

ILLINOIS POLLUTION CONTROL BOARD
APRIL 12, 1990

CITY OF EAST MOLINE,)
)
 Petitioner,)
)
 v.) PCB 89-188
) (Variance)
)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

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

This matter comes before the Board on the petition for variance extension filed by the City of East Moline (City) on November 14, 1989, as amended January 9, 1990. The City seeks a variance from the Board's public water supply regulations namely 35 Ill. Adm. Code 602.105(a), "Standards for Issuance" and 35 Ill. Adm. Code 602.106(b), "Restricted Status" to the extent those rules relate to the maximum allowable concentration (MAC) for trihalomethanes (THM) in public drinking water. The City specifically requests the extension of the variance granted to the City by the Board in Order PCB 87-128 for the extended period of January 22, 1991 to September 30, 1991.

On February 26, 1990, the Illinois Environmental Protection Agency (Agency) filed its recommendation in support of the variance subject to conditions. Hearing was waived and none has been held.

Based upon the record before it, the Board finds that the City has presented adequate proof that compliance with the Board's regulations would impose an arbitrary or unreasonable hardship. Accordingly, the variance extension will be granted subject to conditions.

PROCEDURAL HISTORY

The City filed a petition for variance (PCB 87-128) on August 14, 1987 and amended that petition on October 5, 1987. On January 21, 1988, the Board granted the City a variance from the restricted status regulations as they pertained to the maximum allowable concentration of trihalomethanes in drinking water. That variance was subject to conditions and was to terminate on January 21, 1991.

BACKGROUND

A complete discussion of the City's water system and the hardships that compliance with the Board's public water supply regulations would cause are included in the Board's Opinion and Order PCB 87-128. That Opinion and Order is incorporated by reference in this proceeding.

The Board had granted a variance to the City in PCB 87-128 from the public water supply regulations, subject to conditions, until January 21, 1991. The conditions of the variance included submission of a final report of its consultant's studies concerning steps necessary for compliance by April 1, 1989; filing applications for all constructions permits with the Agency by July 1, 1988; and completion of all phases of construction by January 20, 1990.

The City received the consultant's report and received bids on February 27, 1988 for the first phase (Phase I) of the project to attain compliance. Phase I included revisions to the existing chlorination systems and flow monitoring systems for basins 3 and 4, and installation of ammonia feed facilities. Completion of Phase I was scheduled for December 15, 1989.

The City's consultant, during performance of Phase I, designed a second phase (Phase II) which included revisions to the carbon feed, alum feed and lime feed systems. Plans and specifications for Phase II were submitted to the Agency on March 9, 1989; the City received a permit for construction on June 9, 1989. The City received bids on July 13, 1989 which "were substantially and unexpectedly over the construction estimates for Phase II" (Petition at 3). The City stated that the bids ranged from \$425,219 to \$474,856, well over the engineer's estimate of \$200,000. The City, in response to the recommendation of its consulting firm, rejected all bids received on July 13, 1989, and revised the plans and specifications for Phase II. On October 2, 1989, the City accepted the low bid of \$389,246 on the revised Phase II plans and a contract was awarded. Completion of Phase II is scheduled for June 30, 1990. In addition, the City anticipates that completion of the necessary equipment testing and minor process adjustments will not be completed before September 30, 1990. Phase II construction is necessary for the operation of the water plant and the City is therefore requesting an extension of its variance.

The City has continued to monitor the concentration of THM since the granting of its variance. The following is a table of the average concentrations of THM from 1987 until the filing of the instant petition:

<u>DATE</u>	<u>Average THM Concentration (mg/l)</u>
08-03-89	0.196
05-08-89	0.106
02-06-89	0.082

11-08-88	0.078
08-25-88	0.102
05-02-88	0.087
02-16-88	0.083
12-16-87	0.052
12-02-87	0.082
09-08-87	0.120

(Petition at 5).

REGULATORY FRAMEWORK

In recognition of the health risks occasioned by exposure to THM, the Board adopted a 0.10 mg/l MAC for THM in R81-11 for water supplies serving over 10,000 individuals. In R84-12, the Board adopted a rule which extended the THM standard to include public water supplies serving less than 10,000 individuals. The City is not seeking a variance from the MAC for THM; rather, the City requests the temporary lifting of prohibitions imposed pursuant to 35 Ill. Adm. Code 602.105 and 602.106.

Board regulations 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 Board regulations not found in federal law. It is from this prohibition which the City requests an extension of its variance.

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. Demonstration of such simple hardship alone is insufficient to allow the Board to find for a petitioner. Also a petitioner must demonstrate 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 achieve compliance within the term of the variance.

HARDSHIP

The City asserted in its prior petition that to keep the City on restricted status would impose an arbitrary and unreasonable hardship. The City also states that:

Restricted status prevents East Moline from expanding, extending or modifying its water distribution system. Recently, East Moline has lost much of its industrial base and has suffered a resulting loss in water users. This has served to increase water rates while it discourages both industry and residents from using the public water supply system. As a result, East Moline does not have the funding required to implement many necessary improvements to the water treatment plant and distribution system. (City of East Moline v. IEPA, PCB 87-128 (January 21, 1988)).

