

ILLINOIS POLLUTION CONTROL BOARD
October 5, 1995

VILLAGE OF ELBURN,)
)
 Petitioner,)
)
 v.) PCB 95-179
) (Variance-Water)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

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

This matter is before the Board on a June 21, 1995 Petition for Variance filed by the Village of Elburn (Elburn). Elburn seeks a variance from 35 Ill. Adm. Code 602.105(a), "Standards for Issuance", and 602.106(a), "Restricted Status", to the extent that they relate to radium requirements under 35 Ill. Adm. Code 611.301(b). Elburn was granted a variance from these requirements on April 6, 1989 in PCB 88-204. (Pet. at 1.) Elburn was subsequently granted a five-year extension of that variance on July 3, 1990 in PCB 90-41. (Id.) Elburn seeks another five-year variance to allow the continued operation of its water supply and distribution system, and any expansion deemed necessary. The Illinois Environmental Protection Agency (Agency) filed its recommendation on July 20, 1995, advising that the variance be granted, subject to certain conditions. Elburn waived hearing and none was held.

BACKGROUND

The Village of Elburn is a rural community located in Kane County, Illinois which has experienced significant growth, and is anticipating continued growth, in population. (Pet. at 3-4.)¹ It owns and operates a water supply and distribution system, providing potable water to 1,700 customers. (Pet. at 4.) Petitioner's water system is comprised of two deep wells, one shallow well, one 300,000-gallon water tower, pumps, and distribution facilities. (Pet. at 4.)

Elburn first learned that its water supply exceeded the maximum allowable concentration limit (MCL) for radium in January 1985. (Rec. at 4.) Since notification of the violation, Elburn petitioned the Board for a variance, which was granted in PCB 88-204 on April 6, 1989, and extended in PCB 90-41 on July 3, 1990

¹Petitioner's Petition for Variance will be cited as (Pet. at __.). Respondent's recommendation will be cited as (Rec. at __.).

(Id.) This extension expired on July 3, 1995. (Id.) Elburn is not on restricted status for exceeding any other contaminant. (Rec. at 5.)

REGULATORY FRAMEWORK

The United States Environmental Protection Agency (USEPA) has promulgated a value of 5 cPi/L of combined radium for drinking water. (Rec. at 5.) Pursuant to Section 17.6 of the Illinois Environmental Protection Act (Act), any revisions to the 5 cPi/L standard by the USEPA will automatically become the standard in Illinois.

Elburn is not seeking a variance from the MCL for radium, which remains applicable to its potable water supply. Rather, Elburn is requesting a variance from the prohibitions imposed at 35 Ill. Adm. Code 602.105(a) and 602.106(a) until it can achieve compliance. 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 . . . Act (Ill. Rev. Stat. 1981, ch. 111 1/2, par. 1001 et seq.), . . . 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.

Illinois regulations thus provide that communities are prohibited from extending water service, by virtue of not being able to obtain the requisite permits, if their water fails to meet any of the several standards for finished water supplies. This provision is a feature of the Illinois regulations and is not found in federal law. It is from this prohibition which Elburn requests a variance. However, we emphasize that the duration of restricted status is linked to the length of time it takes the water supply to comply with the underlying standards. As such, the time frames for compliance with the underlying standards in the proposed compliance plan are an essential consideration in determining whether a restricted status variance will be granted. Thus, grant of variance from restricted status will be conditioned upon a schedule of compliance with the

underlying 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. (Caterpillar Tractor Co. v. Pollution Control Board, 48 Ill.App.3d 655, 363 N.E.2d 419 (3rd Dist. 1977).) Further, the burden is on the petitioner to show that its claimed arbitrary or unreasonable hardship outweighs the public interest in attaining compliance with regulations designed to protect human health and the environment. (Willowbrook Motel v. Illinois Pollution Control Board, 135 Ill.App.3d 343, 481 N.E.2d 1032 (1st Dist. 1985).)

