

ILLINOIS POLLUTION CONTROL BOARD
December 7, 1995

CITY OF ALTAMONT,)	
)	
Petitioner,)	
)	
v.)	PCB 96-65
)	(Variance -
ILLINOIS ENVIRONMENTAL)	Public Water Supply)
PROTECTION AGENCY,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by M. McFawn):

This matter is before the Board on the September 18, 1995 variance petition filed by the City of Altamont (Altamont). Altamont seeks relief from 35 Ill. Adm. Code 602.106(a), "Restricted Status", to the extent the rule relates to violation by Altamont's public water supply of the 0.10 mg/l standard for total trihalomethanes (TTHM). (35 Ill. Adm. Code 602.106(a).) The standard for TTHM is set forth at 35 Ill. Adm. Code 611.310(c). Altamont requests a variance until January 1, 1997 for continued operation of its water supply and the removal of its water supply from the Illinois Environmental Protection Agency's Restricted Status List for TTHM. Altamont waived hearing and none was held.¹

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 there with responsibility of granting a 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 Illinois Environmental Protection Agency (Agency) is required to appear in hearings on variance petitions. (415 ILCS 5/4(f).) The Agency is also charged 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).)

On October 23, 1995, the Agency filed its variance recommendation. The Agency recommends that a variance from 35 Ill. Adm. Code 602.105(a), "Standards for Issuance"² and 35 Ill.

¹ Altamont's petition for variance shall hereinafter be referred to as (Pet. at ___); the Illinois Environmental Protection Agency's recommendation shall be referred to as (Ag. Rec. at ___).

² While the City of Altamont does not specifically request a variance from 35 Ill. Adm. Code 602.105(a), "Standards of Issuance", the Agency

Adm. Code 602.106(a), "Restricted Status" be granted to Altamont, but only as they relate to the requirements for TTHM. The Agency recommends the variance be granted for eighteen months, subject to certain conditions. Altamont did not file a reply to the Agency's recommendation.

For the following reasons, the Board finds that Altamont has presented adequate proof that immediate compliance with the Board's regulations for "Standards for Issuance" and "Restricted Status" would result in the imposition of an arbitrary or unreasonable hardship. Accordingly, the variance is granted, subject to conditions set forth in the attached order.

BACKGROUND

The City of Altamont is located in Effingham County, Illinois. Altamont provides potable water for the residents and commercial and industrial customers within the corporate boundaries of the City of Altamont. (Pet. at 3.) Altamont owns and operates its own water treatment plant and water distribution system which serves approximately 2,636 users. (Pet. at 3.) Water is provided to all residential, commercial and industrial users, as needed, and the customers are charged for the water service as established by city ordinance. (Pet. at 3.) Residential customers account for 90% of the total water flow and commercial customers account for 10%. (Pet. at 3.)

The Agency first advised Altamont that it exceeded the maximum contaminate level (MCL) for TTHM³ on February 24, 1992. (Ag. Rec. at 5.) Altamont's water supply showed a level of 0.135 mg/L for TTHM, thus exceeding the 0.10 mg/L standard. (Ag. Rec. at 5.) The Agency had taken an annual composite of four consecutive quarterly samples from 1991 to 1992 and found that in three out of the four samples, Altamont was over the .10 MCL for TTHM. (Pet. at 3, Exhibit A; Ag. Rec. at 5.) As a result, the Agency notified Altamont that it would be placed on restricted status on March 3, 1992. (Pet. at 4; Ag. Rec. at 5.)

Altamont requests the variance to extend its water distribution system to serve new users in two developing subdivisions, South Towers Acres and Camp Ground Court, located within the corporate boundaries of the City of Altamont. (Pet. at 3, 4.) South Towers Acres Subdivision has fourteen lots designed for single-family residences. Two of these lots have already been sold to third parties without notice or knowledge that Altamont is and was on the Agency's Restricted Status List.

recommends that a variance from this section also be granted in order for Altamont to pursue extensions to its water mains. (Ag. Rec. at 1.)

