

ILLINOIS POLLUTION CONTROL BOARD
May 5, 1988

CITY OF GENEVA,)
)
Petitioner,)
)
v.) PCB 88-11
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

MR. ROY M. HARSCH OF MARTIN, CRAIG, CHESTER AND SONNENSCHNEIN
APPEARED ON BEHALF OF THE PETITIONER.

SCOTT O. PHILLIPS APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by Michael Nardulli):

This matter comes before the Board upon a January 7, 1988 petition for variance filed on behalf of the City of Geneva. The City of Geneva requested a five-year variance from 35 Ill. Adm. Code 602.105(a), Standards of Issuance, and from 35 Ill. Adm. Code 602.106(b), Restricted Status, to the extent those rules involve 35 Ill. Adm. Code 604.301(a), combined radium-226 and radium-228 concentration. The requested period of variance is for five years from the date of issuance of a Board order granting the request. The petitioner waived its right to hearing in this matter and consequently no hearing has been held. On February 17, 1988, the Illinois Environmental Protection Agency (hereinafter "Agency") filed a Variance Recommendation recommending that the variance be denied because the petition for variance was inadequate.

Subsequently, on March 29, 1988, the Petitioner filed a Response to Agency Recommendation which was answered by the Respondent's Reply to Petitioner's Response to Agency Recommendation on April 13, 1988. In the Respondent's Reply the Respondent withdrew its recommendation of denial and states that "the Agency has no objection to a grant of a variance..." The Board construes this statement as a recommendation by the Agency to grant a variance.

Based on the record, the Board adopts the Agency's Recommendation of April 13, 1988 and finds that the request by the City of Geneva should be granted subject to the conditions. The granting of the variance will allow the City of Geneva to avoid an arbitrary or unreasonable hardship that would not be justified by the environmental impact.

BACKGROUND

The City of Geneva, located in Kane County, owns and operates a deep-well water supply system which supplies and distributes potable water to approximately 4,100 residential, 30 industrial and 350 commercial utility customers. The industries and businesses served by Geneva's water facilities employ about 5,000 people. The water supply system consists of five deep wells, two ground-level storage reservoirs, two elevated storage tanks, various pumps, appurtenances and distribution facilities and a recently constructed shallow well providing water to blend with the deep-well water.

The Petitioner has previously sought two variances from regulations governing public water supplies. On July 1, 1985 the petitioner requested a five-year variance from the restricted status regulations as they pertained to the maximum allowable concentration for combined radium and gross alpha particle activity (PCB 85-93). The Board granted a variance subject to conditions. The variance was effective from January 12, 1986 to March 30, 1987.

The Petitioner filed its second petition for variance on December 30, 1986 (PCB 86-225), requesting a variance until March 31, 1989, from the restricted status regulations as they pertained to the maximum allowable concentration for combined radium. The Board granted the second requested variance until December 15, 1988, to allow the Petitioner to supply water to thirteen (13) new developments in the City. The petitioner sought reconsideration and modification of the Board Order in PCB 86-225. The Board denied the Petitioner's request for modification. The Petitioner filed another Motion for Modification on January 8, 1988, requesting the Board to allow the Agency to issue water main extension permits, in addition to the thirteen (13) developments specified in the Board's Order in PCB 86-225, as long as the total population served by all such extensions did not exceed the 27,601 people that the petitioner claimed would be served by water main extensions to the original thirteen (13) developments. On February 4, 1988, the Board denied the motion. However, in the February 4, 1988 Order, the Board allowed two (2) more developments to be added to the list of thirteen (13) new developments to which the Agency could issue water main extension permits.

PETITIONER'S COMPLIANCE PLAN

The compliance program developed by the City of Geneva involves construction of additional shallow wells to provide water to blend with its existing supply of deep-well water and as a result, reduce the concentration of Radium in the water distributed. Geneva anticipates that carrying out this compliance schedule will cost approximately eight-million dollars (\$8,000,000) - although it cannot estimate the cost with

certainty because Geneva has not chosen the sites for the wells. The sites of the wells will be selected after a study evaluating the shallow groundwater aquifer for Kane County is received from the Illinois State Water Survey in June of 1988. The City of Geneva anticipates being in a position to provide the Board, and the Agency, with a detailed schedule for installing the shallow wells, the treatment system for the shallow water and the required distribution system within six (6) months of receiving the aquifer report. Geneva anticipates that it will take approximately thirty-eight (38) months to construct the wells, treatment facility and distribution system.