Lastly, a variance by its nature is a temporary reprieve from compliance with the Board's regulations and compliance is to be sought regardless of the hardship which the task of eventual compliance presents an individual polluter. (Monsanto Co. v. IPCB, 67 Ill.2d 267, 367 N.E.2d 684 (1977).) Accordingly, except in certain special circumstances, a variance petitioner is required, as a condition to grant of variance, to commit to a plan that is reasonably calculated to achieve compliance within the term of the variance.

COMPLIANCE PROGRAM

Alternate Methods

In 1988 Elburn hired Rempe-Sharpe and Associates to investigate compliance options. (Pet. at 12.) Rempe-Sharpe and Associates submitted a report which offered 10 compliance options. (Pet. at Exhibit M, section 2-3.) The most cost effective alternative proved to also be the riskiest, so Elburn chose the second most cost effective alternative, ion-exchange. (Id.)

Past Compliance Efforts

Elburn has been sampling its public water supply for combined radium levels since an exceedence of the combined radium standards was first discovered. (Pet. at 5.) In addition, Elburn has spent \$1,095,240 in taking the following steps to achieve compliance:

- (1) Hired an engineering firm to investigate compliance options. (Pet. at 7.)
- (2) Approved the ion-exchange radium removal technology option. (Id.)
- (3) Hired Rempe-Sharpe and Associates to provide preliminary engineering services for the construction of a treatment facility and sanitary sewer interceptor

to channel softener backwash from the facility to Elburn's wastewater treatment plant. (Id.)

- (4) Identified and began purchase negotiations on a 2.35-acre site for the treatment facility. (Id.)
- (5) Purchased a 2.41-acre parcel to serve as the location for well #4. (Pet. at 8.)
- (6) Opened bids and ultimately awarded a contract to Dempsey Ing, Inc. to construct the North Street Sanitary Sewer Interceptor. (Id.)
- (7) Approved an ordinance authorizing the sale of \$975,00 in General Obligation Bonds to finance Elburn's radium compliance plan. (Id.)
- (8) In 1990, the interceptor and well #4 was completed.

Future Compliance

Elburn states that it has not taken final steps to construct the proposed water treatment facility because the USEPA may promulgate a new standard for combined radium which will be higher than Elburn's current readings. (Pet. at 6.) If the USEPA does not promulgate a new standard for combined radium, Elburn plans to:

- (1) Replace the pump at well #3 to increase its capacity to 500 gpm. (Pet. at 10)
- (2) Transmit water from well #3 to an ion-exchange radium removal treatment plant. (Id.)
- (3) Construct a third deep well (Well #5), an additional ion-exchange unit and an additional high service pump. (Id. at 11.)

HARDSHIP

Both parties agree that denial of a variance from 35 Ill. Adm. Code 602.105(a), Standards for Issuance, and 35 Ill. Adm. Code 602.106(a), Restricted Status, would result in an arbitrary or unreasonable hardship for petitioner. (Pet. at 14-16, Agency Rec. at 8-9.) First, a denial would require the Agency to refuse construction and operating permits until compliance is achieved. That in turn means that current construction on an annexed 120-acre parcel would have to cease. (Pet. at 14.) Elburn's current negotiations regarding commercial and residential development of a 625-acre parcel would also be put on hold. (Pet. at 15. In addition, an Agency denial would require Elburn to add a treatment facility and new deep well to the water system,

construction of which would severely deplete Elburn's resources, and possibly force it to issue bonds at its bonding capacity. (Pet. at 13-14.) Elburn has already spent \$1,095,240 towards achieving compliance, but asserts that proceeding to final design without first knowing the final USEPA standards is an unreasonable hardship. (Pet. at 11, 13.)

Secondly, if a variance is granted as to Section 602.105(a), then a variance from Section 602.106(a) is critical to restrain the Agency from publishing that petitioner is on the restricted list for violating those standards. Publication on the restricted list would mislead developers and other persons about the compliance status of petitioner's water supply, and could stifle the area's economic growth.

ENVIRONMENTAL IMPACT

Although Elburn made no formal assessment of the environmental effect of the requested variance, it contends that a continuance of the variance for 29 months will not result in any environmental impact. (Pet. at 9.) Elburn's has been testing for combined radium for the past seven years, and the levels have ranged from 6.1 pCi/L to 24.0 pCi/L, which exceed the standard of 5 pCi/L. (Pet. at 12.)

