

ILLINOIS POLLUTION CONTROL BOARD
April 18, 1985

VILLAGE OF HANNA CITY,)
)
 Petitioner,)
)
 v.) PCB 85-40
)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

VILLAGE OF GARDNER,)
)
 Petitioner,)
)
 v.) PCB 85-42
)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by J. Anderson):

The Village of Hanna City filed its petition for variance on April 8, 1985. The Village of Gardner filed its petition for variance on April 9, 1985. Each petition seeks relief from the radiological quality standards for drinking water. The date for filing of the Agency Recommendation was extended in each case until June 1, 1985,* and the date for Board decision until September 1, 1985. In each case, the Agency filed a motion to join additional parties. The Board is addressing each petition and motion in this joint order for the purpose of administrative convenience; the cases are not hereby consolidated.

The Hanna City Petition - Radium.

The Village of Hanna City seeks variance from 35 Ill. Adm. Code Section 604.301(a), establishing a maximum allowable concentration of 5 pCi/l (pico Curies per liter) for combined radium-226 and radium-228. The Village provided as Exhibit 1 a 1984 report of the results of an Agency composite sample showing

*The Board notes that the deadline date for the filing of the Agency Recommendation is set by Section 37(a) of the statute and cannot be extended by Petitioners. The Board will construe these "waivers" as lack of objection.

a combined radium content of 13.6 pCi/l. However, Exhibit 1 goes on to say that "public notice will be required in addition to the public notice for gross alpha content". No request is made for variance from the 15 pCi/l gross alpha particle activity concentration limit of 35 Ill. Adm. Code 604.301(b).

Although this petition does not so indicate, the Board notes that Hanna City had previously been granted a variance from the gross alpha standard in PCB 80-206 (January 21, 1981 as supplemented March 5, 1981). This variance, which is due to expire January 1, 1986, also provided relief from the 2.0 maximum fluoride concentration limit of 35 Ill. Adm. Code 604.203. Testing for combined radium was a condition of that variance.

Based on the combined radium readings, and in the interests of providing the Village with complete relief in one proceeding, the Board questions whether continued relief will be necessary from the gross alpha standard.

Clarification of the scope of the Village's request will facilitate handling of the petition. If an amended petition curing this defect is not filed within 45 days of the date of this Order this petition will be subject to dismissal. The Board wishes to note that the filing of an amended petition will restart the Board's 90 day decision timeclock, which may by statute extend the various dates contained in the Village's April 4, 1985 "Notice of Waiver" of the statutory due date for Agency recommendation until June 1, 1985, and for Board decision until September 1, 1985.

Finally, the Board also notes that it would be interested in knowing whether compliance with the fluoride standard has been attained, and if not what progress has been made in that area. (Usually, treatment methods which will insure compliance with fluoride standards will also cure radioactive problems.)

The Gardner Petition--Gross Alpha.

The Village of Gardner clearly seeks variance from the 15 pCi/l gross alpha particle activity level of 35 Ill. Adm. Code 604.301(b) (see introductory paragraph and paragraph 4), providing as Exhibit 1 a 1981 report of the results of an Agency composite sample showing gross alpha activity of 32.2 pCi/l. However, Exhibit 1 also notes that the sample would be analyzed for radium content, and the results forwarded to the Village. No radium results are included in the petition. While paragraph 3 of the petition requests variance from the radium limitations, it refers to 35 Ill. Adm. Code 604.301(b), the gross alpha limitation. The Board is therefore unsure whether, in fact, variance from the 5 pCi/l combined radium-226 and radium-228 standard has been requested or is necessary to give the Village complete relief. Clarification of the scope of the Village's

request, and inclusion of any recent sampling results for either/both gross alpha activity and the combined radium will facilitate handling of the petition. If an amended petition curing this defect is not filed within 45 days of the date of this Order, this petition will be subject to dismissal. The Board wishes to note that the filing of an amended petition will restart the Board's 90 day decision timeclock, which may by statute extend the various dates contained in the Village's April 9, 1985 "Notice of Waiver" of the due date for Agency recommendation until June 1, 1985, and for Board decision until September 1, 1985.

The Agency Motions

On April 12, 1985, in the Hanna City radium variance (PCB 85-40), the Agency moved the Board to join as additional parties 46 public water supplies listed on Attachment A to the motion, alleging that each was or would soon be "placed on restricted status for exceeding the combined radium standard or for exceeding that standard and another standard". On April 11, 1985, in the Gardner gross alpha variance (PCB 85-42), the Agency moved the Board to join as additional parties 36 public water supplies listed on Attachment A to the motion, alleging that each was or would soon be "placed on restricted status for exceeding the gross alpha particle activity or for exceeding that standard and another standard". In each case, attached to the motion was a cover letter sent by the Agency to the public water supplies containing certain procedural advice concerning this motion.

