

ILLINOIS POLLUTION CONTROL BOARD
June 30, 1988

IN THE MATTER OF:)
)
PROPOSED AMENDMENTS TO) R85-14
PUBLIC WATER SUPPLY)
REGULATIONS, 35 ILL. ADM.)
CODE 602.105 and 602.106)

DISMISSAL OF PROPOSAL.

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

Procedural History

This proposal was initiated by the regulatory proposal filed by the Illinois Environmental Protection Agency (Agency) on June 12, 1985. The purpose of the proposal is to "suspend" the effects of restricted status to allow Agency issuance of water main extension permits until January 1, 1989 to certain public water supplies. More specifically, the proposal would affect over 100 municipal and other water supplies which are presently on restricted status and which deliver water to their customers containing:

- a) fluoride at concentrations less than or equal to 4.0 mg/l.
- b) combined radium 226 and 228 at concentrations less than or equal to 20 pCi/l, and
- c) gross alpha particle activity at concentrations less than or equal to 60 pCi/l.

The Agency stated in its proposal that there were "compelling reasons" supporting it, including its beliefs that:

- 1. "the standards are being reviewed by USEPA";
- 2. "for a few years, there is unlikely to be any significant public or environmental harm";
- 3. "the economic burden of compliance is not outweighed by public or environmental benefit"; and
- 4. "it would be economically unreasonable to stop" the growth of those communities awaiting Lake Michigan water meeting existing MAC

requirements as a longer term solution to achieve compliance until it is actually obtained (expected to occur "in several years") (Proposal, pp. 5-6).

On June 13, 1985, the Board ordered first notice publication in the Illinois Register, which notice appeared at 9 Ill. Reg. 10594. On August 15, 1985, after two public hearings, held on July 30, 1985 and August 2, 1985, the Board adopted the proposal as emergency rules which expired January 11, 1986.

Additional merit hearings were held on June 10 and August 25, 1986. On October 23, 1986, the Department of Energy and Natural Resources (DENR) filed a "hearing copy" of its study "An Economic Impact of Proposed Amendments to Public Water Supply Regulations Pending Before the Illinois Pollution Control Board" (EcIS).

By Order of April 16, 1987, the Board again directed first notice publication of this proposal, as required by the Administrative Procedures Act when a rule has not been adopted within one year of first notice publication. This notice appeared at 11 Ill. Reg. 7873 on May 1, 1987. Economic hearings were held on May 5 and May 12, 1987. On August 24, 1987, DENR filed a "final report" of this EcIS which contained certain changes on the basis of information presented at hearing.

For the reasons outlined below the Board hereby dismisses this docket.

General Background and Overview

The Federal Safe Drinking Water Act requires USEPA to establish regulations for contaminants which may have any adverse human health effect. The fluoride standard was promulgated December 24, 1975. The USEPA regulations on combined radium and gross alpha were promulgated in their final form on July 9, 1976. Both regulations became effective at the federal level June 24, 1977.

USEPA delegated to the State of Illinois its primary enforcement authority, so state standards must be as strict as federal standards. The Pollution Control Board adopted the fluoride and combined radium and gross alpha standards and they became effective August 29, 1978.

Delays occurred in determining compliance, particularly with the radiological quality standards. It takes a year of collecting to obtain a sample to analyze for compliance with the combined radium and gross alpha standards. In the early 1980's, some analyses were invalid due to laboratory error and needed to be re-analyzed. USEPA agreed to analyze samples on a time as

available basis, which turned out to be two years before analyses were reported to IEPA. The last federal reports came in 1985. More than one hundred supplies were found to have excessive combined radium or gross alpha levels, and more than 40 to have excess fluoride.

Many supplies requested temporary relief by way of variances from these standards. For most, the Agency recommended a grant of the requested variance and the Board granted the variances in most instances.

USEPA determined that in its opinion variances from federal standards could not be granted unless the supply had already installed the treatment technology. USEPA revoked a number of variances in 1986. Since spring of 1986, the IEPA had been recommending that supplies seek variances only from the restricted status regulations, not the federal regulations.

Congress passed amendments to the Safe Drinking Water Act in the latter half of 1986. USEPA was mandated by Congress to initiate enforcement action in a prescribed manner. Illinois EPA in close consultation with USEPA has been developing what may be called an enhanced enforcement program. Under this program all public water supplies that do not have USEPA approved enforceable compliance plans when the program starts will face enforcement action, leading either to compliance orders or federal administrative orders. The result of this is that all systems violating all standards, including the radiological standards, must come into compliance within a few years.

