

ORIGINAL

RECEIVED
CLERK'S OFFICE

JUN 29 2001

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

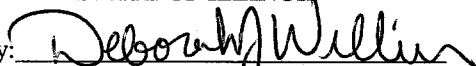
IN THE MATTER OF:)	R 01-31
)	(Rulemaking – Water)
PROVISIONAL VARIANCES FROM)	
WATER TEMPERATURE STANDARDS:)	
PROPOSED NEW 35 Ill. Adm. Code 301.109)	
)	

NOTICE OF FILING

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the ANSWERS of the Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

See attached Service List.

ENVIRONMENTAL PROTECTION AGENCY
OF THE STATE OF ILLINOIS

By: 
Deborah J. Williams
Assistant Counsel
Division of Legal Counsel

DATED: June 28, 2001

Illinois Environmental Protection Agency
1021 North Grand Avenue East
Post Office Box 19276
Springfield, Illinois 62794-9276
(217) 782-5544

JUN 29 2001

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
PROVISIONAL VARIANCES FROM) R01-31
WATER TEMPERATURE STANDARDS:) (Rulemaking - Water)
PROPOSED NEW 35 Ill. Adm. Code 301.109)
)

ANSWERS OF THE ILLINOIS EPA

NOW COMES the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA" or "Agency"), by and through one of its attorneys, Deborah J. Williams, pursuant to the Hearing Officer Order dated June 13, 2001, and hereby respectfully submits to the Illinois Pollution Control Board ("Board") its Answers to the additional questions for the Illinois EPA filed by the Illinois Environmental Regulatory Group ("IERG") on June 15, 2001. The Illinois EPA's responses are as follows:

1. Regarding Section 301.109(a), what is the rationale for including the contents of the "application" in the Agency recommendation?

ANSWER: The Illinois EPA discussed its rationale in including the contents of the provisional variance application in its provisional variance recommendation at the July 7, 2001 hearing. *See* June 7, 2001 Hearing Transcript, pp. 22-23. The Illinois EPA believes this requirement will help explain the conclusion the Agency reached regarding an individual application and provide advance notice to potential thermal provisional variance applicants of the type of information the Illinois EPA will be looking for in analyzing their applications.

- a. Is this "inclusion" in addition to a discussion of the items in 301.109 (a)(1), (2), and (3)?

ANSWER: Yes.

- b. Or, is it just that the information included in the application will be used to prepare paragraphs (a)(1)-(3) in the Agency's recommendation?

ANSWER: In addition to being discussed individually, it is anticipated that the contents of the provisional variance application will be a primary source used by the Illinois EPA to develop its response to the informational requirements of proposed 301.109(a)(1) – (3).

2. What "other rules" are the Agency referring to when it refers to water temperature standards "set forth in 35 Ill. Adm. Code 302.211 or 303 or any other rule?"

ANSWER: The Illinois EPA did not contemplate any particular additional rules when it refers to "302.211, 303 or any other rule." This language was included to provide flexibility and address any other applicable thermal limitation whether found in a state, federal, or site-specific requirement currently in effect or adopted in the future.

3. Does the Agency believe that all of the 180.202(b) information should be required even in those instances when an applicant submits a provisional variance application pursuant to the emergency provisions contained in Section 180.204?
- a. If yes, how do you reconcile that with the clear language of 180.204 regarding emergencies? What is the purpose of emergency petitions?
- b. Doesn't this, in effect, eliminate the ability to have provisional variances on an emergency basis for thermal dischargers?

ANSWER: In both emergency and standard provisional variance applications, there might be information listed in 180.202(b) that is not applicable to a particular situation. The Illinois EPA does not demand the submission of information listed in 180.202(b) that is not applicable to a given facility.

The procedures provided for Emergency Applications in 35 Ill. Adm. Code 180.204 differ in one respect from the typical provisional variance process. Under Section 180.204, when the emergency circumstances contemplated by that provision exist, the Agency may obtain information over the telephone from provisional applicants and begin its investigation and recommendation process prior to (or in appropriate circumstances in the absence of) receiving written information from the applicant. The purpose of the emergency application provision is to allow the Illinois EPA to proceed without written information where its independent investigation reveals sufficient facts, or to require the submission of some or all of the information required by 180.202(b) in writing to follow within 10 working days. As a practical matter, the Agency generally requests emergency applicants follow up their telephone notification with a written explanation that typically includes the same information as a 180.202(b) application. Applicants usually provide this information in much less than 10 business days. Though Part 180 provides the Agency authority to proceed with making a recommendation in emergency circumstances, based upon the results of its own investigation, in nearly all cases it is necessary for the facility to provide some type of written documentation that the facts they have described over the telephone are accurate.

