

ILLINOIS POLLUTION CONTROL BOARD
September 8, 1988

MCINTOSH, LTD, - HOLDING, INC.)
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 and)
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TURNBERRY UTILITIES, INC.)
)
 Petitioners,)
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 v.)
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)
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)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
 Respondent.)

PCB 88-81
PCB 88-88
(Consolidated)

JANICE EDWARDS OF MCDERMOTT, WILL AND EMERY APPEARED ON BEHALF OF PETITIONER, TURNBERRY UTILITIES

EDWARD J. GRIFFIN OF DEFRIES AND FISKE APPEARED ON BEHALF OF PETITIONER, MCINTOSH, LTD., - HOLDING, INC.

BOBELLA GLATZ APPEARED ON BEHALF OF THE RESPONDENT

OPINION OF THE BOARD (by Michael Nardulli):

This matter comes before the Board from two petitions for variance. The first was filed on May 3, 1988 on behalf of McIntosh, Ltd. - Holdings (hereinafter "McIntosh"). This petition was subsequently amended on May 11, 1988. The second petition for variance was filed on May 16, 1988 on behalf of Petitioner, Turnberry Utilities, Inc. (hereinafter "Turnberry"). In response to a Board order of May 19, 1988, the parties agreed to the consolidation of proceedings for the two petitions. On June 15, 1988, Turnberry filed its answer to McIntosh's amended petition for variance and on July 18, 1988 further amended its petition for variance.

The Petitioners request variance from 35 Ill. Adm. Code Section 602.105(a), Standards for Issuance, to the extent those rules involve 35 Ill. Adm. Code Section 604.203(a). Under this rule, in certain counties, including McHenry County where the Petitioners are located, the maximum allowable concentration of flouride in drinking water is 2.0 mg/l.

Public hearing was held on July 22, 1988 in the Village of

Lakewood, McHenry County. The hearing officer was Mr. Allen E. Shoenberger. No post-hearing briefs were submitted by the parties. On August 4, 1988, in response to a July 18, 1988 request for expedited decision, filed on behalf of Petitioner Turnberry, the Board issued a final order in this proceeding. The order granted variance to Turnberry from Section 602.105(a) Standards for Issuance and 602.106(b) Restricted Status, but only as they relate to the 2.0 mg/l fluoride standards in 35 Ill. Adm. Code 604.202 fluoride. The period of the variance is from May 16, 1988 to May 16, 1991 and is subject to conditions. The Board did not grant a variance to McIntosh.

The Board notes that in the time since the order was issued, Illinois House Bill 4009 has been signed into law and become Public Act 85-1330. As a result of Public Act 85-1330, the State of Illinois has adopted the Federal maximum allowable concentration for flouride in drinking water as of August 31, 1988. The Federal standard is 4.0 mg/l. Therefore, since August 31, 1988, Turnberry has been in compliance with the new state standard of 4.0 mg of flouride per liter of drinking water, and the variance from the rule has become unnecessary.

The Board is prepared to consider a Motion for Reconsideration to limit the period of the variance from the present period of May 16, 1988 until May 16, 1991 to the required period of May 16, 1988 until August 31, 1988. An adjusted variance will alleviate Turnberry's obligation to adhere to the conditions in the order while it is in compliance with the flouride standard.

BACKGROUND

McIntosh is engaged in business as a real estate developer and builder and is the owner of the Turnberry Subdivision in the Village of Lakewood, McHenry County. The subdivision is planned and zoned for 870 residents and two eighteen-hole golf courses. As of December 31, 1987, one golf course, a club house and ninety houses had been built.

Turnberry is a sewer and water utility formed to provide service to Turnberry Subdivision. Turnberry owns and operates a deep-well water supply system and maintains the public water distribution system that includes pumps, a storage tank and distribution facilities. Turnberry currently operates a single well providing utility service to all residential and commercial users in its certificated area.

The fluoride level of Turnberry's water was reported at 3.0 mg/l in July of 1978. The Public Water Supply Division of the Agency notified Turnberry on July 19, 1979 that Turnberry would be placed on the Restricted Status List because their water supply exceeded the maximum allowable concentration for fluoride. The most recent level of fluoride concentration was

reported as 3.16 mg/l. Turnberry is not on restricted status for any other contaminant.

