

ILLINOIS POLLUTION CONTROL BOARD
July 25, 2013

CITGO PETROLEUM CORPORATION and)
PDV MIDWEST REFINING, L.L.C.,)
)
Petitioners,)
)
v.) PCB 12-94
) (Variance – Water)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

CITGO PETROLEUM CORPORATION and)
PDV MIDWEST REFINING, L.L.C.,)
)
Petitioners,)
)
v.) PCB 14-4
) (Variance – Water)
ILLINOIS ENVIRONMENTAL) (Not Consolidated)
PROTECTION AGENCY,)
)
Respondent.)

ORDER OF THE BOARD (by C.K. Zalewski):

This matter comes before the Board on related filings in two cases involving variance relief requested by CITGO Petroleum Corporation (CITGO) and PDV Midwest Refining, L.L.C. (PDVMR) (petitioners) from the Board’s water quality standards for total dissolved solids (TDS) at 35 Ill. Adm. Code 302.208(g), and 302.407. Petitioners seek continued relief for discharges from the oil refinery in Lemont (Lemont Refinery), which CITGO operates and PDVMR owns. The Lemont Refinery discharges into the Chicago Sanitary and Ship Canal (CSSC), which is a tributary to the Des Plaines River.

Today’s order does not rule on a pending motion to vacate PCB 12-94. It similarly does not accept the newly-filed variance petition docketed as PCB 14-4, or rule on the motion to incorporate prior records. The Board reserves ruling on these filings pending receipt of responses from the parties concerning another procedural option discussed below.

THE FILINGS

IEPA Motion to Vacate PCB 12-94 Variance Order

In CITGO Petroleum Corporation and PDV Midwest Refining, L.L.C. v. IEPA, PCB 12-94 (Oct. 18, 2012), the Board granted a five-year variance, subject to conditions, from the TDS water quality standard of 35 Ill. Adm. Code 302.407. Grant of the variance was recommended by the Illinois Environmental Protection Agency (IEPA) as consistent with the variance requirements of the Environmental Protection Act (Act), (415 ILCS 5/35-37 (2010)), including consistency with federal law. In a motion of June 25, 2013 as amended June 26, 2013 (Am. Mot.), IEPA now requests that the Board vacate its opinion and order granting the variance as inconsistent with the federal Clean Water Act (CWA), and USEPA rules at 40 CFR 131.

The basis for the IEPA request is the March 15, 2013 issuance by the United States Environmental Protection Agency (USEPA) of a letter formally disapproving the variance. Am. Mot., Attach. USEPA stated that the basis for its disapproval decision is that the granted variance “removed for a time-limited period” an aquatic life use and the criteria necessary to protect that use. USEPA continued that its rules and the CWA do not allow for such a change because compliance would result in an arbitrary or unreasonable hardship. Rather such a change may only be accomplished under Section 101(a)(2) of the CWA, and USEPA rules at 40 CFR 131. *Id.* at 1. The USEPA letter said that to address its disapproval,

Illinois needs to take action so that the indigenous aquatic life designated use and the TDS criterion to protect that use at 35 Ill. Adm. Code 302.407 are fully effective under Illinois law with respect to the CSSC, including with respect to discharges into the CSSC from the oil refinery owned by [petitioners]. *Id.* at 2.

USEPA suggested that the Board “could perform a structured, scientific assessment of the attainability of aquatic life uses, taking into account deicing activities, and of the criteria necessary to protect aquatic life uses, and revise water quality standards accordingly” in its pending rulemaking proceedings captioned Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System (CAWS) and the Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303 and 304, R08-9 (C) and (D). Am. Mot., Attach. at 2.

Petitioners’ Objection to Motion to Vacate PCB 12-94 Variance Order

On July 2, 2013, petitioners filed an objection (Obj.) to the motion to vacate the PCB 12-94 variance order, citing several grounds. Petitioners noted that similar relief had been granted in two prior variance proceedings, PCB 05-85 and PCB 08-33, neither of which had been submitted to USEPA for review. Petitioners further noted that it originally requested relief because installation of flue gas desulfurization (FGD) at the refinery was necessary to comply with a consent decree among petitioners, USEPA, IEPA, and other state agencies. At the time, IEPA determined that a variance was necessary due to elevated TDS loading to the CSSC from chlorides used for de-icing during snow melt conditions.

Among petitioners' grounds for objection is that the Board order is not contrary to federal law, and is one the Board had authority to issue. Obj. at 3-4. Petitioners also note that IEPA's requested relief is overbroad, and would "throw out the entire set of [PCB 12-94] variance conditions," including extensive monitoring, reporting, and planning requirements. *Id.* at 4.

Petitioners suggest that USEPA's reservation could be addressed by adoption of an interim TDS criterion protective of designated uses of the CSSC "and/or Regulated Navigation Zone". Obj. at 2.