In addition, since the Illinois EPA customarily submits provisional variance recommendations to the Board two times per month, to coincide with scheduled Board meetings, provisional variance orders are typically dated to provide the appropriate relief that is justified by the circumstances and the time limitations in the statute. This method of submitting recommendations so they arrive two days prior to a scheduled Board meeting means that the emergency application provisions of 180.204 have little practical

effect. Even if the Illinois EPA were to make a determination to recommend the grant of a provisional variance the same day it is notified of an emergency circumstance, the recommendation will not generally be filed with the Board until its next meeting; therefore, the Illinois EPA is typically able to wait for receipt of a 180.202(b) application from the facility prior to filing its recommendation. Nothing in the additional requirements for an Illinois EPA recommendation to the Board under the proposed 301.109 should interfere with emergency application process as it currently is implemented.

c. Do emergencies never exist for thermal dischargers?

ANSWER: Of course, thermal dischargers may encounter an emergency circumstance that might require provisional variance relief from an absolute maximum effluent temperature limit. However, the typical thermal provisional variance might differ in terms of the amount of lead time a discharger might have to address the circumstance giving rise to the provisional variance. The vast majority of thermal provisional variances are not granted from the absolute maximum temperature limit, but from the number of days a facility is allowed to discharge between a lower maximum limit and its absolute maximum limit. For example, a permit limitation might provide that the permittee's discharge can only exceed 90 degrees on 1 percent of the days of the year on a rolling average and can never exceed 93 degrees. Therefore, typically, a thermal discharger will have advance notice that it is in danger of exceeding this lower limit based on the number of days the temperature of its effluent has been over this lower maximum limit during the preceding 12 months.

4. Regarding Section 301.109(a)(1), do the current applications contain enough information to allow the Agency to fulfill its responsibility under this provision?

- a. If so, please explain what is provided in the application that would allow the Agency to fulfill its responsibility.
- b. If not, what additional information and effort will be required of the Agency, and how long will it take to gather the necessary information?
- c. On whom will the Agency rely for this additional information, the applicant or other information sources, and what would those other sources be?

ANSWER: Subsection 301.109(a)(1) requires the Agency to “identify the extent to which the arbitrary and unreasonable hardship results from weather and operational conditions.” The Environmental Protection Act (“Act”) requires the Agency to recommend the grant of provisional variances to the Board where it finds that compliance on a short term basis poses an arbitrary or unreasonable hardship. In addition, Section 180.202(b)(7) requires submittal of information identifying the nature of the hardship. Therefore, there must be information in the application which allows the Illinois EPA to determine the nature of the hardship, and Section 301.109(a)(1) only requires additional breakdown by the Agency about the nature of the hardship as it relates to weather and operational conditions.

5. Regarding Section 301.109(a)(2), do the current applications contain enough information to allow the Agency to fulfill its responsibility under this provision?
 - a. If so, please explain what is provided in the application that would allow the Agency to fulfill its responsibility.
 - b. If not, what additional information and effort will be required of the Agency, and how long will it take to gather the necessary information?
 - c. On whom will the agency rely for this additional information, the applicant or other information sources, and what would those other sources be?

ANSWER: Pursuant to proposed 301.109(a)(2), the Illinois EPA's recommendation must "explain why the conditions in subsection (a)(1) of this Section were not reasonably foreseeable based on historical weather patterns and predictable operational conditions." Currently, when an applicant relies on unusual weather or operational conditions to demonstrate arbitrary and unreasonable hardship, the applicant sometimes submits the information necessary to respond to Section 301.109(a)(2). The Illinois EPA anticipates that this proposal will result in more complete applications in the future by providing notice to applicants regarding the type of information the Agency will be trying to derive from their provisional variance applications and will allow applicants the opportunity to submit available information regarding unusual weather patterns and operational conditions to support the claim of arbitrary and unreasonable hardship. The Illinois EPA does not know of any specific sources of additional information on which it will rely to conduct its investigations under this provision, but as it does currently, the Illinois EPA will seek out additional expertise from other agencies and experts whenever necessary to make a determination.