The Board's restricted status rule, which prohibits the Agency from issuing permits for water main extensions, is exclusively a state rule: Illinois is not required to have such a rule pursuant to the SDWA, and USEPA rules do not contain a restricted status component. One effect of the rule is to provide an additional economic incentive for achievement of compliance, especially in cases where no formal enforcement action had been initiated.

The Agency filed its proposal on June 12, 1985 and asked that the proposed rule expire January 1, 1989. The reason for the proposal and the time limit to the rule are related.

One reason for the proposal was that USEPA had proposed rule-making on these contaminants and the Agency believed there was a chance the standards could be changed before 1989. Hence, the Agency proposed relaxing the economic penalty for violating these standards while USEPA was reviewing its standards. Another reason was that, given the number of communities which had only recently learned of their violations of the standard, it appeared that a rule change would be in the best interests of all

concerned, as it would avoid the necessity of processing numerous variance petitions.

USEPA did relax its fluoride standard in April of 1986. USEPA has not as yet taken action on the radiological standards.

Reasons For Dismissal

The Board will not summarize the substantial technical testimony which was presented in this docket relative to the health effects of ingestion of water containing fluoride or combined radium at various levels, as this testimony provides no basis for the Board's determination to dismiss this docket. As aforementioned, one of the bases for this proposal was considerations of administrative economy, that is, that the affected class should be given regulatory relief from the restricted status rules to avoid the necessity of their seeking similar relief one-by-one in variance proceedings. Given the shift in enforcement priorities resulting from the 1986 SDWA amendments, it is to the benefit of the Board, the Agency, and the affected communities to retain intact the restricted status rule which fosters entry, by way of a Board variance, of an Order tailored to a community's individual compliance problems, including any economic ones.

Generally, the Board finds that while the proposal was a reasonable and appropriate response to a problem when made in 1985, amendment of the rule as suggested today would be highly inappropriate, given events which have occurred and experience which has been gained by the Agency and the Board during the pendency of this proceeding.

In 1985, many of the affected communities shared a "common hardship": they had only recently been informed of their non-compliance status, and so could not be reasonably expected to have cured the problem. Under these circumstances, the restricted status sanction, whose effect is to halt economic development, did not appear to be "fair", particularly since revenue increases brought by economic development would assist communities in financing the very system improvements or deep well water supply alternatives which would be necessary to achieve compliance.

The Board takes official notice of the fact that, since 1985, it has received 27 petitions for variance from the restricted status rules as they relate to radium, and 4 petitions for variance from the restricted status rules as they relate to fluoride. The Board incorporates into this record as Group

Exhibit No. 58, the Opinions and Orders which it has entered in cases which have come to judgment.*

* Where a case is still pending, the word "open" appears in parentheses following the case name and number; otherwise, the decision date is listed.

The 4 restricted status/fluoride cases are as follows:

Village of Wataga v. EPA, PCB 85-20 (August 15, 1985)
Turnberry Utilities, Inc. v. EPA, PCB 87-186 (December 3, 1987)
McIntosh, Ltd.-Holdings v. EPA, PCB 88-81 (Open)
Turnberry Utilities, Inc. v. EPA, PCB 88-88 (Open)

The 27 restricted status/radium cases are as follows:

