

ILLINOIS POLLUTION CONTROL BOARD

July 8, 1999

VILLAGE OF DORCHESTER,)	
)	
Petitioner,)	
)	
v.)	PCB 99-161
)	(Variance - Public Water Supply)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

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

This matter is before the Board on the May 12, 1999 variance petition filed by the Village of Dorchester (Dorchester), in Macoupin County. Dorchester seeks relief for twenty-four months from 35 Ill. Adm. Code 602.106(a) "Restricted Status" for total trihalomethanes (TTHM). 35 Ill. Adm. Code 602.106(a). The maximum contaminant level (MCL) for TTHM is 0.10 milligrams per liter (mg/L). 35 Ill. Adm. Code 611.310(c).¹ Dorchester waived hearing and none was held.

The Board's responsibility in this matter arises from the Environmental Protection Act (Act). 415 ILCS 5/1 *et seq.* (1998). The Board is responsible for granting variances from Board regulations whenever it is found that compliance with the regulations would impose an arbitrary or unreasonable hardship upon a petitioner. 415 ILCS 5/35(a) (1998). The Illinois Environmental Protection Agency (Agency) is required to appear at hearings on variance petitions. 415 ILCS 5/4(f) (1998). The Agency is also charged with the responsibility of investigating each variance petition and making a recommendation to the Board for the disposition of the petition. 415 ILCS 5/37(a) (1998).

The Agency filed its variance recommendation on June 14, 1999.² The Agency recommends that a variance from 35 Ill. Adm. Code 602.105(a) "Standards for Issuance" and 35 Ill. Adm. Code 602.106(a) "Restricted Status" be granted to Dorchester, but only as they relate to the requirements for TTHM under 35 Ill. Adm. Code 611.310(c). Furthermore, the Agency recommends that the variance be granted for only twelve months, subject to certain

¹ In December 2003, there will be a reduction of the MCL for TTHM to 0.08 mg/L. See proposed amendment Primary Drinking Water Standards: 35 Ill. Adm. Code 611.312(a) (May 6, 1999), R99-12.

² Dorchester's petition for variance will hereinafter be referred to as "Pet. at __."; the Illinois Environmental Protection Agency's recommendation will be referred to as "Ag. Rec. at __."; Dorchester's reply to the Agency's response to the Village of Dorchester's petition for variance and request for expedited decision will be referred to as "Pet. Reply at __."

conditions discussed more fully below. Ag. Rec. at 6. On June 23, 1999, Dorchester filed a reply to the Agency's recommendation in which it fully concurred in the recommendations of the Agency. Dorchester also requested an expedited decision from the Board. The statutory decision deadline is September 9, 1999.

Dorchester's motion for expedited decision is granted. For the following reasons, the Board finds that Dorchester has presented adequate proof that to require 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 the conditions set forth below.

BACKGROUND

Dorchester is located in Macoupin County, Illinois. Dorchester provides potable water to all residential and commercial users within the corporate boundaries of Dorchester. Pet. at 3. Dorchester owns and operates its own water distribution system, but purchases treated water from the City of Gillespie (Gillespie). *Id.* Water is provided to all residential, agricultural, commercial and industrial users, as needed. Charges, as established by ordinance, are made to all users. *Id.* Dorchester supplies water to approximately 200 users. *Id.* Residential customers account for 50% of the total water flow and commercial customers, primarily agricultural users, account for 50%. Pet. at 4.

The Agency first advised Dorchester that it exceeded the MCL for TTHM on September 23, 1996. Ag. Rec. at 4. Dorchester's water supply showed a level of 0.11 mg/L for TTHM, thus exceeding the 0.10 mg/L standard. *Id.* The Agency notified Dorchester on October 30, 1996, that it was going to be placed on restricted status. *Id.* Moreover, in the past four quarters, Agency records indicate that in two out of four samples, Dorchester exceeded the 0.10 mg/L MCL for TTHM. Ag. Rec. at 5. As a result, Dorchester's current annual average of TTHM is 0.117 mg/L, which exceeds the 0.10 mg/L MCL. *Id.*

Because Dorchester purchases water from Gillespie, its ability to obtain compliance levels of TTHM in its water is, in the first instance, dependent upon receiving water with compliance levels of TTHM from Gillespie, which has not heretofore been able to reliably supply it. Pet. at 3-5; Ag. Rec. at 3-4. Gillespie was removed from restricted status for TTHM in April 1998, after installing additional treatment modifications. Gillespie's latest testing results from February 22, 1999, showed a level of 0.057 mg/L for TTHM, which meets the MCL of 0.10 mg/L. Ag. Rec. at 5. Dorchester asserts that Gillespie's improvements will improve the quality of water supplied by Gillespie so that Dorchester will be in compliance with the MCL for TTHM. Pet. at 5.

