

ILLINOIS POLLUTION CONTROL BOARD
February 1, 1996

WYNSTONE PROPERTY OWNERS')	
ASSOCIATION,)	
)	
Petitioner,)	
)	
v.)	PCB 96-113
)	(Variance - Water)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by R.C. Flemal):

This matter is before the Board on the November 29, 1995 filing by the Association, Wynstone Property Owners' Association (Association), of a petition for variance. The Association seeks relief from 35 Ill. Adm. Code 602.105(a), Standards for Issuance, and 602.106(b), Restricted Status, but only to the extent those rules involve 35 Ill. Adm. Code 611.330 (combined radium-226 and radium-228). The Association requests a variance for five years from January 18, 1996, until January 18, 2001, or until the United States Environmental Protection Agency (USEPA) adopts revised radium standards.

On December 22, 1995, the Illinois Environmental Protection Agency (Agency) filed its variance recommendation. The Agency recommends that the variance be granted for relief from 35 Ill. Adm. Code 602.105(a), Standards for Issuance, and 602.106(b), Restricted Status, subject to certain conditions. The Association waived hearing and none was held.

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 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 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).)

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

BACKGROUND

The Wynstone Property Owners' Association is located at 133 North Wynstone Drive, North Barrington, Lake County, Illinois. According to the Association, it provides potable water through a distribution system for a population of 250 residential customers representing approximately 1,000 residents. The Association is not part of a regional public water supply system. Water is provided to all residential users as needed and charged according to rates established by the Association. (Pet. at 3.)

The Association's water supply system consists of four deep wells, pumps, and distribution facilities. (Pet. at 3.) The wells depth and the year drilled is as follows: Well #1, 1,000 ft, 1988; Well #2, 1,000 ft., 1988; Well #3, 1,321 ft., 1992; and Well #4, 1,000, 1989. (Pet. at 3.) According to the Agency records, the Association has not previously sought variance from radium regulations. The Association is not presently on restricted status for exceeding any other contaminant. (Rec. at 5.)

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. 1991, ch. 111 , pars. 1001 et seq.) (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.

- 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.

Section 611.330 Radium and Gross Alpha Particle Activity

The following are the MCL's for radium-226 and radium-228.

- a) Combined radium-226 and radium-228 - 5 pCi/L.

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 public water supplies.

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 upon 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 (1st Dist. 1977), 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 or 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 (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 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 does not absolve the Association from compliance with the drinking water standards at issue, and does not insulate the Association from possible enforcement action brought for violation of those standards. The underlying standards remain applicable to the Association regardless of

whether variance is granted or denied.

Standards for combined radium in drinking water were first adopted as National Interim Primary Drinking Water Regulations (NIPDWRs) by the USEPA in 1976. The standard adopted was 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 contaminant levels under both federal and Illinois law, and will remain so unless modified by the USEPA¹.

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). On June 19, 1991, the USEPA announced a proposal to modify both standards. 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.

This change was to be promulgated by April 1995, but this deadline was later extended to September 1995. However, Congress has prohibited funds to promulgate final radionuclide standards for fiscal years 1994 and 1995. Mr. Joseph Harrison, Chief of the Safe Drinking Water Division, USEPA Region V, announced that in light of the projected proposal for the relaxed standard, the USEPA would not force any municipality to spend funds to comply with the federal combined standard. Most recently the Federal Register has indicated that radionuclide standards are no longer scheduled for a specific final regulatory action date. (60 Fed. Reg. 60656, November 28, 1995.)

COMPLIANCE PLAN

As referenced above, the current combined standard for radium-226 and radium-228 is 5 pCi/L. The Association's most recent water supply analyses, completed on August 8, 1995, showed a combined radium content of 8.1 pCi/L. (Rec. at 4.) The 8.1 pCi/L was obtained from composite samples compiled from four consecutive quarterly samples.

¹ In anticipation of USEPA revision of the radium standard, the legislature amended the Act at Section 17.6 in 1988 to provide that any new federal radium standard immediately supersedes the current Illinois standard.

On February 6, 1995, the Agency notified the Association of the exceedence of the MCL for radium-226 and radium-228 in its water supply. Accordingly on February 21, 1995 the Association was placed on the Restricted Status List. (Rec. at 5.)

