

ILLINOIS POLLUTION CONTROL BOARD
February 8, 1990

VILLAGE OF MALTA,)
)
 Petitioner,)
)
 v.) PCB 89-130
) (Variance)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

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

This matter comes before the Board upon the filing by the Village of Malta ("Malta") of a Petition for Variance ("Pet") on August 15, 1989 and an Amended Petition for Variance ("Amended Pet.") on November 29, 1989. Malta seeks variance from 35 Ill. Adm. Code 602.105(a) "Standards For Issuance" and 602.106(b) "Restricted Status" to the extent those rules relate to violation by Malta's public water supply of the 5 picocuries per liter ("pCi/l") combined radium-226 and radium-228 standard of 35 Ill. Adm. Code 604.301(a). The variance is requested for a period of five years from the date variance is granted.

On January 16, 1990 the Illinois Environmental Protection Agency ("Agency") filed a Variance Recommendation ("Rec.") in support of grant of variance subject to conditions. The Agency's recommended conditions are similar to those proposed by Malta (Amended Pet. at par. 30), with the principal exception that the Agency recommends grant for a period of two years rather than five. Malta has waived hearing, and no hearing has been held.

Based on the record before it, the Board finds that Malta has presented adequate proof that immediate compliance with the Board regulations would impose an arbitrary or unreasonable hardship. Accordingly, the variance will be granted, subject to conditions consistent with this Opinion.

Malta has neither sought nor received any prior variance relating to public water supplies prior to the instant action.

BACKGROUND

Malta is a community located in west-central DeKalb County. Among other services, Malta provides a potable public water supply derived from a one deep well and one shallow well. Malta provides water to a population of 350 residential and 7

industrial and commercial utility customers representing some 1,000 residents and businesses and industries employing approximately 30 people (Amended Pet. at par 10, 12).

Malta was first advised of the high radium content in its water supply by letter from the Agency dated November 30, 1987, and was notified of placement on restricted status by letter from the Agency in January 1988 (Rec. at par. 10, 11). The Agency based its determination on sampling results which showed a radium-226 content of 3.4 pCi/l and a radium-228 content of 4.9 pCi/l, for a combined value of 8.1 pCi/l (Id. at par. 10).

REGULATORY FRAMEWORK

In recognition of a variety of possible health effects occasioned by exposure to radioactivity, the U.S. Environmental Protection Agency has promulgated maximum concentration limits for drinking water of 5 pCi/l of combined radium-226 and radium-228. Illinois subsequently adopted the same limit as the maximum allowable concentration under Illinois law.

The action Malta requests here is not variance from the maximum allowable radium concentration. Regardless of the action taken by the Board in the instant matter, this standard will remain applicable to Malta. Rather, the action Malta requests is the temporary lifting of prohibitions imposed pursuant to 35 Ill. Adm. Code 602.105 and 602.106. In pertinent part these sections 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. 1981, ch. 111 $\frac{1}{2}$, pars. 1001 et seq.) (Act), or of this Chapter.

Section 602.106 Restricted Status

- a) Restricted status shall be defined by 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.

- c) The Agency shall notify the owners or official custodians of supplies when the supply is initially placed on restricted status by the Agency.

Illinois regulations thus provide that communities are prohibited from extending water service, by virtue of not being able to obtain the requisite permits, if their water fails to meet any of the several standards for finished water supplies. This provision is a feature of Illinois regulations not found in federal law. It is this prohibition which Malta requests be lifted. Moreover, as Malta properly notes (Amended Pet. at par. 38), grant of the requested variance would not absolve Malta from compliance with the combined radium standard, nor insulate Malta from possible enforcement action brought for violation of this standard.

In consideration of any variance, the Board is required to determine whether the petitioner would suffer an arbitrary or unreasonable hardship if required to comply with the Board's regulations at issue (Ill.Rev.Stat.1987, ch. 111 $\frac{1}{2}$, par. 1035(a)). It is normally not difficult to make a showing that compliance with regulations involves some hardship, since compliance with regulations usually requires some effort and expenditure. However, demonstration of such simple hardship alone is insufficient to allow the Board to find for a petitioner. A petitioner must go further by demonstrating that the hardship resulting from denial of variance would outweigh the injury of the public from a grant of the petition (Caterpillar Tractor Co. v. IPCB (1977), 48 Ill. App. 3d 655, 363 N.E. 2d 419). Only with such showing can hardship rise to the level of arbitrary or unreasonable hardship.

