if the variance is granted the "status quo would be maintained." (Pet. at 10.) The District states it is not requesting variance relief in order to discharge anything other than what it is already discharging.

Section 104.121(h)

Past efforts to achieve compliance including costs incurred, results achieved, permit status, and, for publicly-owned treatment works or connections thereto, construction grant status;

The District claims it has been in compliance with Section 304.207(b)(1) and has made no efforts beyond the installation of the aerators and injecting more oxygen than is required by Section 304.207(b)(1). (Pet. at 11.) The Agency argues that the petition is insufficient because it does not provide any information as to compliance efforts.

The Board finds that the District's petition has met the requirements of Section 104.121(h). The District has been operating under the assumption that it was only required to meet the standards of Section 302.206 as far as its discharge not contributing to a violation of the water quality standard for dissolved oxygen in Cedar Creek. The District states its past effort was to inject dissolved oxygen into the creek so that the standards of Section 302.206 are achieved in relation to its discharge. Since the District believed that by injecting dissolved oxygen it was in compliance, those were its compliance efforts and there is no other applicable information.

Section 104.121(i)

A discussion of the availability of alternate methods of compliance, the extent that such methods were studied, and the comparative factors leading to the selection of the control program proposed to achieve compliance;

As stated previously concerning the requirements of Section 104.121(g), the District states that it has not investigated alternative compliance methods since it believed it was in compliance and that it is unreasonable to require any further investigation until the impacts of the closure of Gunther Products, a company which discharges to the District, and the Board's decision in AS 94-20 is known. The Agency argues that

the compliance methods have not been investigated and therefore the petition is deficient. (Mot. at 8.)

The Board finds that, at this point in the proceeding, the District has met the applicable informational requirements of Section 104.121(i). In this case the District has supplied the information that is applicable at this time.

Section 104.121(j)

A statement of the measures to be undertaken during the period of the variance to minimize the impact of the discharge of contaminants on human, plant, and animal life in the affected area, including the numerical interim discharge limitations which can be achieved during the period of the variance;

The District states that there is little it can do to minimize the environmental impact during the variance term as a result of its National Pollution Discharge Elimination System (NPDES) permit limiting the amount of dissolved oxygen levels it can inject into Cedar Creek at 150% saturation. (Pet. at 11.) The Agency states that the District's statements are in direct conflict with the earlier statement that there is no impact and asserts that the information made by the District provided is inadequate to meet the requirements.

The Board finds the information is adequate concerning the petition for variance. The variance is not requesting the ability to discharge anything additional to the creek during the variance, thus the impact of the discharge during the variance will be the same as it is without the variance. Furthermore, since there is a question of the interpretation of Section 304.207(b)(1) as it relates to Section 302.206, the District has provided the applicable information at this time.

Section 104.122(b)

All petitions for variances from Title III of the Act; from 35 Ill. Adm. Code, Subtitle C, Ch I; or from water pollution related requirements of any other title of the Act or chapter of the Board's Regulations shall indicate whether the Board may grant relief consistent with the Clean Water Act (33 U.S.C. 1251), U.S.E.P.A. effluent guidelines and standards, any other Federal regulations, or any areawide waste treatment management plan approved by the Administrator of U.S.E.P.A. pursuant to Section 208 of the Clean Water Act.

The District states that the relief requested is consistent with federal law and the Board's intent of Section 304.207(b)(1).

(Pet. at 12.) The District in its response to the Agency's motion states that the federal law has not changed in 15 years which could render the relief sought inconsistent with federal law. (Resp. at 1.) The Agency argues that the District has not provided enough information for the Board to determine whether the relief requested is consistent with federal law.

The Board finds that the District has provided adequate information to indicate that the relief can be granted consistent with federal law.

CONCLUSION

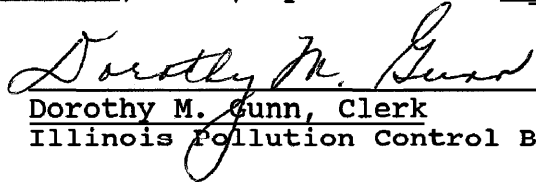
Usually, when the Board has found the variance petition to be deficient, we would require the petitioner to amend its petition prior to proceeding with the matter. However, due to the unique posture of this matter we will not direct the District at this time to amend its petition. We will instead proceed to make a determination as to the interpretation of 35 Ill. Adm. Code 304.207(b)(1). If necessary, the District may amend its variance petition correcting the deficiencies and to provide additional information as it deems appropriate.⁴ Although arguably there exists no variance action before us at this time due to the insufficiency of the requested relief, due to the unique posture of this matter we will proceed with the determination concerning Section 304.207. Furthermore, our finding on the sufficiency of the petition at this time, except for the relief requested, does not mean we are finding that the information submitted is sufficient to justify grant of variance. For the reasons stated above we deny the Agency's motion to dismiss.

As to the Board's determination of the interpretation of Section 304.207(b)(1), the Board will allow the Agency twenty-one (21) days from the date of service of this order to respond to the District's assertions as to the interpretation of Section 304.207(b)(1). After the Agency files its response, or that time expires, within seven (7) days the District may file a response. The Board will then determine the interpretation of Section 304.207(b)(1). Then if the District desires to proceed with the variance it may do so by filing an amended petition. If the District does not file an amended petition we will dismiss the case and close this docket. Since the Board will be directing the District to file an amended petition, if this matter proceeds, the Agency will be able to file its recommendation 30 days after the filing of the amended petition, making its motion for an extension of time to file its recommendation moot.

⁴The filing of an amended petition will restart the Board's decision timeclock in this matter.

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 5th day of October, 1995, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board