

ILLINOIS POLLUTION CONTROL BOARD
February 7, 1991

CITY OF TOLUCA,)	
)	
Petitioner,)	
)	
v.)	PCB 90-226
)	(Variance)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

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

This matter comes before the Board upon a filing by the Village of Toluca ("Toluca") on December 4, 1990 of a Petition for Variance ("Pet."). Toluca seeks relief from 35 Ill. Adm. Code 602.105(a), "Standards for Issuance", and 602.106(b), "Restricted Status", to the extent those rules relate to violation by Toluca's public water supply of the 5 picocuries per liter ("pCi/L") combined radium-226 and radium-228 standard and 15 picocuries per liter gross alpha particle activity standard of 35 Ill. Adm. Code Subtitle F¹. Variance is requested for two years.

The Illinois Environmental Protection Agency ("Agency") filed its Variance Recommendation ("Rec.") on December 17, 1990 and its Amended Recommendation ("A.Rec.") on January 2, 1991. The Agency Amended Recommendation is accompanied by its Motion to File Recommendation Instanter ("Mot."). That motion is hereby granted. The Agency recommends that variance be granted, subject to conditions. Hearing was waived and none has been held.

Based on the record before it, the Board finds that Toluca has presented adequate proof that immediate compliance with the Board regulations at issue would impose an arbitrary or unreasonable hardship. Accordingly, the variance will be granted, consistent with this Opinion and as set forth in the Order.

BACKGROUND

¹ The standards for combined radium and gross alpha particle activity were formerly found at 35 Ill. Adm. Code 604.301(a) and 604.301(b) respectively; effective September 20, 1990 they were recodified to 35 Ill. Adm. Code 611.330(a) and 611.330(b) respectively (see Illinois Register, Volume 14, Issue 40, October 5, 1990).

Toluca is a municipality located in Marshall County. Among other services, Toluca provides potable water supply and distribution to 591 residential, and 49 industrial and commercial utility customers representing approximately 1400 residents (Pet.¶9). Toluca's water supply system is a deep well system drawn from two wells, identified respectively as wells #2 and #3 (Pet.¶11; Pet.Attachment, p.3).

Toluca was first advised that its water supply was being placed on restricted status by letter from the Agency dated November 17, 1987 (Pet.¶13). The combined radium and gross alpha particle activity concentrations which originally resulted in Petitioner being placed on restricted status are not given in either the petition or in the Agency Recommendation. An April 27, 1990 analyses gave a result of 15.5 pCi/L for radium-226 and radium-228 content. Gross alpha particle activity was also reported to be 15.5 pCi/L (Rec.¶11).

Toluca has neither sought nor received prior variance as regards this matter.

REGULATORY FRAMEWORK

The U.S. Environmental Protection Agency ("USEPA") has promulgated a maximum concentration limit for drinking water of 5 pCi/L of combined radium-226 and radium-228. Illinois subsequently adopted this same limit as the maximum allowable concentrations under Illinois law. Pursuant to Section 17.6 of the Illinois Environmental Protection Act (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1017.6), any revision of the 5 pCi/L combined standard by the USEPA will automatically become the standard in Illinois. Illinois' adopted maximum concentration for gross alpha particle activity is 15 pCi/L (35 Ill. Adm. Code 611.330(b)).

The action that Toluca requests here is not variance from the maximum allowable concentrations for radium or gross alpha particle activity. Regardless of the action taken by the Board in the instant matter, these standards will remain applicable to Toluca. Rather, the action Toluca requests is the temporary lifting of prohibitions imposed pursuant to 35 Ill. Adm. Code 602.105 and 602.106. In pertinent part these Sections 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 1/2, 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.

Illinois regulations thus provide that communities are prohibited from extending water service, by virtue of not being able to obtain the requisite construction permits, if their water fails to meet any of the several standards for finished water supplies. This provision is a feature of Illinois regulations not found in federal law. It is this prohibition which Toluca requests be lifted. Moreover, grant of the requested variance would not absolve Toluca from compliance with the combined radium and gross alpha particle activity standards, nor insulate Toluca from possible enforcement action brought for violation of those standards.

In consideration of any variance, the Board determines 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 1/2, 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, 481 N.E.2d 1032). Only with such showing can the claimed hardship rise to the level of arbitrary or unreasonable hardship.

Lastly, a variance by its nature is 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.

