

ILLINOIS POLLUTION CONTROL BOARD
December 19, 1996

CITY OF MOLINE,)
)
Petitioner,)
) PCB 97-39
v.) (Variance - Water)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

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

On August 23, 1996, the City of Moline (Moline) filed a request for variance from the Board's regulations 35 Ill. Adm. Code 306.303, 306.304, and 306.305 for a period of four years.¹ Moline makes this request to reinstate a former sanitary sewer overflow so that it can investigate and correct an infiltration and inflow problem that has led to sewer surcharging and basement back-ups during periods of extended wet weather and/or heavy rainfall events.

On October 3, 1996, the Illinois Environmental Protection Agency (Agency) filed its recommendation recommending that the variance be granted with certain conditions.² Moline did not file a response to the Agency's recommendation. Moline waived hearing and no hearing was held.

The Board's responsibility in this matter arises from the Environmental Protection Act (Act) (415 ILCS 5/1 et seq. (1994).) The Board is charged in the Act with the responsibility of granting variance from Board regulations whenever it is found that compliance with the regulations would impose an arbitrary or unreasonable hardship upon the petitioner. (415 ILCS 5/35(a).) The Agency is required to appear in hearings on variance petitions. (415 ILCS 5/4(f).) The Agency is also charged, among other matters, with the responsibility of investigating each variance petition and making a recommendation to the Board as to the disposition of the petition. (415 ILCS 5/37(a).)

BACKGROUND

Moline states that homeowners in the City have recently experienced unprecedented basement flooding believed to be due to excessive inflow and infiltration from yet unknown sources, public or private, resulting in surcharging of the sanitary sewer system. (Pet. at 1.) Moline claims that in order to comply with 35 Ill. Adm. Code 306.305 an existing sanitary

¹ The petition filed by Moline will be referenced to as "Pet. at " and petitioners exhibits will be referenced to as "Exh. at ".

² The Agency's recommendation will be referred to as "Rec. at ".

sewer overflow (SSO) was removed in 1995 in conjunction with a street construction project at 27th Street. (Pet. At 1.) Moline asserts that the former overflow pipe was approximately 12", was connected to an 18" storm sewer and discharged to a ravine. (Pet. at 1, Exh. D.)

Moline states that it is requesting this variance in order "to reinstate the former sanitary sewer overflow at the existing sanitary manhole on the existing 10" sanitary sewer, approximately 150 feet north of the intersection of 27th Street and 24th Avenue". (Pet. at 1.) Moline maintains that the reinstated SSO would be reinstated at its prior elevation since the former overflow pipe through the existing manhole wall still exists as a plugged pipe. (Pet. at 1.) Additionally Moline states that "[t]he flow line of the existing plugged pipe is approximately 4 feet above the invert of the existing sanitary manhole" and would be "reconnected to the existing 18" storm sewer system at a newly constructed storm sewer inlet structure adjacent to the existing sanitary manhole". (Pet. at 1.) Moline alleges that the volume of the proposed SSO will vary depending on the intensity and duration of a particular rainfall event if there is any volume at all. (Pet. at 1.) Moline states that "[t]he concentration of the sanitary sewage will likely be diluted by inflow and infiltration introduced to the sanitary sewer". (Pet. at 1.)

Moline states that the claimed basement flooding in May 1996 occurred during a period of sustained rainfall for most of the month and that the "records obtained from the National Climatic Data Center, the Moline weather station recorded 9.26 inches of precipitation in May". (Pet. at 1-2.) Moline asserts that there were 19 days where at least 0.01 inches of rain was received, resulting in saturated ground conditions and that the total rainfall was 4.96 inches above the May norm. (Pet. at 2.) Moline claims that that similar weather conditions are not expected to reoccur in the near future. (Pet. at 2, Exh. at G, H, and I.) Moline believes that the sewer back-ups are caused by a combination of the heavy rainfalls and possible illegal connections and dilapidated conditions of the sewer. (Pet. at 1-2.)

The Agency states that it agrees with Moline's statement of facts and that it is "not aware of any additional facts, besides those contained in the petition and this recommendation, that are relevant to the disposition of this matter". (Rec. at 2.)

REGULATORY FRAMEWORK

Moline is requesting a variance from the Board's water regulations set forth at 35 Ill. Adm. Code 306 Performance Criteria. Specifically, Moline requests variance from 35 Ill. Adm. Code 306.303, 306.304, and 306.305. Section 306.303, Excess Infiltration states:

Excess infiltration into sewers shall be eliminated, and the maximum practicable flow shall be conveyed to treatment facilities.