Dorchester requests this variance to extend its water distribution system to serve new users in the Heyen Subdivision, located within the corporate boundaries of Dorchester. Pet. at 4. The Heyen Subdivision has thirteen lots designated for single-family residences. Two lots in the Heyen Subdivision have been built upon by third parties; the first residence was built and occupied without notice or knowledge by the subdivision owner that Dorchester was on

the Agency's restricted status list. Pet. at 6. Ten of the thirteen lots have been sold to third parties and seven of the sold lots will have homes under construction by June 1999. *Id.*

If the requested variance is granted, Dorchester asserts that it will be able to continue to operate, expand, improve, and extend its water distribution system in the Heyen Subdivision. Pet. at 8.

REGULATORY FRAMEWORK

Dorchester's variance request involves two of the Board's public water supply regulations: "Standards for Issuance" and "Restricted Status," which are found at 35 Ill. Adm. Code 602.105 and 602.106. In pertinent part they 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 [415 ILCS 5].

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.

The cumulative effect of these regulations is that community water supply systems are prohibited from extending water service unless and until their water meets all of the standards for finished water supplies. Dorchester requests this variance in order to extend its water service while it continues to pursue compliance with the TTHM standard, as opposed to extending service only after attaining compliance.

In determining whether a 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) (1998). Furthermore, the burden is on 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, 135 Ill. App. 3d 343, 481 N.E.2d 1032 (1st Dist. 1985). Only with such a showing can the claimed hardship rise to the level of arbitrary or unreasonable hardship.

A variance is only a temporary reprieve from compliance with the Board's regulations. Compliance is to be sought regardless of the hardship which the task of eventual compliance presents to an individual polluter. Monsanto Co. v. Pollution Control Board, 67 Ill. 2d 276,

367 N.E.2d 684 (1977). Accordingly, except under certain special circumstances not present here, a petitioner requesting a variance is required 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” neither absolves a petitioner from compliance with the drinking water standards at issue, nor insulates a petitioner from a 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. City of Altamont v. IEPA (December 7, 1995), PCB 96-65.

COMPLIANCE PLAN

Dorchester is awaiting the results of the water quality tests performed after Gillespie installed improvements before Dorchester itself undertakes expensive remedial action. Dorchester believes that the modifications to Gillespie’s water treatment system will eliminate its own violation of the MCL for TTHM. Pet. at 8. Gillespie was removed from restricted status for TTHM in April 1998 after installing additional treatment modifications. Gillespie’s latest testing results from February 22, 1999, showed a level of 0.057 mg/L for TTHM, which meets the MCL of 0.10 mg/L. Ag. Rec. at 5. Dorchester intends to monitor its own water quality each month for the next six months and to obtain, at its own expense, monthly samples of water for TTHM analysis at the Dorchester master meter connection to Gillespie’s water supply. Pet. at 8. After the results of the six month study, Dorchester will address any water quality issues that remain. *Id.*

The Agency states that Dorchester has not previously sought a variance from regulations pertaining to TTHM. Ag. Rec. at 4. Additionally, Dorchester is not presently on restricted status for exceeding any other contaminant. Ag. Rec. at 6.

HARDSHIP

Dorchester contends that failure to obtain a variance would cause unreasonable hardship on Dorchester’s growth and on all persons affected by its denial. Currently, third parties constructing homes in the Heyen Subdivision must drill water wells or haul potable water due to the inability of Dorchester to provide water service as long as it is on the Agency’s restricted status list. Pet. at 6. Dorchester also asserts that failure to obtain a variance would not allow new water main extensions and halt construction of new subdivision homes. Pet. at 6-8.

Finally, Dorchester alleges that failure to obtain a variance would cause unreasonable hardship in that Gillespie, after years of non-compliance, has implemented a comprehensive plan, the effect of which will be to reduce TTHM levels for Gillespie and for all of its bulk water customers, including Dorchester. Pet. at 7.

The Agency agrees that denial of a variance would result in an arbitrary or unreasonable hardship because denial of that variance would require the Agency to continue to

deny construction and operating permits for new water main extensions until compliance is achieved. Ag. Rec. at 9. Imposition of restricted status means that no new water main extensions could be issued permits by the Agency, and economic growth dependent on those water main extensions could not occur. Ag. Rec. at 10.

