

ILLINOIS POLLUTION CONTROL BOARD  
May 20, 1993

VILLAGE OF FORRESTON, )  
 )  
 Petitioner, )  
 )  
 v. ) PCB 93-13  
 ) (Variance)  
 )  
 ILLINOIS ENVIRONMENTAL )  
 PROTECTION AGENCY, )  
 )  
 Respondent. )

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter comes before the Board on the variance petition filed on January 22, 1993 by the Village of Forreston (Forreston). Forreston requests a variance from 35 Ill. Adm. Code 306.303 and 306.304 and from 415 ILCS 5/12 (1992). The Agency, on April 1, 1993, filed its recommendation suggesting that the variance be denied. Forreston waived its right to a hearing and no hearing was held.

Forreston is a rural community of approximately 1,400 people located in Ogle County. (Pet. at 2.) The community is surrounded by agricultural land. (Pet. at 2.) Forreston provides sewer service to approximately 550 users. (Pet. at 2.)

Forreston requests a variance to allow bypassing the sanitary sewer collection system during periods of excessive surface runoff; the excessive runoff currently causes surcharging of the sewer system. (Pet. at 1.) Forreston reports that basement backup of sewage into approximately eleven homes occurred on June 29, 1990 and March 26, 1991. (Pet. at 1.) Forreston has undertaken steps to determine the potential cause of the inflow/infiltration. (Pet. at 2.) Several identified sources have been corrected and there has been no additional incidents of basement backups. (Pet. at 2.)

While Forreston has taken several steps to reduce the surcharging which caused the basement backups, Forreston asserts that the adequacy of these measures cannot be proven since Forreston has not experienced a rainfall of the magnitude that resulted in the prior backups. (Pet. at 2.) Forreston contends that the variance is required to prevent basement backups from occurring until other remedies can be implemented and proven. (Pet. at 1.) Forreston proposes constructing an overflow bypass which would relieve to a surface ditch during surcharging conditions. (Pet. at 3.) Forreston intends to bypass the sewage system when heavy rain conditions exist to protect residences from sewage backup. (Pet. at 3.)

The Environmental Protection Agency (Agency) opposes the granting of the variance. The Agency contends that Forreston has failed to demonstrate sufficient hardship as required by the Environmental Protection Act and the Board regulations. The Agency notes that the economic difficulties asserted by Forreston do not amount to a statutory hardship. The Agency contends that Forreston has failed to fully explain the environmental impact of bypassing the sewer system.

#### DISCUSSION

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. IPCB (1977), 133 Ill. App. 3d 343, 481 N.E.2d 1032). Only with such showing can the claimed hardship rise to the level of arbitrary or unreasonable hardship. Where the petitioner seeks to extend a variance, the petitioner must show satisfactory progress.

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.

Forreston proposes bypassing the sewer system during periods of surcharging while it completes evaluations of its sewer system. (Pet. at 4.) If it is determined that sanitary sewer improvements are needed, Forreston will proceed with the needed sewer construction. (Pet. at 4.) Forreston contends that due to the anticipated infrequent times and durations of overflows and the dilute nature of the surcharge overflows of sanitary sewage, negligible impact on human, plant and animal life is anticipated in the unnamed ditches and tributaries. (Pet. at 5.) Forreston notes that it does not have the financial resources to undertake a sanitary sewer replacement program and additional time is needed to determine if backups are likely to reoccur and obtain the required funding if construction is necessary.

The Agency contends that Forreston has only demonstrated a possibility of future backups and has not demonstrated with any certainty that backups are likely to occur in the future. The

Agency maintains that this does not present a hardship. The Agency further contends that the need to obtain funding to undertake sewer replacement is not considered a hardship. The Agency also argues that Forreston has not provided sufficient information concerning the environmental impact of the bypass. In particular, the Agency notes that Forreston has not provided a plan to remove the sewage from the ditch or a means to keep residents away from the ditches or named the ditches in which the bypassed water will flow or described how far the bypassed water will flow. The Agency argues that without this information it is unable to determine the environmental impact of the bypass system.

Forreston has not filed a response addressing the concerns raised by the Agency in its recommendation.

The Board finds that Forreston has not presented adequate proof that immediate compliance with the regulations would impose an arbitrary or unreasonable hardship. Further, the Board finds that Forreston has not fully addressed the environmental impact of bypassing the sewer system during periods of surcharging. Therefore, the Board denies the request for variance.

While Forreston has taken some measures to correct the inflow/infiltration problem, it is not certain whether these measures have fully corrected the problem. Forreston has noted a decrease in flow to the wastewater treatment plant. Forreston has not presented any information relating to the events that resulted in prior basement backups of the sewer system. Further, Forreston has presented limited data concerning the modifications made to the sewer system or the results of these modifications. Based on the material presented in the petition it is impossible to determine if basement backups are more than likely to occur in the future or under what conditions backups are likely to occur.

To establish arbitrary or unreasonable hardship the petitioner must prove that the economic hardship resulting from a denial of the variance would outweigh the injury to the public from a grant of the petition. (Caterpillar Tractor Co. v. Ill. Pollution Control Board (3rd Dist. 1977), 48 Ill. App. 3d 655, 363 N.E.2d 419.) If the variance is not granted, the public may be subject to additional backups causing property damage or injury and creating a potential health hazard. The Board notes that the bypass system proposed by Forreston could also result in property damage or injury and create a potential health hazard. Forreston has not demonstrated that measures were taken in the design of the bypass system to eliminate these potential problems. Based on the information submitted by Forreston, the Board cannot determine the effect that the granting of the variance would have on the public and the environment.

For the reasons discussed above the Board denies the variance sought by Forreston. This denial does not preclude Forreston from submitting a new petition with additional information.

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

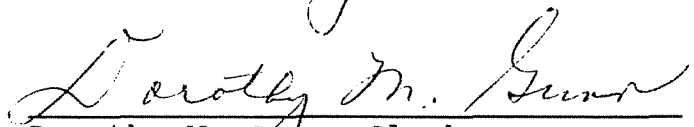
ORDER

The Board hereby denies the Village of Forreston's petition for a variance from 35 Ill. Adm. Code 306.303, 35 Ill. Adm. Code 306.304 and 415 ILCS 5/12 (1992).

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act, (415 ILCS 5/41 (1992)), provides for appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (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 20<sup>th</sup> day of May, 1993, by a vote of 6-0.

  
 Dorothy M. Gunn, Clerk  
 Illinois Pollution Control Board