

ILLINOIS POLLUTION CONTROL BOARD

May 15, 1997

CITY OF JOLIET,)	
)	
Petitioner,)	
)	PCB 97-137
v.)	(Variance - Public Water Supply)
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by K.M. Hennessey):

This matter is before the Board on the City of Joliet's (Joliet) petition for variance filed on February 14, 1997. Joliet is seeking an extension of variance from the requirements of 35 Ill. Adm. Code 602.105(a), "Standards for Issuance," and 35 Ill. Adm. Code 611.106(b), "Restricted Status," to the extent these requirements involve 35 Ill. Adm. Code 611.330(a). The latter section establishes the maximum contaminant level (MCL) for combined radium-226 and radium-228 of 5.0 picocuries per liter (pCi/L). Joliet waived hearing in this matter and requests that the record of its prior variance be incorporated in this matter, which the Board grants. (Pet. at 19.)¹ On February 14, 1997, Joliet filed a motion for expedited review. Due to the unique issue presented in this case, as described below, the Board is unable to grant Joliet's motion for expedited decision.

On March 19, 1997 the Illinois Environmental Protection Agency (Agency) filed its recommendation. The Agency recommends that an extension of variance be granted for two years following USEPA action or five years from the date of this order subject to certain conditions. (Rec. at 1, 15.)

For the reasons set forth below, the Board believes that the opinion in In the Matter of Amendments to 35 Ill. Adm. Code Subtitle F (May 1, 1997) R96-18, effective May 8, 1997 may render Joliet's petition for variance unnecessary. By today's order, the Board directs the parties to file briefs on whether R96-18 alleviates the rules' arbitrary or unreasonable hardship on Joliet, and thereby gives Joliet the relief it requests.

The Board's responsibility in this matter arises from the Illinois Environmental Protection Act (Act). (415 ILCS 5/1 *et seq.* (1994).) The Board is charged with the responsibility of granting variance from Board regulations whenever it is found that immediate compliance with the regulations would impose an arbitrary or unreasonable hardship upon the

¹ Joliet's Petition for Extension of Variance will be cited as (Pet. at __); the Agency's Recommendation will be cited as (Rec. at __).

petitioner. (415 ILCS 5/35(a).) The Agency is required to appear at hearings on variance petitions (415 ILCS 5/4(f)), and is charged, among other things, with the responsibility of investigating each variance petition and making a recommendation to the Board as to the disposition of the petition. (415 ILCS 5/37(a).)

BACKGROUND

The City of Joliet is a municipality located in Will County, Illinois. (Rec. at 3.) Joliet provides a potable water supply and distribution system to a population of approximately 111,000 people, representing approximately 21,376 residential customers, and 4,400 commercial and industrial utility customers, as estimated in 1996. Joliet also provides water to a portion of the Village of Channahon, and additional connections with other surrounding communities exist to provide standby water service. (Pet. at 5.) Joliet's water supply and distribution system consists of 11 deep wells, six shallow wells, pumps and distribution facilities. (Pet. at 6.)

Joliet's most recent analyses of its water supply was completed at the following locations:

June 1996: A sample was taken from the distribution system that receives blended water from Warren - Gavel 1, Route 6 - Gravel 2, Hahney - Gravel 3, E. Buck - Gravel 4, W. Buck - Gravel 5, Warren - Rock 1, Hahney - Rock 2, and Briick - Rock 3. Result: 7.3 pCi/L;

June 1995: Williamson well result: combined radium content of 23.0 pCi/L;

June 1996: Washington well result: combined radium content of 11.8 pCi/L;

June 1996: Campbell well result: combined radium content of 19.3 pCi/L;

June 1996: Well 10-D result: combined radium content of 14.8 pCi/L;

June 1996: Well 11-D result: combined radium content of 13.5 pCi/L;

June 1995: Well 12-D result: combined radium content of 16.9 pCi/L;

Ottawa Well: no longer in operation;

Jasper Well: no data provided. (Pet. at 8.)

Joliet states it has proceeded with actions to develop a new water source that would accommodate a required capacity of 15 million gallons per day average daily flow. The Agency states that Joliet is not listed on restricted status for exceeding any other contaminant standard. (Rec. at 6.)

Joliet is requesting a variance to allow for extension of its water supply and distribution system to serve new home construction, which was at an all-time high in 1996, and new

industrial and commercial development. Joliet states that restrictions on extensions of its water supply would harm land developers, home purchasers and the city's tax base because construction is an important part of a community's economy. (Pet. at 15-16.) Joliet lists the following active construction projects requiring public water supply for domestic and fire protections needs:

1. Pheasant Landing Subdivision;
2. Cumberland Subdivision;
3. Mirage Subdivision;
4. Lakewood on Caton;
5. Mayfair Subdivision;
6. Black Road Site;
7. Wesmere Subdivision;
8. Wesmere West Subdivision;
9. Riverbrook Subdivision;
10. Northfield Subdivision;
11. Louis Joliet Mall area (commercial development);
12. The Oaks Subdivision;
13. Kendall Ridge Subdivision;
14. Sunset Ridge;
15. Stonegate Subdivision;
16. Fieldbrook Subdivision;
17. Brookside Subdivision; and,
18. Fairway Estates Subdivision.

