

ILLINOIS POLLUTION CONTROL BOARD
April 22, 1993

VEACH OIL COMPANY & LAKE)
OF EGYPT WATER DISTRICT,)
Petitioner,)
)
v.) PCB 92-202
) (Variance)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

GREGORY VEACH APPEARED ON BEHALF OF PETITIONER VEACH OIL COMPANY;

JAMES B. BLEYER APPEARED ON BEHALF OF PETITIONER EGYPT WATER DISTRICT;

STEVE EWART APPEARED ON BEHALF OF ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

OPINION AND ORDER OF THE BOARD (by G. T. Girard):

On December 7, 1992, Veach Oil Company (Veach Oil) filed a petition for variance from 35 Ill. Adm. Code 602.105(a), Standards for Issuance, and from 35 Ill. Adm. Code 602.106(a), Restricted Status. The petition asserts that "the purpose of this variance request is to allow the extension of the present water distribution system of the Lake of Egypt Water District (District) which is necessary to enable it to serve commercial property located adjacent to the intersection of Illinois Route 148 with Interstate 57 in extreme southern Williamson County, Illinois, which property is owned by the petitioner". The District is on restricted status due to inadequacies of the treatment plant and raw water source. (Ag. Rec. at 4-5.) By order of December 17, 1992, the Board ordered Veach to file an amended petition joining the District, and supplying certain additional information.

On January 5, 1993, Veach filed an amended petition. The amended petition joins the District as a petitioner and requests hearing on the petition.

On February 16, 1993, the Board received the Illinois Environmental Protection Agency's (Agency) recommendation with a motion to file instant. On February 25, 1993, the Board granted the motion to file instant. The Agency recommends that the Board deny the requested variance.

Hearing was held on this matter on March 3, 1993, in Marion, Williamson County, Illinois. There were no members of the public present at that hearing. Closing arguments and a reply from Veach Oil were received on March 19, 1993, and April 5, 1993,

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respectively. Closing arguments were received from the Agency on March 29, 1993. Lake of Egypt Water District did not submit arguments or present witnesses at hearing.

BACKGROUND

Veach Oil Company owns a parcel of commercial property at the intersection of Illinois Route 148 and Interstate 57 in Williamson County, Illinois. (Am. Pet. at 1.)¹ Veach Oil's property is located within one mile of the District's supply source and approximately one thousand yards from the existing water main distribution line. (Am. Pet. at 1.)

The District supplies potable water to approximately 13,300 persons, including 5,161 residential, industrial and commercial users. (Ag. Rec. at 3.) The District obtains its water from Lake of Egypt in accordance with a contract with the Southern Illinois Power which permits the District to draw raw water from Lake of Egypt. (Ag. Rec. at 3.) The provisions of the contract require the District to obtain an alternative source of water in the event the District's water use reaches "thirty million (30,000,000) gallons during an average 30 day period (or 1 million gallons per day ("MGD")), the water contract directs the District to obtain an additional source of water within a period of three years". (Ag. Rec. at 3.) The Agency's records indicate that the District's use has reached that level; however, an alternative source has not been found. (Ag. Rec. at 3.)

REGULATORY FRAMEWORK

Veach Oil asks the Board to grant a variance from 35 Ill. Adm. Code 602.105(a) and 602.106(a). Section 602.105(a) provides:

- 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. 1981, ch. 111 1/2. pars. 1001 et seq.) ("ACT"), or of this Chapter.

¹The amended petition will be cited as "Am. Pet. at ___"; the agency recommendation will be cited as "Ag. Rec. at ___"; Veach Oil's Closing argument and reply will be cited as "V.O. Br. at ___" and "V.O.R. Br. at ___", respectively; the Agency Closing argument will be cited as "Ag. Br. at ___"; and the transcript will be cited as Tr. at ___".

Section 602.106(a) provides:

- 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.

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).²) 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. Pollution Control Board (1977), 133 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. Where the petitioner seeks to extend a variance, the petitioner must show satisfactory progress.

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.

