

ILLINOIS POLLUTION CONTROL BOARD
June 5, 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 from the 5 pCi/l combined radium drinking water standard of 35 Ill. Adm. Code 604.301(a) on April 8, 1985; on April 12 the Agency moved the Board to join as additional parties 46 public water supplies. The Village of Gardner filed its petition for relief from the 15 pCi/l gross alpha particle activity drinking water standard of 35 Ill. Adm. Code 604.301(b); on April 11 the Agency moved the Board to join as additional parties 36 public water supplies. On April 18, the Board entered an Order requesting the Agency to address several issues concerning legal ramifications and procedural manageability of the group variance approach suggested by the Agency. On May 24, the Agency filed a reply to the April 18 Order, as well as a motion to withdraw its previous request that the Board join additional parties to these variances.

The motion to withdraw does not involve an Agency retreat from the group variance concept, but instead involves an acknowledgment of the time required for the Agency to contact water supplies to determine whether a) they wish to "opt in" to a group variance proceeding after reviewing a petition, b) will waive the decision period c) will waive hearing and present an affidavit attesting to its factual allegations. As all of this activity could substantially retard completion of the records in

the Hanna City and Gardner variances, the Board will grant the Agency's motions to withdraw.

The Agency's Procedural Proposal

In its Reply to the Board's Order, the Agency requests Board approval of various procedures proposed by the Agency after its consideration of the questions posed by the Board and the Agency's resulting consultation with USEPA. In the interests of facilitating resolution of a problem facing some four score public water supplies, the Board will comment on the Agency's suggestions.

The Agency has refined or altered its previous approach in several respects. The Agency is inclined to take a group approach to communities in violation of the fluoride standard, as well as those in violation of the gross alpha and radium standards or combinations thereof. The Agency has volunteered to itself provide certain basic data concerning each water supply, and to serve as a clearing-house for data which can only be supplied by that supply. The Agency suggests that each supply's request should be separately docketed, but consolidated for hearing and/or decision purposes. The Agency intends to present scientific testimony at hearings which may be scheduled at the Board's discretion or in response to statutory objection. However, it notes that its witnesses, especially those who are not Agency employees, may not be expected to be available at each of the hearings which could hypothetically be required by statute, as the affected communities are located in some 25 counties.

The single most significant change in the Agency's manner of approach to the problems of these communities is its intention to recommend that variance be granted only from the Board rule [35 Ill. Adm. Code 602.105(a)] requiring denial of water main extension permits for communities placed on, or eligible for placement on, restricted status because of violation of the combined radium and/or gross alpha and/or fluoride standards. The Agency would no longer recommend grant of variance from the drinking water standards themselves.

In explaining its postural change, the Agency recites the history of disagreement of the Agency and the Board with the USEPA concerning the eligibility of water supplies for federal variances under Section 1415 of the Safe Drinking Water Act where characteristics of the raw water source are the reason for noncompliance, but where certain technologies identified by USEPA in a guidance document have not been installed. The USEPA has taken the position that the technology must be installed before relief can be granted; the Board has maintained a contrary legal position since 1980. The Agency wishes to avoid the possibility of USEPA revocation of numerous Board variances from drinking water standards, and resulting potential revocation of Illinois Primary Enforcement Responsibility under the SDWA and its

attendant \$1 million in federal funds by recommending variance only from the Board's restricted status rule.

The Board's Suggestion

The Restricted Status Problem

Lack of compliance with a drinking water standards brings two consequences: 1) the possibility of enforcement by IEPA, USEPA, or any other person and 2) restricted status, a "sanction-by-rule" precluding additional service connections independent of any enforcement decisions. In the usual drinking water variance where variance is granted from the standard, the restricted status sanction is automatically extinguished since the variance grant forgives the non-compliance.

The proposed restricted status variance is, in effect, a variance to the Agency, allowing it to issue construction and operating permits under Sections 601.101 and 601.102 which would otherwise be precluded under Section 602.105. It is the opinion of the Board that this result can be better and more directly reached by initiation of a rulemaking to consider making an exception to the restricted status by giving the Agency explicit authority to issue permits to water supplies whose exceedances of the drinking water standards fall within limits established in such an exception to the general rule. If supported by the hearing record, this route would more effectively utilize the resources of the Board, the Agency, and the affected communities in two ways. First, it would eliminate much of the duplicative paperwork involved in the group variance proposal. Second, the quality of the hearing and public participation process will be enhanced.

As earlier noted, a group variance could hypothetically require that hearings be held in 25 counties. The Agency has stated that it will provide the expert witnesses who will testify concerning the health effects of consuming drinking water exceeding the standards at issue here, but that it cannot dispatch them to every location at which hearing might be required to repeat their testimony. In some counties, then, interested persons might hear little "live" explanatory testimony, although they would have the option of presenting comments on testimony presented in other locations.

Under the rulemaking approach, merit hearings would be scheduled in at least two areas of the state. All of the expert testimony could be presented at each location to provide a more informative hearing to the citizen participants, but without imposing a substantial burden on scarce Agency resources.

The Board notes that neither a group variance request from restricted status nor a restricted status rulemaking would solve the water supply's other problem of continued liability to enforcement because of its failure to comply with the drinking

water standards. The Board's standards are identical to USEPA's standards. Change of Board standards would not provide a community with complete relief from enforcement, since USEPA could enforce its own standards. The only procedural mechanism to accomplish this goal is by way of variance from the standards themselves.

The Board does not retreat from its position that variances under the Safe Drinking Water Act cannot be denied on the basis of failure to install treatment technology identified in a guidance manual, where the guidance manual has not been promulgated as a rule. Any public water supply remains free to petition the Board for variance from the drinking water standards. Such petitions will be subject to the usual Board procedures and analysis.

Summary

The Agency is strongly urged to submit a proposal for amendment to Section 602.105(a). The proposal should specify the numerical limits for each parameter concerning which the Agency wishes to remove water supplies from the effect of restricted status. A statement of the basis for the Agency's choice of each numerical limit should be provided at the same time, so that the public is informed to some degree of the Agency's thinking in advance of hearing. The length of time anticipated for Federal action on pertinent pending drinking water standards should also be indicated. Hearings will be promptly scheduled after the Board's receipt of this proposal and the proceedings will be expedited as much as is possible.

Finally, the Board notes that Hanna City has amended its petition to request only a variance from restricted status, while Gardner has moved to withdraw its petition. In light of the views expressed by the Board in this Order, each Village may wish to reevaluate its decisions concerning its variance proceeding. The Board requests a filing from each Village indicating whether it wishes to proceed with its variance petition as presently filed. These filings should be made on or before June 21, 1985.

IT IS SO ORDERED.

Board Member Bill Forcade dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board hereby certify that the above Order was adopted on the 5th day of June, 1985 by a vote of 6-1.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board