

ILLINOIS POLLUTION CONTROL BOARD
November 21, 1991

VILLAGE OF BLOOMINGDALE,)
)
 Petitioner,)
)
 v.) PCB 91-135
) (Variance)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

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

This matter is before the Board on the August 5, 1991 filing by petitioner Village of Bloomingdale (Village) of a petition for variance. The Village seeks relief from 35 Ill. Adm. Code 602.105(a), "Standards for Issuance", and 602.106(a), "Restricted Status", to the extent those rules relate to violation by the Village's public water supply of the standards for combined radium-226 and radium-228 and for gross alpha particle activity.¹ The Village requests a two-year variance.

On September 26, 1991, the Illinois Environmental Protection Agency (Agency) filed its variance recommendation, with a motion to file instanter. The motion to file instanter is granted. The Agency recommends that the variance be granted subject to certain conditions. The Village waived hearing and none has been held.

For the following reasons, the Board finds that the Village 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 Village is a municipality located in DuPage County. The Village provides potable water supply and distribution for a population of 6,684 residential and 576 industrial and commercial utility customers, representing some 16,000 residents and 576 industries and businesses employing approximately 9,000 people as of 1991. (Pet. 7.) The water system includes three deep wells, two shallow wells, pumps, and distribution facilities. (Pet. 7.)

¹ The standard for combined radium was formerly found at 35 Ill. Adm. Code 604.301(a); effective September 20, 1990 it was recodified at 35 Ill. Adm. Code 611.330(a).

The Village was first advised that its water supply exceeded the maximum allowable concentration for combined radium in a December 26, 1990 letter from the Agency. That December 1990 analysis showed a combined radium content of 13.3 pCi/l. (Pet. 8-9; Rec. 4.) On January 4, 1991, the Agency notified the Village that it would be placed on restricted status. (Pet. 9; Rec. 4.) This is the Village's first request for a variance involving combined radium and gross alpha particle activity. (Rec. at 3.)

REGULATORY FRAMEWORK

The instant variance request concerns two features of the Board's public water supply regulations: "Standards for Issuance" and "Restricted Status". These features are found at 35 Ill. Adm. Code 602.105 and 602.106, which in pertinent part 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 (Ill. Rev. Stat. 1989, ch. 111 ½, pars. 1001 et seq.) (Act), or of this Chapter.

Section 602.106 Restricted Status

- b) The Agency shall publish and make available to the public, at intervals of not more than six months, a comprehensive and up-to-date list of supplies subject to restrictive status and the reasons why.

The principal effect of these regulations is to provide that public 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. The Village requests that it be allowed to extend its water service while it pursues compliance with the radium standards, 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. (Ill. Rev. Stat. 1989, ch. 111 ½, par. 1035(a)). 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 (1977), 135 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, as here, 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 (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, 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.

It is to be noted that grant of variance from "Standards for issuance" and "Restricted Status" does not absolve a petitioner from compliance with the drinking water standards at issue, nor does it insulate 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.

Standards for radium in drinking water were first adopted as national Interim Primary Drinking Water Regulations (NIPDWRs) by the USEPA in 1976. The standards adopted were 5 pCi/l for the sum of the two isotopes of radium, radium-226 and radium-228 (combined radium). Shortly thereafter Illinois adopted the same limits. Although characterized as "interim" limits, these standards nevertheless are the maximum allowable concentrations under both federal and Illinois law, and will remain so unless modified by the USEPA.²

Over much of the fifteen years since their original promulgation, the current radium standards have been under review at the federal level. The USEPA first proposed revision of the standards in October 1983 in an advance notice of proposed rulemaking (48 Fed.Reg. 45502). It later republished this advance notice in September 1986 (51 Fed.Reg. 34836). Most recently, on June 19, 1991, USEPA announced a proposal to modify the radium standards.³ USEPA proposes to replace the 5 pCi/l combined radium standard by separate standards of 20 pCi/l each for radium-226 and radium-228. Under the USEPA's calendar, these standards are scheduled for promulgation by April 1993 with an effective date of

² In anticipation of USEPA revision of the radium standard, the legislature amended the Illinois Environmental Protection Act at Section 17.6 in 1988 to provide that any new federal radium standard immediately supersedes the current Illinois standard.

³ Publication occurred at 56 Fed.Reg. 33050, July 18, 1991.

