

ILLINOIS POLLUTION CONTROL BOARD
June 17, 1993

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

ORDER OF THE BOARD (by J. Anderson):

On November 18, 1992, Citizens Utilities Company of Illinois (Citizens) filed a motion for rehearing and reconsideration. On April 30, 1993, the Illinois Environmental Protection Agency (Agency) filed its response.¹ On May 3, 1993, Citizens filed a motion for leave to file a reply to the Agency's response instantler. The Agency has not filed a response to the motion.

35 Ill. Adm. Code 101.241(c) provides that a party shall not have the right to reply except as permitted by the Board to prevent material prejudice. Citizens, in its motion, asserts that it will be prejudiced if not allowed to file its reply. Because the Agency has not objected to the motion, the Board grants Citizens' motion for leave to file its reply. The Board also grants the motion for reconsideration but, as discussed below, declines to grant rehearing.

In its motion for rehearing and reconsideration, Citizens requests the Board to reconsider its October 16, 1992 order on remand. In that order, the Board determined that the Agency's imposition of a condition in Citizens' NPDES permit limiting the amount of ammonia-nitrogen in the effluent from Citizens' West Suburban Wastewater Treatment Plant No. 2 (i.e., a 4.0 mg/l "winter" ammonia-nitrogen effluent limit and a 1.5 mg/l effluent limit for the remaining months when the water quality standard downstream of the outfall is exceeded) was "necessary to achieve compliance with the Act and regulations."

¹The Agency filed three motions for extensions of time to file its response to Citizens' motion (i.e. on December 4, 1992, February 4, 1993, and April 21, 1993). In each motion, the Agency represented that Citizens did not object to the motions. The Board granted the Agency's motions for extension so that the parties could engage in settlement negotiations. (see December 17, 1992, February 4, 1993, and April 22, 1993 Board orders).

In support of its motion, Citizens states that it seeks rehearing to bring to the Board's attention certain facts which, on reconsideration, should cause the Board to remove the disputed permit condition. First, Citizens asserts that the Board applied an overly stringent burden of proof in that it has required Citizens to prove its case "beyond a reasonable doubt" rather than by a "preponderance of the evidence" and has required Citizens to show the condition has no "rational basis".

Citizen's next argues that the Agency has failed to explain the evidentiary basis for the condition as is required by Section 40(a)(1) of the Act. Citizens also argues that the Agency failed to present any scientific evidence as to how it arrived at the effluent limits or from what Board regulations such limits were derived. More specifically, Citizens notes that the Board's regulations have never contained the 1.5 mg/l limit and that the Board's regulations no longer contain the 4.0 mg/l limit. Finally, Citizens asserts that the condition is an illegal attempt by the Agency to establish effluent limitations because the Act gives only the Board the authority to establish effluent limitations and because the effluent limitations are not in the Act, Board regulations, or Federal Water Pollution Control Act as required by Section 39(b) of the Act.

Citizens further argues that the permit condition is unnecessary in that the Agency has admitted that the condition is unnecessary for the summer months. As for the winter months, Citizens notes that the Agency used a "worse-case scenario" to determine possible non-compliance that is inconsistent with the Board's averaging rules at 35 Ill. Adm. Code 304.104.

Citizens also claims that the permit condition is unreasonable. Specifically, Citizens argues that the Board erred in considering only the necessity of the condition rather than the reasonableness of the condition in violation of the Act (Section 33(c)(2) and (4)), Board regulations (35 Ill. Adm. Code 105.102(10)), and case law. Citizens also claims that the Board did not consider the economic impact of the condition as required by Section 27(b) of the Act and case law.

Finally, Citizens argues that the Board failed to comply with the appellate court's remand order. Specifically, Citizens asserts that, although the Board admitted new evidence into the record as directed by the court, it failed to give it due consideration and make findings based on the additional documentation as ordered by the court.

At the outset, the Board rejects Citizens' argument regarding the Board's misapplication of the "preponderance of the evidence" standard. The Board will not review its position on this matter in this order because it has already addressed the argument in its October 16, 1992 order and because Citizens'

arguments in its motion raise nothing new. As for Citizens' contention that the Board failed to explain pursuant to Section 40(a) of the Act, the Board notes that the language relied on by Citizens was added to the Act over five years after the Agency issued the permit and after the permit expired. In addition Section 40(a)(1) of the Act applies to toxics criteria derived by the Agency under the authority of the Board's R88-22 toxics regulations. Such toxics regulations did not exist at the time the permit was issued.

As for Citizens contention that the Board failed to review the reasonableness of the condition at issue, the Board has repeatedly pointed out that Section 39(a) of the Act provides, "the Agency may impose such conditions as may be necessary to accomplish the purposes of [the] Act....". Accordingly, the "reasonableness" of a condition is not at issue. We also disagree with Citizens' contention that the Board's review of permit conditions is governed by Section 33(c) of the Act. Section 33 on its face applies to enforcement actions.

The Board also rejects the argument that the "winter" limitation should not be placed in the permit because the limitation is no longer in the regulations. As the Agency correctly points out in its response, even though the effluent limitation is no longer in effect, the limitation was in effect at the time the condition was initially placed in Citizens' permit. In fact, the effluent limitation and the permit are being kept alive by this litigation. The Agency will be able to act on Citizens' application for permit renewal and reissue a permit that reflects current law, and thus may alleviate Citizens' concerns, once this litigation ends.

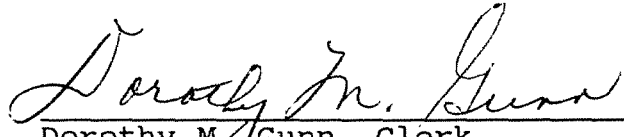
The Board also notes that it specifically determined that the condition at issue was necessary to accomplish the purposes of the Act and that Citizens, in its motion, raises nothing new with regard to its argument. The Board has stated that "winter" standard is an application of a Board regulation. As for the "summer" standard, the Board reviewed the record and determined that the limitation was a proper exercise of the Agency's permitting authority and necessary pursuant to Section 39(b) of the Act. Finally, as to Citizens' accusation that the Board failed to comply with the appellate court's mandate, the Board notes that, in its October 16, 1992 opinion, it discussed information that was contained in the stipulation and expressly stated in the accompanying order that the condition was proper in light of the evidence submitted after remand.

Accordingly, for the foregoing reasons, the Board grants Citizens' motion to for leave to file a reply. The Board also grants reconsideration but declines to grant the requested relief.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act, 415 ILCS 5/41 (1992), provides for the appeal of final orders of the Board within 35 days. The rules of the Supreme Court of Illinois establish filing requirements.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 17th day of June, 1993, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board