Section 306.304 Overflows

Overflows from sanitary sewers are expressly prohibited.

Section 306.305 Treatment of Overflows and Bypasses

All combined sewer overflows and treatment plant bypasses shall be given sufficient treatment to prevent pollution, or the violation of applicable water standards unless an exception has been granted by the Board pursuant to Subpart D.

Sufficient treatment shall consist of the following:

- a) All dry weather flows, and the first flush of storm flows as determined by the Agency, shall meet the applicable effluent standards; and
- b) Additional flows, as determined by the Agency but not less than ten times the average dry weather flow for the design year, shall receive a minimum of primary treatment and disinfection with adequate retention time; and
- c) Flows in excess of those described in subsection (b) shall be treated, in whole or in part, to the extent necessary to prevent accumulations of sludge deposits, floating debris and solids in accordance with 35 Ill. Adm. Code 302.203, and to prevent depression of oxygen levels; or
- d) Compliance with a treatment program authorized by the Board in an exception granted pursuant to Subpart D.

In determining whether any variance is to be granted, the Act requires the Board to determine whether a petitioner has presented adequate proof that immediate compliance with the Board regulations at issue would impose an arbitrary or unreasonable hardship. (415 ILCS 5/35(a)(1992)) Furthermore, the burden is upon the petitioner to show that its claimed hardship outweighs the public interest in attaining compliance with regulations designed to protect the public. (Willowbrook Motel v. Pollution Control Board, (1985), 135 Ill. App.3d 343, 481 N.E.2d 1032.) Only with such a showing can the claimed hardship rise to the level of arbitrary or unreasonable hardship.

A further feature of a variance is that it is, by its nature, 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, (1977), 67 Ill.2d 276, 367 N.E.2d 684.) Accordingly, except in certain special circumstances, 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.

Moline states as part of its compliance plan that “[b]eginning in the Summer of 1996, the City will undertake a sewer system evaluation study to identify potential sources of inflow and infiltration”. (Pet. at 2.). Moline states further that the “study will include smoke and dye flow testing, sewer televising and household surveys” and is expected to proceed throughout this summer and fall. (pet. at 2.) Moline claims that “[i]f illegal connections to the sanitary sewer are found, they will be eliminated”. (Pet. at 2.) Moline provided the following compliance plan in its petition:

27th Street Area Sanitary Sewer Compliance Time Schedule

<u>Phase</u>	<u>Undertaking</u>	<u>Start Date</u>	<u>Finish Date</u>	<u>Estimated Costs</u>
I.	Conduct Sewer Study	7/15/96	6/15/97	By City Forces
II.	Eliminate Illegal Connections If Found	1/1/97	9/19/97	By City Forces
III.	Complete Point Repairs If Required	10/1/97	10/1/97	By City Forces or Contractor \$100,000±
IV.	Evaluate effectiveness of previous actions. Implement other actions as necessary.	1/1/99	6/30/00	By City \$ - ?

Moline state that it will achieve compliance by June 30, 2000 by eliminating the SSO connection to the storm sewer. (Pet. at 2.)

ENVIRONMENTAL IMPACT

Moline states that “[t]he environmental impact of the proposed variance is projected to be minimal on plant and animal life subject to the sanitary sewer discharge into the storm sewer and the storm sewer’s subsequent discharge”. (Pet. at 2.) Moline asserts that the impact on human health of the SSO should be viewed as an improvement when compared to the possibility of raw sewage backing up into household basements. (Pet. at 2.) Additionally, Moline claims that “[t]he sanitary sewer overflow will likely be diluted by the additional flow contributions from other area storm sewers, prior to discharge in a remote ravine location”. (Pet. at 2, Exh. D, E, and F.)

The Agency asserts that the environmental impact during the variance period should be minimal. (Rec. at 2.) The Agency states, citing to page 2 of the petition, “[a]s described in

the petition, the SSO should be diluted by the additional flow contributions from tributary storm sewers prior to being discharged to the ravine, and should then be further diluted as more of the storm water ravine discharges join together prior to the final discharge point at the Rock River". (Rec at 2-3.)

