ILLINOIS POLLUTION CONTROL BOARD
June 29, 1972

McHENRY SHORES WATER CO.)
)
v.) # 72-137
)
ENVIRONMENTAL PROTECTION AGENCY)

ROBERT HORWITZ, Attorney for Environmental Protection Agency

JOHN FUHLER, President of McHenry Shores Water Company

OPINION OF THE BOARD (BY MR. CURRIE):

This variance petition initially sought until June 15, 1972 to obtain Agency approval of plans for correcting admitted inadequacies of a small public water supply system in McHenry County. At the hearing the request was extended to July 15 (R. 57). The Agency's recommendation alleged continuing violation of the regulations despite two years of complaints, and asked that as conditions of any variance the company be required to comply by July 1, to post a $50,000 bond, and to make no further connections to its system until compliance was achieved. A hearing was held.

Agency tests* substantiate the admission that iron content in the water supplied by the company significantly exceeds the 0.3 mg/l permitted by the regulations (Ill. Dept. of Public Health, Public Water Supply Systems Rules and Regulations, renumbered as PCB Regs., Ch. 6 Rule 3.13, incorporating the United States Public Health Service Standards for Drinking Water, Rule 5.21 of which prescribed the iron limit, which is not to be exceeded if "other more suitable supplies are or can be made available.") There have been complaints about the water, the company president acknowledged, "probably from the first day" after the company was acquired in 1969 (R. 24, 10). Complaints have included discolored water that results in spots on laundry (R. 44). It is also conceded in the petition that fluoride content is below that required (0.9 mg/l) by statute (Ill. Rev. Stat. ch. 111 1/2, § 121) and by regulation (Water Supply Rules, supra, Rule 5.28, as amended 1/15/69), and that water quantity and storage capacity are below that required by Rules 3.14 and 3.30 of the regulations. The petition admits that the system was in bad shape when acquired; complaints, as noted, have been received since the beginning; the president admits he was contacted by the Agency about violations as early as 1970 (R. 15).

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*R. 38-40. The concentrations found were 0.8, 0.6, and 1.0 mg/l.

The evidence is that no effort was made to correct the violations until some six to ten weeks before the hearing, when two consultants were employed to propose solutions, one with regard to chemical treatment and the other for additional capacity (R. 15-16, 4-6). The reason given for the delay was financial. The petition alleged that the company suffered an operating loss of $2,498 during its first year; that subsidies had been provided by the president's real estate company; and that the president had loaned the company $3,025. The president testified that the company has no money and that the improvements to be made will be financed by a personal loan (R. 20). He added that the reason nothing was done about the violations earlier was that his first priority had been repairing the meters in order to build up revenue (R. 30). At the same time, while violations were left uncorrected, the company increased the number of homes it served from about 150 to about 230, about 42 or 43 of the new connections being homes built and sold by a real estate company owned by the water company's president (R. 10-13). Recently, however, the federal Department of Housing and Urban Development has indicated that in order to restrict further overloading of the system it will no longer provide mortgage assistance for new homes in McHenry Shores (R. 49).

As for the future, the consultants report was expected June 15 (R. 19). While the president expressed his intention to implement the recommendations in order to meet the law (see petition; R. 19), he also stated that he would provide "service as we can afford" (R. 19) and that "financing may come in the picture" (R. 22). No preliminary steps toward financing had been taken at the time of the hearing (R. 24); there was no program of specific improvements until the consultants' report was received; there was no schedule for achieving compliance; the president surmised that construction of "some of it" might begin "within 60 days after the recommendation from the engineer and then the okay from the Environmental Protection Agency" (R. 23-24).

It is evident that McHenry Shores Water Co. has committed continuing and multiple violations of several different rules respecting the serious business of public water supply for over two years in the face of repeated complaints and official Agency warning. It is clear that the company has been unconscionably dilatory in correcting the situation. No reason is given why money was not borrowed at the outset, instead of in the future, in order to satisfy the important obligations of a public utility. No attempt is made to justify the deliberate, profitable course of making a large number of new connections to an already inadequate system, which put money into the pockets of the common owner while causing additional violations. We do not understand why the Agency has not filed enforcement proceedings long since.

