

ILLINOIS POLLUTION CONTROL BOARD
May 15, 1997

PINEWOOD MOBILE HOME PARK,)	
)	
Petitioner,)	
)	PCB 97-129
v.)	(Variance - Public Water Supply)
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by M. McFawn):

This matter is before the Board on the January 30, 1997 filing by petitioner, Pinewood Mobile Home Park (Pinewood or Petitioner), of a petition for variance. Pinewood seeks relief from 35 Ill. Adm. Code 602.105(a), "Standards for Issuance," and 602.106(a), "Restricted Status," but only to the extent those rules involve 35 Ill. Adm. Code 611.331(b), nitrate levels, and 35 Ill. Adm. Code 653.109(b), hydropneumatic storage. Pinewood waived hearing on the petition and no hearing was held.

On February 28, 1997, the Illinois Environmental Protection Agency (Agency) filed its variance recommendation. The Agency recommends that the variance be granted, subject to certain conditions.

The Board's responsibility in this matter arises from the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (1994).) 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) (1994).) The Agency is required to appear in hearings on variance petitions. (415 ILCS 5/4(f) (1994).) The Agency is also charged, among other things, with the responsibility of investigating each variance petition and making a recommendation to the Board as to the disposition of the petition. (415 ILCS 5/37(a) (1994).)

For the following reasons, the Board finds that Pinewood 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

Pinewood is located in Chillicothe, Peoria County, Illinois. (Pet. at 5.) Pinewood provides potable water supply and distribution for 206 mobile home units, of which approximately 185 are occupied. (Pet. at 5.) Figuring that 2.25 people occupy each unit, Pinewood estimates that the system has the potential to serve a population of 464 people. The population is served by three wells, a 12,000 gallon hydropneumatic storage tank and distribution system. (Pet. at 5.) Petitioner owns and operates the distribution system. (Pet. at 5.) Water is provided to all residential users as needed and charges are made as part of the monthly rental fee. (Pet. at 5.) Petitioner is not currently part of a regional public water supply. (Pet. at 5.)

Petitioner foresees extending its water main to serve new users in Pinewood Mobile Home Park, Phase Two which is to be located west and southwest of the existing park. (Pet. at 5.) Phase Two will consist of 73 mobile homesites with an anticipated population of 164 persons. (Pet. at 5.) Petitioner is unable to obtain the required permits from the Agency since the petitioner is on the restricted status list.

Petitioner was first notified in a letter dated April 1, 1994 from the Agency that the maximum contaminant level (MCL) for nitrate had been exceeded. (Pet. at 6.) The MCL for nitrate is 10 mg/L. (35 Ill. Adm. Code 611.300(b).) In an April 19, 1994 letter, petitioner was notified that it would be placed on restricted status. (Pet. at 6.) Petitioner was removed from restricted status in 1994 but returned to restricted status in August 1995 since the nitrate levels would naturally fall under the MCL during autumn. (Pet. at 6.) The last analyses of the water supply completed on January 21, 1997 showed nitrate levels of 10.6 mg/L. (Ag. Rec. at 6.)

In a letter dated May 10, 1995 from the Agency, petitioner was advised that the existing 12,000 gallon storage tank had inadequate volume. (Pet. at 7.) The Agency stated that based on the required 35 gallons per capita (35 Ill. Adm. Code 653.109.), the gross storage volume should be 16,590 gallons. (Pet. at 6.) The water supply was placed on the restricted status list for having inadequate volume. (Pet. at 7.)

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. 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 public water supplies. Pinewood requests that it be allowed to extend the water service while it pursues compliance with the nitrate standard and hydro-pneumatic storage requirement, 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) (1994).) 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 (1st Dist. 1977), 135 Ill. App. 3d 343, 481 N.E.2d 1032.) Only with such a 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, and does not 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

Petitioner does not have any existing controls for nitrate or any additional hydro-pneumatic storage capacity. (Pet. at 8.) After being notified by the Agency of violations, Pinewood instructed its consulting engineer to provide plans and specifications for a nitrate removal system and additional hydro-pneumatic storage. (Pet. at 7 and 8.)