6. How does the Agency plan to make a foreseeability determination?
 - a. If the weather conditions during the summer of 1999 were to repeat themselves tomorrow, would those conditions be reasonably foreseeable?

ANSWER: A foreseeability determination is one element of the balancing test the Illinois EPA conducts when determining whether there is an arbitrary and unreasonable hardship present, or whether the applicant had an opportunity to come into compliance or apply for a regular variance. Where foreseeable conditions would lead to thermal loading to a water body that would be out of compliance with the Board's water quality standards or an NPDES permit, a discharger is expected to provide adequate cooling capacity to address those conditions.

In recent years the electric utility industry has developed computer models that are able to perform sophisticated forecasting of the thermal conditions that would result from various weather conditions and levels of power demand. It is expected that

facilities will use this information to assist in their compliance with the Board's regulations and that the Illinois EPA can use this type of data to determine whether the conditions at issue were foreseeable.

With regards to the conditions of the summer of 1999, the Illinois EPA believes that the duration of the extended heat wave in that summer was not foreseeable at the time, but is hopeful that this proposal will encourage additional planning to provide for electrical generation during similar conditions without the need for provisional variances.

- b. How, in the Agency's view, does foreseeability relate to arbitrary or unreasonable hardship?

ANSWER: If a condition that results in the need for a provisional variance was foreseeable, the applicant is expected to take steps to avoid the need for such relief. If the applicant does not address conditions of potential non-compliance that are reasonably foreseeable, the hardship the applicant experiences is considered self-imposed. Generally, self-imposed hardship has been found by the Board and the Agency as an insufficient basis for regulatory relief. However, in certain extreme cases, the Board has found a sufficient danger to public health and safety to exist to justify regulatory relief even where the hardship is self-imposed (or foreseeable). *See, City Wyoming v. Illinois EPA, PCB 84-032 (8/2/84)*(danger to public health from sewer back-ups outweighs City's self-imposed economic hardship) and *Department of the Army (Savannah Army Depot) v. Illinois EPA, PCB 85-143 (September 20, 1985)*(Board granted provisional variance only to protect public from the danger from explosive wastes, not based on the Army's self-imposed hardship created by the failure to perform an adequate inventory).

- c. Would the proposed rules have the effect of providing a basis for denying a provisional variance request based on the Agency's determination that the weather conditions were "reasonably foreseeable?"

ANSWER: To the extent the weather conditions at issue were foreseeable and were ignored, an applicant greatly increases the chances its provisional variance request will be

denied. The proposed rules provide the flexibility to grant provisional variances in appropriate situations including some situations where the relevant weather conditions are reasonably foreseeable, but other factors justify the granting of a provisional variance. To the extent foreseeable weather conditions formed the sole basis for the claimed hardship, this has been and will continue to be a basis for denying the request.

7. Regarding Sections 301.109(a)(3), why has the Agency included a provision seeking information regarding five year historical data?

ANSWER: This provision does not ask the applicant to provide 5 years of data, it only asks the Agency to identify this information in its recommendation. This is intended to require additional investigation by the Illinois EPA to provide an opportunity to discover patterns and repeat provisional variance requesters in order to identify whether insufficient cooling capacity might be an issue at a particular facility.

- a. Is this data to be a determinant in the granting or denial of a provisional variance?

ANSWER: No. If an applicant otherwise qualifies for a provisional variance, the request should not be denied based solely on the fact the same facility was granted a provisional variance four or five years earlier.

- b. If so, what is the statutory basis for this type of restriction?

ANSWER: This provision establishes an informational requirement on the Illinois EPA to present the Board with the history of the facility at issue.

8. Regarding Section 301.109(b)(2), is it the intent of this proposal to require that the Agency recommend the imposition of all of the listed conditions on every provisional variance unless the Agency justifies otherwise? If so,

- a. Please discuss why each condition should be applied in all cases.

- b. Please explain why the language requires the Agency to explain what actions it **did not take** rather than the actions it did take.
- c. Can the Agency identify any other case in which it is required to defend an action that it did not take (in the context of an approval; not a permit denial)?

ANSWER: Yes. The Illinois EPA intends that the conditions presented are the minimum appropriate conditions in most types of thermal provisional variances. In those cases where one or more of these conditions is not appropriate, it is useful for the Illinois EPA to explain why the condition is not appropriate in that particular case. In addition, the Illinois EPA is required by this proposal to explain its rationale for imposing additional conditions beyond those provided in Section 301.109(b)(2). Other instances in which the Agency defends its action or inaction are not relevant to this proceeding.

