

ILLINOIS POLLUTION CONTROL BOARD
May 5, 1994

CITY OF STAUNTON,)
)
 Petitioner,)
)
 v.) PCB 94-95
) (Variance)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

OPINION AND ORDER OF THE BOARD (by E. Dunham):

This matter is before the Board on the March 23, 1994, filing by petitioner, City of Staunton (Staunton), of a petition for variance. Staunton seeks relief from 35 Ill. Adm. Code 602.106(a), "Restricted Status," to the extent the rule relates to violation by Staunton's public water supply of the 0.10 mg/l standard for total trihalomethanes (TTHM). The standard for TTHM is set forth at 35 Ill. Adm. Code 611.310(c). Staunton requests a variance up to and including December 31, 1997. Staunton waived hearing and none was held.

On April 19, 1994, the Illinois Environmental Protection Agency (Agency) filed its variance recommendation. The Agency recommends that a variance from 35 Ill. Adm. Code 602.105(a), "Standards for Issuance"¹ and 35 Ill. Adm. Code 602.106(a) "Restricted Status" be granted to Staunton, but only as they relate to the requirements for TTHM. The Agency recommends a grant of the variance for thirty months, subject to certain conditions. Staunton did not file a reply to the Agency's recommendation.

The Board's responsibility in this matter arises from the Environmental Protection Act (Act) (415 ILCS 5/1 et seq. (1992).) The Board is charged therein with the responsibility to "grant individual variances beyond the limitations prescribed in this Act, whenever it is found upon presentation of adequate proof, that compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship." (415 ILCS 5/35(a) (1992).) More generally, the Board's responsibility in this matter is based on the system of checks and balances integral to Illinois environmental governance: the Board is charged with the rulemaking and principal adjudicatory

¹ While Staunton does not specifically request a variance from the Standards of Issuance in its petition, a variance from this section is required for Staunton to pursue the extensions to its water mains.

functions, and the Agency is responsible for carrying out the principal administrative duties.

Based on the record before the Board, the Board finds that Staunton has presented adequate proof that immediate compliance with the Board's regulations for "Standards for Issuance" and "Restricted Status" would result in the imposition of an arbitrary or unreasonable hardship. Accordingly, the variance is granted, subject to conditions set forth in the attached order.

BACKGROUND

Staunton is located in Macoupin County and provides potable water for the residents and commercial and industrial customers in the City of Staunton, Prairietown Road Water District, Reservoir Road Water District and Silvester Water District. (Pet. at 5.) The total population served is approximately 5,000. (Pet. at 5.) The petitioner owns and operates the water supply, treatment facility and distribution system in the City of Staunton. (Pet. at 5.) Staunton does not own or operate the distribution system of the Prairietown Road Water District. (Pet. at 5.) The system is provided to all residential, commercial and industrial users as needed with charges to all users established by ordinance. (Pet. at 5.)

Staunton was first advised, by the Agency, that its water supply exceeded the permissible level of TTHM by a letter dated March 3, 1992. (Pet. at 6.) Then, Staunton's water supply showed a level of 0.15 mg/l for TTHM, thus exceeding the 0.10 mg/l standard. (Pet. at 6.) In the same letter, the Agency notified Staunton that it would be placed on restricted status. (Ag. Rec. at 6.)

If the requested variance is granted, Staunton foresees extending its water mains to serve new users in the Fleming Addition and Staunton High School Expansion. (Pet. at 6.) A new 10" water main would also be added to provide adequate fire protection to Community Memorial Hospital and County Care Center Nursing Home. (Pet. at 6.)

REGULATORY FRAMEWORK

The instant variance 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, which in pertinent part read:

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 (Ill. Rev. Stat. 1989, ch. 111 ½, pars. 1001 et seq.) (Act), or of this Chapter.

Section 602.106 Restricted Status

- 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.

The principal effect of these regulations is to provide that public water supply systems are prohibited from extending water service, by virtue of not being able to obtain the requisite permits, unless and until their water meets all of the standards for finished water supplies. It is Staunton's request that it be allowed to extend its water service while it pursues compliance with the TTHM standard, as opposed to extending service only after attaining compliance.