October 1994.⁴

COMPLIANCE PLAN

The Village intends to obtain Lake Michigan water (which has a low radium content) to replace the water currently supplied by its deep wells. The Village and several neighboring municipalities have begun construction of a Lake Michigan water transmission system. The facilities to accept and distribute Lake Michigan water are expected to be ready for operation by October 31, 1991. (Pet. 18.) The Village and other municipalities, members of the DuPage County Water Commission, have secured allocations from the State of Illinois to use Lake Michigan water and have executed numerous contracts with each other, financial institutions, governmental and private property owners, and contractors. The total cost for the water transmission system is over \$350,000,000. The Village states that although the primary purpose of this program is to cease using the dwindling supply of groundwater and assure the public of an adequate supply of high quality Lake Michigan water, the program will also eliminate the radium in the public water supply. (Pet. 10-11.) The Village states that Lake Michigan water will be delivered beginning between January 31, 1992 and May 1, 1992, with the first full year of operation anticipated in 1993. (Pet. 11.)

HARDSHIP

The Village contends that the hardship resulting from denial of the requested variance outweighs any injury to the public from granting the variance. (Pet. 2.) The Village states that only one major project is expected to connect to its water distribution system. This project is a commercial/retail planned unit development with an expected population equivalent of 270 PE persons. The Village maintains that this project is not expected to connect to the water system for at least nine months, which is after Lake Michigan water is expected to be delivered. However, the Village's placement on the restricted status list threatens the development, because the developer's lender will not issue funds for the project while the Village is on restricted status list. Without funds, ground cannot be broken for the project. The Village contends that loss of the project would mean a loss of annual sales tax revenue of between \$400,000 and \$600,000 per year. (Pet. 2.) In sum, the Village maintains that restricted status

⁴ The Board notes that the Agency states that it anticipates that the new federal standard will be adopted within 12 to 18 months after the date of publication of the proposed rule. (Rec. 6.) This would mean that the new federal standard would be adopted between July 1992 and January 1993, significantly ahead of the April 1993 and October 1994 dates given by USEPA in its July publication.

inhibits the project (which is expected to be a significant source of income), does little to protect the public health, does nothing to speed the receipt of Lake Michigan water, and accomplishes little in preventing additional use of well water. (Pet. 3.)

The Agency agrees that denial of the variance would impose an arbitrary or unreasonable hardship on the Village. (Rec. 7.)

ENVIRONMENTAL IMPACT

Although the Village has not undertaken a formal assessment of the environmental effects of its requested variance, it contends that there will be minimal or no adverse impact caused by the granting of the variance. (Pet. 11-12.) The Agency agrees with the Village's assertion. (Rec. 5-7.) Both the Village and the Agency cite the testimony presented by Richard E. Toohey, Ph.D., of Argonne National Laboratory, at the July 30 and August 2, 1985 hearings for the Proposed Amendments to Public Water Supply Regulations 35 Ill. Adm. Code 602.105 and 602.106 (R85-14) in support of the assertion that the variance will not result in any adverse environmental impact. (Pet. 12; Rec. 6.) The Agency also refers to updated testimony presented by Dr. Toohey in the Board's hearing on a variance requested by the City of Braidwood in PCB 89-212. (Rec. 6.)

While the Agency believes that radiation at any level creates some risk, it contends that the risk associated with the Village's water supply is very low. (Rec. 6.) The Agency states as follows:

The Agency believes that the hardship resulting from denial of the recommended variance from the effect of being on Restricted Status would outweigh the injury of the public from grant of that variance. In light of the likelihood of no significant injury to the public from continuation of the present level of the contaminants in question in the Petitioner's water for the limited time period of the variance, the Agency concludes that denial of a variance from the effects of Restricted Status would impose an arbitrary or unreasonable hardship upon Petitioner.

The Agency observes that this grant of variance from restricted status should affect only those users who consume water drawn from any newly extended water lines. This variance should not affect the status of the rest of Petitioner's population drawing water from existing water lines, except insofar as the variance by its conditions may hasten compliance. In so saying, the Agency emphasizes that it continues to place a high priority on compliance with the standards.

(Rec. 9-10.)

CONSISTENCY WITH FEDERAL LAW

The Agency states that the requested variance may be granted consistent with the Safe Drinking Water Act (42 U.S.C. 300(f)) and corresponding regulations (40 CFR Part 141) because the variance does not grant relief from compliance with the federal primary drinking regulations. (Rec. 8.)