Moreover, a variance by its nature is 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, a variance petitioner is required, as a condition to grant of variance, to commit to a plan which is reasonably calculated to achieved compliance within the term of the variance.

HARDSHIP

Malta believes that a requirement to come into immediate compliance would impose an arbitrary or unreasonable hardship. Malta and the Agency both note that because of Malta's inability to receive permits for water main extensions, any economic growth dependent on those water main extensions would not be allowed.

Malta foresees the immediate need to extend water mains to serve the Malta Community School District High School located approximately one-half mile east of the Malta Village limits; the extension would thus serve the 220 students and employees of that facility (Amended Pet. at par. 13). Malta contends that inability to make this extension would force the Malta School Board to undertake a more costly method to secure a viable source of water, thus hurting all residents of the Malta School District (Id. at par. 33).

Lastly, Malta contends that the hardship resulting from denial of the requested variance would outweigh the injury of the public (see below), particularly in light of Malta's intention to achieve compliance within 24 months (Amended Pet. at par. 31). Malta thus believes that the hardship rises to the level of arbitrary or unreasonable hardship (Id. at par. 34). The Agency agrees that denial of variance would constitute an arbitrary or unreasonable hardship (Rec. at par. 20).

PUBLIC INJURY

Although Malta has not undertaken a formal assessment of the environmental effect of its requested variance, it contends that extension of its watermains will not cause any significant harm to the environment or to the people served by the potential watermain extensions for the limited time period of the requested variance (Amended Pet. at par. 28, 31). The Agency contends likewise (Recommendation at par. 19). In support of these contentions, Malta and the Agency reference testimony presented by Richard E. Toohey, Ph.D. and James Stebbins, Ph.D., both of Argonne National Laboratory, at the hearing held on July 30 and August 2, 1985 in R85-14, Proposed Amendments to Public Water Supply Regulations, 35 Ill. Adm. Code at 602.105 and 602.106.

The Agency believes that while radiation at any level creates some risk, the risk associated with Malta's water is low (Rec. at par. 14). In summary, the Agency states:

The Agency believes that the hardship resulting from denial of the recommended variance from the effect of being on Restricted Status would outweigh the injury of the public from grant of that variance. In light of the cost to the Petitioner of treatment of its

current water supply, the likelihood of no significant injury to the public from continuation of the present level of the contaminants in question in the Petitioner's water for the limited time period of the variance, and the possibility of compliance with the MAC standard due to blending, the Agency concludes that denial of a variance from the effects of Restricted Status would impose an arbitrary or unreasonable hardship upon Petitioner.

The Agency observes that this grant of variance from restricted status should affect only those users who consume water drawn from any newly extended water lines. This variance should not affect the status of the rest of Petitioner's population drawing water from existing water lines, except insofar as the variance by its conditions may hasten compliance. Grant of variance may also, in the interim, lessen exposure for that portion of the population which will be consuming more effectively blended water. In so saying, the Agency emphasizes that it continues to place a high priority on compliance with the standards.

(Rec. at par. 26 and 27).

COMPLIANCE PROGRAM

Malta proposes to achieve compliance by blending the low-radium waters of its shallow well with the higher-radium waters of its deep well; blending will occur in Malta's existing ground storage tank at a ratio of approximately one to one (Amended Pet. at par. 22-24). Malta has already undertaken a portion of the improvement necessary to effectuate the blending, including construction of a water line between the shallow well and the storage reservoir and installation of timers on the two wells to control the blending ratio (Id. at par. 24). Completion of the blending system will apparently require approximately an additional year (Rec. at par. 28).

CONSISTENCY WITH FEDERAL LAW

The Agency believes that Malta may be granted variance consistent with the requirements of the Safe Drinking Water Act (42 U.S.C. §300(f)) and corresponding regulations because the requested relief is not variance from a national primary drinking water regulation (Rec. at par. 22).

The Agency further notes that if the state variance requires an appropriate compliance plan and compliance with the radium

standard is ordered to be achieved by the end of the variance period, it is probable that the United States Environmental Protection Agency would consider the variance to be a compliance order and defer federal enforcement (Rec. at par. 25).

