

ILLINOIS POLLUTION CONTROL BOARD
October 5, 1995

CITY OF BYRON,)
)
 Petitioner,)
)
 v.) PCB 96-23
) (Variance-Water)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

OPINION AND ORDER OF THE BOARD (J. Theodore Meyer):

This matter is before the Board on an August 1, 1995 Petition for Extension of Variance filed by the City of Byron (Byron). Byron seeks a variance from 35 Ill. Adm. Code 602.105(a), "Standards for Issuance", and 602.106(b), "Restricted Status", to the extent that they relate to radium requirements under 35 Ill. Adm. Code 611.301(b). Byron was granted a two-year variance on August 5, 1993, in PCB 93-110. (Pet. at 1.) Byron seeks a five-year extension of that variance to allow the continued operation, and possible expansion, of its water supply and distribution system. The Illinois Environmental Protection Agency (Agency) filed its recommendation on August 17, 1995, advising that the variance be granted, subject to certain conditions. Byron waived hearing and none was held. On September 25, 1995, Byron filed a Motion for an Expedited Decision which the Board is granting by adopting this opinion and order.

BACKGROUND

Byron is a municipality located in Ogle County, Illinois. (Pet. at 2.)¹ It owns and operates a water supply and distribution system, providing potable water to 1,216 residents, as well as 52 industrial, commercial and utility businesses which employ about 2,066 people. (Id.) Byron is not part of a regional public water supply. (Pet. at 3.)

Petitioner's water distribution system is comprised of one deep well, two shallow wells, pumps, and distribution facilities. (Pet. at 3.) Water from the two shallow wells is blended to meet the Maximum Contaminant Levels (MCL) for trichloroethylene, which Byron maintains originated from leaking underground storage tanks

¹Petitioner's Petition for Variance will be cited as (Pet. at ____). The Agency's recommendation will be cited as (Rec. at ____).

from a nearby gasoline station. (Pet. at 4.)

Byron first learned that its blended water from the two shallow wells exceeded the MCL for radium by a letter from the Agency dated February 18, 1993. (Pet. at 4.) The report indicated a value of 5.9 pCi/L for combined radium-226 and radium-228 based upon an annual composite of four consecutive quarterly samples. (Id.) The most recent analyses, completed January 25, 1995, showed a combined radium content of 6.9 pCi/L. (Rec. at 4.) Since notification of the violation, Byron has developed a program to reduce the contaminant to levels at or below the MCL, which is explained below. Petitioner is not on restricted status for exceeding any other contaminant. (Rec. at 5.)

REGULATORY FRAMEWORK

The United States Environmental Protection Agency (USEPA) has promulgated an MCL for drinking water of 5 mg/l of radium. (Rec. at 3.) Illinois subsequently adopted the same limit. (Id.) Pursuant to Section 17.6 of the Illinois Environmental Protection Act (Act), any revisions to the 5 mg/l standard by the USEPA will automatically become the standard in Illinois.

Byron is not seeking a variance from the MCL for radium, which remains applicable to its potable water supply. Rather, Byron is requesting a variance from the prohibitions imposed at 35 Ill. Adm. Code 602.105(a) and 602.106(a) until it can achieve compliance. 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 . . . Act or of this Chapter.

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.

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 the Illinois regulations and is

not found in federal law. It is from this prohibition which Byron requests a variance. However, we emphasize that the duration of restricted status is linked to the length of time it takes the water supply to comply with the underlying standards. As such, the time frames for compliance with the underlying standards in the proposed compliance plan are an essential consideration in determining whether a restricted status variance will be granted. Thus, grant of variance from restricted status will be conditioned upon a schedule of compliance with the underlying standards.

In consideration of any variance, the Board determines whether a petitioner has presented adequate proof that immediate compliance with the Board regulations at issue would impose an arbitrary or unreasonable hardship. (Caterpillar Tractor Co. v. Pollution Control Board, 48 Ill.App.3d 655, 363 N.E.2d 419 (3rd Dist. 1977).) Further, the burden is on the petitioner to show that its claimed arbitrary or unreasonable hardship outweighs the public interest in attaining compliance with regulations designed to protect human health and the environment. (Willowbrook Motel v. Illinois Pollution Control Board, 135 Ill.App.3d 343, 481 N.E.2d 1032 (1st Dist. 1985).)