- d. Why is it not appropriate to reverse the language to explain why a condition was added rather than why it was not added?

ANSWER: It is not clear what proposed alternative language this question contemplates, but the Illinois EPA welcomes the submission by the public of alternative language to the Agency's proposal that addresses this or any other issue.

- e. What level of justification must the Agency provide when recommending that a specific condition not be imposed?
- f. Must the Board accept that level of justification?

ANSWER: This provision does not require the Illinois EPA to present a justification, but rather to provide the Board and the applicant with an explanation of the conditions imposed or why the presumptive conditions were not imposed.

- 9. Regarding Section 301.109(b)(2)(A), is this a condition that is currently imposed in thermal provisional variances?

ANSWER: Yes. *See, e.g.* Commonwealth Edison Company (Dresden Power Station) v. Illinois EPA, PCB 00-48 (September 23, 1999), PCB 00-18 (August 5, 1999), PCB 99-39 (September 3, 1998), PCB 99-7 (July 23, 1998) and PCB 98-20 (July 24, 1997); Commonwealth Edison Company (LaSalle Generation Station) v. Illinois EPA, PCB 00-19 (August 5, 1999); Kincaid Generation v. Illinois EPA, PCB 00-20 (August 5, 1995); Commonwealth Edison Company (Fisk, Crawford, Will County and Joliet Generating Stations) v. Illinois EPA, PCB 96-51 (September 13, 1995), PCB 96-26 (August 3, 1995) and PCB 95-183 (June 25, 1995).

10. Please explain the need for, and feasibility of, requiring continuous monitoring of the receiving water.
- a. Is this currently being done by all potentially affected facilities?
 - b. If not, what type of facilities currently do so?
 - c. What would be the cost and feasibility of adding such monitoring for a provisional variance if it is not currently undertaken by the facility?

ANSWER: Continuous monitoring is intended to monitor the impact of the provisional variance on the receiving water and evaluate compliance with water quality standards. It is not currently being done by all potential affected facilities, though large power utilities located on receiving waters with significant or critical thermal loads are required to do this as part of their National Pollutant Discharge Elimination System (“NPDES”) permit. The technology to conduct such monitoring is readily available; however, the cost and feasibility may vary on a case-by-case or site specific basis.

11. What is the need for inspection of the intake area?

ANSWER: The intake area is inspected to monitor any impact the emergency operation may have on fish impingement or entrainment.

12. What does the Agency intend by requiring inspections three times daily?

- a. Will this require nighttime inspections?
- b. What level of effort would be required at such inspections to determine mortality?

ANSWER: Visual inspections (e.g., drive by or walk by) are being required to observe unusual conditions including mortality to fish or other aquatic life. The Illinois EPA has determined through experience that thrice daily inspections assure that a good portion of the day does not pass without the discovery of a problem that may exist, without being overly burdensome on the facility performing the inspections. The proposal does not require that inspections be performed at night.

13. Regarding Section 301.109(b)(2)(B), is this a condition that is currently imposed in thermal provisional variances?

ANSWER: Yes, with the exception of the requirement to submit documentation to the Department of Natural Resources ("DNR"). See e.g., Commonwealth Edison Company (Dresden Power Station) v. Illinois EPA, PCB 00-48 (September 23, 1999), PCB 00-18 (August 5, 1999), PCB 99-39 (September 3, 1998), PCB 99-7 (July 23, 1998) and PCB 98-20 (July 24, 1997); Commonwealth Edison Company (LaSalle Generation Station) v. Illinois EPA, PCB 00-19 (August 5, 1999); and Kincaid Generation v. Illinois EPA, PCB 00-20 (August 5, 1995).

14. Please explain what the Agency means by "document environmental conditions."
 - a. What level and types of activities are expected?

ANSWER: This condition provides for record-keeping and reporting of the monitoring activities undertaken to evaluate the secondary impacts on the aquatic ecosystem or other designated uses of the water body. At a minimum, this will include

documentation regarding the continuous temperature monitoring and visual inspections required by Section 301.109(b)(2)(A).

15. What actions will the Agency take to assess the adequacy of the information submitted?
 - a. What occurs if the Agency (or the Board) is not satisfied with the submittal?
 - b. Can either the Agency or the Board request additional information?
 - c. What, if any, appeal rights are anticipated?