(Pet. at Attachment 5.)

The Board previously granted Joliet two variances from "Standards of Issuance," "Restricted Status," and gross alpha particle activity, the last of which expired February 27, 1997. (Pet. at 8; City of Joliet v. IEPA, (November 6, 1986) PCB 86-121; City of Joliet v. IEPA, (February 27, 1992) PCB 91-246.) Joliet states that sampling in 1995 indicated

compliance with the gross alpha particle activity standard; therefore, it requests an extension of its prior variance as to “Standards of Issuance” and “Restricted Status” for five years after the date the variance request is granted. (Pet. at 2.)

REGULATORY FRAMEWORK

Applicable Regulations

In determining whether any variance is to be granted, the Act requires the Board to ascertain whether a petitioner has presented adequate proof that immediate compliance with the Board regulations at issue would impose an arbitrary or unreasonable hardship. (415 ILCS 5/35(a) (1994).) Furthermore, the burden is upon petitioner to show that its claimed hardship outweighs the public interest in attaining compliance with regulations designed to protect the public. (Willowbrook Motel v. Pollution Control Board, 135 Ill.App.3d 343, 481 N.E.2d 1032 (1st Dist. 1977).) The petitioner must establish this burden in order for the claimed hardship to rise to the level of arbitrary or unreasonable hardship.

A variance, by its very nature, is a temporary reprieve from compliance with the Board’s regulations, and compliance is to be pursued regardless of the hardship which eventual compliance presents an individual petitioner. (Monsanto Co. v. Pollution Control Board, 67 Ill.2d 276, 367 N.E.2d 684 (1977).) Accordingly, as a condition to the granting of variance, a variance petitioner is required to commit to a plan which is reasonably designed to achieve compliance within the term of the variance, unless certain special circumstances exist. A request for extension of a variance can be granted on a year to year basis, but only upon a showing of substantial progress towards achieving compliance. (415 ILCS 36(b) (1994).)

The instant variance request concerns two features of the Board’s public water supply regulations: Standards for Issuance and Restricted Status. These features are found at 35 Ill. Adm. Code 602.105 and 602.106, and until May 8, 1997, read as follows:

Section 602.105 Standards for Issuance

- a) The Agency shall not grant any construction or operating permit required by this Part unless the applicant submits adequate proof that the public water supply will be constructed, modified or operated so as not to cause a violation of the Environmental Protection Act.

(35 Ill. Adm. Code 602.105.)

Section 602.106 Restricted Status

- a) Restricted status shall be defined as the Agency determination pursuant to Section 39(a) of the Act and Section 602.105, that a public water supply facility may no longer be issued a construction permit without causing a violation of the Act or this Chapter.

b) The Agency shall publish and make available to the public, at intervals of not more than six months, a comprehensive and up-to-date list of supplies subject to restrictive status and the reasons why.

(35 Ill. Adm. Code 602.106.)

Under these regulations, restricted status was imposed whenever a public water supply was in violation of one or more drinking water standards. Thus, being on restricted status constituted a determination that a public water supply could no longer be issued a construction permit without causing a violation of the Act. (35 Ill. Adm. Code 602.106.)

History of Radium Standard

Standards for combined radium in drinking water were first adopted as National Interim Primary Drinking Water Regulations by the United States Environmental Protection Agency (USEPA) in 1976. The standard adopted was 5.0 pCi/L for the sum of two isotopes of radium: radium-226 and radium-228 ("combined radium"). Shortly thereafter Illinois adopted the same limits. Although characterized as "interim" limits, these standards are the MCLs under both federal and Illinois law, and will remain so unless modified by the USEPA. In anticipation of USEPA's revision of the radium standard, the Illinois legislature amended the Act at Section 17.6 in 1988 to provide that any new federal radium standard will immediately supersede the current Illinois standard. The state standard is therefore inexorably tied to the federal standard, and cannot be greater or less than the federal limit.