The company plainly does not qualify for an unconditional variance that would shield it from penalties for its improper actions. Its inability to comply with the regulations today was brought about by its own inexcusable inaction, and such self-inflicted hardship cannot

be the basis for immunity from enforcement. See EPA v. Lindgren Foundry Co., #70-1 (Sept. 25, 1970); Decatur Sanitary District v. EPA, #71-37 (March 22, 1971). The flat denial of a variance, as we have said before, would not require a shutdown of the offending facilities; it would merely leave the operator subject to whatever sanctions might be imposed in an enforcement proceeding. See Flintkote Co. v. EPA, #71-68 (Nov. 11, 1971). Moreover, a firm and adequate program for correcting violations by a stated and expeditious date is generally a requisite for a variance of the kind sought here. See Godfrey Township Utility Board v. EPA, #72-68 (June 27, 1972), and cases cited. In the present case there is no program of specific improvements to be made; there is no date for compliance; there is inadequate commitment to do the job, since the whole thing remains contingent upon "financing."

To deny relief completely, however, would not promote a rapid resolution of the problem, as further proceedings would have to be filed and further delay might result. In appropriate cases in the past we have granted limited variances upon strict conditions in order to avoid further litigation and resolve an entire dispute in a single proceeding. See, e.g., Marquette Cement Mfg. Co. v. EPA, #71-23 (Jan. 6, 1971). In the present case, as in Marquette, we must condition the variance on payment of the penalty for past inexcusable violations. In view of the importance of public water supply and the long failure to correct known violations, the penalty must be $3000. Payment of this sum will, we believe, justify granting protection against further penalties in the future so long as the company actively pursues and completes its correction program. Without the penalty there would be no justification for any variance at all.

The request is for a variance until July 15 to permit filing of detailed plans with the Agency. Those plans must provide for construction of facilities adequate to meet the regulations within the shortest practicable time, which must be explicitly stated. A request for extension of the variance during the construction period shall be included, and the Agency will be given the opportunity to respond. To assure performance, a $50,000 security will be required, as the Agency requests. The failure to adhere to any of these conditions will void the protection given by the variance and leave the company open to full statutory penalties in any proceeding the Agency may bring.

The Agency asks us to make it a further condition that no new connections be allowed. There are special statutory notice provisions applicable if such an order is contemplated, and they have not been met in this case (Environmental Protection Act, § 33(c)). This does not mean that additional connections are permissible. Any new connection would be one more violation of the regulations regarding water quality and quantity, and we have before us no request for a variance to allow such new violations. No Board order is necessary.

ORDER

McHenry Shores Water Co. (McHenry) is hereby granted a variance from Rules 3.13, 3.14, 3.30, and 5.28 of the Public Water Supply Systems Rules and Regulations until July 15, 1972, provided the following conditions are met:

1. McHenry shall submit to the Agency and to the Board, on or before July 15, 1972, a firm and specific program for construction of improvements sufficient to achieve compliance with the above Rules in the shortest practicable time, which shall be explicitly stated. Such program shall include a request for extension of this variance during the construction period.

2. The filing of the program required in condition one of this order shall extend this variance for thirty days to allow Agency and Board consideration of the program. The Agency shall respond to the program within twenty days after its receipt, and McHenry may file comments in reply.

3. Within 35 days after receipt of this order, McHenry shall post with the Agency a bond or other security in form satisfactory to the Agency in the amount of $50,000 to assure compliance with the terms and conditions of this order.

4. McHenry shall so operate its facilities during the period of this variance as to furnish the best service practicable under the circumstances.

5. Within 35 days after receipt of this order, McHenry shall pay to the State of Illinois the sum of $3000 as a penalty for the violations found in the Board's opinion. Such payment shall be made by check payable to the Fiscal Service Division of the Environmental Protection Agency, 2200 Churchill Road, Springfield, Illinois 62706.

6. Failure to comply with the conditions of this order shall render this variance null and void.

I, Christan L. Moffett, Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion and Order this 29th day of June, 1972, by a vote of 4-0.

Christan L. Moffett