Petitioners further suggest

The appropriate approach is to proceed with a revised variance petition in order to fill the perceived gap cited by USEPA. The Lemont Refinery is preparing such a petition, and intends to request use of the same TDS water quality standard as the Board granted to ExxonMobil in R06-24, or 1,686 [milligrams per Liter or] mg/L. [See Revisions to Water Quality Standards for Total Dissolved Solids in the Lower Des Plaines River for ExxonMobil Oil Corporation: Proposed 35 Ill. Adm. Code 303.445, R06-24 (Feb. 15, 2007).] That water quality standard was for general use waters and was approved by USEPA. However, the Lemont Refinery discharges into the Chicago Sanitary and Ship Canal which is a "secondary contact water" and is proposed to be classified as a "Use B" water [by the Board in R08-9]. Petitioner is confident that the 1,686 mg/L water quality standard for TDS is very protective of the "tolerant" aquatic species that are in the Ship Canal and the designated water uses there. [See Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System (CAWS) and the Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303 and 304, R08-9(C) (Feb. 12, 2013) (first notice opinion and order).]

As part of the Lemont Refinery's forthcoming petition to amend the variance Order in this proceeding, Petitioner does not expect to ask for an extension of the schedule for the existing conditions ordered in this proceeding. Rather Petitioner simply expects to add an interim water quality condition of 1,686 mg/L for TDS, based upon the TDS water quality standard adopted by the Board in the petition filed by Exxon Mobil in R06-24. The Lemont Refinery will also propose a sulfate standard be added along with the 1,686 mg/L standard for TDS since the increased discharge of sulfates from the FGD unit is the activity that occasioned this series of variances. Obj. at 5.

PCB 14-4 Petition For Modification of [PCB 12-94] Variance To Include Additional Conditions For Protection Of Aquatic Life Uses

On July 10, 2014, petitioners filed the document referenced in their Objection, which they captioned as a "Petition For Modification of [PCB 12-94] Variance To Include Additional Conditions For Protection Of Aquatic Life Uses." The Board docketed the filing as PCB 14-4 Citgo Petroleum Corporation and PDV Midwest Refining, L.L.C. v. IEPA. Specifically, Petitioners request the Board to

modify the variance issued in PCB 12-94 . . . by adding a condition for the protection of aquatic life uses in the Lower Ship Canal. . . . Petitioners additionally request that the Board affirm and re-adopt the requirements from the prior Order, which required the Lemont Refinery to undertake certain actions as contained in the existing [PCB 12-94] variance that authorizes discharges of Total Dissolved Solids. Pet. at 1.

Petitioners request a hearing on the petition. *Id.* at 14.

The petition was accompanied by a motion to incorporate the entire records of PCB 05-85, PCB 08-33, and PCB 12-94, and to allow the petitioner to file only one copy of the record of each case.

Assuming *arguendo* (without so ruling here) that the petition is sufficient under 35 Ill. Adm. Code 104, based on the petition's filing date the Board calculates that the deadline date for Board decision in PCB 14-4 would be November 7, 2013.

DISCUSSION

The Agency has not previously requested the Board to vacate a variance order as improperly issued, and cites no authority for the proposition. If the PCB 12-94 variance were to be vacated, the petitioners would lose any shield from enforcement. Additionally, as petitioners note, the State loses the benefit of the extensive monitoring, reporting, and planning requirements contained in the conditions.

Petitioners have a statutory right to have their latest filing handled by the Board as a new variance proceeding, to be decided by November 7, 2013. But, assuming the PCB 12-94 variance was to be vacated, there would be no variance to modify. The parties and the Board would be in the same position they were upon commencement of PCB 12-94, discussing continuation of relief granted in prior variances never submitted by IEPA to USEPA for approval. The PCB 14-4 petition recognizes this, to the extent the petitioners wish to incorporate the content of all of the prior records in their entirety.

Under the unique circumstances of this case, the Board believes that this situation might appropriately be handled under the procedures of Section 101.904 (b). *See* 35 Ill. Adm. Code 101.904(b)(1). As petitioners note, USEPA disapproval of the PCB 12-94 variance was through no fault of their own. Petitioners could move to modify the PCB 12-94 variance and seek the relief they request in that proceeding. Were the Board to reopen the PCB 12-94 proceeding and take additional evidence and argument in that docket, the parties would be free to build upon an established record and introduce material responsive to USEPA concerns. The hearing petitioners requested in PCB 14-4 could be held in a reopened PCB 12-94, to allow for ventilation of additional questions and concerns. This would also allow IEPA to further press any claim it may have that the October 18, 2012 order is void and should be vacated. *See* 35 Ill. Adm. Code 101.904(b)(3)). If PCB 12-94 were to be reopened, the Board would expect to dismiss PCB 14-4 as unnecessary.

Petitioners are directed to file any appropriate filing responsive to this order on or before August 8, 2013. The Agency may file any response on or before August 19, 2013. The “mailbox rule” of 35 Ill. Adm. Code 101.300 (b) does not apply. The Board has established these tight filing deadlines based on its duty to see that the November 7, 2013 decision deadline in PCB 14-4 is not jeopardized. If the parties wish additional time to consider their options, they may apply to the hearing officer for additional time. But, the hearing officer is directed to grant such motions only upon receipt of a suitable decision deadline waiver in PCB 14-4.

IT IS SO ORDERED.

I, John Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 25, 2013, by a vote of 4-0.

A handwritten signature in black ink, reading "John T. Therriault", enclosed in a thin black rectangular border.

John T. Therriault, Clerk
Illinois Pollution Control Board