Lastly, a variance by its nature is a temporary reprieve from compliance with the Board's regulations and compliance is to be sought regardless of the hardship which the task of eventual compliance presents an individual polluter. (Monsanto Co. v. IPCB, 67 Ill.2d 267, 367 N.E.2d 684 (1977).) Accordingly, except in certain special circumstances, a variance petitioner is required, as a condition to grant of variance, to commit to a plan that is reasonably calculated to achieve compliance within the term of the variance.

ALTERNATIVE COMPLIANCE OPTIONS

Byron envisions the following alternatives in order to achieve compliance:

- (a) Construction of a new well which would replace water presently being supplied by Wells #1 and #2;
or,
- (b) Constructing treatment facilities to properly treat all water supplied by Well #1.

(Pet. at 5.)

COMPLIANCE PROGRAM

Prior to its first variance, Byron determined that construction of a new well and eventual abandonment of its shallow wells would be more cost effective than constructing

treatment facilities. (Pet. at 5.) Since its petition for variance was granted in 1993, Byron retained a financial consultant to ascertain how the new well would be financed. (Id.) It was determined that alternative revenue bonds, paid out of the revenue received from water and sewer user fees, would be issued to pay for the new construction costs. (Id.) In June 1994 the ordinance authorizing the bonds was passed, and in 1995, \$1.7 million of alternate revenue bonds were issued. (Id.) Byron is currently negotiating with a landowner to purchase property north of the city on which to construct the new well and a 500,000 gallon above-ground storage tank. (Id.)

Byron maintains that since the granting of the variance in August 1993, it has followed the conditions set out in the Board order, including:

1. Collecting and testing quarterly samples of water from its distribution system for radium concentrations;
2. Sending quarterly notices to each user of its public water supply which state that Byron is currently not in compliance with the radium standards, but that the Board has granted it a variance from those standards; and,
3. Continuing to blend water from its two shallow wells to reduce the level of contamination.

(Pet. at 7.)

Byron states that it will undertake the following measures during the variance period to minimize the impact of the discharge in the affected area:

- (1) In consultation with the Agency, continue its sampling program to determine as accurately as possible the level of radium in its wells and finished water. Until this variance expires, testing and reporting shall continue.
- (2) 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, send to each user of its public water supply a written notice to the effect that Byron has been granted by the Pollution Control Board a variance from 35 Ill. Adm. Code 602.105(a), Standard of Issuance, and 35 Ill. Adm. Code 602.106(a), Restricted status, as they relate to the radium standard.
- (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, send to each user of its public water supply a written notice to the effect that Byron is not in compliance with the radium standard. The notice shall state the average content of radium in samples taken since the last notice period during which samples were taken.

- (4) Until full compliance is reached, take all reasonable measures with its existing equipment to minimize the level of radium in its finished drinking water.
- (5) Provide written progress reports every six months to the Agency's Department of Public Water Supplies, (DPWS), concerning steps taken to comply with paragraphs 1 through 4 above. Progress reports shall quote each of said paragraphs and immediately below each paragraph state what steps have been taken to comply with each paragraph.
- (6) Within three months of the grant of this variance, Byron shall apply to the Agency's DPWS for all necessary permits for construction of the new well.
- (7) Within one month after the construction permit is issued, Byron will advertise for bids and accept bids within a reasonable time. Byron will notify the Agency's DPWS within 30 days of each of the following actions: advertisements for bids; names of successful bidders; and, whether Byron accepted the bids. Construction necessary to achieve compliance shall begin no later than 12 months from the grant of this variance, and shall be completed no later than 18 months from the grant of this variance.

(Pet. at 7-8.)

HARDSHIP

Both parties agree that denial of a variance from 35 Ill. Adm. Code 602.105(a), Standards for Issuance, and 35 Ill. Adm. Code 602.106(a), Restricted Status, would result in an arbitrary or unreasonable hardship for Byron. (Pet. at 8-9, Rec. at 8-9.) First, a denial would require the Agency to refuse construction and operating permits until compliance is achieved. (Rec. at 9.) In turn, no new water main extensions could be issued permits which would prevent further development from occurring in Byron. (Id.) This would have a severely adverse economic impact on Byron. (Pet. at 8.) Specifically, two subdivisions--Mill Creek Phase III and Rose Meadows, and a new seven-acre light industrial park, will need to provide water to approximately 1,295 residents. (Pet. at 3.) In addition, the Northern Heights subdivision, consisting of 95 homes, and developers who may

construct two more subdivisions with an expected population of 210, have also approached Byron to obtain access to Byron's water supply. (Id.)

