

ILLINOIS POLLUTION CONTROL BOARD
July 25, 1991

VILLAGE OF MILAN,)
)
 Petitioner,)
)
 v.) PCB 91-33
) (Variance)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

OPINION AND ORDER OF THE BOARD (by J. Anderson):

This matter comes before the Board upon a petition for variance extension filed by the Village of Milan ("Milan") on February 25, 1991. Milan seeks a variance from the Board's public water supply regulations, namely from 35 Ill. Adm. Code 602.105(a) (Standards for Issuance) and 35 Ill. Adm. Code 602.106(b) (Restricted Status) but only to the extent that those rules involve 35 Ill. Adm. Code 604.301(a) (combined Radium - 226 and Radium - 228).¹ Milan requests variance until March 1, 1993.

On April 1, 1991, Milan filed its Amended Petition for Variance ("Am. Pet."). On April 17, 1991, the Illinois Environmental Protection Agency ("Agency") filed its Recommendation ("Rec.") that the variance be granted. Hearing was waived and none has been held. Based on the record before it, the Board grants Milan's variance request, subject to conditions.

BACKGROUND

Milan is a municipality located in Rock Island County, Illinois providing public services, including potable water supply and distribution for a total of 2400 residential, industrial and commercial customers. This includes 5800 residents and some 176 industries and businesses employing approximately 3000 people. Petitioner is not a part of a regional public water supply (Am. Pet. ¶ ¶ 8,9).

The Petitioner owns and operates a distribution system which includes one deep well and three shallow wells, pumps and distribution facilities, as follows:

¹ This standard was recodified at 611.330(a) effective September 20, 1990. (See Illinois Register, Volume 14, Issue 40; October 5, 1990).

<u>Well No.</u>	<u>Depth</u>	<u>Placed in Operation</u>	<u>Gallons Per Minute</u>	<u>Location</u>
1	200	Standby	100	First Avenue and Fourth St. West
2	200	Standby	100	First Avenue and Fourth St. West
3	450	1955	300	12th Ave. and Third Street
4	1780	1970	1200	Camden Park (Am. Pet. paragraph 12)

Milan was first notified of noncompliance with the combined radium standard by letter from the Agency dated September 14, 1984. The Agency report stated that testing revealed combined radium concentration levels of 7.3 pCi/L.²

If the requested variance is granted, Petitioner will only extend its water mains to serve Milan Industrial Park, a 52 acre development with estimated development costs of \$612,000.00. The Industrial Park will contain approximately 18 lots having an average size of 2.8 acres. When fully developed Milan estimates that the park will employ 200 people and that 18 hookups will be required (Am. Pet. ¶ 11).

REGULATORY FRAMEWORK

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, 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. 111½, 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

² Recent test result dated March 11, 1991 prepared by Q. C. Metallurgical Laboratory, Inc. does not indicate a violation (Am. Pet. Exh. 3A). This result is not a composite quarterly sampling, however.

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 St. Charles' request that it be allowed to extend its water service while it pursues compliance with the radium and gross alpha particle standards, as opposed to extending service only after attaining compliance.

In determining whether any variance request is to be granted, the Act requires that the Board determine whether the petitioner has presented adequate proof that immediate compliance with the Board regulations at issue would impose an arbitrary or unreasonable hardship (Ill. Rev. Stat. 1989, ch. 111 $\frac{1}{2}$, par. 1035(a)). 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), 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); 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.

It is to be noted that grant of variance from "Standards of 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, as St. Charles itself notes (Pet. at 19). The underlying standards remain applicable to the petitioner regardless of whether variance is granted or denied.

Standards for radium and gross alpha particle activity in drinking water were first adopted as National Interim Primary Drinking Water Regulations (NIPDWRs) by the USEPA in 1976. The standards adopted were 5 pCi/l for the sum of the two isotopes of radium, radium-226 and radium-228 ("combined radium"), and 15 pCi/l for gross alpha particle activity. Shortly thereafter Illinois adopted the same limits. Although characterized as

"interim" limits, these standards nevertheless are the maximum allowable concentrations under both federal and Illinois law, and will remain so unless modified by the USEPA.³

Over much of the fifteen years since their original promulgation, the current radium and gross alpha particle activity standards have been under review at the federal level. The USEPA first proposed revision of the standards in October 1983 in an Advance Notice of Proposed Rulemaking (48 FR 45502). It later republished this advance notice in September 1986 (51 FR 34836). Most recently, on June 19, 1991, USEPA announced a proposal to modify both of them. USEPA proposes to replace the 5 pCi/l combined radium standard by separate standards of 20 pCi/l each for radium-226 and radium-228. The gross alpha particle activity standard is proposed to be replaced by an adjusted gross alpha particle activity standard; the latter would still have a 15 pCi/l value, but would no longer include alpha particle activity associated with radium or uranium decay. Under the USEPA's calendar, these standards are scheduled for promulgation by April 1993 with an effective date of October 1994.