Since their original promulgation, the current radium standards have been under review at the federal level. The USEPA has been evaluating the interim radium standards pursuant to Sections 1412(b)(1)(B) and 1412(b)(2) of the Safe Drinking Water Act, which require USEPA to propose and promulgate the National Revised Primary Drinking Water Regulations. On October 5, 1983, USEPA announced its intention to revise the interim radionuclides standards in an Advanced Notice of Proposed Rulemaking (ANPR). (48 Fed. Reg. 45502). In that notice, USEPA stated that it would perform a comprehensive reassessment of the interim standards in order to optimize public health protection without imposing unnecessary economic burdens on states and communities. It later republished this ANPR in September 1986, establishing MCL goals for radionuclides and providing information related to establishing MCLs for radionuclides. (51 Fed. Reg. 34836).

On July 18, 1991 the USEPA published a rulemaking proposal which included a revision of the interim standards for radium-226 and radium-228. (56 Fed. Reg. 33050). USEPA proposes to replace the 5.0 pCi/L combined radium standard with separate MCLs of 20.0 pCi/L each for radium-226 and radium-228. Public hearings on the proposed federal standard began on September 6, 1991. In an amended consent order in Miller v. Browner, (No. 89-6328HO, slip op. (D. Or., Feb. 22, 1994)), the federal district court for Oregon ordered the USEPA to take final action on the radiological rule with respect to the radium-226 and radium-228 standards no later than April 30, 1995. However, Congress prohibited

funding necessary for the promulgation of a radon standard during 1994 and 1995. Since radon was a part of the radionuclide proposal, no new standards for radium-226 and radium-228 were adopted. USEPA has proposed a modification to the Miller v. Browner consent order; however, it has not yet committed to a new promulgation schedule.

Since 1991, when the USEPA proposed increasing the radium and gross alpha particle standards, the Agency placed those public water supplies that exceed the 5.0 pCi/L combined level or 15.0 pCi/L gross alpha particle MCL on restricted status pursuant to Section 601.106 of the Board regulations. (35 Ill. Adm. Code 602.106.) As previously stated, placement on restricted status prevents the Agency from granting permits. However, a public water supply may petition the Board for a variance from restricted status. (415 ILCS 5/35 (1994).)

The variance process is costly to communities and expends Agency and Board resources. (See In the Matter of Amendments to 35 Ill. Adm. Code Subtitle F (May 1, 1997) R96-18 at p.7.) As of October 1996, the Board had issued 134 variances from restricted status for 83 public water supplies that exceeded the 5.0 pCi/L combined radium standard. Thirty-five of these public water supplies (or 26%) have received more than one variance. (Id.)

Amendment to Sections “Standards for Issuance” and “Restricted Status”

To resolve the problems that arose because the radium standard is in flux, the Agency proposed amendments to the Board’s regulations that would allow the Agency to issue construction permits notwithstanding the fact that a public water supply is on the restricted status list for a violation of the radium MCL. On May 1, 1997 the Board adopted the Agency’s proposal. (In the Matter of Amendments to 35 Ill. Adm. Code Subtitle F (May 1, 1997) R96-18.) This rulemaking adds a new subsection (d) to Sections 602.105 and 602.106 which precludes the Agency from enforcing the restricted status regulations against those facilities that currently exceed the current radium or gross alpha activity MCLs, but that are in compliance with the proposed federal radium MCLs.

This exemption will be in effect for a limited time and will alleviate some of the regulatory burden placed upon public water supplies that are waiting for federal action on the proposed radium MCL. As stated in the Board’s opinion, “[e]xemption of certain public water supplies from the provisions of 35 Ill. Adm. Code 602.105 and 602.106 provides a common sense approach to alleviating the financial and regulatory burden placed upon public water supplies due to the failure of the USEPA to adopt the proposed radium and gross alpha particle standards in a timely fashion.” (In the Matter of Amendments to 35 Ill. Adm. Code Subtitle F (May 1, 1997) R96-18 at 8.)

ANALYSIS

As noted, R96-18 is now effective and amends the rules from which Joliet seeks a variance extension. These amendments may preclude the Agency from enforcing against Joliet the Standards for Issuance and Restricted Status regulations from which Joliet seeks a variance.

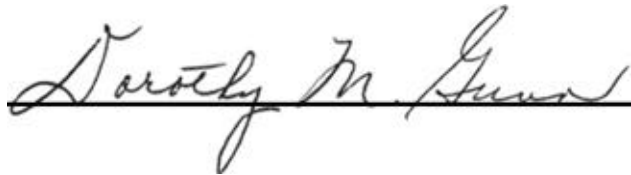
If so, the regulations as amended may no longer impose an arbitrary or unreasonable hardship on Joliet.

As a result, the Board believes it prudent to allow the parties to address this issue. Because the due date in this matter is June 15, 1997, the Board must render its decision at its next Board meeting, June 5, 1997. Therefore, the Board directs the parties to file briefs on or before May 29, 1997.

IT IS SO ORDERED.

Board Member R. C. Flemal dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 15th day of May, 1997, by a vote of 5-1.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", is written over a solid horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board