ANSWER: The Illinois EPA will enter into consultation with the provisional variance recipient to remedy any perceived inconsistencies in the information submitted consistent with its obligations and authority under the Act. If the submittal pursuant to this condition is confusing or inadequate, the Illinois EPA can request additional information from the provisional variance recipient. There is no need for appeal rights to this condition. If the Illinois EPA determines that a provisional variance recipient has violated the terms of a provisional variance, the proper course of action for the Agency to pursue would be to evaluate the merits of an enforcement action against the facility.

16. Regarding section 301.109(b)(2)(C), is this a condition that is currently imposed in thermal provisional variances?

ANSWER: Yes, with the exception of requiring the submittal of documentation to DNR, this condition has been imposed on occasion. *See, e.g., Commonwealth Edison Company (Dresden Power Station) v. Illinois EPA, PCB 00-48 (September 23, 1999) and PCB 00-18 (August 5, 1999).*

17. Please explain what the Agency means by "immediately implement."

ANSWER: The Illinois EPA intended this phrase to mean to undertake as soon as practicable.

18. Please explain what the Agency means by “biological activities.”
 - a. Would they vary among different habitats and different situations?
 - b. What types of plans would an applicant have to submit to demonstrate that it was prepared to “implement biological activities?”
 - c. What type of review would the Agency need to determine whether the plans are adequate?
 - d. Can this be done within the context of the time frame for a provisional variance? Of an emergency provisional variance?

ANSWER: Biological activities refers to physical or other biologically related monitoring and management activities. It is likely these activities would vary among habitats and water bodies. The review of the documentation submitted pursuant to the condition contained in Section 301.109(b)(2)(C) would be handled in the same manner as the documentation required pursuant to the condition in Section 301.109(b)(2)(B). See response to Question # 15 above. Although it might be desirable to document certain biological conditions prior to the onset of the provisional variance period, this condition is intended to require biological monitoring or management activities to begin on the effective date of the provisional variance or the onset of the provisional variance activities. The monitoring or management activities must continue during the term of the provisional variance with submittal of documentation of such activities to occur within 30 days after the expiration of the provisional variance, not before or during the provisional variance.

19. This provision requires the applicant to “characterize how aquatic life respond[s] to the thermal conditions.” What will the characterization be compared to?
 - a. How will this response to thermal conditions be measured?
 - b. How would this requirement differ from the requirements contained in Section 301.109(b)(2)(A)?
 - c. Please comment on the feasibility of undertaking such an effort within the time frame of a provisional variance.

ANSWER: The response of aquatic life to provisional variance conditions should be compared to normal conditions. The condition in Section 301.109(b)(2)(D) is primarily a notification provision. The activities conducted under the preceding conditions will be sufficient in most cases to identify unusual responses of aquatic life to the provisional variance. However, this condition requires the provisional variance recipient to immediately notify the Illinois EPA and DNR when the visual inspection, temperature monitoring and biological monitoring identify a problem and to keep the agencies informed regarding the return to normal conditions. This effort is not intended to occur before an application is submitted, but during the period for which relief has been granted and for any additional period of time that may be necessary to recover from any unforeseen environmental impacts.

20. Regarding Section 301.109(b)(2)(D), is this a condition that is currently imposed in thermal provisional variances?

ANSWER: Yes. *See, e.g., Commonwealth Edison Company (Dresden Power Station) v. Illinois EPA*, PCB 00-48 (September 23, 1999), PCB 00-18 (August 5, 1999), PCB 99-39 (September 3, 1998) and PCB 98-20 (July 24, 1997).

21. Please explain and give examples of what the Agency means by “unusual conditions.”

ANSWER: Unusual conditions are conditions not ordinarily observed or explainable by factors unrelated to the thermal discharge or provisional variance relief granted.

22. Will the applicant be required to remedy problems even if the provisional variance does not cause the problem?
- a. Is there any presumption in the proposed rules that any “unusual conditions” observed have been caused by the provisional variance discharge unless proven otherwise?
 - b. Will the discharger have the burden of proving a lack of causation in order to be relieved of an obligation to remedy the problem observed in the receiving water?
 - c. Please expand on what type of remedy the Agency envisions for specific possible problems.

ANSWER: This provision is not intended to require a facility to remedy a problem that was not caused by the provisional variance or create a presumption that any unusual conditions are being caused by the relief granted. It is expected, however, that if the petitioner notices that thermal conditions during the provisional variance period are causing harm to aquatic life, it will attempt to improve the temperature of its effluent to prevent further environmental harm.