Petitioner is involved in negotiations with Illinois-American Water Company to provide water service to the mobile park. (Pet. at 8.) Illinois-American Water Company has submitted a proposal dated September 19, 1996, to the Chillicothe-Hallock-Medina Public Water District to provide potable water service to several areas including Pinewood. (Pet. at 8.) Under the proposal it is anticipated that construction will begin April 21, 1997 and be completed no later than December 31, 1997. (Ag. Rec. at 8.) Petitioner believes that by becoming part of the proposed regional water distribution system its water problems will be solved. (Pet. at 9.)

HARDSHIP

Denial of the variance means that all construction within the service area requiring the extension of the water supply could not resume. (Pet. at 13.) Petitioner maintains that this negatively impacts prospective tenants. (Pet. at 13.) Petitioner contends that its inability to expand its business is an arbitrary and unreasonable hardship. (Pet. at 13.) Petitioner further contends that expenditure of significant sums of money to comply is an arbitrary and unreasonable hardship when a regional water distribution system will be available within two years. (Pet. at 12.)

The Agency agrees that denial of the variance would impose an arbitrary or unreasonable hardship on Pinewood. (Ag. Rec. at 11.) The Agency believes that the hardship resulting from the denial of the variance would outweigh the possibility of injury to the public from the granting of the variance. (Ag. Rec. at 13.)

ENVIRONMENTAL IMPACT

While Pinewood has made no formal assessment of the environmental impact of the variance, it contends that there will be no significant harm to the environment or the people served by the water mains if the variance is granted. (Pet. at 10.) Petitioner does not consider the quality of the water supply to be a significant health risk for the limited time period of the requested variance. (Pet. at 10.)

Nitrate is used in fertilizer and is found in sewage and wastes from human and/or farm animals and generally gets into drinking water from those sources. (Ag. Rec. at 10.) Excessive levels of nitrate in drinking water have caused serious illness and sometimes death in infants under six months of age. (Ag. Rec. at 10.) The serious illness in infants is caused because nitrate is converted into nitrite which interferes with the oxygen-carrying capacity of the child's blood. (Ag. Rec. at 10.) Symptoms include shortness of breath and blueness of the skin. (Ag. Rec. at 10.)

The Agency believes that an increase in the allowable concentration of nitrate should cause no significant health risk for a limited population served by new water mains for the time period of the variance. (Ag. Rec. at 10.) The Agency's conclusion is based on the petitioner providing bottled water to the children six-months or younger in the mobile home park. (Ag. Rec. at 10.)

CONSISTENCY WITH FEDERAL LAW

The Agency states that the requested variance may be granted consistent with the Safe Drinking Water Act (SDWA), PL 93-523, as amended by PL 96-502, 42 U.S.C. 300(f) and corresponding regulations (40 CFR Part 141) because the variance does not grant relief from compliance with the federal primary drinking regulations. (Ag. Rec. at 12.) The Agency states that granting a variance from the effects of restricted status affects State and not federal law and regulations; a variance from the effect of restricted status would allow water main extensions, under the Act and Board regulations. (Ag. Rec. at 12.) The Agency further states that the recommended variance is not a variance from USEPA's national primary drinking water regulations and does suspend the effect of the SDWA. (Ag. Rec. at 12.) The Agency asserts that a federal variance is not at issue, and there should be no risk to the State of Illinois of loss of primary enforcement responsibility. (Ag. Rec. at 12.) The Agency states that petitioner will remain subject to the possibility of enforcement for violations of the MCL for the contaminants in question under state and federal law. (Ag. Rec. at 12.) The Agency concludes that because continuing efforts are being made towards compliance, it is unlikely that the USEPA will object to the issuance of the recommended variance. (Ag. Rec. at 12.)

