

ILLINOIS POLLUTION CONTROL BOARD

September 9, 1999

VILLAGE OF PRINCEVILLE,)	
)	
Petitioner,)	
)	
v.)	PCB 00-15
)	(Variance - Public Water Supply)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by R.C. Flemal):

This matter is before the Board on the July 26, 1999 variance petition filed by the Village of Princeville (Princeville), in Peoria County, Illinois. Princeville seeks relief for twenty-four months from 35 Ill. Adm. Code 602.105 "Standards for Issuance" and 35 Ill. Adm. Code 602.106 "Restricted Status" for gross alpha particle activity. The maximum contaminant level (MCL) gross alpha particle activity is 15 pCi/L. 35 Ill. Adm. Code 611.330(b). Princeville 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 August 19, 1999.¹ The Agency recommends that a variance from 35 Ill. Adm. Code 602.105(a) "Standards for Issuance" and 35 Ill. Adm. Code 602.106(b) "Restricted Status" be granted to Princeville, but only as they relate to the requirement for gross alpha particle activity under 35 Ill. Adm. Code 611.330(b). The Agency recommends that the variance be granted for twenty-four months subject to certain conditions discussed more fully below. Ag. Rec. at 13. The statutory decision deadline is November 23, 1999.

For the following reasons, the Board finds that Princeville 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

¹ Princeville'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 ___."

variance is granted, subject to the conditions set forth below.

BACKGROUND

Princeville is located in Peoria County, Illinois. Princeville provides public services including potable water supply and distribution to an estimated population of 656 residential and 85 industrial and commercial utility customers. Pet. at 4. The total population served is estimated as 1,715 persons. Ag. Rec. at 5. Princeville owns and operates its own water distribution system. The system is a deep well water supply system including 3 deep wells, pumps, and distribution facilities. Pet. at 5. Water is provided to residential, commercial, and industrial users, as needed. Charges, as established by ordinance, are made to all users. *Id.* Princeville is not part of a regional public water supply. Pet. at 4.

The Agency first advised Princeville that it exceeded the MCLs for radium-226, radium-228, and gross alpha particle activity on September 25, 1987. Pet. at 6. Princeville has previously sought and obtained a variance from 35 Ill. Adm. Code 602.105(a), "Standards for Issuance" and 35 Ill. Adm. Code 602.106(b), "Restricted Status," but only to the extent those rules involve 35 Ill. Adm. Code 611.330(a) combined radium-226 and radium-228 and 35 Ill. Adm. Code 611.330(b) gross alpha particle activity. Pet. at 2, Ag. Rec. at 5. The petition for variance was granted by the Board on January 20, 1994, in PCB 93-227, and accepted by Princeville on January 25, 1994. *Id.* The variance granted in PCB 93-227 expired on September 30, 1998. Pet. at 6, Ag. Rec. at 5. The most recent analyses and results of Princeville's water supply were completed on the following:

02/24/99, Tap 1, Gross- α of 33 ± 5 pCi/L;
02/24/99, Tap 2, Gross- α of 42 ± 6 pCi/L;
01/26/99, Tap 1, Gross- α of 16 ± 5 pCi/L;
02/10/99, Tap 2, Gross- α of 42 ± 5 pCi/L;

Princeville currently does not have any controls for radium and gross alpha particle activity contaminants. Pet. at 6. On October 17, 1997, the Agency notified Princeville that the water supply system had been placed on the Restricted Status list for exceeding the MCL for adjusted gross alpha particle activity. Ag. Rec. at 6.

Princeville has begun construction of a new water treatment plant utilizing a reverse osmosis system to remove radium and other contaminants to achieve compliance with the radiological MCLs. Pet. at 6. Actual construction for the new water treatment plant began on November 2, 1998. Pet. at 7. Construction is expected to be completed by December 31, 1999. *Id.* The new treatment plant is expected to be fully operational in the year 2000. Pet. at 6. Once construction is completed, it is expected that an additional three months will be required to bring the system on-line and achieve full compliance with MCL regulations. Pet. at 7. Princeville estimates that the total cost to improve its water system to achieve compliance is \$2,845,832. *Id.* The water treatment plant and the new water tower are being funded through the Agency's revolving loan fund. Ag. Rec. at 7. Princeville states that it will proceed with diligence in the construction and operation of the new treatment plant. Pet. at 8.