23. This provision requires applicants to notify the Agency and DNR when normal conditions return. What is the basis of comparison for determining normal conditions?

ANSWER: The basis of comparison is those conditions in existence prior to the grant of the provisional variance relief.

24. Regarding Section 301.109(b)(2)(E), is this a condition that is currently imposed in thermal provisional variances?

ANSWER: The specific language utilized in this section has not appeared in prior provisional variances. Several thermal provisional variances have included a condition that the petitioner “shall mitigate possible adverse affects” of the provisional variance.

See, e.g., Commonwealth Edison Quad Cities Power Station v. Illinois EPA, PCB 89-115 (July 13, 1989) and PCB 88-129 (August 18, 1988) and Commonwealth Edison Dresden Power Station v. Illinois EPA, PCB 88-128 (August 18, 1988).

25. Please explain from where the authority to require remediation is derived.
- a. Who will judge the adequacy of the remediation plan?
 - b. By what criteria will this adequacy be judged?
 - c. What are the appeal provisions from this condition?

ANSWER: This provision does not specifically address a discharger's burden to remediate environmental harm caused by its discharge. Rather, the provision requires provisional variance recipients to develop and implement a response and recovery plan to address any unforeseen environmental harm due to thermal conditions resulting from the provisional variance relief granted. As with the documentation provision discussed above, the Illinois EPA will consult with the facility if it feels the plan is inadequate; however, the Illinois EPA did not contemplate a formal approval or disapproval process for the plan required by this provision. No appeal provisions are appropriate from this provision, because if the Illinois EPA determines that the facility has caused water pollution or violated the conditions of a provisional variance that has been granted, the next step is to evaluate the appropriateness of an enforcement proceeding against the facility.

26. Within section 301.109(b)(2), paragraphs (B), (C) and (D), the proposal would require an applicant to provide various information to the Illinois Department of Natural Resources (DNR). What statutory authority does the Board or Agency have to require certain reports to be submitted to the DNR?

ANSWER: The Illinois EPA has not intended to include any language that would conflict with DNR's statutory authority.

- a. To whom at the DNR would these be submitted?

ANSWER: The Illinois EPA has not identified a specific contact at DNR to receive this information, but the information can be submitted to the Director of DNR or his or her designee.

b. What actions would the DNR take with respect to these reports?

ANSWER: The Illinois EPA is not able to identify how these notifications will be handled or reviewed by DNR.

c. Does the Agency believe that its own review of and determinations regarding provisional variances have been inadequate to protect aquatic life?

ANSWER: No.

d. Why can the DNR not fill the same role without such inclusion in the regulation?

ANSWER: The Illinois EPA can and will consult with DNR in appropriate cases with or without this requirement.

e. Does the inclusion of DNR in this proposal indicate some regulatory or decision-making authority in this process beyond that which the Department currently possess?

ANSWER: No.

In addition to the preceding twenty-six (26) multi-part questions, IERG has requested that the Illinois EPA supplement its answers to two questions presented at the first hearing. Pursuant to IERG's request, the Illinois EPA submits the following supplemental responses:

1. Do you believe the Board has the authority to deny a provisional variance if the Agency recommends that it be answered [sic]?

ANSWER: Under Section 35(b) of the Environmental Protection Act, the Illinois EPA is assigned the responsibility to determine whether compliance on a short-term basis with a requirement would cause an arbitrary or unreasonable hardship and notify the Board when it determines such a hardship exists. The Board often defines its responsibility under the Act as to “adopt a formal order, assure formal maintenance of the record, assure the enforceability of the variance, and provide notification of the action by press release.” Presumably, the Board has some limited jurisdictional authority to deny a provisional variance if the Agency were to recommend, for example, that a provisional variance be granted for greater than 45 days at one time or more than 90 days in a calendar year. *See, Mobil Oil v. Illinois EPA, PCB 86-221 (December 23, 1986) and Union Carbide Corp. v. Illinois EPA, PCB 86-214 (December 18, 1986)*(here the Board refused to grant a provisional variance from the hazardous waste 90-day storage limitation where a previous 30 day variance had been granted. In these cases the Board was interpreting 35 Ill. Adm. Code 722.134(b) of the Board’s rules, rather than Section 35(b) or 36(c) of the Act.)

2. If the Agency were to make a recommendation to the Board with conditions, can the Board grant that provisional variance without those conditions or with different conditions, or is the Board bound by those conditions?