City of Batavia v. EPA, PCB 85-11, April 4, 1985
Village of Hanover Park v. EPA, PCB 85-22 (May 30, 1985)
Village of Hanna City v. EPA, PCB 85-40 (July 11, 1985)
City of Aurora v. EPA, PCB 85-51 (July 11 and July 19, 1985)
City of Geneva v. EPA, PCB 85-93 (September 20, 1985)
Village of Minooka v. EPA, PCB 85-100 (September 20, 1985)
Village of Oswego v. EPA, PCB 85-106 (June 20, 1985)
Village of Montgomery v. EPA, PCB 87-5 (April 16, 1987)
Village of Plainfield v. EPA, PCB 87-9 (April 16, 1987)
City of Lockport v. EPA, PCB 87-16 (June 10, 1987)
City of Yorkville v. EPA, PCB 87-33 (April 16, 1987)
Village of Minooka v. EPA, PCB 87-35 (September 17, 1987)
City of Oglesby v. EPA, PCB 87-37 (July 16, 1987)
Village of Roselle v. EPA, PCB 87-39 (December 3, 1987)
Village of Romeoville v. EPA, PCB 87-69 (June 2, 1988)
City of Batavia v. EPA, PCB 87-79 (August 20, 1987)
Village of North Aurora v. EPA, PCB 87-83 (October 15, 1987)
Lake County Public Works Department Wildwood Subdivision Water Supply System v. EPA, PCB 87-107 (April 7, 1988)
Village of Willowbrook v. EPA, PCB 87-114 (February 4, 1988)
Village of Hinckley v. EPA, PCB 87-140 (November 19, 1987)
City of Yorkville v. EPA, PCB 87-158 (January 21, 1988)
County of Lake (Vernon Hills Public Water Supply System) v. EPA, PCB 87-198 (May 5, 1988)
Village of Elburn v. EPA, PCB 88-4 (June 2, 1988)
City of Geneva v. EPA, PCB 88-11 (May 5, 1988)
Village of Ladd v. EPA, PCB 88-30 (March 24, 1988)
Village of Channahon v. EPA, PCB 88-42 (June 30, 1988)
Village of Coal City v. EPA, PCB 88-83 (June 30, 1988)

Some of these cases are requests for extensions of prior variances, while others are requests from communities with newly discovered problems. Without singling out any particular communities for praise or blame, the Board will generally observe that the petitions filed, particularly restricted status/radium ones, do not indicate that a "common hardship" exists. While many communities have diligently worked to solve their problems in timely fashion, others who have requested variance extensions have done little or nothing during the initial variance term based on a strategy of "waiting and seeing" whether standards would change, a strategy which is totally unacceptable to the Board.

The Agency's enhanced enforcement program, inaugurated last year, does address the problem of the "wait and see" public water supplies to some extent.

As explained by the Agency at the last two hearings in this matter the enhanced enforcement program works as follows:

"Basically, if certain communities are in violation, they are on the USEPA computer program, and we will be notified, and pursuant to the Federal Act [SDWA] if enforcement action is not undertaken within certain time periods, the Federal Government, USEPA, must take enforcement action as a matter of federal law.

Roughly speaking, what we would do is contact the communities, pursuant to Section 31(B) of the Act, provide notice of the violations, ask them to meet with us to come up with a compliance plan.

After that meeting we would expect them to present the compliance plan, which would be somewhat similar to the IEPA model variance petition package, which has increments of progress and a final compliance date.

They would then come back to us later with a final engineering situation, but we also would turn this compliance plan into an enforceable order, either a Pollution Control Board order or court order.

Then pursuant to that court order, we would expect a penalty to be paid as well as compliance with the compliance plan and with the order. (R. 237-239).

The Agency went on to explain, however, that resource limitations will likely not permit it to immediately commence proceedings against all public water supplies which are not in compliance; rather, the Agency will need to prioritize some situations over others, and proceed on a phased basis over a period of years.

Given these circumstances, retention of the existing restricted status rule will serve to stretch enforcement resources by giving water supply owners additional economic incentive to interact with the Agency and the Board by way of variance proceedings, rather than following a natural, if regrettable, tendency to "wait and see" if formal enforcement proceedings are commenced.

For these reasons, the Board is dismissing this docket, whose stated purpose was amendment of the restricted status rules only, and which did not seek to amend the fluoride or radiological quality standards themselves. The issue of changing these underlying standards has been indirectly raised in this docket and is deserving of brief mention here.

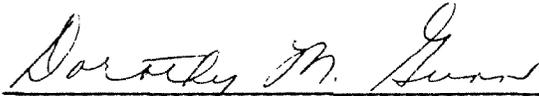
As to the fluoride standard, the Board notes that it has the legal authority to raise the standard to the 4.0 mg/l level established by USEPA, and that the Agency has already developed a technical record in this proceeding which can be utilized in a docket devoted to consideration of raising the standard. By Order of April 21, 1988, the Board opened Docket R88-13 for the purpose of considering revisions to the fluoride standard. As noted in the Board's Order of June 2, 1988 in R88-13, in response to a request by the Board, the Agency is presently consulting with USEPA to determine what program elements must be addressed in a proposal. The Board presently anticipates adopting a first notice proposal shortly after receipt of Agency comments, now due by July 2, 1988.

As to the combined radium and gross alpha standards, the Board will consider initiation of a docket to modify them only in the event that USEPA makes any modification.

For these reasons, this docket is dismissed.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 30~~th~~ day of June, 1988, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board