ILLINOIS POLLUTION CONTROL BOARD
January 9, 1992

MARATHON OIL COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 91-173
	)	(Variance)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent.	)	

JOSEPH W. WRIGHT, OF MCBRIDE BAKER & COLES, APPEARED ON BEHALF OF PETITIONER;

ROBB LAYMAN APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by R.C. Flemal):

This matter comes before the Board on the September 17, 1991 filing by petitioner, Marathon Oil Company ("Marathon"), of a petition for variance ("Pet."). Marathon seeks variance from its own site-specific water quality standard for chloride found at 35 Ill. Adm. Code 303.323. Variance is requested for the time period necessary for resolution of a related rulemaking proposal[1]. In the rulemaking Marathon seeks to make permanent the relief requested in the instant variance proceeding.

On July 15, 1991, the Illinois Environmental Protection Agency ("Agency") filed its variance recommendation ("Rec."). The Agency recommends that variance be denied based on the contentions that Marathon can and does comply with the current regulations and that Marathon has not met its burden of demonstrating that compliance with the current regulation would constitute an arbitrary or unreasonable hardship.

Hearing was held November 13, 1991 in Robinson, Illinois, site of the facility at issue. Marathon presented the only witness and no members of the public attended the hearing.

As presented below, the Board finds that Marathon has not met its burden of demonstrating that denial of variance would impose an arbitrary or unreasonable hardship. Accordingly, the variance request is denied.

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[1] In the Matter of: Petition of Marathon Oil Company for Site-Specific Water Regulation, R91-23.

BACKGROUND

Marathon operates a petroleum refinery located on the outskirts of the City of Robinson, Crawford County, Illinois. The refinery processes some 180,000 barrels of oil per day and employs approximately 650 persons (Tr. 11).

Part of the refining process consists of removing water from the crude oil. The water contains chloride, the quantity of which varies depending upon the nature of the pore fluids in the source rocks of the crude oil and the history of recovery, transportation, and storage of the crude oil. Because the Marathon facility receives crude oil from different sources, the chloride content of the crude processed at the facility likewise differs. Since 1988 the chloride content has varied on a monthly-average basis from a low of 29.2 pounds per million barrels to 104.5 pounds per million barrels; in the first ten months of 1991 chloride contents ranged from an average of 48.5 to 88.7 pounds per million barrels (Exh. 8).

Marathon treats its wastewaters prior to discharging them. However, the treatment is not capable of producing significant reduction in chlorides. Marathon is in the process of designing an upgraded treatment facility that would allow it to increase treatment capacity, but this too would have only marginal effect on chloride discharge concentrations (Tr. 25-27).

Discharge of the wastewaters is to an unnamed[2] tributary of Sugar Creek at approximately mile 5.0 of the unnamed tributary; Sugar Creek thence flows approximately five miles more to its mouth on the Wabash River (Pet. Exh. 1, p. 8).

The unnamed tributary at the Marathon discharge has a drainage area of approximately eight square miles (Tr. 15) and a natural 7-day 10-year ("7Q10") low flow of zero (Tr. 22). However, actual low flow in the unnamed tributary is controlled by wastewater and other manmade discharges. These include discharges located upstream from Marathon's discharge that aggregate an average of approximately 1.4 million gallons per day ("MGD"[3]) (Tr. 15-6), of which the discharge of the City of Robinson's sewage treatment plant at 1.2 MGD is the largest. Marathon itself discharges an average of another 1.4 MGD, such that the low flow is approximately doubled due to Marathon's discharge.

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[2] Although not officially named, the creek is sometimes referred to as Robinson Creek (e.g., Pet. Exh., p. 6).

[3] One MGD equals 0.04381 cubic meters per second or 1.55 cubic feet per second ("cfs").

PROCEDURAL BACKGROUND

The Board's general effluent regulations do not include a specific limitation for chloride. However, they do prohibit any discharge that would cause or contribute to a violation of a water quality standard. (35 Ill. Adm. Code 304.105.) The pertinent water quality standard for chloride is the 500 mg/L General Use Water Quality Standard found at 35 Ill. Adm. Code 302.304.

Marathon initially petitioned this Board for exemption of its receiving waters from the 500 mg/L water quality standard in PCB 80-102. On October 2, 1985 the Board granted this petition, under condition that chloride effluent concentrations not exceed 700 mg/L, effective through October 2, 1985.