The grant of variance from 35 Ill. Adm. Code 602.105(a) and 602.106(a) does not absolve a petitioner from compliance with the standard at issue, nor does it insulate a petitioner from possible enforcement action brought for violation of that standard. The underlying standard remains applicable to the petitioner regardless of whether variance is granted or denied.

REQUESTED VARIANCE

Specifically Veach Oil is seeking this variance to remove the District from restricted status so that Veach Oil can extend the District's water line and add a new water main on its property in Williamson County. Veach Oil will use this extension to service a convenience store/truck and auto plaza with related

²This section of the Act was previously codified at Ill.Rev. Stat. 1991, ch. 111½, par. 1035(a).

dining facilities Veach Oil wishes to construct on its property. (Am. Pet. at 2.)

The amended petition also indicates that the District supports the petition for variance. (Am. pet. at 3.)

AGENCY RECOMMENDATION

The Agency recommends that the variance be denied. (Ag. Rec. at 1.) The Agency believes that a variance to allow connection of new facilities to the District water system is unwarranted because of the current status of the District's system. Of particular concern to the Agency are the system incidence of low pressure and volume within the distribution system as well as the lack of a firm commitment and timetable by the District to upgrade and expand its water treatment plant and to secure a new and reliable source of raw water for its system. (Ag. Rec. at 11-12.)

DISCUSSION

Veach Oil maintains that failure to grant the variance to Veach Oil would result in an unreasonable or arbitrary hardship for Veach Oil. (V.O.Br. at 2.) Veach Oil argues that absent the variance Veach Oil will be unable to develop the land. Other alternative water sources, such as a well, are too costly to develop and it is questionable that water could be found, according to the petitioner. (V.O.Br. at 3.)

Veach Oil further maintains that upon completion of the project, the business will have gross receipts from sales exceeding "four million dollars (\$4,000,000) per year and will employ an average of thirty (30) persons in the operational phase and approximately seventy-five (75) during the construction and development phases of the this project". (Am. Pet. at 4.) Thus, Veach Oil argues that granting the variance will provide "substantial employment opportunities" and enhance the tax base in a depressed area of the state. (Am. Pet. at 7.)

Veach Oil also argues that the granting of a variance will not result in injury to the public. (V.O. R.Br. at 6.) In fact, Veach Oil maintains that the impact on existing customers of the District is "minimal since it is anticipated that the monthly usage of water by the petitioner's business development is less than twenty thousand (20,000) gallons per month for at least the next five (5) years". (Am. Pet. at 8.)

Veach Oil indicates that the variance would not exacerbate the low pressure problem and argues that no evidence was provided at hearing that would indicate that the anticipated usage would

effect the low pressure problem. (V.O. R.Br. at 6.) Veach Oil maintains that although the District is operating at or near capacity at its operating plant, the District is presently undertaking improvement to its water system and plant which will double its capacity to treat and supply potable water. (V. O. Br. at 3-4.) Veach Oil also maintains that the completion of the improvements, later this year, will alleviate the low pressure problems. (V. O. Br. at 4.)

Veach Oil also argues that the District's draw from the Lake of Egypt will decrease in the fall of 1993, as the Burnside water system will cease purchasing its water from the District. (Tr. at 49; V.O. Br. at 7.) Veach Oil points out that the Burnside water system uses an average of 85,000 to 110,000 gallons per day of water which far exceeds the usage that Veach Oil will add. (V. O. Br. at 7.)

The Agency recommends denial of the variance. The Agency argues that the District is on restricted status and has been since 1989 with no set compliance schedule. (Ag. Br. at 1.) Further, the Agency argues that the District "has not been able to provide adequate water service to its existing customers; adding even the smallest water user to a system that is presently on restricted status is not in the public interest". (Ag. Br. at 1.)