Subsequent to being placed on restricted status, the Association had been investigating opportunities to reduce the amount of radium in its water supply. During the term of the variance the Association will maximize the utilization of water from Wells #1, #2, and #4, in addition to increasing the production of Well #3; Well #3 has the highest combined radium level and is the principal water supply source. The Association believes it is not feasible to blend the existing water well supplies to meet the MCL. (Pet. At 4.)

The Association claims it will continue its good faith effort to achieve compliance with the radium standards. (Rec. at 7.) The Association agrees to continue its present testing program to accurately determine the level of radioactivity in its wells and finished water. (Rec. at 7.) The Association shall submit quarterly progress reports to the Agency regarding all actions taken to determine and implement a compliance plan as well as continue to notify its customers of its variance and radiological levels in its water. (Id.) Additionally, the Association will plan for additional water storage facilities. (Pet. at 6.)

HARDSHIP

The Association asserts that compliance with the standard does not significantly benefit the public or environment and any expenditure of money to comply is an arbitrary or unreasonable hardship. The Agency believes that while radiation at any level creates some risk, the risk associated with this level is very low. (Rec. at 6.) The Agency agrees with the Association that grant of the requested variance would impose no significant injury to the public or to the environment for the limited time period requested and that denial would be an arbitrary and unreasonable hardship to the Association. (Rec. at 9.) Denial of the requested extension of variance would require the Agency to deny construction and operating permits until compliance is achieved. According to the Agency, the result of placing the Association on restricted status would mean no new water main extensions permits could be issued and further development would be prevented. (Id.)

ENVIRONMENTAL IMPACT

The Association has not formally assessed the effect of this variance on the environment. (Pet. At 5.) However, the Association is of the opinion that granting the variance will not cause harm to the environment or to the people served by the wells and distribution system in question. (Id.)

The Agency believes an increase in the allowable concentration for contaminants in question "should cause no significant health risk for a limited population served by new water main extensions for the time period of this recommended variance". (Rec. at 8.) The Agency cites the testimony presented by Richard E. Toohey, Ph.D., at the June 25, 1985 hearing in PCB 85-54 and R85-14, the Proposed Amendments to Public Water Supply Regulations, 35 Ill. Adm. Code 602.105 and 602.106, as well as the updated testimony presented by Dr. Toohey in the Board's hearing for a variance requested by the Association of Braidwood in Association of Braidwood v. IEPA, (June 21, 1990), PCB 89-212, to show additional information regarding combined radium levels. (Rec. at 7.) The Agency notes that the variance should affect only those users who consume water drawn from any newly extended water lines. (Rec. at 11.)

CONSISTENCY WITH FEDERAL LAW

The Agency states that the requested variance for relief from 35 Ill. Adm. Code 602.105(a) and 602.106(b) may be granted consistent with the Safe Drinking Water Act (SDWA), PL 93-523, as amended by PL 96-502, 42 U.S.C. 300(f) and corresponding regulations (40 CFR Part 141) because the variance does not grant relief from compliance with the national primary drinking regulations. (Rec. at 10.) The Agency states that granting a variance from the effects of restricted status affects State and not federal law and regulations; a variance from the effect of restricted status would allow water main extensions, under the Act and Board regulations. (Rec. at 10.) The Agency further states that the recommended variance is not a variance from USEPA's national primary drinking water regulations and does suspend the effect of the SDWA. (Id.) The Agency asserts that a federal variance is not at issue and there should be no risk to the State of Illinois of loss of primacy. (Id.) The Agency states that the Association will remain subject to the possibility of enforcement for violations of the MCL for the contaminants in question under state and federal law. (Id.) The Agency concludes that because continuing progress is being made towards compliance while awaiting final promulgation of the

standard, it is unlikely that the USEPA will object to the issuance of the recommended variance. (Id.)

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 Association. The Board agrees with the Agency that denial of the recommended variance would outweigh the injury to the public from granting variance. The Board also agrees with the parties that granting this variance does not pose a significant health risk to those persons served who will be affected by the variance, assuming that compliance is timely forthcoming.

The Board notes that timely compliance by the Association may be affected by USEPA action to promulgate new standards for radionuclides in drinking water. USEPA has recommended a standard of 20 pCi/l for both radium-226 and radium-228. This proposed standard was published on July 18, 1991 (56 Fed. Reg. 33,050 (1991)), and the public hearings on the standard began on September 6, 1991. New radionuclide standards would significantly alter the Association's need for a variance or alternatives for achieving compliance

Today's action is solely a grant of variance extension from standards of issuance and restricted status. The Association is not granted a variance from compliance with the combined radium standard, and today's action does not insulate the Association in any manner against enforcement for violation of these standards. As the Agency has observed, granting this extension of variance should affect only those users who consume water drawn from any newly extended water lines. (Rec. at 12.) And therefore this variance should not affect the status of the rest of the Association's population drawing water from existing water lines.