The Petitioner states in its Response to the Agency Recommendation that they evaluated four potential compliance options before choosing the recommended shallow water plan. The alternatives involved the use of treatment to remove radium from deep-well water, Lake Michigan water and Fox River water. Based on availability and cost, the consultants for the City of Geneva recommended that Geneva pursue the shallow-well-water option.

HARDSHIP AND ENVIRONMENTAL IMPACT

In its petition, the City of Geneva states that the imposition of restricted status on Geneva will cause a "continuing hardship" on the City. The Petitioner claims that the imposition of restricted status would disrupt Geneva's sustained economic growth which is necessary to finance improvements, including the construction of shallow wells. Further, the disruption would interfere with Geneva's efforts to provide long range planning to ensure controlled growth in the best long-term interest of its residents. In its recommendation and reply the Agency acknowledge the hardships but maintains that they were largely self-imposed by Geneva.

Contrasting with the issue of hardship is the issue of environmental impact. The Petitioner and the Respondent maintain that the potential risk to human health from ingestion of water with radium levels that are present in the City of Geneva are very low. The Agency points out that the present MAC for combined radium and gross alphic particle activity is currently under review at the federal level. However, the Agency does not expect any proposal to change the standard in the near future. No other environmental impact appears to be involved in this petition. Therefore, even though it is disputed whether the hardship is self-imposed or, even if not self-imposed, whether a delay in economic development is a hardship of consequential value, the lack of concern for environmental impact leads to a conclusion that the imposition of even a slight hardship, for little or no reason, would be arbitrary or unreasonable. However, radium at any level creates some risk and the City of Geneva's compliance with 35 Ill. Adm. Code 604.301(a) will significantly reduce the risk to its customers.

AGENCY RECOMMENDATION

In its variance recommendation of February 17, 1988, the Agency recommended that the variance be denied because the petition for variance was inadequate. The Agency also stated that it believed the Petitioner failed to comply with the Board Order in PCB 85-93 and that such failure has resulted in a delay in bringing the Village of Geneva into compliance with the MAC for the contaminant in question. The Agency therefore believes that any continuing hardship on the Petitioner is in large measure self-imposed and not arbitrary or unreasonable. Nevertheless, the Agency believes it is important for the Board to place the Petitioner under an enforceable Board Order that requires the City of Geneva to be in compliance with the MAC in the contaminant in question by a date certain. Therefore, the Agency was inclined to support the grant of the requested relief, subject to conditions, if an adequate petition for variance was submitted.

The Agency accepted the additional information supplied by the Petitioner in its Response to Agency Recommendation as comprising an adequate petition. In its Reply to Petitioner's Response to Agency Recommendation, the Agency withdrew its recommendation of denial. Accordingly, the Agency has no objection to a grant of a variance from 35 Ill. Adm. Code 602.105(a), Standards for Issuance, and from 35 Ill. Adm. Code 602.106(b), Restricted Status, as they relate to combined radium-226 and radium-228, subject to the conditions incorporated into this Order.

In the Response to Agency Recommendation the Petitioner objected to the importance of the Agency's recommended conditions that were labeled 37C, 37D, 37F and 37G. The Board has noted these objections but in light of Geneva's apparent difficulty in committing to a compliance plan, it is appropriate to include stringent conditions that will allow close supervision of Geneva's progress in complying. The Board also notes the Petitioner's comments concerning the Petitioner's past efforts to comply with the original variance granted to Geneva in PCB 86-225 and the intent of the Petitioner in seeking further variance. The Board strongly disagrees with the mischaracterizations made by the Petitioner on this subject. The Board responds to these mischaracterizations by standing by its statements in the Order and Opinion of PCB 86-225.

SUMMARY

The Board notes that the environmental impact is relatively small and the length of time for which the Petitioner would be out of compliance would be relatively short. On this basis, the Board concludes that the hardship associated with a denial of the variance would be arbitrary or unreasonable. The Board is

persuaded by the reasoning of the Agency that the important issue in this situation is to guarantee the timely compliance to the standard. With the conditions imposed with the variance, this objective should be achieved. The Board will grant the requested variance, subject to conditions intended to ensure that the City of Geneva expeditiously comes into compliance. However, the Board cautions the Petitioner that the Board is of the opinion that Geneva has been granted a considerable amount of freedom in this matter. Failure to comply with the Order, or further requests for variance without some consideration from Geneva, will be look upon with disfavor.