The Agency states that, while radiation at any level creates some risk, the risk associated with the levels found in Elburn's water supply are very low. (Rec. at 8.) As support for its assertion, the Agency incorporated by reference the testimony of and exhibits presented by Richard E. Toohey, Ph.D. and Dr. James Stebbings at the 1985 hearings in R85-14, In the Matter of: Proposed Amendments to Public Water Supply Regulations, 35 Ill. Adm. Code 602.105 and 602.106. (Id. at 7.)

In addition, the Agency indicated that the MCL for combined radium is currently under review by the USEPA, which has recommended a standard of 20 pCi/L for each isotope. (Id. at 8.) It had been anticipated that a new standard would be adopted in September 1995. (Id.) Mr. Joseph F. Harrison, chief of the Safe Drinking Water Division, USEPA, announced that as a result of the proposed relaxed standard, no municipalities would be required to spend funds preparing for final design and construction of a treatment system to achieve compliance with the current standard. (Id.)

The Agency concludes that an increase in the allowable concentration for the 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. (Id. at 9.) The Agency observes that this grant of the extension of the variance from restricted status should affect only those users who consume water drawn from any newly

extended water lines. (Rec. at 12.) According to the Agency, also states that the variance should not affect the status of the rest of Elburn's population drawing water from existing water lines, except if the variance, by its conditions, hastens compliance. (Id.) Finally, the Agency recommends that the variance terminate on July 3, 2000, or two years following the date of USEPA action, whichever comes first. (Id. at 7.)

CONSISTENCY WITH FEDERAL LAW

Both Elburn and the Agency state that Elburn may be granted a variance consistent with the requirements of the Safe Drinking Water Act (42 U.S.C. 300(f) *et. seq.*), as amended by the Safe Drinking Water Act Amendments of 1986 (Pub. 99-339, 100 Stat. 642 (1986)), and the USEPA National Interim Primary Drinking Water Regulations (40 CFR Part 141) because the requested relief would not be a variance from national primary drinking water regulations or a federal variance. (Pet. at 15, Rec. at 11.) Rather, granting a variance from the effects of restricted status means that only the State's criteria for variances are relevant. (Id.)

Both Elburn and the Agency recognize that Elburn remains subject to the possible enforcement actions for violating standards for the contaminant in question. (Pet. at 16, Rec. at 12.)

CONCLUSION

After considering all the facts and circumstances of this case, the Board finds that Elburn has presented adequate proof that immediate compliance with 35 Ill. Adm. Code 602.105(a), Standards of Issuance, and 602.106(a), Restricted Status, would impose an arbitrary or unreasonable hardship upon Elburn. We particularly note Elburn's firm commitment, both financially and otherwise, towards achieving compliance. However, we agree with the Agency that compliance could be achieved within 24 months. The Board therefore will allow Elburn until July 3, 2000 to achieve compliance, subject to conditions listed in this opinion and order.

The Board agrees with the parties that granting this variance will pose no significant health risk to either the persons served by Elburn's potable water supply, or the surrounding environment, assuming that compliance is timely forthcoming. The Board will accordingly grant a variance consistent with this Opinion and Order. Although it is well established that the term of variance begins on the date the Board renders its decision, exceptions will be allowed upon showing of unusual or extraordinary circumstances. (*See, e.g. DMI, Inc. v. IEPA* (December 19, 1991), PCB 90-277, 128 PCB 245-249.) In this case, Elburn timely filed its petition 12 days

before the last extension expired; therefore, the Board finds that the instant circumstances warrant the short retroactive start of the variance.