HARDSHIP

Milan states that the limited extension of water mains that it seeks will not cause any significant harm to the environment or to the people served by any extension of water mains. Continuation of restricted status would, however mean that Milan could not extend its water mains to the Milan Industrial Park, and, therefore, mean that Milan could not continue efforts to develop the park (Pet. ¶ 31). Milan has obtained a grant from the Economic Development Administration totalling approximately \$300,000 for the development of Milan Industrial Park. Because of certain time constraints, failure to obtain variance would place the grant in jeopardy. Milan states that failure to complete the project would result in the loss of jobs and the increase in tax revenue, associated with the project (Am. Pet. ¶ 32). Milan believes that as there is no significant risk of environmental harm or risk to public health associated with grant of the variance, continuation of Restricted Status would be a arbitrary or unreasonable hardship (Pet. ¶ 33).

PUBLIC INTEREST

Although Milan has not undertaken a formal assessment of the environmental effect of its requested variance, it contends that there will be little or no adverse impact caused by the granting

³ In anticipation of USEPA revision of the radium standard, the legislature amended the Illinois Environmental Protection Act at Section 17.6 in 1988 to provide that any new federal radium standard immediately supersedes the current Illinois standard.

of variance (Pet. ¶ 21). The Agency contends likewise (Rec. ¶ 14). In support of these contentions, the Agency references testimony presented by Richard E. Toohey, Ph.D. of Argonne National Laboratory at the hearing held on July 30 and August 2, 1985 in R85-14, Proposed Amendments to Public Water Supply Regulations, 35 Ill. Adm. Code 602.105 and 602.106, and to updated testimony presented by Dr. Toohey in the Board's hearing on the Braidwood variance, PCB 89-212 (Rec. ¶ 15).

The Agency believes that while radiation at any level creates some risk, the risk associated with Milan's water is low (Rec. ¶ 14). In summary, the Agency states:

The Agency believes that the hardship resulting from denial of the recommended variance from the effect of being on Restricted Status would outweigh the injury of the public from the grant of that variance. In light of the likelihood of no significant injury to the public from the continuation of the present level of the contaminant in question in the Petitioner's water for the limited time period of the variance, and the possibility of compliance with a new MCL standard by less expensive means if the standard is revised upward, the Agency concludes that denial of a variance from the effects of Restricted Status would impose an arbitrary or unreasonable hardship upon Petitioner.

The Agency observes that this grant of variance from restricted status should affect only those users who consume water drawn from any newly extended water lines. This variance should not affect the status of the rest of Petitioner's population drawing water from existing water lines, except in so far as the variance by its conditions may hasten compliance. In so saying, the Agency emphasizes that it continues to place a high priority on compliance with the standards.

(Rec. ¶ ¶ 27 and 28)

COMPLIANCE PROGRAM

Milan does not now have any existing controls for the contaminant. Petitioner is in the final stages of constructing a blending/water main connection project that connects its water distribution system with that of the City of Rock Island (Am. Pet. ¶ 18; Exh. 4). The City of Rock Island is a municipality that has a present population of 43,000 and its source of water supply is the Mississippi River. The Mississippi River water has no significant and detectable radium.

Blending of waters produced by Petitioner's system with water purchased from the City of Rock Island requires significant construction, including:

- A. The laying of 6500 lineal feet of 12 inch water main along 92nd Avenue in the City of Rock Island to Petitioner's well No. 4 located in Camden Park. This phase of construction has been fully completed at a cost to Milan of \$192,000.00
- B. The construction of improvements to the pumping station and pumping equipment owned by the City of Rock Island and located on Ridgewood Road. Milan states that this phase of construction is approximately 30% completed and when completed the total cost will be \$71,000.00.
- C. The construction of blending facilities at well No. 4 at Camden Park including control valve, flow meter, pump, motor, signal transmitters, all to be housed in a newly constructed control building, and the construction of a blending tank. This phase of construction is 98% completed. The total cost of this phase is \$473,000.00 (Am. Pet. ¶ 19).

The total cost of the improvements referred to is estimated by Milan at \$736,000.00 (Am. Pet. ¶ 20). Once construction is completed, Milan will have achieved compliance with the applicable standards.

CONSISTENCY WITH FEDERAL LAW

The Agency believes that Milan may be granted variance consistent with the requirements of the Safe Drinking Water Act (42 U.S.C. §300 (f)) and corresponding regulations because the requested relief is not a variance from a national primary drinking water regulation (Am. Rec., par. 22).