Princeville requests this variance to allow construction of a water main extension to serve two parcels recently annexed to Princeville. Pet. at 1. The extension is presently expected to serve one existing home and one new construction. Pet. at 4. Princeville is not presently on restricted status for exceeding any other contaminant. Ag. Rec. at 6.

Because recent measurements of gross alpha particle activity level minus the radium-226 level in the water supply exceed 15 pCi/L, Princeville does not fall within the exceptions provided in Sections 602.105(d)(3) and 611.106(d)(3). 35 Ill. Adm. Code 602.105(d)(3) and 602.106(d)(3); Pet. at 2. If the gross alpha particle activity level minus the radium-226 level is less than or equal to 15 pCi/L, then the Agency may not place a public water supply on restricted status or deny a construction permit, and Princeville would therefore not need to petition for a variance in order to proceed with construction of water main extensions.

REGULATORY FRAMEWORK

Princeville'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 the regulations read:

Section 602.105 Standards for Issuance

- (a) The Agency shall not grant any construction or operating permit required by this Part, except as otherwise provided in subsection (d) of this Section, 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.
- (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 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. A community water supply not meeting the MCLs will also be placed on the Agency's "Restricted Status" list. 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 a variance is granted or denied. City of Altamont v. IEPA (December 7, 1995), PCB 96-65. Princeville requests this variance in order to extend its water service while it continues to pursue compliance with the gross alpha particle activity 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, as a condition to the granting of variance, a variance petitioner is required to commit to a plan which is reasonably calculated to achieve compliance within the term of the variance, unless certain special circumstances exist.

COMPLIANCE PLAN

Princeville is proceeding with construction of a new water tower and a new water treatment facility utilizing reverse osmosis to eliminate contaminants including radium and other sources of gross alpha particle activity. Pet. at 7. The reverse osmosis system was selected to eliminate contaminants including radium and gross alpha particle activity to achieve compliance with MCL regulations. Ag. Rec. at 7. Actual construction began on November 2, 1998. Pet. at 7. Construction is expected to be completed by December 31, 1999. *Id.* Once construction is complete, it is expected that an additional three months will be required to bring the system on-line and achieve full compliance with MCL regulations. *Id.* The total estimated cost to achieve compliance is \$2,845,832. *Id.*

Princeville intends to continue its sampling program to monitor the level of radioactivity in its wells and finished water. Pet. at 9. Princeville intends to collect quarterly samples of its water from its distribution system and will composite and analyze them annually by a laboratory certified by the State of Illinois for radiological analysis so as to determine the concentration of the contaminants. *Id.* Princeville also intends to take all reasonable measures with its existing equipment to minimize the level of gross alpha particle activity in its finished water. *Id.*

The Agency states that Princeville has previously sought a variance from regulations pertaining to radium and gross alpha particle activity. Ag. Rec. at 5. Additionally, Princeville is not presently on restricted status for exceeding any other contaminant. Ag. Rec. at 6.

HARDSHIP

Princeville contends that failure to obtain a variance would cause arbitrary and unreasonable hardship. Pet. at 11. A denial of a variance will bar new construction in Princeville during the construction of the new water treatment plant, where construction has been allowed in the past, and will be allowed once the new water supply system is completed. *Id.* Currently, one of the existing homes to be served by the proposed extension relies upon well water likely to be inferior to water to be provided by Princeville. Pet. at 10. Princeville also asserts that failure to obtain a variance would mean that all construction within its service area requiring new water main extensions must await completion of the new water treatment plant and operational testing. *Id.* Princeville alleges that this hurts prospective home purchasers, business developers, and Princeville's tax base. *Id.*