In PCB 85-83 Marathon petitioned for extension of the PCB 80-102 variance with respect to chloride. On January 23, 1986 this petition was granted effective for the period October 2, 1985 through October 2, 1990.

On January 28, 1987 Marathon filed a site-specific rulemaking petition seeking, among other matters, to make permanent its exemption from causing or contributing to violations of the 500 mg/L water quality standard under the continuing provision that its effluent discharge not exceed 700 mg/L. On September 13, 1989[4] the Board responded to Marathon's petition by promulgating a new rule at 35 Ill. Adm. Code 303.323. The new rule generally tracks Marathon's proposal, except that the Board added a 550 mg/L limit on in-stream chloride concentrations as recommended by the Agency. Accordingly, the pertinent rule now is as follows:

Section 303.323 Sugar Creek and Its Unnamed Tributary

a) This Section applies only to Sugar Creek and its unnamed tributary from the point at which Marathon Petroleum[5] Company's outfall 001 discharges into the unnamed tributary to the confluence of Sugar Creek and the Wabash River.

b) 35 Ill. Adm. Code 304.105 shall not apply to total dissolved solids and chlorides discharged by Marathon Petroleum Company's Outfall 001, so long as both of the following conditions are true:

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[4] In the Matter of: Marathon Petroleum Company Site-Specific, R87-2, 103 PCB 133.

[5] Marathon Oil Company is the successor in interest to Marathon Petroleum Company (Marathon brief at 1).

1) Effluent from Marathon Petroleum Company's Outfall 001 does not exceed 3,000 mg/l total dissolved solids or 700 mg/l chlorides,

2) The water in the unnamed tributary does not exceed 2,000 mg/l total dissolved solids or 550 mg/l chlorides.

On August 19, 1991 Marathon filed a new site-specific rulemaking proposal, R91-23, seeking to amend the chloride provisions of Section 303.323. The new proposal would increase the effluent chloride limitation from 700 mg/L to 1000 mg/L and the chloride water quality standard from 550 mg/L to 700 mg/L. Hearing in R91-23 is scheduled for January 16, 1992.

On September 17, 1991 Marathon filed the instant proposal. In it Marathon requests as variance conditions the same 1000 mg/L and 700 mg/L effluent and water quality limitations that it proposes as amendments to Section 303.323. Thus, favorable consideration of Marathon's variance request would have the effect of establishing as interim standards the same standards Marathon's seeks to have made permanent via its site-specific petition.

HARDSHIP

The Agency and Marathon agree that Marathon is not now violating the applicable chloride limits (Tr. 62; Resp. Brief at 4). Marathon has been able to meet the current limits in part due to its employing a program of water management, which consists of storage and controlled release of wastewaters (Tr. 35-36). Marathon contends, however, that there have been some "some close calls" where its ability to store more high-chloride wastewaters had nearly been exhausted (Tr. 37). Marathon also observes that use of its stormwater facilities to store wastewater reduces it ability to manage stormwater discharges (Tr. 38-39).

Marathon further contends that its ability to achieve compliance with its existing chloride limits will worsen due to increasing content of chloride in crude oils and prospective plant additions (Tr. 35). As basis for the former contention, Marathon observes that salt contents of crudes received at the Marathon facility have shown a general increase of 3 to 5 percent per year over the last several years (Tr. 39-40). The presumption is that this trend would continue.

The Agency points to the past ability of Marathon to comply with the chloride standard as evidence that Marathon does not need variance and that therefore Marathon is not experiencing an arbitrary or unreasonable hardship.

DISCUSSION

Marathon does not argue that maintaining compliance with the current standards has been impossible. It only argues that maintaining compliance has been achieved with difficulty, and that continued compliance will likely face lesser assurity of success as time goes on.

The Board finds this to be an insufficient basis for grant of variance. A requirement to maintain compliance is not arbitrary or unreasonable solely because it is difficult; this Board is empowered to grant variance only where compliance is shown to constitute an arbitrary or unreasonable hardship. (Ill. Rev. Stat. 1989, ch. 111½, pars. 1035(a) ("Act"); Monsanto Co. v. IPCB (1977), 10 Ill.Dec. 231, 367 N.E.2d 684, 67 Ill.2d 276,289.) Marathon fails to meet this burden. The Board also finds that Marathon's projection of increased chloride loads is too speculative to form grounds for variance. We know neither that the "upward trend" in chloride concentrations will actually cause the current limits to be exceeded, nor that productions increases will actually cause total chloride loadings to rise to unmanageable levels.