In determining whether any variance is to be granted, the Act requires the Board to determine 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) (1992).) Furthermore, the burden is upon the petitioner to show that its claimed hardship outweighs the public interest in attaining compliance with regulations designed to protect the public. (Willowbrook Motel v. IPCB (1st Dist. 1977), 135 Ill.App.3d 343, 481 N.E.2d. 1032). Only with such showing can the claimed hardship rise to the level of arbitrary or unreasonable hardship.

A further feature of a variance is that it is, by its nature, a temporary reprieve from compliance with the Board's regulations (Monsanto Co. v. IPCB (1977), 67 Ill.2d 276, 367 N.E.2d 684), and compliance is to be sought regardless of the hardship which the task of eventual compliance presents an individual polluter (Id.). Accordingly, except in certain special circumstances, a variance petitioner is required, as a condition to grant of variance, to commit to a plan which is reasonably calculated to achieve compliance within the term of the variance.

A grant of variance from "Standards for Issuance" and "Restricted Status" does not absolve a petitioner from compliance with the drinking water standards at issue, nor does it insulate a petitioner from possible enforcement action brought for violation of those standards. The underlying standards remain applicable to the petitioner regardless of whether variance is granted or denied.

COMPLIANCE PLAN

The existing treatment facility was built in 1926. (Pet. at 7.) The petitioner contends that it is unable to meet the requirements for TTHM because inadequacies of the treatment facility. (Pet. at 7.) After receiving notification of the TTHM violation, petitioner modified the treatment process at its facility. (Pet. at 8.) These modifications included construction of a potassium permanganate feeder, more frequent removal of sludge from the rectangular basin and feeding chlorine before filtration. (Pet. at 8.) These modifications have decreased the annual average level of TTHM concentrations from 0.150 mg/l to 0.121 mg/l. (Pet. at 8.) However, additional modifications to the treatment process are required to meet the 0.10 mg/l maximum contaminant level (MCL) for TTHM.

Staunton has retained the services of an engineering company to design additional modifications to the treatment facility. (Pet. at 8.) The proposed modifications include the addition of a third rapid sand filter, rehabilitation of existing sand filters, rehabilitation of existing backwash and construction of a new chemical feed building. (Pet. at 8.) These improvements will allow petitioner to achieve compliance with the TTHM standard. (Pet. at 8.) Construction is scheduled to begin in late 1994 and should be completed by Spring of 1995. (Pet. at 8.)

The Agency states that its records indicate that Staunton has not previously sought a variance from regulations pertaining to TTHM. (Ag. Rec. at 4.)

HARDSHIP

Staunton contends that failure to obtain a variance would mean that all construction within the service area requiring the extension of the water supply system could not resume. (Pet. at 10.) Staunton argues that this would negatively impact prospective home purchasers as well as developers and Staunton's tax base. (Pet. at 10.) Staunton contends that there is no significant risk of environmental harm or harm to the public health for the limited period of the requested variance, and that continuation of restricted status for TTHM would be an arbitrary or unreasonable hardship on Staunton, its taxpayers, prospective developers, and persons and industries served by those developers. (Pet. at 10.)

The Agency agrees that denial of the requested variance would result in an arbitrary or unreasonable hardship. (Ag. Rec. at 9.)

ENVIRONMENTAL IMPACT

Although Staunton has not undertaken a formal assessment of the environmental effects of its requested variance, it contends that the granting of the variance for the limited time requested will not cause any significant harm to the environment or to the people served by potential water main extensions. (Pet. at 9.) The Agency also maintains that an incremental increase in the allowable concentration of TTHM should not cause a significant health risk for the limited population served by new water main extensions for the time period of the requested variance. (Ag. Rec. at 9.) The Agency states that the variance should not affect the status of those drawing water from the existing water lines, except insofar as the variance will hasten compliance with the TTHM standard. (Ag. Rec. at 12.)

CONSISTENCY WITH FEDERAL LAW

The petitioner and the Agency state that the requested variance may be granted consistent with the Safe Drinking Water Act (42 U.S.C. 300(f)) and corresponding regulations (40 CFR Part 141) because the variance does not grant relief from national primary drinking water regulations. Therefore, the parties contend that there is no risk to Illinois of loss of primacy because there is no federal variance to be presented to the U.S. EPA.

CONCLUSION

Based upon the record, the Board finds that immediate compliance with the "Standards for Issuance" and "Restricted Status" regulations would impose an arbitrary or unreasonable hardship on Staunton. The Board also agrees with the parties that granting this variance does not pose a significant health risk to those persons served by any new water main extensions, assuming that compliance is obtained during the period of the variance.