PROPOSED FEDERAL STANDARD REVISION

The federal standard for radium has been under review for some time. In anticipation of the federal revision of the radium standard, the legislature amended the Illinois Environmental Protection Act at Section 17.6 in 1988 to provide that any new federal radium standard immediately supersedes the current Illinois standard. On April 22, 1991 USEPA published its "Unified Agenda" concerning its proposed maximum contaminant levels goals and primary drinking water standards for radionuclides in drinking water. (56 Fed. Reg. 18014) Then, on June 19, 1991 USEPA proposed a drinking water standard for radium-226 and radium-228 set at 20 pCi/l respectively. Final

action is due April 1993 according to the proposal and would become effective October 1994.⁴

CONCLUSION

The Board finds that, in light of all the facts and circumstances of this case, Milan has presented adequate proof that immediate compliance would impose an arbitrary or unreasonable hardship on Milan. Milan expects to complete all components of its compliance plan before August 1991. Given Milan's imminent completion of improvements necessary to assure compliance, the Board also finds that a short period of variance is both warranted and appropriate. Finally, Milan's construction schedule means that any change in the standard promulgated by U.S. EPA will not require an alteration of the compliance schedule adopted here. Therefore, the Board grants variance consistent with this Opinion and Order to July 25, 1992.

ORDER

1. Petitioner, Village of Milan, is hereby granted variance from 35 Ill. Adm. Code 602.105(a), Standards of Issuance, and 602.106(b), Restricted Status, as they relate to the standard for radium in drinking water of 35 Ill. Adm. Code.Subtitle F, subject to the following conditions:
 - (A) Variance shall terminate on the earliest of the following dates:
 - (1) July 25, 1992; or
 - (2) When analysis pursuant to 35 Ill. Adm. Code 605.104(a), or any compliance demonstration method then in effect, shows compliance with any standards for radium in drinking water then in effect.
 - (B) Compliance shall be achieved with any standards for radium and gross alpha particle activity then in effect no later than the date on which this variance terminates.
 - (C) In consultation with the Illinois Environmental Protection Agency ("Agency"), Petitioner shall continue its sampling program to determine as accurately as

⁴ Public hearings are scheduled for September 6, 1991 in Washington, D.C. and September 12, 1991 in Chicago, Illinois. A ninety day comment period began with publication.

possible the level of radioactivity in its wells and finished water. Until this variance terminates, Petitioner shall collect quarterly samples of water from its distribution system at locations approved by the Agency. Petitioner shall composite the quarterly samples for each location separately and shall have them analyzed annually by a laboratory certified by the State of Illinois for radiological analysis so as to 228. At the option of Petitioner the quarterly samples may be analyzed when collected. 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

- (D) Construction of all installations, changes or additions necessary to achieve compliance with the maximum allowable concentration of combined radium, or with any standards for radium in drinking water then in effect, shall be completed no later than August 1, 1991.
- (E) Pursuant to 35 Ill. Adm. Code 606.201, 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, Petitioner shall send to each user of its public water supply a written notice to the effect that Petitioner is not in compliance with standard for radium. This notice shall state the average content of radium in samples taken since the last notice period during which samples were taken.
- (F) Until full compliance is achieved, Petitioner shall take all reasonable measures with its existing equipment to minimize the level of combined radium, radium-226, and radium-228, and gross alpha particle activity in its finished drinking water.
- (G) Petitioner shall provide written progress reports to the Agency at the address below every six months concerning steps taken to comply with the paragraphs of this Order. Progress reports shall quote each of said paragraphs 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
Springfield, Illinois 62794-9276

- 2. Within 45 days of the date of this Order, Petitioner shall execute and forward to Stephen C. Ewart, Division of Legal Counsel, Illinois Environmental Protection Agency, 2200 Churchill Road, Post Office Box 19276, Springfield, Illinois 62794-9276, a Certification of Acceptance and Agreement to be bound to all terms and conditions of this variance. The 45-day period shall be held in abeyance during any period that this matter is being appealed. Failure to execute and forward the Certificate within 45 days renders this variance void and of no force and effect as a shield against enforcement of rules from which variance was granted. The form of said Certification shall be as follows:

CERTIFICATION

I (We), _____
hereby accept and agree to be bound by all terms and conditions of the Order of the Pollution Control Board in PCB 91-33, July 25, 1991.

Petitioner

Authorized Agent

Title

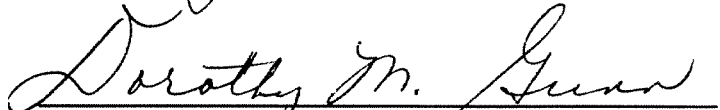
Date

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

Board Member Jacob D. Dumelle concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 25th day of July, 1991, by a vote of 5-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board