ILLINOIS POLLUTION CONTROL BOARD
January 11, 1995

VILLAGE OF HOFFMAN ESTATES,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 94-222
	)	(Variance)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by C.A. Manning):

This matter is before the Illinois Pollution Control Board (Board) on an amended petition for variance filed by the Village of Hoffman Estates (Village) on September 30, 1994.[1] The Village is seeking a variance from the Board's public notification requirements found at 35 Ill. Adm. Code 611.851 through 611.855 which are applicable to a public water supplier when its public water supply is in noncompliance with a maximum contaminant level (MCL).

The Board's responsibility in this matter arises from the Environmental Protection Act (Act) (415 ILCS 5/1 et seq. (1992).) The Board is charged there with the responsibility of granting variance from Board regulations whenever it is found that immediate 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, 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).)

The Agency recommends that the Board deny the Village's variance petition. No public hearing in this matter has been held. The Village waived a hearing, and the Board received no requests to hold a hearing.

For the reasons set forth below, the Board denies the Village's petition for variance; accordingly, this matter will be dismissed.

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[1]The Village originally filed its petition on August 16, 1994. However on September 1, 1994, the Board found the petition deficient and directed that an amended petition be filed within 45 days of the Board's order.

PROCEDURAL AND FACTUAL BACKGROUND

This case involves the Village of Hoffman Estates which is a municipal corporation of approximately 50,000 people. The Village owns and operates a public water supply and is a member of the Joint Action Water Agency (JAWA). As a public water supplier, the Village is required to collect water samples for bacteriological testing in monthly sampling periods. From February 21, 1994 through March 27, 1994 the Village collected 55 water samples. It is undisputed that of these 55 samples, four samples were total coliform positive, and as such the Village was in noncompliance with the MCL for coliform bacteria. (See 35 Ill. Adm. Code 611.325.)

Upon receipt of the laboratory results showing the four positive samples, the Village took one "resample" for each of the positive four samples. According to the Village, it contacted the Agency and was told that only one resample was required[2]. (Am. Pet. at 2.) The resamples tested negative for coliform and therefore because the Village was following an older version of the Board's rule, the Village believed that it was under no duty to give public notice of a coliform violation[3].

There are no facts in the record before us that the Village took any measures to "invalidate" the positive samples as it could have done had the total coliform samples tested positive due to improper sampling procedures. (See 35 Ill. Adm. Code Section 611.523.) Thus we can assume the Agency had no evidence that would allow it to determine whether the total coliform positive samples were from anything other than total coliform being present in the public water supply.

Accordingly, on April 25, 1994, the Agency sent a "Notice of Violation" letter (Pet. Exh. "A") to the Village notifying the Village that it had exceeded the coliform MCL and that the Village had failed to submit to the Agency the required number of

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[2]According to the Agency, none of its employees recalls a conversation wherein the Agency instructed the Village to take only one resample at each source of the positive total coliform samples. (Agency Rec. at 6.) The Agency urges that even if such a conversation took place, the Board's rules establish minimum standards, and any good faith efforts that fall below the Board requirements still constitute violation of the rules. (Agency Rec. at 4.) Had the Village properly resampled, the Village would not be in violation of the resampling procedures of 35 Ill. Adm. Code 611.522, and would not now be seeking a permanent variance from the public notice requirements.

[3]There is no statement in the record from the Village indicating the rules upon which it was relying. We note however, that the current primary drinking water standards found at 35 Ill. Adm. Code Part 611 have been effect since 1989.

repeat samples within 24 hours of the exceedences. The letter informed the Village that it was under a regulatory requirement to take three resamples for each positive sample: one at the source, one upstream and one downstream. (See 35 Ill. Adm. Code 611.522.) The letter also informed the Village that it was under three public notice requirements: (1) that the violations of the MCL must be published in a newspaper within 14 days of the sampling period (in this case, by approximately April 10, 1994); (2) that the Village must also publicly notice the MCL violation by direct mail to the public water supply customers within 45 days of the sampling period (by approximately May 11, 1994); and (3) that the Village is required to give public notice of its failure to properly take repeat samples within 90 days of the sampling period. (Pet. Exh. "A".) It is these three public notice requirements from which the Village is seeking a variance before the Board. The notice also informed the Village that failure to make the public notices, and failure to provide copies of the notice to the Agency, are violations of both state and federal law, and may result in an enforcement action. (Id.)