The variance is granted until December 31, 1996, or until analysis pursuant to 35 Ill. Adm. Code 605.104(a) shows compliance with the TTHM standard, whichever occurs first. This will allow Staunton to complete the modifications to the facility in the Spring of 1995, perform additional sampling and make any additional changes to achieve compliance during the term of the variance.

Today's action is solely a grant of variance from standards of issuance and restricted status. Staunton is not granted variance from compliance with the TTHM standard, nor does today's action insulate Staunton in any manner against enforcement for violation of these standards.

This opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

The City of Staunton is hereby granted a variance from 35 Ill. Adm. Code 602.105(a), "Standards for Issuance", and 602.106(b), "Restricted Status", as they relate to the standards for total trihalomethanes (TTHM) in drinking water as set forth in 35 Ill. Adm. Code 611.310(c), subject to the following conditions:

1. Variance shall terminate on the earliest of the following dates:
 - a. December 31, 1996; or
 - b. When analysis pursuant to 35 Ill. Adm. Code 611.684, or any analytical standards then in effect, shows compliance with standards for TTHM in drinking water then in effect.
2. In consultation with the Illinois Environmental Protection Agency (Agency), Staunton shall continue its sampling program to determine as accurately as possible the level of TTHM in its public water supply. Until this variance terminates, Staunton shall collect and analyze quarterly samples of its water from its distribution system at locations approved by the Agency, in accordance with 35 Ill. Adm. Code 611.680. Analysis shall be done by a laboratory certified by the State of Illinois for TTHM analysis. The results of the analyses shall be reported within 30 days of receipt of the most recent result to:

Illinois Environmental Protection Agency
Compliance Assurance Section
Division of Public Water Supplies
2200 Churchill Road
Springfield, Illinois 62794-9276

The running average of the most recent four quarterly sample results shall be reported to the above address within 30 days of receipt of the most recent quarterly sample.

3. If Staunton takes additional samples within any quarter, said additional samples shall be reported within 30 days to the Agency as above. The average of all results taken in a quarter shall then be used to calculate the running average of four quarterly sampling results.
4. Pursuant to 35 Ill. Adm. Code 611.851(b), in its first set of water bills or within three months after the date of this

order, whichever occurs first, and every three months thereafter, Staunton will send to each user of its public water supply a written notice to the effect that Staunton has been granted by the Pollution Control Board a variance from 35 Ill. Adm. Code 602.105(a) "Standards of Issuance" and 35 Ill. Adm. Code 602.106(a) "Restricted Status", as they relate to the TTHM standard.

5. If results or analyses performed on samples pursuant to 35 Ill. Adm. Code 611.685 show a violation of the maximum contaminant level (MCL) for TTHM, then public notice shall be made pursuant to 35 Ill. Adm. Code 611.851(b).
6. Until full compliance is achieved, Staunton shall take all reasonable measures with its existing equipment to minimize the level of TTHM in its finished drinking water.
7. Staunton shall provide written progress reports to the Agency at the address below every six months concerning steps taken to comply with this order. Progress reports shall quote each paragraph and immediately below each paragraph state what steps have been taken to comply with each paragraph:

Illinois Environmental Protection Agency
 Division of Public Water Supply
 Field Operations Section
 2200 Churchill Road
 P. O. Box 19276
 Springfield, Illinois 62794-9276

8. Within forty-five days of the date of this order, Staunton shall execute and forward to:

Stephen C. Ewart
 Division of Legal Counsel
 Illinois Environmental Protection Agency
 2200 Churchill Road, P.O. Box 19276
 Springfield, Illinois 62794-9276

a Certificate of Acceptance and agreement to be bound to all terms and conditions of the granted variance. The 45-day period shall be held in abeyance during any period that this matter is appealed. Failure to execute and forward the Certificate within 45-days renders this variance void. The form of the Certificate is as follows.

I (We), _____,
hereby accept and agree to be bound by all terms and conditions
of the order of the Pollution Control Board in PCB 94-95, dated
May 5, 1994.

Petitioner

Authorized Agent

Title

Date

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act, (415 ILCS 5/41 (1992)), provides for appeal of final orders of the Board within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246, Motion for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 5th day of May, 1994, by a vote of 6-0.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board