ANSWER: The Agency has not had an opportunity to consider this issue in practice, since the Board typically adopts the conditions recommended by the Agency. In rare

instances in the past, the Board has both added language to provisional variances and found that they had no authority to add conditions. *Compare, Department of the Army v. Illinois EPA, PCB 83-109 (August 10, 1983)(Board found conditions Agency set forth wholly inadequate to protect the environment, but found it did not have authority to impose additional conditions) with City of Wenoa v. Illinois EPA, PCB 90-48 (April 12, 1990)(Board altered a condition imposed by the Agency which the Board found inconsistent with the Act). It appears from these opinions, that the Board acknowledges the Illinois EPA's determination regarding the presence of an arbitrary or unreasonable hardship and its judgment regarding the most appropriate conditions to assure protection of the environment as required by the Act. However, the Board has not included conditions when it found the Illinois EPA's condition would be beyond the Illinois EPA's authority under the Act.*

WHEREFORE, the Illinois EPA respectfully submits to the Board these responses to the questions submitted by IERG on June 13, 2001.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: 

Deborah J. Williams
Assistant Counsel
Division of Legal Counsel

DATED: June 28, 2001

Illinois Environmental Protection Agency
1021 North Grand Avenue East
Post Office Box 19276
Springfield, Illinois 62794-9276
(217)782-5544

STATE OF ILLINOIS)

COUNTY OF SANGAMON

) SS
)
)

PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached **Answers of the Illinois EPA** and **Notice** upon the person to whom it is directed, by placing a copy in an envelope addressed to:

See attached **Service List**.

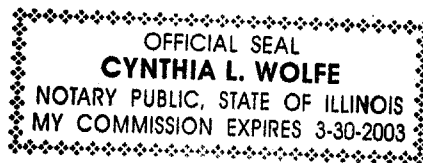
and mailing it from Springfield, Illinois on **June 28, 2001**, with sufficient postage affixed as indicated above.

Nancy JD Lampert

SUBSCRIBED AND SWORN TO BEFORE ME

this 28th day of June 2001.

Cynthia L. Wolfe
Notary Public



**Service List
June 28, 2001**

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601
(OVERNIGHT MAIL)

Andrew Boron
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601
(OVERNIGHT MAIL)

Mark Biel
Executive Director
Chemical Industry Council of Illinois
920 South Spring Street
Springfield, Illinois 62704
(FIRST CLASS MAIL)

Debbie Bruce
Illinois Department of Natural Resources
600 North Grand Avenue West
Springfield, Illinois 62701
(FIRST CLASS MAIL)

Joel Cross
Illinois Department of Natural Resources
600 North Grand Avenue West
Springfield, Illinois 62701
(FIRST CLASS MAIL)

Susan Franzetti
Sonnenschein Nath and Rosenthal
8000 Sears Tower
Chicago, Illinois 60606
(FIRST CLASS MAIL)

Lisa Frede
Director of Regulatory Affairs
Chemical Industry Council of Illinois
9801 West Higgins Road, Suite 515
Rosemont, Illinois 60018
(FIRST CLASS MAIL)

Mike Hooe
Illinois Chapter of the American Fisheries Society
416 Briarwood Drive
Salem, Illinois 62881
(FIRST CLASS MAIL)

Robert Lawley
Chief Legal Counsel
Illinois Department of Natural Resources
524 South Second Street
Springfield, Illinois 62701-1787
(FIRST CLASS MAIL)

Alex Messina
Illinois Environmental Regulatory Group
215 East Adams Street
Springfield, Illinois 62701
(FIRST CLASS MAIL)

William Murray
Regulatory Affairs Manager
Office of Public Utilities
800 East Monroe Street
Springfield, Illinois 62757
(FIRST CLASS MAIL)

David Rieser
Ross and Hardies
150 North Michigan Avenue
Chicago, Illinois 60601
(FIRST CLASS MAIL)

Jim Smithson
Dynergy
785 West Hickory Point Road
Forsyth, Illinois 62535
(FIRST CLASS MAIL)

Julia Wozniak
Midwest Generation
One Financial Place, 440 South LaSalle, Suite 3500
Chicago, Illinois 60605
(FIRST CLASS MAIL)

Stan Yonkauski
Illinois Department of Natural Resources
524 South Second Street
Springfield, Illinois 62701-1787
(FIRST CLASS MAIL)