COMPLIANCE PROGRAM

Toluca's compliance plan was submitted to the Agency in the form of a Letter of Commitment which described actions it would take to achieve full compliance (see Pet.Att. No.2). On March 16, 1989 Toluca submitted to the Agency a Compliance Report and Compliance Plan which described alternative methods of control

which could be undertaken. Toluca has elected to construct a reverse osmosis treatment plant and has authorized the necessary engineering designs to ensure project completion. To partially finance the project cost (\$804,000), Toluca applied for and received a grant of \$350,000 from the Illinois Department of Commerce and Community Affairs (Pet.¶14-18). In its Amended Recommendation, the Agency states that Toluca should come into compliance under this plan, within one year, with an additional year to prove compliance (A.Rec.¶A). The Agency recommends that the variance expire on December 1, 1991 (A.Rec.¶B). Given the Agency's explanation that an extra year be afforded for proof of compliance, the Board reasons that the Agency intended to recommend the variance expire December 1, 1992 (A.Rec.¶A).

HARDSHIP

Toluca contends that denial of variance would constitute an arbitrary or unreasonable hardship. It notes that:

- a) The variance will allow the system to continue to operate until compliance is achieved;
- b) Continued presence on Restricted Status would have an adverse effect on prospective developers and industries which may be considering locating in the City of Toluca;
- c) Without the variance the Petitioner is not eligible to issue general obligation bonds . . . and it would be forced to issue revenue bonds in lieu thereof, at a significantly higher interest rate (Pet.¶19).

The Agency also contends that denial of variance would constitute an arbitrary or unreasonable hardship (Rec.¶27). The Agency's revised recommendation, however, revises certain "internal" compliance dates. The Agency states that it conferred with Petitioner and determined that these dates were "more realistic." As stated above, ultimate compliance was to be achieved by December 1, 1992 (see Mot., p.1; A.Rec.¶A).

PUBLIC INTEREST

Although Toluca has not undertaken a formal assessment of the environmental effect of its requested variance, it contends that there will be little or no adverse impact caused by the granting of variance (Pet.¶18). The Agency contends likewise (Rec.¶16). In support of its contention, the Agency (Rec.¶15) references testimony presented by Richard E. Toohey, Ph.D. of Argonne National Laboratory at the hearing held on July 30 and

August 2, 1985 in R85-14, Proposed Amendments to Public Water Supply Regulations, 35 Ill. Adm. Code at 602.105 and 602.106, to the testimony of Dr. James Stebbings in the same proceeding, and to updated testimony presented by Dr. Toohey in the Board's hearing on the Braidwood variance, PCB 89-212.

The Agency believes that while radiation at any level creates some risk, the risk associated with Toluca's water is very low (Rec. ¶14). In summary, the Agency states:

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 cost to the Petitioner of treatment of its current water supply, the likelihood of no significant injury to the public from continuation of the present level of the contaminant in question in the Petitioner's water for the limited time period of the variance, and the possibility of compliance with a new MCL standard by less expensive means if the standard is revised upward, 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. Grant of variance may also, in the interim, lessen exposure for that portion of the population which will be consuming more effectively blended water. In so saying, the Agency emphasizes that it continues to place a high priority on compliance with the standards.

(Rec. ¶27 and ¶28)

CONCLUSION

The Board finds that, in light of all the facts and circumstances in this case, denial of variance would impose an arbitrary or unreasonable hardship upon Toluca. The Board also agrees with the parties that no significant health risk will be incurred by persons who are served by any new water main extensions, assuming that compliance is timely forthcoming.

The Board has slightly altered the proposed compliance dates contained in the Agency's Amended Recommendation in order to provide the full two years of variance, as requested by Toluca

and as intended by the Agency. The variance, therefore, will begin on the date of this Board Order and terminate February 7, 1993.