In response to the Agency's "Notice of Violation" letter, the Village on June 13, 1994 sent a letter to the Agency requesting a waiver from the direct mail notification requirement only. (Pet. Exh. "B".) The Village expressed concern that "mail notice will unduly alarm citizens who have a high level of confidence in "Lake Michigan water". (Id.) The Village admitted to the exceedences but, without evidence, attributed the exceedences to contaminated sampling bottles rather than coliform being present in the public water supply. The Village notified the Agency that it had conducted an investigation of the positive coliform samples and determined that there were no ill health effects, and that the resamples the Village did retake were negative. The Village further admitted that it failed to follow the regulatory-required "resampling" procedures, but that the Village's failure to do so was in good faith. (Id.)[4]

On July 26, 1994, the Agency denied the Village's request to waive direct mail public notice since the Village had not first satisfied the requirement to give newspaper public notice. (See Pet. Exh. "C".) The Agency further stated that it did have the power to give the public notice under the regulations, but that public notices made by the public water supplier itself are more favorable. (Id.) The Agency restated, as it did in the April 25, 1994 letter, that failure to make the public notices and

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[4]Though the letter from the Village states it is seeking a "waiver" rather than a "special exception permit", in light of the primary drinking water standard regulations, we assume that any relief from the public notice requirements would have granted by the Agency pursuant to the "special exception permit" provisions in 35 Ill. Adm. Code 611.851(a)(2).

forward copies of the notice to the Agency is a violation of federal and state law. (Id.)

Accordingly, the Village filed the instant petition for variance seeking relief from all of the public notification requirements set forth in 35 Ill. Adm. Code 611.851 through 611.855. To date, the Village has given no notice of any kind to its public water supply customers.

On October 28, 1994, the Illinois Environmental Protection Agency (Agency) filed its recommendation in this matter. The recommendation asks that the Board deny the requested relief and as one of the basis, the Agency argues that granting a variance would be inconsistent with federal law.

RELIEF REQUESTED

The Village argues that it would be appropriate for the Board to grant a variance from the public notice requirements found in 35 Ill. Adm. Code 611.851 through 611.855 because in these circumstances public notice would be an arbitrary and unreasonable hardship. The Village is asking that the Board permanently excuse it from the regulatory duty to notify its customers that the Village's public water supply was in noncompliance with the MCL for coliform from February 21, 1994 through March 27, 1994. The Village is also asking that the Board permanently excuse the Village from giving public notice that the Village failed to comply with the regulatorily-required resampling procedures when routine total coliform samples are found to be positive[5].

According to the Village, public notice is an arbitrary and unreasonable hardship because there was no real violation. The Village believes that the noncompliance occurred as a result of the contaminated sample bottles. The Village is concerned that any notice to the public would confuse the public, cause unnecessary alarm to the public and create a permanent loss of public confidence in the Village of Hoffman Estates' public water supply. (Am. Pet. at 3.)

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[5]Section 611.851 contains the requirements governing newspaper and mail public notice when there is noncompliance with an MCL. Section 611.852 contains the requirements for newspaper public notice when a public water supplier fails to perform monitoring as required by Part 611, or when improper testing procedures occur. Section 611.853 provides that public notice must be given to new customers when they come on-line. Section 611.854 controls the content of the public notice and Section 611.855 directs that the notice must contain information about the health effects of the violation.

AGENCY RECOMMENDATION

In response, the Agency argues that granting a variance from the public notice requirements would be improper in this case. The Agency argues that the Village has not provided a sufficient compliance plan and it has not demonstrated that ultimate compliance with the public notice requirements would cause an unreasonable or arbitrary hardship. The Agency also argues that a variance in this case would jeopardize Illinois' drinking water program because a variance from the public notice requirements would be inconsistent, if not less stringent than federal law.

DECISION

An essential feature of an environmental variance under Illinois law is that it is, by its nature, a temporary reprieve from compliance with regulations. (Monsanto Co. v. Pollution Control Board (1977), 67 Ill.2d 276, 367 N.E.2d 684.) The reprieve consists of a shield from enforcement for the period during which the variance holder is actively engaged in achieving compliance. A successful petitioner for a variance must not only be actively pursuing compliance, but must also demonstrate that coming into immediate compliance would constitute an arbitrary or unreasonable hardship. (415 ILCS 5/35(a) (1994); Willowbrook Motel v. Pollution Control Board (1st Dist. 1977), 135 Ill.App.3d 343, 481 N.E.2d 1032.)

The request for variance here before the Board fails to conform to this model in several essential respects. Most critically, the request is for a time period fully in the past, rather than for a current and future time. The effect of grant of variance under this circumstance would be to provide a shield against enforcement for acts entirely in the past. However, it is well settled that such after-the-fact grants of variance are inconsistent with the intent of the Act and are not to be used to legitimize past failure to comply with rules and regulations. (E.g., Modine Mfg. v. IEPA (December 22, 1987), PCB 85-154, 84 PCB 739.)

Moreover, the instant variance request fails to conform with the elements necessary for grant of variance in that it asks that compliance be excused rather than delayed. The Village requests that it be granted variance from past failure to give notice as required by law. Each of these notices was required by a date certain, with each date certain now past. It is accordingly no longer possible for the Village to come into compliance with the regulations from which variance is sought.

The Board has sympathy with the Village and the position in which it has found itself. Further, the Board has no reason to question that the Village acted in other than good faith. Nevertheless, the Board finds that remedy that the Village

proposes, which is grant of variance, is inappropriate, and accordingly, beyond the ability of this Board to grant.

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

ORDER

The request for variance filed by the Village of Hoffman Estates on September 30, 1994 is denied. The docket in this matter is hereby closed.

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 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 11th day of January, 1995, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board