The Agency points out that it is not questioning the good faith effort of the District to comply with the Board's regulations; however, there is no set compliance schedule. (Ag. Br. at 2.) Further, the development plan calls for using 5-10 acres of a 28 acre site and Veach Oil indicated it had contacted fast food restaurants and motel and lodging type businesses concerning use of the property. (Ag. Br. at 2-3.) Thus, the Agency is concerned that here is a potential for other businesses to be developed on this property without the need of an Agency permit, creating an even greater water demand on the district. (Ag. Br. at 3.)

The Agency also argues that the location of the Veach Oil property is in the vicinity of the "Houston Water Tower" (Houston tank). The Houston tank is a silo tank that is 61 feet tall with an overflow point of 60 feet. Customers served by that tank have complained about low pressure. (Ag. Br. at 3-4.) Even though the District has taken measures to correct the problem as late as February 26, 1993, low pressure was still discovered at the homes receiving water from the Houston tank. (Ag. Br. at 3-4.) The District conceded that the addition of Veach Oil will increase demand in the vicinity of the Houston tank. (Tr. at 83.)

Finally, the Agency concedes that the District has plans to increase its capacity to 2 million gallons per day and to increase the District draw from the Lake of Egypt. (Ag. Br. at

4.) However, the District has no projected dates for when the project will be complete and further, the project is dependent on securing a Farmers Home Administration loan. (Ag. Br. at 4.)

The Board is persuaded that a variance should not be granted at this time. The Board is concerned with the failure to present a specific compliance plan in view of the public health concerns expressed by the Agency. The Board is not convinced that the addition of a new main will have no effect on the present customers of the District. Further, the District is already drawing more water from Lake of Egypt than the District has contracted for. The petitioner did indicate that alternative sources are being sought; however, at this time the District's only source is Lake of Egypt.

The property is currently being used for agricultural purposes. (Tr. at 16.) Further, at hearing, when Mr. Veach was asked if any harm or injury would result to Veach Oil if the project was delayed, Mr. Veach stated:

I don't see any harm other than we would like to develop this piece of property and without water, we can't develop the property. We should like to expand our business and this is one way of doing it.

(Tr. at 28.)

In addition, the Agency has also pointed out that there is no indication that the additional revenues from the development of the property would be new revenues. The development could simply result in removing revenues from other areas in the county. Therefore, the Board finds that denial of the variance will not result in an arbitrary or unreasonable hardship.

The Board further notes that Veach Oil draws an analogy between its circumstances and those of the petitioner in Caterpillar Tractor Co. v. Illinois Pollution Control Board, 48 Ill.App.3d 655, 6 Ill.Dec. 737 (3d Dist. 1977) (Caterpillar). In the Caterpillar case the Board denied the variance and the court overturned the Board's decision because the court saw no indication in the record that the Caterpillar plant contributed to air quality violations and that there was injury to persons living in the area of the plant sufficient to outweigh the economic impact of closure of the plant. This case is clearly distinguishable from Caterpillar in that there is a clear link between the extension of the water line for Veach Oil and low pressure areas in the District's system. The addition of Veach Oil could result in further water quality problems for the District and thus present the potential for danger to public health.

For the reasons discussed above, the Board denies the variance sought by Veach Oil for its facility in Williamson County, Illinois.

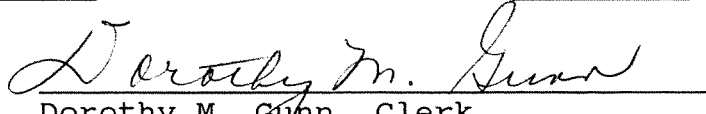
ORDER

The variance sought by Veach Oil for property located at the intersection of Illinois Route 148 and Interstate 57 in Williamson County, Illinois is denied.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41) provides for the appeal of final Board orders within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also, 35 Ill. Adm. Code 101.246, Motions for Reconsideration, and Casteneda v. Illinois Human Rights Commission (1989), 132 Ill. 2d 304, 547 N.E.2d 437; Strube v. Illinois Pollution Control Board, No. 3-92-0468, slip op. at 4-5 (3d Dist. March 15, 1993).)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 23rd day of April, 1993, by a vote of 6-0.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board