Secondly, if a variance is granted as to Section 602.105(a), then a variance from Section 602.106(a) is critical to restrain the Agency from publishing that Byron is on the restricted list for violating those standards. (Rec. at 9.) Publication on the restricted list would mislead developers and other persons about the compliance status of Byron's water supply, and could stifle the area's economic growth. (Id.)

ENVIRONMENTAL IMPACT

Although Byron made no formal assessment of the environmental effect of the requested variance, it contends that the blended water from its shallow wells will result in only a minimal amount of radium entering its potable water system. (Pet. at 6.) Further, Byron incorporated by reference the testimony of and exhibits presented by Richard E. Toohey, Ph.D. and Dr. James Stebbings at the 1985 hearings in R85-14, In the Matter of: Proposed Amendments to Public Water Supply Regulations, 35 Ill. Adm. Code 602.105 and 602.106. (Id.) Based on that testimony, Byron asserts that there will be little, if any, adverse environmental or health impact caused by a grant of the requested variance. (Id.)

The Agency states that, while radiation at any level creates some risk, the risk associated with levels found in Byron's water supply is very low. (Rec. at 6.) In addition, the MCL for combined radium is currently under review by the USEPA, which has recommended a standard of 20 pCi/L for each isotope. (Id.) It had been anticipated that a new standard will be adopted in September 1995. (Id.) Mr. Joseph F. Harrison, chief of the Safe Drinking Water Division, USEPA, announced that as a result of the proposed relaxed standard, no municipalities would be required to spend funds preparing for final design and construction of a treatment system to achieve compliance with the current standard. (Id. at 7.) The Agency concludes that an increase in the allowable concentration for the contaminants in question should cause no significant health risk for a limited population served by new water main extensions for the time period of this recommended variance. (Id. at 8.) The Agency observes that this grant of the extension of the variance from restricted status should affect only those users who consume water drawn from any newly extended water lines. (Rec. at 12.) According to the Agency, also states that the variance should not affect the status of the rest of Elburn's population drawing water from existing water lines, except if the variance, by its conditions, hastens compliance. (Id.) Finally, the Agency recommends that the variance terminate on August 5, 2000, or two years following the date of USEPA action, whichever comes first. (Id. at 7.)

CONSISTENCY WITH FEDERAL LAW

Both Byron and the Agency state that Byron may be granted variance consistent with the requirements of the Safe Drinking Water Act (42 U.S.C. 300(f) *et. seq.*), as amended by the Safe Drinking Water Act Amendments of 1986 (Pub. 99-339, 100 Stat. 642 (1986)), and the USEPA National Interim Primary Drinking Water Regulations (40 CFR Part 141) because the requested relief would not be a variance from national primary drinking water regulations or a federal variance. (Pet. at 9, Rec. at 9-10.) Specifically, granting a variance from the effects of restricted status means that only the State's criteria for variances are relevant. (Rec. at 10.)

Both Byron and the Agency recognize that Byron remains subject to the possible enforcement actions for violating standards for the contaminant in question. (Pet. at 9, Rec. at 10.)

TERMS OF VARIANCE

Byron requests that the term of variance be from August 5, 1995 to August 5, 2000. (Pet. at 1.) The Agency recommends that an extension of the variance be granted until the earliest of the following dates: two years following the date of the USEPA action or August 5, 2000. (Rec. at 11-12.)

CONCLUSION

After considering all the facts and circumstances of this case, the Board finds that Byron has presented adequate proof that immediate compliance with 35 Ill. Adm. Code 602.105(a), Standards of Issuance, and 602.106(a), Restricted Status, would impose an arbitrary or unreasonable hardship upon Byron. The Board therefore will allow Byron until August 5, 2000 to achieve compliance, subject to conditions listed in this opinion and order. Although it is well established that the term of variance begins on the date the Board renders its decision, exceptions will be allowed upon showing of unusual or extraordinary circumstances. (See, e.g. DMI, Inc. v. IEPA (December 19, 1991), PCB 90-277, 128 PCB 245-249.) In this case, Byron timely filed its petition on August 1, 1995, 4 days before its original variance expired; therefore, the Board finds that the instant circumstances warrant the short retroactive start of the variance.

The Board agrees with the parties that granting this variance will pose no significant health risk to either the persons served by Byron's potable water supply, or the surrounding environment, assuming that compliance is timely forthcoming. The Board will accordingly grant a variance consistent with this opinion and order.