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

ORDER

Petitioner, the Village of Elburn (Elburn), is hereby granted variance from 35 Ill. Adm. Code 602.105(a), Standards of Issuance, and 602.106(a), Restricted Status, but only as they relate to the 5 pCi/L radium standard of 35 Ill. Adm. Code 611.301(b), subject to the following conditions:

- (1) For purposes of this variance, the date of the United States Environmental Protection Agency (USEPA) action shall consist of the earlier date of the:
 - (a) date the regulation is promulgated by the USEPA which amends the maximum contaminant level (MCL) for combined radium, either of the isotopes of radium, or the method by which compliance with a radium MCL is demonstrated; or
 - (b) 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.
- (2) This variance shall terminate on the earliest of the following dates:
 - (a) July 3, 2000; or
 - (b) two years following the date of USEPA action.
- (3) In consultation with the Illinois Environmental Protection Agency (Agency), Elburn shall continue its sampling program to determine as accurately as possible the level of radium in its wells and finished water. Until this variance terminates, Elburn shall collect and analyze quarterly samples of its water from its entry point into the distribution system at locations approved by the Agency. Elburn 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 the contaminants in question. Results of the analyses shall be reported within 30 days of receipt of each analysis to:

Illinois Environmental Protection Agency
Division of Public Water Safety
Compliance Assurance Section
2200 Churchill Road
Springfield, Illinois 62794-9276

If Elburn elects, the quarterly samples may be analyzed when collected. The running average of the most recent four quarterly sample results shall be reported to the above address within 30 days of receipt of the most recent quarterly sample.

- (4) Within 3 (three) months of USEPA action, Elburn shall apply to the Agency at the address below for all permits necessary for the construction, installation, changes, or additions to Elburn'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 Program
Permit Section
2200 Churchill Road
Springfield, Illinois 62794-9276

- (5) Within 3 (three) months of the issuance of each construction permit by the Agency, Elburn shall advertise for bids, to be submitted within 60 days, from contractors to do the necessary work described in the construction permit. Elburn shall accept appropriate bids within a reasonable time, and shall notify the Agency, Division of Public Water Supplies (DPWS) within 30 days, of each of the following actions:
- (a) advertisements for bids;
 - (b) names of successful bidders; and,
 - (c) whether Elburn accepted the bids.
- (6) Construction allowed on said construction permits shall commence within a reasonable time of bids being accepted, but in any event, 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.
- (7) 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, Elburn shall send to each user of its public water supply a written notice to the effect that Elburn is not in compliance with the standard in question. The notice shall state the average content of the contaminants in samples taken since the last notice period during which samples were taken.

- (8) 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, Elburn shall send to each user of its public water supply a written notice to the effect that Elburn has been granted by the Pollution Control Board a variance from 35 Ill. Adm. Code 602.105(a), Standard of Issuance, and 35 Ill. Adm. Code 602.106(a), Restricted Status, as it relates to the MCL standard in question.
- (9) Until full compliance is reached, Elburn shall take all reasonable measures with existing equipment to minimize the level of contaminants in its finished drinking water.
- (10) Elburn shall provide written progress reports to the Agency's DPWS, FOS every six months concerning steps taken to comply with paragraphs 3, 4, 5, 6, 7, 8 and 9. Progress reports shall quote each of said paragraphs and immediately below each paragraph state what steps have been taken to comply with each paragraph.

IT IS SO ORDERED.

If Elburn chooses, to accept this variance subject to the above order, within 45 days of the date of this order, an officer of Elburn properly authorized to bind Elburn to all the terms and conditions of the variance, shall execute and forward the attached Certificate of Acceptance and Agreement to:

Stephen C. Ewart
Division of Legal Counsel
Illinois Environmental Protection Agency
2200 Churchill Road
P.O. Box 19276
Springfield, Illinois 62794-9276

Once executed and received, the Certification of Acceptance and Agreement shall bind petitioner 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. 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 Illinois Pollution Control Board, in PCB 95-179, October 5, 1995.

Petitioner: _____

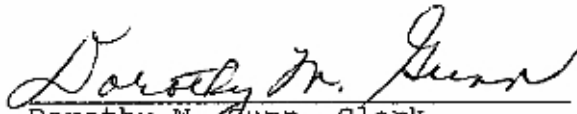
By: Authorized Agent

Title: _____

Date: _____

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rule of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.)

I, Dorothy Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 5th day of October, 1995, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board