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

ORDER

Petitioner, Village of Toluca, is hereby granted variance from 35 Ill. Adm. Code 602.105(a), Standards of Issuance, and 602.106(b), Restricted Status, as they relate to the standards for radium and gross alpha particle activity in drinking water of 35 Ill. Adm. Code.Subtitle F, subject to the following conditions:

- (A) Variance shall terminate on the earliest of the following dates:
 - (1) When analysis pursuant to 35 Ill. Adm. Code 611.720(d), or any compliance demonstration method then in effect, shows compliance with any standards for radium and gross alpha particle activity in drinking water then in effect; or
 - (2) February 7, 1993.
- (B) Compliance shall be achieved with any standards for radium and gross alpha particle activity then in effect no later than the date on which this variance terminates.
- (C) In consultation with the Illinois Environmental Protection Agency ("Agency"), Petitioner shall continue its sampling program to determine as accurately as possible the level of radioactivity in its wells and finished water. Until this variance terminates, Petitioner shall collect quarterly samples of water from its distribution system at locations approved by the Agency. Petitioner shall composite the quarterly samples for each location separately and shall have them analyzed annually by a laboratory certified by the State of Illinois for radiological analysis so as to determine the concentrations of radium-226, radium-228 and gross alpha particle activity. At the option of Petitioner the quarterly samples may be analyzed when collected. The results of the analysis 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
P.O. Box 19276
2200 Churchill Road
Springfield, Illinois 62794-9276

- (D) Within 3 months of this grant of variance, Petitioner shall apply to the Agency at the address below for all permits necessary for construction of installations, changes, or additions to Petitioner's public water supply needed for achieving compliance with the maximum allowable concentration for combined radium and gross alpha particle, or with any standards for radium in drinking water then in effect:

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

- (E) Within one month after each construction permit is issued by the Agency, Petitioner shall advertise for bids, to be submitted within 60 days, from contractors to do the necessary work described in the construction permit. Petitioner shall accept appropriate bids within a reasonable time. Petitioner shall notify the Agency at the address in condition (D) of each of the following actions: 1) advertisement for bids, 2) names of successful bidders, and 3) whether Petitioner accepted the bids.
- (F) Construction allowed on said construction permits shall begin within a reasonable time of bids being accepted, but in any case, construction of all installations, changes or additions necessary to achieve compliance with the maximum allowable concentration of combined radium and gross alpha particle activity, or with any standards for radium and gross alpha particle activity in drinking water then in effect, shall begin no later than 6 months of this grant of variance. Petitioner shall complete construction no later than one year after grant of this variance.
- (G) 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, Petitioner shall send to each user of its public water supply a written notice to the effect that Petitioner 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(b) Restricted Status, as they relate to the radium and gross alpha particle activity standards.

- (H) 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, Petitioner shall send to each user of its public water supply a written notice to the effect that Petitioner is not in compliance with standards for radium and gross alpha particle activity. The notice shall state the average content of radium and gross alpha particle activity in samples taken since the last notice period during which samples were taken.
- (I) Until full compliance is achieved, Petitioner shall take all reasonable measures with its existing equipment to minimize the level of combined radium, radium-226, radium-228 and gross alpha particle activity in its finished drinking water.
- (J) Petitioner shall provide written progress reports to the Agency at the address below every six months concerning steps taken to comply with paragraphs B-I. Progress reports shall quote each of said paragraphs and immediately below each paragraph state what steps have been taken to comply with each paragraph:

Illinois Environmental Protection Agency
Field Operations Division
2200 Churchill Road
Springfield, Illinois 62794-9276

This Order is issued by the Board to abate a violation of the Act, and constitutes an order for such purposes, pursuant to Section 46 of the Act. Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1046.

Within 45 days of the date of this Order, Petitioner shall execute and forward to Stephen C. Ewart, Division of Legal Counsel, Illinois Environmental Protection Agency, 2200 Churchill Road, Post Office Box 19276, Springfield, Illinois 62794-9276, a Certification of Acceptance and Agreement to be bound to all terms and conditions of this variance. The 45-day period shall be held in abeyance during any period that this matter is being appealed. Failure to execute and forward the Certificate within 45 days renders this variance void and of no force and effect as a shield against enforcement of rules from which variance was granted. The form of said Certification shall be as follows:

CERTIFICATION

I, (We), _____,
hereby accept and agree to be bound by all terms and conditions
of the Order of the Pollution Control Board in PCB 90-226,
February 7, 1991.

Petitioner

Authorized Agent

Title

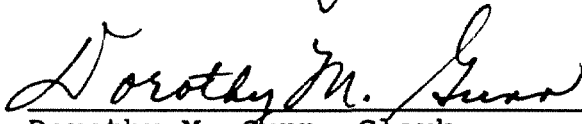
Date

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.

IT IS SO ORDERED.

Board Member 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 7th day of February, 1991, by a vote of 5-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board