

ILLINOIS POLLUTION CONTROL BOARD  
September 27, 1990

CITY OF BRAIDWOOD, )  
 )  
 Petitioner, )  
 )  
 v. ) PCB 89-212  
 ) (Variance)  
 ILLINOIS ENVIRONMENTAL )  
 PROTECTION AGENCY, )  
 )  
 Respondent. )

ORDER OF THE BOARD (by J. Anderson):

On August 27, 1990, the City of Braidwood ("Braidwood") filed a Motion to Reconsider, requesting the Board to reconsider its June 21, 1990 Opinion and Order denying Braidwood's request for variance from 35 Ill. Adm. Code 602.105(a), "Standards of Issuance", and 602.106(b), "Restricted Status". On September 10, 1990, the Illinois Environmental Protection Agency ("Agency") filed its "Response to the Motion to Reconsider." The Board hereby grants the Motion to Reconsider, but denies the relief requested therein.

Braidwood cites several arguments in support of its motion. First, Braidwood states that the Board unfairly portrayed it in an unfavorable light when it stated that neither the Agency nor Braidwood addressed the issue of Braidwood's noncompliance with the gross alpha standards (Opinion, p. 7). Braidwood asserts that it filed a "Motion for Leave to File Supplemental Petition" and a "Supplemental Petition to First Amended Petition for Variance" with the Hearing Officer at hearing. Braidwood states that the Supplemental Petition contains Braidwood's request for variance from restricted status for gross alpha activity.

Second, although Braidwood admits that testing was not done pursuant to the regulations, it cites poor recordkeeping, a reliance on the Agency, and the lack of expertise and self-control as reasons for its failure. Specifically, Braidwood states that it acted in good faith and submitted the results of gross alpha tests for eleven quarters (between July, 1979 and April 25, 1990) even though the Agency waited for the same period of time to raise the issue of noncompliance with the gross alpha standard. Braidwood also states that its testing and reporting efforts should be considered applicable to a single contaminant based on the fact that Dr. Toohey testified that the gross alpha contamination is due to excess radium.

Third, although Braidwood admits that it acquired a permit for the construction for the first portion of the water main loop subsequent to its construction, it states that its Mayor believed that no permit was required and that it did not allow new homes

to tap into the construction loop. Fourth, although Braidwood admits that it did not publish notices on three occasions since August 26, 1987, it argues that, as a practical matter, citizens were notified before and after each lapse, that the citizens knew about the excess radium from previous notices, and that the Mayor acted in good faith because he believed that the notices were published each quarter and was unaware that they should have been forwarded to the Agency. Finally, Braidwood argues that it is unfair for the Board to fault it for noncompliance when it, like other communities, was simply awaiting a federal change in the radium standard.

At the outset, the Board notes that the Hearing Officer filed Braidwood's "Motion for Leave to File Supplemental Petition" and Supplemental Petition with the Board on September 7, 1990. The Hearing Officer stated, in the cover letter accompanying the documents, that his notes did not contain any information about the filing of the documents and that he could only surmise that Braidwood gave him the documents at the beginning of hearing without any comment. Because there is no mention of the documents in the transcript and because a Hearing Officer is only required to forward the record to the Board, the Board will not fault the Hearing Officer for not forwarding the documents to the Board. Moreover, even if the documents had been in the Board's possession at the time that the Opinion and Order were written, its decision would not have been different


With regard to Braidwood's other arguments, the Board notes that most, if not all, are not new or have already been considered by the Board. The Board wishes to note, however, that the basis for its decision did not rest on questions of good faith, the "practical" effects of public notice omissions, or of whether testing and reporting should be applicable to only one contaminant. The Board reminds Braidwood that it was made aware that it was in violation of the gross alpha standard and the combined radium standard in 1981 and 1984, respectively. We see no reason why Braidwood should not be, as the Agency correctly points out, presumed to know the law and to take appropriate action to comply with the law.

Finally, with regard to Braidwood's argument that it should not be penalized because it was awaiting a potential federal revision of the combined radium standard, the Board agrees with the Agency that it is inappropriate for Braidwood to supplement the record at this time when it never mentioned its reliance on a possible federal revision in the radium standard previously. Without in any manner implying that the Board would make a favorable determination, we note that Braidwood is free to file another variance petition.

IT IS SO ORDERED.

Board Member R. Flemal dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 27<sup>th</sup> day of September, 1990, by a vote of 6-1.

  
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Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board