These motions are not yet ripe as the respective Villages' response times have not yet run; the Board will not rule on these motions today for this reason, as well as for reasons expressed below. The Board is addressing these motions today to minimize confusion on the part of the 82 communities and water supply operators who have received the Agency's motion. (The Board will provide a copy of this Order to each of these listed supplies via first class mail.)

The rationale of the Agency's motion can be briefly summarized as follows. The USEPA has, under the Safe Drinking Water Act (SDWA), 42 U.S.C. 300(f) et seq., established National Revised Primary Drinking Water Regulations (40 CFR 141) which set radiological quality limits of 5 pCi/l for radium-226 and radium-228 combined, and 15 pCi/l for gross alpha particle activity. Since October, 1983, the USEPA has been in the process of reviewing these standards (48 Fed. Reg. 45502), but has not as yet proposed revised standards.

The aquifer underlying much of northern Illinois naturally has a radium level in excess of this standard. The Agency believes that the standards are too stringent, and believes the radium standard should be set at 20-30 pCi/l, and the gross alpha

standard at 60-80 pCi/l. The Board's drinking water standards are set at the same levels as those established by USEPA; Illinois can retain SDWA enforcement primacy only if its regulations are no less stringent than those of USEPA. Thus, the Agency cannot propose a rulemaking to revise Illinois' standards, without risking primacy.

To void imposition of bans on extension of water service, the Agency has asked the Board to consider the problems of the water supplies who exceed the standards in two groups: those with radium levels under 30 pCi/l, and those with gross alpha levels under 80 pCi/l. The Agency apparently requests that all these communities be joined as parties, but that the Board allow individual communities to "opt out". It would appear that the Agency does not anticipate that these communities would actively participate in the proceeding, but would instead rely on assertions by the Agency and/or the lead petitioner that: compliance is costly and many compliance methods create additional problems, compliance would be unnecessary if the standard is changed, and compliance is unnecessary for the protection of human health.

As precedent for this approach, the Agency reminds the Board of the variance granted to 287 sewage treatment plants in Village of Bloomingdale v. IEPA, PCB 78-124, 32 PCB 23 (November 2, 1978).*

The Board is appreciative of the Agency's desire to "take the lead" in assisting communities who do not comply with existing radiological quality standards, and has no objection to considering group variances if they can be properly managed consistent with statutory requirements and administrative capabilities. However, the Board does not believe the Agency has fully considered the ramifications of its request. The Board will therefore make some observations concerning management of these actions, to which the Agency is requested to reply.

*Bloomingdale involved sewage treatment effluent discharges in a six county area seeking variance to discharge beyond regulatory limits where: a model had predicted that a water quality standard would be violated in the six county area; absent variance hundreds of dischargers would have had to provide conclusive proof as to whether they were causing or contributing to violations of the standard in order to even qualify for variance relief; the Board was in the midst of a regulatory proceeding proposing the regulatory limit be changed; and the model was a part of a review designed to develop an implementation plan under the federal Clean Water Act which would be binding on all dischargers. One hearing was held in this matter.

First, the various filings appear to contemplate that the group variances can proceed to judgment on the pleadings, without hearings, as indicated in part by the shortness of the waiver of the decision deadline in each case. Hearing has been waived by each of the individual petitioners here, and no Section 37(a) objections have as yet been filed. As each individual petitioner has presented a complete variance petition and requests relief from radioactivity levels within ranges which the Board has previously considered, it is possible that the individual cases could be decided upon the petition and Agency Recommendation. The Board does not believe that the group variances could be decided without hearings and within the deadline even as extended, for several reasons.

Were the Board to join each of the listed communities, each would have a right to hearing unless it was waived. In addition, the Agency would be required to give notice of the petition to the public pursuant to Section 37(a), as was done in the other group variance granted by the Board in recent years, Mercy Hospital, et al. v. IEPA, PCB 80-218 (December 19, 1980, as supplemented June 10, 1981) (variance granted to 286 hospitals from landfill disposal ban). In that case, hearings were held in five counties pursuant to objections concerning various individual hospitals, with each presenting evidence to support its individual hardship. Based on the Board's experience with radiological quality variances, the Board notes that public interest is high, and objections are often filed, e.g. Village of Lemont v. IEPA, PCB 80-48, May 1, 1981. The Board would anticipate that a certain number of objections would be filed in these cases as well, which would trigger hearings even if such were waived by the petitioners.