³ Total trihalomethanes (TTHMs) are organic chemicals consisting of one carbon atom and three halogen atoms. These are formed when free chlorine reacts with naturally occurring compounds which are generally produced by decaying vegetation. (Ag. Rec. at 8.)

(Pet. at 4.) Six of these lots are subject to sale pending the outcome of this variance request. (Pet. at 4.) Camp Ground Court Subdivision has fifteen lots designed for single-family residences. Two of these lots are subject to sale pending the outcome of this variance request.⁴ (Pet. at 4.)

If the requested variance is granted, Altamont foresees continuing to operate, expand, improve and extend its water distribution system into South Towers Acres Subdivision and Camp Ground Court Subdivision. (Pet. at 5-6.)

REGULATORY FRAMEWORK

The instant variance request concerns two features of the Board's public water supply regulations: "Standards for Issuance" and "Restricted Status", which are found at 35 Ill. Adm. Code 602.105 and 602.106. In pertinent part they 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 Environmental Protection Act (415 ILCS 5 (1994).)(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.

⁴ The developers of the South Towers Acres Subdivision are Mr. Jim Baker and Mr. Gene Haker. The developer of Camp Ground Court Subdivision is Mr. W.T. Frederking. (Pet. at 4.) Mr. Baker and Mr. Haker installed a water main in the subdivision that was just short of connection to the Altamont public water supply. (Ag. Rec. at 4.) The developers of both subdivisions proceeded to develop the subdivisions allegedly without notice or knowledge that Altamont is and was on the Agency's Restricted Status List. (Pet. at 4.) The Agency's inspections disclosed that this water main was installed without a construction permit. According to the Agency's recommendation, the Agency intends to initiate formal enforcement against Mr. Baker and Mr. Haker for violation of Section 602.101 of Subtitle F, the Public Water Supply regulations promulgated by the Board. However, the Agency believes that the City of Altamont had no involvement in the apparent construction and installation of this water main without the required construction permit and is therefore supporting a grant of the variance from the Restricted Status List. (Ag. Rec. at 4.)

The cumulative effect of these regulations is to provide that community water supply systems are prohibited from extending water service, by virtue of not being able to obtain the requisite permits, unless and until their water meets all of the standards for finished water supplies. Altamont requests this variance in order to extend its water service while it continues to pursue compliance with the TTHM standard, as opposed to extending service only after attaining compliance.

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)(1994).) Furthermore, the burden is on 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 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.

A grant of variance from "Standards for Issuance" and "Restricted Status" neither absolves a petitioner from compliance with the drinking water standards at issue, nor insulates a petitioner from possible enforcement action brought for violation of those standards. The underlying standards remain applicable to the petitioner regardless of whether variance is granted or denied.

COMPLIANCE PLAN

In striving to achieve compliance with Agency regulations and to protect the health of its water customers, Altamont has: (1) installed a destratifier to improve raw water quality, (2) improved water quality and minimized the impact of Atrazine and other synthetic organic chemicals by disallowing farming operations in the tributary watershed and (3) installed ammonia feed equipment to institute the chlorination process to minimize TTHM formation in the distribution system. (Pet. at 6.) Due to inadequate water storage capability, Altamont also uses pre-

chlorination protocols in the water treatment process to assure proper disinfection of drinking water.⁵ (Pet. at 6.)

Altamont is expending \$1.8 million to update its water treatment plant and water distribution system that will be operational in December, 1995. (Pet. at 6.) The updated system will include a granular activated carbon filter media and a powdered activated carbon feed system to aid in the removal of organic precursors associated with TTHM formation. (Pet. at 6.) Further, the new water treatment plant will provide additional onsite water storage in order to improve the disinfection process and provide 5-log Giardia inactivation. (Pet. at 7.)