Geneva requests variance for five years from the date of the Board Order, maintaining that thirty-eight (38) months are required for construction of the wells. While this construction period seems unnecessarily long, the Board will accept Geneva's assertion. However, the Board notes that the requirement of demonstrating compliance by May of 1993 involves more than having fully operational facilities by May of 1993.

A demonstration of compliance, in fact, requires that the concentration of an annual composite of consecutive quarters or the average of the analyses of four consecutive quarterly samples be less than the 5 pCi/l standard, pursuant to 35 Ill. Adm. Code 604.105(a). Thus, the accumulation of data necessary to demonstrate compliance may require as much as a year after sub-5 pCi concentrations are first achieved. Therefore, it will be necessary to have all of the required facilities operational for one year prior to the end of the variance period, in order to be able to prove compliance by May of 1993. If Geneva does not have all of the facilities fully operational, and available for sampling, by May of 1992, the variance will be terminated.

This Opinion constitutes the Board's finding of fact and conclusion of law in this matter.

ORDER

Petitioner, City of Geneva, is hereby granted variance from 35 Ill. Adm. Code 602.105(a), Standards for Issuance, and from 35 Ill. Adm. Code 602.106(b), Restricted Status, as they relate to 35 Ill. Adm. Code 604.301(k), combined radium-226 and radium-228 concentration. This agreement supersedes the variance agreement from PCB 86-225. Upon the acceptance and agreement to be bound by all terms and condition of this Order of the Pollution Control Board, the Petitioner agrees to terminate the variance agreement from PCB 86-225. This variance expires five years from the date of this Order, or when compliance with 35 Ill. Adm. Code 604.301(a) is achieved, whichever is sooner. The variance may also expire four years from the date of this Order for failure to comply with condition (A) below. The grant of variance is subject to the following conditions:

- (A) The Petitioner shall apply for all necessary Agency construction permits by August 2, 1989. All such installations, changes, or additions must be operational by May 5, 1992.
- (B) The Petitioner shall award all construction contracts by January 20, 1990, and such award shall not be contingent upon financing.
- (C) In consultation with the 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 expires, Petitioner shall collect quarterly samples of its water from its distribution system, at locations approved by the Agency. The Petitioner shall composite the quarterly samples for 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 contaminant in question. The results of the analyses shall be reported to the Compliance Assurance Section, Division of Public Water Supplies, IEPA, 2200 Churchill, P.O. Box 19276, Springfield, Illinois 62794-9276, within 30 days of receipt of each analysis. At the option of Petitioner, the quarterly sample 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.
- (D) 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 will 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 it relates to the MAC standard in question.
- (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 will send to

each user of its public water supply a written notice to the effect that Petitioner is not in compliance with the standard in question. 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 reached, Petitioner shall take all reasonable measures with its existing equipment to minimize the level of contaminant in question in its finished drinking water.
- (G) The Petitioner shall provide written progress reports to IEPA, DPWS, FOS every six months concerning steps taken to comply with paragraphs B, C, and F. Progress reports shall quote each of said paragraphs and immediately below each paragraph state what steps have been taken to comply with each paragraph. Progress reports shall also identify each task set forth in Exhibit 1 of the Petition for Variance that must be completed under this Order by the date of the written progress report. The Petitioner shall specify the date that each such task was completed.
- (H) Within forty-five days (45) of the grant of the variance, Petitioner shall execute and forward to Scott O. Phillips, Enforcement Programs, Illinois Environmental Protection Agency, 2200 Churchill Road, P.O. Box 19276, Springfield, Illinois 62794-9276, a Certificate of Acceptance and Agreement to be bound to all terms and conditions of the granted variance. This forty-five (45) day period shall be held in abeyance for any period during which this matter is being appealed. If the Petitioner fails to execute and forward the agreement within a forty-five (45) day period, the variance shall be void. The form of Certification shall be as follows.

CERTIFICATION

City of Geneva hereby accepts and agrees to be bound by all terms and conditions of the Order of the Pollution Control board in PCB 88-11 dated _____, 1988.

Petitioner

By: Authorized Agent

Title

Date

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1985 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.

J. Dumelle and B. Forcade dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 5th day of May, 1988, by a vote of 5-2.

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