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

ORDER

Petitioner, the City of Byron (Byron), is hereby granted variance from 35 Ill. Adm. Code 602.105(a), Standards of Issuance, and 602.106(a), Restricted Status, but only as they relate to the 5 pCi/L radium standard of 35 Ill. Adm. Code 611.330(a), subject to the following conditions:

- (1) For purposes of this variance, the date of the United States Environmental Protection Agency (USEPA) action shall consist of the earlier date of the:
 - (a) date the regulation is promulgated by the USEPA which amends the maximum contaminant level (MCL) for combined radium, either of the isotopes of radium, or the method by which compliance with a radium MCL is demonstrated; or
 - (b) date of publication of notice by the USEPA that no amendments to the 5 pCi/L combined radium standard or the method for demonstrating compliance with the 5 pCi/L standard will be promulgated.
- (2) This variance shall terminate on the earliest of the following dates:
 - (a) August 5, 2000; or
 - (b) two years following the date of USEPA action.
- (3) In consultation with the Illinois Environmental Protection Agency (Agency), Byron shall continue its sampling program to determine as accurately as possible the level of radium in its wells and finished water. Until this variance terminates, Byron shall collect and analyze quarterly samples of its water from its entry point into the distribution system at locations approved by the Agency. Byron 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 contaminants in question. Results of the analyses shall be reported within 30 days of receipt of each analysis to:

Illinois Environmental Protection Agency
Division of Public Water Safety
Compliance Assurance Section
2200 Churchill Road

Springfield, Illinois 62794-9276

If Byron elects, 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.

- (4) Within 3 (three) months of USEPA action, Byron shall apply to the Agency at the address below for all permits necessary for the construction, installation, changes, or additions to Byron's public water supply needed for achieving compliance with the MCL for combined radium or with any other standard for radium in drinking water then in effect:

Illinois Environmental Protection Agency
Public Water Supply Program
Permit Section
2200 Churchill Road
Springfield, Illinois 62794-9276

- (5) Within 3 (three) months of the issuance of each construction permit by the Agency, Byron shall advertise for bids, to be submitted within 60 days, from contractors to do the necessary work described in the construction permit. Byron shall accept appropriate bids within a reasonable time, and shall notify the Agency, Division of Public Water Supplies (DPWS) within 30 days, of each of the following actions:
 - (a) advertisements for bids;
 - (b) names of successful bidders; and,
 - (c) whether Byron accepted the bids.
- (6) Construction allowed on said construction permits shall commence within a reasonable time of bids being accepted, but in any event, construction of all installations, changes or additions necessary to achieve compliance with the MCL in question shall be completed no later than two years following USEPA action. One year will be necessary to prove compliance.
- (7) 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, Byron shall send to each user of its public water supply a written notice to the effect that Byron is not in compliance with the standard in question. The notice shall state the

average content of the contaminants in samples taken since the last notice period during which samples were taken.

- (8) 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, Byron shall send to each user of its public water supply a written notice to the effect that Byron has been granted by the Pollution Control Board a variance from 35 Ill. Adm. Code 602.105(a), Standard of Issuance, and 35 Ill. Adm. Code 602.106(a), Restricted Status, as it relates to the MCL standard in question.
- (9) Until full compliance is reached, Byron shall take all reasonable measures with existing equipment to minimize the level of contaminants in its finished drinking water.
- (10) Byron shall provide written progress reports to the Agency's DPWS, FOS every six months concerning steps taken to comply with paragraphs 3, 4, 5, 6, 7, 8 and 9. Progress reports shall quote each of said paragraphs and immediately below each paragraph state what steps have been taken to comply with each paragraph.

IT IS SO ORDERED.

If Elburn chooses, to accept this variance subject to the above order, within 45 days of the date of this order, an officer of Elburn properly authorized to bind Elburn to all the terms and conditions of the variance, shall execute and forward the attached Certificate of Acceptance and Agreement to:

Stephen C. Ewart
Division of Legal Counsel
Illinois Environmental Protection Agency
2200 Churchill Road
P.O. Box 19276
Springfield, Illinois 62794-9276

Once executed and received, the Certification of Acceptance and Agreement shall bind petitioner 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. 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 Illinois Pollution Control Board, in PCB 96-23, October 5, 1995.

Petitioner: _____

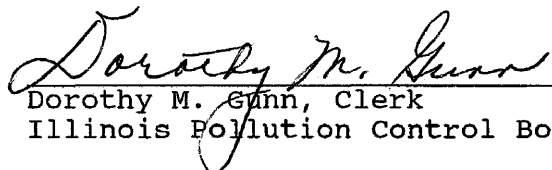
By: Authorized Agent

Title: _____

Date: _____

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rule of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.)

I, Dorothy Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 5th day of October, 1995, by a vote of 7-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board