The new onsite water storage facilities will enable Altamont to discontinue using pre-chlorination protocols. As a result of discontinuing pre-chlorination, both parties believe TTHM levels should be reduced. (Pet. at 7; Ag. Rec. at 6.) These improvements will allow Altamont to achieve compliance with the TTHM standard. (Pet. at 7; Ag. Rec. at 6.)

The Agency states that Altamont has not previously sought a variance from regulations pertaining to TTHM. (Ag. Rec. at 4.) Additionally, Altamont is not presently on restricted status for exceeding any other contaminant. (Ag. Rec. at 7.)

HARDSHIP

Altamont contends that failure to obtain a variance would disallow new water main extensions and halt construction of new subdivision homes. (Pet. at 5.) The City of Altamont has experienced and continues to experience population growth and remains committed to provide everything possible to its residential subdivisions.⁶ (Pet. at 5.) Altamont is expending \$1.8 million to update its facility by December, 1995, in order to achieve compliance with the MCL for TTHM. Further, Altamont argues that it would be a hardship to remain on the Agency's Restricted Status List while demonstrating compliance over the course of the coming year.

The Agency agrees that denial of a variance would result in an arbitrary or unreasonable hardship because denial of that variance would require the Agency to continue to deny construction and operating permits for new water main extensions until compliance is achieved. (Ag. Rec. at 10.) Imposition of restricted status means that no new water main extensions could

⁵ According to Altamont, pre-chlorination of raw water forms the highest possible TTHM concentration in the treated water. Altamont argues that pre-chlorination caused above-normal TTHM levels in the treated water. (Pet. at 3.)

⁶ Altamont argues that both the developers and third parties had no notice or knowledge that Altamont is and was on the Agency's Restricted Status List. (Pet. at 4.)

be issued permits by the Agency, and economic growth dependent on those water main extensions could not occur. (Ag. Rec. at 10.)

ENVIRONMENTAL IMPACT

Although Altamont has not undertaken a formal assessment of the environmental impact of its requested variance, it contends that the granting of the variance for the limited time requested will not cause any significant harm to the environment or to the people served by potential water main extensions. (Pet. at 5.) Altamont has established a comprehensive plan to come into compliance with TTHM standards and to correct the TTHM levels by January 1, 1997.

The Agency also maintains that a variance from "Standards for Issuance" and "Restricted Status", and any requisite increase in the allowable MCL for TTHM should not cause a significant health risk for the limited population served by new water main extensions for the time period of the recommended variance. (Ag. Rec. at 10.) The Agency further contends that the grant of the requested variance would impose no significant injury to the public or to the environment for the limited time period of the requested variance. (Ag. Rec. at 10.)

CONSISTENCY WITH FEDERAL LAW

The Agency states that Altamont may be granted a variance consistent with the requirements of the Safe Drinking Water Act (42 U.S.C. 300(f)), and U.S. EPA Drinking Water Regulations (40 CFR Part 141 (1993)) because the requested relief would not represent a variance from national primary drinking water standards. (Ag. Rec. at 11.) Specifically, granting a variance from the effects of restricted status means that only the state's criteria for variances are relevant. (Ag. Rec. at 11.)

The Agency states that Altamont remains subject to the possibility of federal enforcement for violations of the MCL for TTHM. (Ag. Rec. at 11.) The Agency notes, however, that because of continuing progress being made towards compliance, US EPA would probably accept the issuance of variance, should the Board so decide. (Ag. Rec. at 12.)

TERMS OF VARIANCE

Altamont requests that the term of variance be until January 1, 1997, after the collection and analysis of four quarterly samples in 1996. (Pet. at 7.) The Agency, however, recommends that the variance be granted for eighteen months from the date the variance is granted. (Ag. Rec. at 13.) This will give Altamont time to monitor its water and make any needed adjustments or take any further action as required by the Agency. The additional time will also give Altamont four quarters for testing its samples to determine whether Altamont has come into compliance with the MCL for TTHM. (Ag. Rec. at 13.)