HARDSHIP

The claimed hardship stated by Moline is that during heavy rain events numerous homeowners have sewage backing up into their houses. (Pet. at 1.) Moline further asserts that to determine a plan to correct for the inflow and infiltration depends on the findings of the sanitary sewer plan discussed previously. (Pet. at 3.) Therefore without the variance Moline will not be able to provide immediate relief from inflow and infiltration, which results in the sewer back-ups into houses causing health problems and property damage. (Pet. at 3.)

The Agency states that "Moline has demonstrated that compliance with the Illinois PCB's regulations would impose an arbitrary or unreasonable hardship as required by Section 35 of the Environmental Protection Act ('Act') 415 ILCS 5/35". (Rec. at 3.)

CONSISTENCY WITH FEDERAL LAW

Moline makes no statement as to whether the grant of the requested variance would be consistent with federal law. The Agency states that there are no applicable federal laws or regulations which preclude the granting of this variance as long as Moline receives a National Pollutant Discharge Elimination System ("NPDES") permit for the SSO. (Rec. at 3.) As part of the recommendation of grant, the Agency included certain conditions, one of which conditions was that Moline must obtain a NPDES permit for the SSO. (Rec. at 3.)

We agree with the Agency that as long as Moline receives a NPDES permit for the SSO the grant of the variance would be consistent with federal law.

CONCLUSION

Based on the record the Board finds that Moline has established that immediate compliance with 35 Ill. Adm. Code 306.303, 306.304, and 306.305 constitutes an arbitrary or unreasonable hardship. Moline has demonstrated that there would be minimal environmental impact for the variance period.

The Board finds that temporary relief which is granted by this variance does not pose a significant risk to environmental health. Moline has demonstrated that during the variance period there will be a limited number of times in which the SSO will be needed and as a condition to grant we will be requiring Moline to obtain an NPDES permit for those limited times there is a discharge from the SSO. The Board will grant the variance with the conditions recommended by the Agency. The Board notes that the four year variance period should be more than adequate for Moline to investigate and achieve compliance, and without an appropriate showing a request for a variance extension or another variance may not be appropriate.

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

ORDER

The Board hereby grants the City of Moline a variance from 35 Ill. Adm. Code 306.303, 306.304, and 306.305 so that it may investigate and correct the infiltration and inflow problem that has led to sewer surcharging and basement back-ups during periods of extended wet weather and/or heavy rainfall events. This variance becomes effective on the date of this final order and terminates on June 30, 2000. The variance is subject to the following conditions:

1. During the variance period, Moline shall operate its sanitary sewer system to the best of its ability, providing the most efficient and effective transport as is practicable. Additionally, Moline shall perform the evaluation and take corrective action(s), such as disconnecting illegal connections and making repairs, as expeditiously as possible to minimize the period of time the SSO will need to be connected.
2. Moline shall obtain an NPDES permit for the SSO prior to re-establishing the SSO.
3. Moline shall obtain any other permits necessary to complete the project of rehabilitating the sanitary sewers described in its variance petition.
4. This variance shall end when the overflow point is eliminated or on June 30, 2000, whichever occurs first.
5. Moline shall install an alarm system which will alert Moline that the SSO has been activated which will enable Moline, during the variance period, to monitor and sample the SSO as required by the applicable NPDES permit.

IT IS SO ORDERED.

Board member J. Theodore Meyer dissented.

Board member Kathleen M. Hennessey abstained.

If the petitioner chooses to accept this variance subject to the above order, within forty-five days of the grant of the variance, the petitioner must execute and forward the attached certificate of acceptance and agreement to:

Margaret Howard

Division of Legal Counsel
Illinois Environmental Protection Agency
2200 Churchill Road
Post Office Box 19276
Springfield, Illinois 62794-9276

Once executed and received, that certificate of acceptance and agreement shall bind the petitioner to all terms and conditions of the granted variance. The 45-day period shall be held in abeyance during any period that this matter is appealed. Failure to execute and forward the certificate within 45-days renders this variance void. The form of certificate is as follows:

CERTIFICATION

I (we), _____, hereby accept and agree to be bound by all terms and conditions of the opinion and order of the Pollution Control Board in PCB 97-39, December 19, 1996.

Petitioner _____

Authorized Agent _____

Title _____

Date _____

Section 41 of the Environmental Protection Act (415 ILCS 5/41) provides for the appeal of final Board orders within 35 days of the date of service of this order. (See also 35 Ill. Adm. Code 101.246, Motion for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the _____ day of _____, 1996 by a vote of _____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board