CONCLUSION

The Board concludes that, in light of all the facts and circumstances of this case, denial of variance would impose an arbitrary or unreasonable hardship upon Petitioner. The Board also agrees with the parties that no significant health risk will be incurred by persons who are served by any new water main extensions, given the reasonable assurance that compliance is forthcoming via Malta's blending program.

However, the Board finds that the five-year term of variance requested by Malta is neither necessary nor advisable. By Malta's own admission, it can likely achieve distribution system concentrations of combined radium less than the 5 pCi/l standard within a time period substantially less than five years. Malta may require as much as an additional year after attainment of the sub-5 pCi/l level in order to be removed from restricted status, since, for this action, it will be necessary to maintain the lower radium concentrations for a period sufficient to demonstrate that the average combined radium concentration in an annual composite of consecutive quarters or the average of the analyses of four samples obtained at quarterly intervals is less than the 5 pCi/l level. Thus, a reasonable time period for the instant variance is two years, which is in accord with the Agency's recommendation.

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

ORDER

Petitioner, the Village of Malta, is hereby granted variance from 35 Ill. Adm. Code 602.105(a), Standards of Issuance, and 602.106(b), Restricted Status, but only as they relate to the 5 pCi/l combined radium-226 and radium-228 standard of 35 Ill. Adm. Code 604.301(a), subject to the following conditions:

- (A) Compliance shall be achieved with the combined radium standard of 35 Ill. Adm. Code 604.301(a) no later than two years from grant of this variance.
- (B) This variance shall terminate two years after this grant of variance or when analyses pursuant to 35 Ill. Adm. Code 605.104(a) shows compliance with the combined radium standard, whichever occurs first.

- (C) In consultation with the Illinois Environmental Protection Agency ("Agency"), Petitioner shall continue its sampling program to determine as accurately as possible the level of radioactivity in its wells and finished water. Until this variance terminates, Petitioner shall collect quarterly samples of its water from its distribution system at locations approved by the Agency. Petitioner shall composite the quarterly samples for each location separately and shall have them analyzed annually by a laboratory certified by the State of Illinois for radiological analysis so as to determine the concentration of the two parameters, radium-226 and radium-228. At the option of Petitioner the quarterly samples may be analyzed when collected. The results of the analyses shall be reported within 30 days of receipt of the most recent sample to:

Illinois Environmental Protection Agency
Compliance Assurance Section
Division of Public Water Supplies
P.O. Box 19276
2200 Churchill Road
Springfield, Illinois 62794-9276

- (D) Pursuant to 35 Ill. Adm. Code 606.201, 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 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(b) Restricted Status, as they relate to the combined radium-226 and radium-228 standard.
- (E) Pursuant to 35 Ill. Adm. Code 606.201, 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 Petitioner is not in compliance with the combined radium-226 and radium-228 standard. The notice shall state the average content of the contaminant in question in samples taken since the last notice period during which samples were taken.
- (F) Until full compliance is achieved, Petitioner shall take all reasonable measures with its existing equipment to minimize the level of combined radium in its finished drinking water.

- (G) Petitioner 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 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 Supplies
 Field Operations Section
 2200 Churchill Road
 Springfield, Illinois 62708

Within 45 days of the date of this Order, Petitioner shall execute and forward to Bobella Glatz, Enforcement Programs, Illinois Environmental Protection Agency, 2200 Churchill Road, Post Office Box 19276, Springfield, Illinois 62794-9276, a Certification of Acceptance and Agreement to be bound to all terms and conditions of this variance. The 45-day period shall be held in abeyance during any period that this matter is being 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 variance was granted. The form of said Certification shall be 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 89-130, February 8, 1990.

 Petitioner

 Authorized Agent

 Title

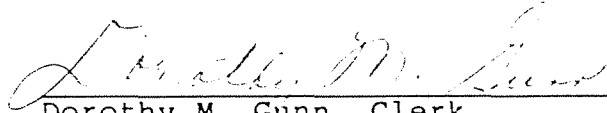
 Date

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1987 ch. 111 1/2 par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

Board Members Jacob D. Dumelle, Bill S. Forcade, and Michael L. Nardulli dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 9th day of February, 1990, by a vote of 4-3.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board