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 Pinewood. The Board also agrees with the parties that granting this variance does not pose a significant health risk to those persons served who will be affected by the variance, given the minimal level of the exceedance of the standard and assuming that compliance is timely-forthcoming. The Board believes that by supplying bottled water to infants under six months of age, petitioner is limiting the risk of potential harm from increased nitrates in the water supply. In addition, the Board believes that expending money for additional storage capacity at this time when that storage capacity would not be needed after the water supply is obtained from Illinois-American Water Company would be an arbitrary and unreasonable hardship. Further, the Board believes that prohibiting Pinewood to extend its water main where new users would eventually be connected to the water supplied from Illinois-American Water Company results in a arbitrary and unreasonable hardship.

Today's action is solely a grant of variance from standards of issuance and restricted status. Pinewood is not granted a variance from compliance with the drinking water standards, and today's action does not insulate Pinewood in any manner against enforcement for violation of the standards.

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

ORDER

Pinewood Mobile Home Park 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 nitrate in drinking water as set forth in 35 Ill. Adm. Code 611.331(b), and hydropneumatic storage as set forth in 35 Ill. Adm. Code 653.109(b) subject to the following conditions:

- (A) The variance shall commence on the date of this order and shall terminate no later than December 31, 1998.
- (B) Pinewood Mobile Home Park shall provide the Illinois Environmental Protection Agency (Agency) with a copy of the agreement entered into with the Illinois-American Water Company when it is fully executed by all affected parties.
- (C) Pinewood Mobile Home Park shall supply bottled water to those residents of the mobile park home who are six months of age or younger.
- (D) In consultation with the Agency, petitioner shall continue a sampling program to determine as accurately as possible the level of nitrates in its public water supply. Until this variance expires, petitioner shall collect weekly samples of water from the distribution system at locations approved by the Agency and shall have them analyzed by a laboratory certified by the State of Illinois so as to determine the concentration of nitrates. The results of the analyses shall be reported within 30 days of receipt of each analysis to:

Illinois Environmental Protection Agency
Compliance Assurance Section
Drinking Water Quality Unit
Bureau of Water
P.O. Box 19276
Springfield, Illinois 62794-9276

- (E) Pursuant to 35 Ill. Adm. Code 611.815(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, petitioner shall send to each user of its public water supply a written notice to the effect that the petitioner is not in compliance with the nitrate standards and the hydropneumatic storage requirements. The notice shall state the average content of the contaminant in samples taken since the last notice period during which samples were taken.
- (F) Pursuant to 35 Ill. Adm. Code 611.851(b), in the first set of water bills or within three months after the date of this order, whichever occurs first, and every three months thereafter, petitioner will send to each user of its public

water supply a written notice to the effect that petitioner 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 standard for nitrate and hydro pneumatic storage requirement.

- (G) Until full compliance is achieved, petitioner shall take all reasonable measures with its existing equipment to minimize the level of contaminants in its finished drinking water.
- (H) Petitioner shall provide written progress reports to the Agency at the address below every six months concerning steps taken to comply with the paragraphs B, C, D, E, F and G 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

IT IS SO ORDERED.

If Pinewood Mobile Home Park chooses to accept this variance subject to the above order, within forty-five days of the date of this order, Pinewood Mobile Home Park 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 and of no force and effect as a shield against enforcement of rules from which this variance is granted. 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 Illinois Pollution Control Board in PCB 97-129, May 15, 1997.

Petitioner

Authorized Agent

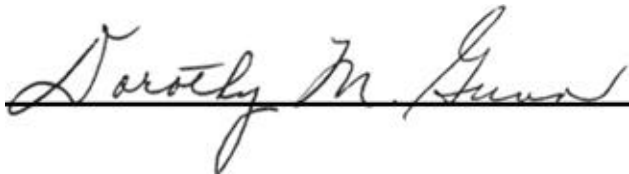
Title

Date

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders to the Illinois Appellate Court 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 "Motions for Reconsideration.")

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 15th day of May, 1997, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board