PETITIONER'S COMPLIANCE PLANS

In its petition for variance, Turnberry stated that it is not able to comply with the 2.0 mg/l standard for fluoride because the excess fluoride in their water is naturally occurring and not amendable to control by Turnberry. Turnberry says the available technology to remove the excess fluoride is prohibitively expensive. Further, there is no surface water supply of proven quality available which offers an economically feasible alternative water supply source. Turnberry also states that should an individual customer desire a reduction of fluoride in his water, alternatives are available to such customers which are more economical than central fluoride removal.

McIntosh states in its petition for variance that part of its compliance plan would be to request the Illinois Commerce Commission to order Turnberry to review and evaluate the situation and to prepare recommendation for resolving the problem. McIntosh also offers to petition the Illinois Commerce Commission to require Turnberry to take a number of actions during the proposed variance period to accurately determine the concentration of fluoride in the water, secure professional assistance in investigating compliance options and prepare and initiate a compliance program.

HARDSHIP AND ENVIRONMENTAL IMPACT

In its variance recommendation, the Agency points out that on August 2, 1986, the United States Environmental Protection Agency increased the maximum allowable fluoride contaminant level to 4.0 mg/l, establishing this level as the level indicative of concern for health. The Agency believes that no significant health risk exist for the population served by new water main extensions for the time period of the requested variance. Further, the Agency believes that grant of the requested variance would have no adverse affect on the environment.

The Agency maintains that failure to grant relief to the Petitioners from the Standard of Issuance would result in an arbitrary or unreasonable hardship because denial of the variance would require the Agency to continue to deny construction and operating permits until compliance is achieved. This means that growth of the subdivision, based on new water main extensions, would not be allowed.

The arbitrary or unreasonable hardship is further developed by the fact that no economically feasible treatment system has been proposed. The consulting engineers engaged by Turnberry concluded that compliance could only be achieved by use of a

central fluoride removal system. The estimated cost of installing the system is over one million dollars and the annual operating cost is estimated at approximately \$400,000. Assuming that all 850 homes are built, each customer's share would be an additional \$450 per year. This hardship would be even greater if the Board's proposed change in the State's maximum allowable concentration level, and its proposed establishment of a secondary maximum allowable concentration level for Illinois, which would comport with federal standards, is adopted.

AGENCY RECOMMENDATION

The Agency believes that the hardship resulting from denial of the recommended variance would outweigh the injury to the public from grant of that variance. In light of the cost to the Petitioner of treatment of its current water supply, the likelihood of no significant injury to the public from 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 a new maximum allowable concentration level, 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. In so saying, the Agency emphasizes that it continues to place a high priority on compliance with the standards, whatever the standards will be in the future. Wherefore, the Agency recommends that Petitioner be granted a variance from 35 Ill. Adm. Code 602.105(a) Standards for Issuance, and 602.106(b) Restricted Status, but only as they relate to fluoride, from May 16, 1988 to May 16, 1991 subject to conditions adopted in the Order.

SUMMARY

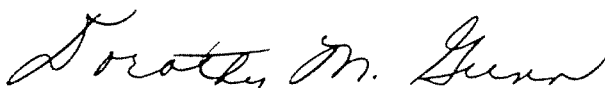
The Board adopts the recommendation of the Agency in support of a grant of the variance. The Board finds that denial of variance to Turnberry would impose an arbitrary or unreasonable hardship, and grants variance subject to conditions as suggested by the Agency. The Board will grant variance solely to Turnberry, which is the operator of the public water supply. Variance to McIntosh is unnecessary, as variance to Turnberry provides all necessary relief to both Petitioners and as all conditions to the variance require actions only by Turnberry.

Petitioner, Turnberry Utilities, Inc. has been granted variance from 35 Ill. Adm. Code 602.105(a) Standards for Issuance, and 602.106(b) Restricted Status, but only as they

relate to the 2.0 mg/l fluoride standard contained in 35 Ill. Adm. Code 604.202 fluoride, from May 16, 1988 to May 16, 1991 subject to conditions recommended by the Agency and adopted in the Order.

This Opinion constitutes the Board's finding of fact and conclusion of law in this matter.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion was adopted on the 8th day of September, 1988, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board