The City further discussed the hardship that restricted status would impose by explaining the City's need to attract new industry to improve the depressed economic conditions in the City, in part caused by a loss of industry. Inclusion on the restricted status list effectively prohibits the City from establishing new industry as it cannot modify its water distribution system to accommodate that industry.

The City in its instant petition states that:

East Moline has endeavored, and continues to endeavor, in good faith and with its best efforts to comply fully and in a timely manner with the terms of the Order. However, because of the unexpected delay caused by the surprisingly high Phase II bids, completion of Phase II and the necessary equipment testing and minor process adjustments cannot be completed before September 30, 1990, so as to achieve THM compliance before the expiration of the requested variance extension until September 30, 1991. (R. at 4, petition)

The Agency agrees that to deny the requested extension "would result in an arbitrary or unreasonable hardship" (Recommendation at 5).

AGENCY RECOMMENDATION

The Agency's recommendation indicates that the extension of the variance would not cause a significant health risk. The Agency stated in its recommendation to grant the variance extension that:

The Agency believes an incremental increase in the allowable concentration for the contaminant in question even up to a maximum of four times the MAC for the contaminant in question, should cause no significant health risk for the limited population served by new water main extensions for the time period of this recommended variance.

The table submitted by the City indicate that it at various times, since the grant of the original variance, the City's water supply is within the THM standard and the table further indicates that the average THM concentration, as measured, has not been higher than 0.196 mg/l.

CONSISTENCY WITH FEDERAL LAW

The Agency believes the Board may grant the City the extension of the variance, consistent with the Safe Drinking Water Act (SDWA), PL 93-523, as amended by PL 96-502, 42 U.S.C Section 300(f), and corresponding regulations because the recommended relief is not a variance from a national primary drinking water regulation.

CONCLUSION

The Board notes that the City has already taken several steps in order to bring its public water supply into compliance with the THM standard and the City has met certain of the deadlines set forth in the Board Order at PCB 87-128. However, unforeseen difficulties have arisen which render the possibility of the City being able to achieve compliance by January 21, 1991 unlikely. The Board finds that, in light of all facts and circumstances of this case, denial of variance would impose an arbitrary or unreasonable hardship upon the City. The Board further finds that satisfactory progress toward compliance has been shown. 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, assuming that compliance is timely forthcoming. Therefore, the Board will grant an extension of the City's variance until September 30, 1991 subject to conditions similar to those outlined by the Agency.

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

ORDER

Petitioner, the City of East Moline, is hereby granted an extension of its variance from 35 Ill. Adm. Code 602.105(a) "Standards for Issuance", and 602.106(b), "Restricted Status", solely as they relate to excursions of the 0.10 mg/l trihalomethane (THM) standard of Section 604.202, subject to the following conditions:

- (A) Compliance shall be achieved with the THM standard of 0.10 mg/l no later than September 30, 1991.
- (B) This variance expires September 30, 1991 or when analysis pursuant to 35 Ill. Adm. Code 605.104(a) shows compliance with the THM standard, whichever occurs first.
- (C) In consultation with the Agency, Petitioner shall continue its sampling program to determine as accurately as possible the level of THM in its finished water.
- (D) Construction allowed on construction permits shall begin within a reasonable time of bids being accepted, but in any case, construction of all installations, changes or additions necessary to achieve compliance with the THM standard of 0.10 mg/l shall be completed no later than September 30, 1990.
- (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 variance 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 for Issuance and 35 Ill. Adm. Code 602.106(b) Restricted Status, as it relates to the THM standard.

- (F) 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 THM standard. The notice shall state the average content of THM in samples taken since the last notice period during which samples were taken.
- (G) Until full compliance is reached, Petitioner shall take all reasonable measures with its existing equipment to minimize the level of THM in its finished drinking water.
- (H) The Petitioner shall provide written progress report to Illinois Environmental Protection Agency, Department of Public Water Supply, Field Operations Section every six months concerning steps taken to comply with paragraphs A - G. Progress reports shall quote each of said paragraphs and immediately below each paragraph state what steps have been taken to comply with each paragraph.
- (I) Within forty-five days of the grant of the variance, Petitioner shall execute and forward to Bobella Glatz, Enforcement Programs, Illinois Environmental Protection Agency, 2200 Churchill Road, 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.

CERTIFICATE

I (We), _____, hereby accept and agree to be bound by all terms and conditions of the Order of the Pollution Control Board in PCB 89-188, April __, 1990.

Petitioner

Authorized Agent

Title

Date

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1985, ch. 111 $\frac{1}{2}$, 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 J. Dumelle and B. Forcade concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 12th day of April, 1990, by a vote of 7-0.

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