CONCLUSION

Based on the record, the Board finds that immediate compliance with the "Standards for Issuance" and "Restricted Status" regulations would impose an arbitrary or unreasonable hardship on Altamont. The Board also agrees that granting this variance does not pose a significant health risk to those persons served by any new water main extensions, particularly since compliance is to be achieved during the period of the variance.

Consistent with the Agency's recommendation, we will grant Altamont a variance which will expire June 7, 1997. This amount of time will allow Altamont to complete the comprehensive water quality improvement plan in December 1995, perform additional sampling and make any additional changes to achieve compliance during the term of the variance.

The Board's action is solely a grant of variance from "Standards of Issuance" and "Restricted Status". Altamont is not granted variance from compliance with the TTHM standard and Altamont does not stand insulated against enforcement for violation of these standards.

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

ORDER

The City of Altamont is hereby granted a variance from 35 Ill. Adm. Code 602.105(a), "Standards for Issuance", and 602.106(b), "Restricted Status", as they relate to the standards for total trihalomethanes (TTHM) in drinking water as set forth in 35 Ill. Adm. Code 611.310(c), subject to the following conditions:

1. The variance terminates on June 7, 1997.
2. In consultation with the Illinois Environmental Protection Agency (Agency), Altamont shall continue its sampling program to determine, as accurately as possible, the level of TTHM in its public water supply. Until this variance terminates, Altamont shall collect and analyze quarterly samples of its water from its distribution system at locations approved by the Agency, in accordance with 35 Ill. Adm. Code 611.680. Analysis shall be done by a laboratory certified by the State of Illinois for TTHM analysis. The results of the analyses shall be reported within 30 days of receipt of the most recent result to:

Illinois Environmental Protection Agency
Compliance Assurance Section
Division of Public Water Supplies
2200 Churchill Road
Springfield, Illinois 62794-9276

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.

3. If Altamont takes additional samples within any quarter, said additional samples shall be reported within 30 days to the Agency per the above requirements. The average of all results taken in a quarter shall then be used to calculate the running average of four quarterly sampling results.
4. 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, Altamont will send to each user of its public water supply a written notice to the effect that Altamont 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(a) "Restricted Status", as they relate to the TTHM standard.
5. If results or analyses performed on samples pursuant to 35 Ill. Adm. Code 611.685 show a violation of the maximum contaminant level (MCL) for TTHM, then public notice shall be made pursuant to 35 Ill. Adm. Code 611.851(b).
6. Until full compliance is achieved, Altamont shall take all reasonable measures with its existing equipment to minimize the level of TTHM in its finished drinking water.
7. Altamont shall provide written progress reports to the Agency at the address below every six months concerning steps taken to comply with this order. Progress reports shall quote each paragraph and immediately below each paragraph state what steps have been taken to comply with each paragraph:

Illinois Environmental Protection Agency
Division of Public Water Supply
Field Operations Section
2200 Churchill Road
P. O. Box 19276
Springfield, Illinois 62794-9276

IT IS SO ORDERED.

If the City of Altamont chooses to accept this variance subject to the above order, within 45 days of the date of this order, Altamont shall execute and forward to:

Stephen C. Ewart
Division of Legal Counsel
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. 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 the Certificate is as follows:

I (We), _____,
hereby accept and agree to be bound by all terms and conditions of the order of the Pollution Control Board in PCB 96-65, dated December 7, 1995.

Petitioner

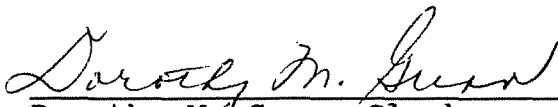
Authorized Agent

Title

Date

Section 41 of the Environmental Protection Act, (415 ILCS 5/41 (1994)), provides for appeal of final orders of the Board within 35 days of the date of service of this order. 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 7th day of December, 1995, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board