More importantly, the Board would question the wisdom or propriety of its acceptance, without hearings, of an Agency assertion that any specified, raised numerical limits are the proper ones for every water supply on an Agency-generated list. After all, were this a regulatory proposal under Title VII of the Act, a hearing would be required in at least two areas of the state. The Board questions whether hearings may be desirable, even if not statutorily required, in every county in which an affected water supply is located.

To justify variance for a group, particularly for those at the upper end of the limits proposed by the Agency, the Board would expect the Agency to "take the lead" in presenting scientific testimony and any necessary related exhibits to support its opinion concerning the health effects of its recommended limits, the general costs and infeasibility of various compliance options, etc.

Secondly, prior to proceeding with a group variance, the Board believes that supplies should "opt in," rather than "opt

out" as suggested by the Agency, as hearing must be waived or requested and participation in a hearing might be required in any event. The Board would require certain basic data concerning each water supply. The first item would be a specification of the radiological quality standard or standards from which variance is necessary; it is again the experience of the Board (as born out by the individual villages' petitions here) that petitioners need guidance in determining whether relief is requested from one or both of the standards. As to public water supplies with gross alpha readings in excess of 5 pCi/l but which have not analyzed for the radium, the Board also queries whether relief is also being requested from that requirement, contained in 35 Ill. Adm. Code 605.105. The second item would be sample results for the parameters for which variance is requested for as many sampling periods as are available, excluding any periods in which data may be suspect, cf. Hanna City, supra, Supp. Op. p. 1. Such data would be important in determining whether the radioactivity level in any community is becoming elevated, possibly due to contamination by man-made sources of radioactivity, which would require further scrutiny. A third item would be a brief description of the supply's water source, and whether and when that source would be replaced by a regional source. A fourth would be a listing of any previous drinking water variances granted by the Board and a listing of any other parameter (e.g. barium, fluoride) for which the supply is now, or will soon be placed on restricted status. The fifth item would be a request for hearing and waiver thereof (accompanied by affidavit), as well as an open waiver of the decision period. The Board assumes that the Agency has much, if not all, of this information in its possession, and would have no objection to an Agency-filed group petition containing this information. (In the event this is the course taken, a listing of the supplies by county would be helpful.)

Finally, the Board would request an assessment by the Agency as to what effect, if any, the granting of group, as opposed to individual, variances would have on Illinois' retention of SDWA enforcement primacy. More particularly, each of the Villages' petitions (paragraphs 34-40) discusses the fact that the Board has taken the position, most recently restated in City of Crystal Lake v. IEPA, PCB 84-2, May 29, 1984, that it "has the authority to grant individual variances consistent with a federal variance [under Section 1415 of the SDWA, as opposed to Section 1416 exemptions having strict time deadlines] to both small and large water supply systems" (p. 3, emphasis added). In granting each of the many individual variances from the radiological quality standards, as well as those from barium and fluoride, the Board has required economic information not only regarding the costs of treatment methods to achieve compliance, but also information concerning the effect of imposition of such costs on the particular community involved. The Agency would appear to be suggesting that the Board interpret the "taking costs into

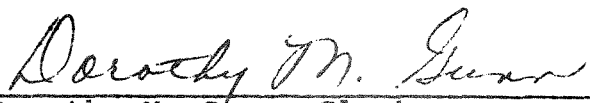
consideration" language of Section 1415 of the SDWA as meaning that "any cost is per se too high as long as a particular, to-be-determined level is not reached". Were the Board to grant group variances on this basis, and USEPA to reject this interpretation, in addition to jeopardizing primacy, the Board would have issued state variances to numerous communities which would be "not worth the paper they were written on" in defending against enforcement suits by USEPA. Such a result, after expenditure of considerable time and effort in pursuit of group variances, should, of course, be avoided.

In light of the above observations, the Agency may wish to consider whether it wishes to request the Villages to provide the Board with an indefinite waiver of the decision periods, or whether the Agency would prefer to withdraw its motions in these cases, prepare and assemble data as necessary, and make fresh group variance filings with new lead petitioners.

The Board requests that the Agency supplement its motions in these cases with a filing responding to the points raised in this discussion on or before April 26, 1985 if the Agency wishes the Board to consider these motions at its May 2 meeting.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board hereby certify that the above Order was adopted on the 18th day of April, 1985 by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board