Additionally, the Board does not grant variance where there is no need for variance, as for example where there is no demonstration that the petitioner is out of compliance with the standard at issue. (Village of Wheeling v. IEPA (July 10, 1980), PCB 80-59, 39 PCB 53,55; City of Rolling Meadows v. IEPA (July 10, 1980), PCB 80-60, 39 PCB 62,63; The Village of Elk Grove Village v. IEPA (January 10, 1985), PCB 84-158, 62 PCB 295,296; City of West Chicago v. IEPA (June 13, 1985), PCB 85-2, 64 PCB 249,251; Village of Minooka v. IEPA (September 20, 1985), PCB 85-100, 65 PCB 527,529; City of Spring Valley v. IEPA (January 5, 1989), PCB 88-181, 95 PCB 57,63; Village of North Aurora v. IEPA (February 8, 1990), PCB 89-66, 108 PCB 25,33.) This precedent notwithstanding, Marathon relies on City of Geneva v. IEPA (March 22, 1990), PCB 89-107, 109 PCB 507), for the premise that under certain circumstances a variance should be granted even when a violation has not been demonstrated. However, in Geneva there was good reason to believe that exceedence of the standard was occurring even though a violation had not been technically demonstrated[6]. In the case at bar, however, there is good reason to believe that violations are not occurring. Thus, the circumstances in the two cases differ in a significant way.

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[6] The regulation at issue in Geneva was a regulation pursuant to which violation could be shown only if the average of samples collected over a period of a year exceeded the specified standard. Geneva had collected enough samples to indicate that the annual average would very likely be exceeded, even though a full annual cycle of sampling had not yet been completed.

Perhaps more on point is Sonoco Products Company v. IEPA, PCB 88-60 (92 PCB 97, September 8, 1988). There the petitioner was in compliance at the time of the variance request, but would have been in noncompliance at anticipated increased production levels. The Board found that in light of this and other factors the petitioner would suffer arbitrary or unreasonable hardship if denied its requested variance (Id. at 92 PCB 102). Sonoco is nevertheless distinguishable from the case at bar in that Sonoco had definite programs for both increased production and achievement of compliance during the variance period.

The Board notes that it does not today make any new findings regarding the environmental impact of Marathon's existing or proposed chloride discharge program. Neither does it address the adequacy of Marathon's compliance plan. Inasmuch as the issue of hardship is dispositive, it is not necessary for the Board to proceed to these additional issues. The Board does observe, however, that the appropriate conduct at this juncture is for Marathon to continue to control its chloride discharges under the system currently employed, at least for the short time until the site-specific rule is resolved. This strategy can do nothing other than serve the betterment of the environment by maintaining lower chloride concentrations to the receiving waters during the interim and until there is full resolution of the matter of whether higher chloride concentrations would be environmentally acceptable. Moreover, once the site-specific matter is decided, Marathon will presumably be in a position to more definitively commit to such compliance plan as may remain necessary.

For these reasons, Marathon's request for variance relief is denied.

Lastly, the Board notes that the conclusions it reaches based upon the record of the instant variance proceeding do not necessarily reflect on the merits of Marathon's site-specific rulemaking proposal currently under consideration in Board docket R91-23. The burdens of proof and the standards of review in a rulemaking (a quasi-legislative action) and a variance proceeding (a quasi-judicial action) are distinctly different (*cf.* Titles VII and IX of the Act; see also Willowbrook Development v. IPCB (1981), 92 Ill.App.3d, 1074), as are the records in the two proceedings. Moreover, the Board cannot lawfully prejudge the outcome of a pending regulatory proposal in considering a petition for variance. (City of Casey v. IEPA (May 14, 1981), PCB 81-16, 41 PCB 427,428.) Conversely, the pendency of a rulemaking does not stand by itself as grounds for grant of a variance. Section 35(a) of the Act; Citizens Utilities Company of Illinois v. IPCB (1985), 134 Ill.App.3d, 111,115; City of Lockport v. IEPA (September 11, 1986), PCB 85-50, 72 PCB 256,260; General Motors Corporation, Electro-Motive Division v. IEPA (February 19, 1987), PCB 86-195, 76 PCB 54,58; Alton Packaging Corp. v. IEPA (February 25, 1988), PCB 83-49, 86 PCB 289,299.