CONCLUSION

Based upon 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 the Village of Bloomingdale. The Village is well on its way to receiving Lake Michigan water, which has a low radium content. As the Village points out, denial of a variance from restricted status will not speed up the delivery of Lake Michigan water, and will not lower the number of people using the higher-radium well water. Denial of the requested variance would, however, endanger the commercial/retail project which is expected to provide a significant source of income to the Village. Therefore, the Board will grant the variance.

The Board notes that the Village has only requested a two-year variance. However, the Village states that it anticipates delivery of Lake Michigan water beginning in 1992, "with its first full year of operation in 1993." (Pet. 11.) Assuming that delivery does not begin until May 31, 1992, the two-year requested variance might be insufficient pursuant to 35 Ill. Adm. Code 611.731(a) which requires four quarterly samples to establish compliance. Hence, the Board will grant this variance for a maximum period of two and a half years, with the extra time being solely for the purpose of testing, subject to certain conditions which could result in an earlier termination of this variance.

Today's action is solely a grant of variance from standards of issuance and restricted status. The Village is not granted variance from compliance with the combined radium or gross alpha particle activity standards, nor does today's action insulate the Village in any manner 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 Village of Bloomingdale 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 combined radium-226 and radium-228 and for gross alpha

particle activity in drinking water as set forth in 35 Ill. Adm. Code 611.330, subject to the following conditions:

- (A) Variance shall terminate on the earliest of the following dates:
 - (1) May 31, 1994; or
 - (3) When analysis pursuant to 35 Ill. Adm. Code 611.720(d) and 611.731(a), or any compliance with standards then in effect, shows compliance with standards for radium in drinking water then in effect.
- (B) Compliance shall be achieved with any standards for radium then in effect no later than the date on which this variance terminates.
- (C) The Village shall report to the Illinois Environmental Protection Agency (Agency) within 6 months of the grant of this variance as to the status of obtaining Lake Michigan water and shall submit to the Agency a copy of the fully executed contract between the Village and all other interested parties.
- (D) Construction of all installations, changes or additions necessary to achieve compliance with the maximum contaminant level in question shall be completed no later than May 31, 1993. The additional year of the variance (from May 31, 1993 to May 31, 1994) is to be used solely to prove compliance.
- (E) In consultation with the Agency, the Village shall continue its sampling level of radioactivity in its wells and finished water. Until this variance terminates, the Village shall collect quarterly samples of its water from its distribution system at locations approved by the Agency. The Village shall composite the quarterly samples from each location separately and shall analyze them annually by a laboratory certified by the State of Illinois radiological analysis so as to determine the concentration of radium-226, radium-228 and gross alpha particle activity. At the option of the Village, the quarterly samples may be analyzed when collected. 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

- (F) Pursuant to 35 Ill. Adm. Code 611.851(b) (formerly 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, the Village will send to each user of its public water supply a written notice to the effect that the Village 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 combined radium and gross alpha standards.
- (G) Pursuant to 35 Ill. Adm. Code 611.851(b) (formerly 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, the Village will send to each user of its public water supply a written notice to the effect that the Village is not in compliance with the standard in question. The notice shall state the average content of the contaminants in question in samples taken since the last notice period during which samples were taken.
- (H) Until full compliance is achieved, the Village shall take all reasonable measures with its existing equipment to minimize the level of combined radium-266 and radium-228 and gross alpha particle activity in its finished drinking water.
- (I) The Village shall provide written progress reports to the Agency at the address below every six months concerning steps taken to comply with the paragraphs of this Order. Progress reports shall quote each of said paragraphs and immediately below each paragraph state what steps have been taken to comply with each paragraph. The progress reports shall be sent to:

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

Within forty-five days of the date of this Order, the Village shall execute and forward to:

Stephen C. Ewart
Division of Legal Counsel
Illinois Environmental Protection Agency

P.O. Box 19276
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. 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.

I (We), _____,
hereby accept and agree to be bound by all terms and conditions of the Order of the Pollution Control Board in PCB 91-135, November 21, 1991.

Petitioner

Authorized Agent

Title

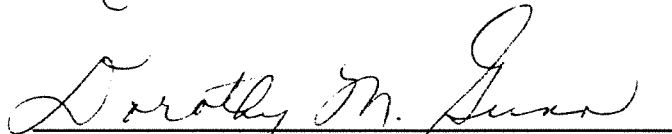
Date

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1989 ch. 111 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.

J.D. Dumelle concurred, and B. Forcade dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 21st day of November, 1991, by a vote of 5-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board