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

ORDER

The Wynstone Property Owners' Association (Association) 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 in drinking water as set forth in 35 Ill. Adm. Code 611.330(a) subject to the following conditions:

- (A) For purposes of this order, the date of United States

Environmental Protection Agency (USEPA) action consists of the earlier date of the following:

- (1) Date of promulgation by the USEPA of any regulation which amends the maximum concentration level for combined radium, either of the isotopes of radium, or the method by which compliance with a radium maximum contaminant level is demonstrated; or
 - (2) Date of publication of notice by the USEPA that no amendments to the 5 pCi/l combined radium standard or the method for demonstrating compliance with the 5 pCi/l standard will be promulgated.
- (B) Variance shall terminate on the earliest of the following dates:
- (1) Two years following the date of USEPA action; or
 - (2) February 1, 2001; or
 - (3) When analysis pursuant to 35 Ill. Adm. Code 611.720, or any compliance with standards then in effect, shows compliance with standards for radium in drinking water then in effect.
- (C) In consultation with the Illinois Environmental Protection Agency (Agency), the Association shall continue a sampling program to determine as accurately as possible the level of radioactivity in its wells and finished water. Until this variance expires, the Association shall collect quarterly samples of water from the distribution system at locations approved by the Agency. The Association shall composite the quarterly samples from each location separately and shall analyze them annually by a laboratory certified by the State of Illinois for radiological analysis so as to determine the concentration of radium-226 and radium-228. At the option of the Association, the quarterly samples may be analyzed when collected. The results of the analyses shall be reported within 30 days of receipt of each analysis to:

Illinois Environmental Protection Agency
Compliance Assurance Section
Drinking Water Quality Unit
Bureau of Water
P.O. Box 19276

Springfield, Illinois 62794-9276

- (D) Within three months of USEPA action, the Association shall apply to the Agency at the address below for all permits necessary for the construction, installation, changes or additions to the Association's public water supply needed for achieving compliance with the MCL for combined radium or with any other standard for radium in drinking water then in effect:

Illinois Environmental Protection Agency
Public Water Supply System
Permit Section
2200 Churchill Road
Springfield, IL 62794-9276

- (E) Within three months of USEPA action and after each construction permit is issued by the Agency, the Association shall advertise for bids, to be submitted within 60 days, from contractors to do the necessary work described in the construction permit. The Association shall accept appropriate bids within a reasonable time. The Association shall notify the Agency, Division of Public Water Supplies, within 30 days, of each of the following actions: 1) advertisements for bids, 2) names of the successful bidders, and 3) whether the Association 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 MCL in question shall be completed no later than two years following USEPA action. One year will be necessary to prove compliance.
- (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 Association will send to each user of its public water supply a written notice to the effect that the Association 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) Pursuant to 35 Ill. Adm. Code 611.851(b) (formerly 35 Ill. Adm. Code 606.201), in the first set of water bills or within three months after the date of this order, whichever occurs first, and every three months thereafter, the Association will send to each user of its public water supply a written notice to the effect that the Association has been granted by the Illinois 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 MCL standard in question.
- (I) Until full compliance is achieved, the Association shall take all reasonable measures with its existing equipment to minimize the level of contaminants in its finished drinking water.
- (J) The Association shall provide written progress reports to the Agency at the address below every six months concerning steps taken to comply with the paragraphs C, D, E, F, G and H 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:

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

IT IS SO ORDERED.

If the Wynstone Property Owners' Association chooses to accept this variance subject to the above order, within forty-five days of the date of this order, the Wynstone Property Owners' Association 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 and of no force and effect as a shield against enforcement of rules from which this variance is granted. 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 Illinois Pollution Control Board in PCB 96-113, February 1, 1996.

The Association

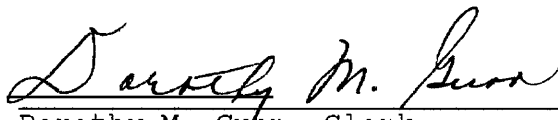
Authorized Agent

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 1st day of February, 1996, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board