ENVIRONMENTAL IMPACT

The Agency believes that any incremental increase in the concentration for TTHM allowed by the grant of the requested variance should cause no significant health risk for the limited population served by new water main extensions for the time period of the recommended variance. Ag. Rec. at 8-9. The Agency further agrees that granting the requested variance would not impose any significant injury to the public or to the environment for the limited time period of the recommended variance. Ag. Rec. at 9.

CONSISTENCY WITH FEDERAL LAW

The Agency states that Dorchester may be granted a variance consistent with the requirements of the Safe Drinking Water Act (42 U.S.C. § 300(f)), and the United States Environmental Protection Agency (USEPA) Drinking Water Regulations (40 C.F.R. Part 141 (1998)) because the requested relief would not represent a variance from national primary drinking water regulations. Ag. Rec. at 10. Specifically, granting a variance from the effects of restricted status means that only the State's criteria for variances are relevant. *Id.*

The Agency states that Dorchester remains subject to the possibility of federal enforcement for violations of the MCL for TTHM. Ag. Rec. at 11. The Agency notes that because of continuing progress being made toward compliance, the Agency does not believe "that USEPA will object to the issuance of [a] variance, should the Board so decide." *Id.*

TERMS OF VARIANCE

Dorchester initially requested that the term of variance be for a period of twenty-four months, or until July 8, 2001. Pet. at 7. The Agency, however, recommends that the variance be granted for twelve months from the date the variance is granted. Ag. Rec. at 12. The Agency states that twelve months would give Dorchester time to monitor its water and make any needed adjustments or take any further action as required by the Agency. The additional time will give Dorchester four quarters in which to test its samples to determine whether it is in compliance. *Id.* Dorchester fully concurs in the recommendations of the Agency, including the twelve month limit on the variance. Pet. Reply at 2.

CONCLUSION

Based on the record, the Board finds that immediate compliance with 35 Ill. Adm. Code 602.105(a) "Standards for Issuance" and 35 Ill. Adm. Code 602.106(a) "Restricted Status" regulations would impose an arbitrary or unreasonable hardship on Dorchester. The Board also finds that granting this variance does not pose a significant health risk to those persons served by any new water main extension.

Consistent with the Agency's recommendation, and with Dorchester's concurrence, we will grant Dorchester a variance which will expire July 8, 2000. This amount of time should allow Dorchester to monitor its water and make adjustments as needed.

The Board's action is solely a grant of variance from "Standards of Issuance" and "Restricted Status". Dorchester is not granted variance from compliance with the TTHM standard and Dorchester is not insulated from enforcement for violation of this standard.

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

ORDER

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

1. The variance terminates on July 8, 2000.
2. In consultation with the Illinois Environmental Protection Agency (Agency), Dorchester shall continue its sampling program to determine as accurately as possible the level of TTHM in its public water supply. Until this variance expires, Dorchester 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
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

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

3. 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, Dorchester will send to each user of its public water supply a written notice to the effect that Dorchester 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 MCL for TTHM.
4. If results or analyses performed on samples pursuant to 35 Ill. Adm. Code 611.685 show a violation of the MCL for TTHM, then public notice shall be made pursuant to 35 Ill. Adm. Code 611.851(b).
5. Until full compliance is reached, Dorchester shall take all reasonable measures with its existing equipment to minimize the level of TTHM in its finished drinking water.
6. Dorchester 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 that paragraph:

Illinois Environmental Protection Agency
 Division of Public Water Supply
 Field Operations Section
 1021 North Grand Avenue East
 P. O. Box 19276
 Springfield, Illinois 62794-9276

Within 45 days of the grant of the variance, Dorchester shall execute and forward to:

Joey Logan-Wilkey
 Division of Legal Counsel
 Illinois Environmental Protection Agency
 1021 North Grand Avenue East
 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 99-161, dated July 8, 1999.

Petitioner

Authorized Agent

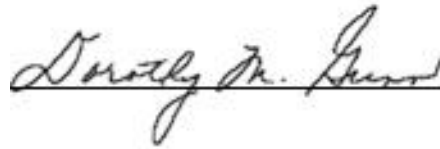
Title

Date

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act, (415 ILCS 5/41 (1998)), provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of the date of service of this order. Illinois Supreme Court Rule 35 establishes such filing requirements. See 172 Ill. 2d R 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, do hereby certify that the above opinion and order was adopted on the 8th day of July 1999 by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board