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 10. 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. *Id.*

ENVIRONMENTAL IMPACT

Princeville opines that granting this variance will not cause harm to the environment or to the people served by the water supply system, as it does not consider the radiological quality of the community water supply to be a significant health risk. Pet. at 8. The Agency believes that any incremental increase in the concentration for radium and gross alpha particle activity 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 Princeville 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 11. 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 Princeville remains subject to the possibility of federal enforcement for violations of the MCL for radium and gross alpha particle activity. Ag. Rec. at 12. 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 the variance, should the Board so decide." *Id.*

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(b) "Restricted Status" regulations would impose an arbitrary or unreasonable hardship on Princeville. 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, we will grant Princeville a variance which will expire September 9, 2001. This will give Princeville time to complete construction of the new water treatment plant, monitor its water and have adjustments made if necessary, and give Princeville four quarters for testing its samples to see if it is in compliance.

The Board's action is solely a grant of variance from "Standards for Issuance" and "Restricted Status" as they relate to gross alpha particle activity. Princeville is not granted variance from compliance with the gross alpha particle activity standard and Princeville 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 Princeville (Princeville) 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 maximum contaminant level (MCL) for gross alpha particle activity in drinking water as set forth in 35 Ill. Adm. Code 611.330(b), subject to the following conditions:

1. The variance terminates on September 9, 2001.
2. In consultation with the Agency, Princeville shall continue its sampling program to determine as accurately as possible the level of radioactivity in its wells and furnished water supply. Until this variance expires, Princeville shall collect quarterly samples of water from its distribution system at locations approved by the Agency. Princeville shall composite the quarterly samples from each location separately and shall analyze them annually by a laboratory certified by the State of Illinois for radiological analysis so as to determine the concentration of the gross alpha particle activity. The results of the analyses shall be reported within 30 days of receipt of the most recent result to:

Illinois Environmental Protection Agency
Division of Public Water Supplies
Compliance Assurance Section
1021 North Grand Avenue East
P.O. Box 19276

Springfield, Illinois 62794-9276

At the option of Princeville, the quarterly samples may be analyzed when collected. The running average of the most recent four quarterly sample results shall be reported to the above address within 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, Princeville will send to each user of its public water supply a written notice to the effect that Princeville is not in compliance with the MCL for gross alpha particle activity and has been granted by the Pollution Control Board a variance from 35 Ill. Adm. Code 602.105(a) "Standards for Issuance" and 35 Ill. Adm. Code 602.106(a) "Restricted Status," as they relate to the MCL for gross alpha particle activity. The notice shall state the average content of the contaminant in samples taken since the last notice period during which samples were taken.
4. Until full compliance is reached, Princeville shall take all reasonable measures with its existing equipment to minimize the level of gross alpha particle activity in its finished drinking water.
5. Princeville 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 Supplies
 Field Operations Section
 1021 North Grand Avenue East
 P.O. Box 19276
 Springfield, Illinois 62794-9276

If Princeville chooses to accept this variance, within 45 days of the grant of the variance, Princeville must execute and forward the attached certificate of acceptance and agreement to:

Stephen C. Ewart
 Division of Legal Counsel
 Illinois Environmental Protection Agency
 1021 North Grand Avenue East
 P.O. Box 19276
 Springfield, Illinois 62794-9276

IT IS SO ORDERED.

Once executed and received, that certificate of acceptance and agreement shall bind Princeville 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:

CERTIFICATION

I(We), _____, hereby accept and agree to be bound by all terms and conditions of the order of the Pollution Control Board in PCB 00-15, dated September 9, 1999.

Petitioner

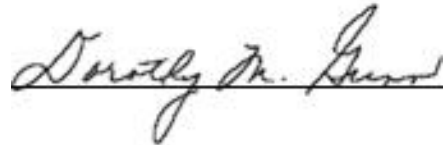
Authorized Agent

Title

Date

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 the 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 9th day of September 1999 by a vote of 6-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board