

ILLINOIS POLLUTION CONTROL BOARD
March 16, 1995

CITY OF PARIS, ILLINOIS,)
)
 Petitioner,)
)
 v.) PCB 95-4
) (Variance-PWS)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

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

This matter is before the Board on the January 6, 1995 filing by the City of Paris (City) of a petition for variance. The City seeks relief from 35 Ill. Adm. Code 602.105(a) "Standards for Issuance", and 602.106(a), "Restricted Status", but only as these rules relate to the Atrazine standard of 35 Ill. Adm. Code 611.311(c). The City requests a variance for up to and including January 1, 1996.

On February 14, 1995, the Illinois Environmental Protection Agency (Agency) filed its variance recommendation. The Agency recommends that the variance be granted until January 1, 1996 subject to certain conditions. The City waived hearing, and none has been held.

For the following reasons, the Board finds that the City 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. Variance is granted until January 1, 1996, subject to conditions set forth in the attached order.

BACKGROUND

The City, located in Edgar County, is an Illinois municipality which provides public services including a potable water supply and distribution system. These services are provided to residential and business customers, totaling approximately 9,000 consumers. (Pet. at 3.)¹ The City's source of raw water is the Paris Twin lakes which consist of two separate lakes with a combined surface area of 220 acres. (Pet.

¹The City's petition for variance will be references as "Pet. at ." and the Agency's recommendation will be referenced as "Rec. at ."

at 3.) The City operates a treatment system consisting of: flocculation², chemical addition, clarification, filtration and disinfection. (Pet. at 4.) The City has contracted to replace its four gravity filter's anthracite media with granular activated carbon (GAC) to reduce the level of Atrazine passing through to the finished water. (Pet. at 4.)

The City requests the variance to allow extensions of its service to new users, both residential and commercial. (Pet. at 4.) Such proposed new users are two subdivisions, one to be located around the Country Club on the east side of the City and another on the north side of the City, and a 88-acre industrial park. (Pet. at 4.)

The City first learned of excessive levels of Atrazine in its public water supply from an Agency letter dated June 15, 1994. (Pet. at 4.) According to the Agency, the City's "tap 01" tested at an annual average of 0.004 mg/l, which exceeds the 0.003 mg/l maximum concentration level (MCL) resulting in a Tier 1 violation. (Pet. at 4.) The City believes that the Atrazine levels are the result of pesticide runoff from the farmland which surrounds its lake water supply. (Pet. at 5.) The City further states that the treatment system it was utilizing at the time of the violations did not remove the Atrazine. (Pet. at 5.) However, the City believes that the GAC system put into operation will achieve compliance with the Atrazine standards set forth at 35 Ill. Adm. Code 611.311(c). (Pet. at 7.)

Pursuant to 35 Ill. Adm. Code 104.180(a), the Agency has investigated the facts alleged by the petitioner. (Rec. at 4.) In accordance with 35 Ill. Adm. Code 104.140(b), the Agency attempted to ascertain the views of persons who might be affected by the grant of the variance by publishing in a newspaper of general circulation in petitioner's county a solicitation of views of such persons and by sending notices of the petition for the variance to the appropriate State legislators and county officials. According to the Agency there has been no response to this newspaper solicitation or notices as of February 10, 1995.

REGULATORY FRAMEWORK

The instant variance request concerns two features of the Board's public water supply regulations: "Standards for Issuance" and "Restricted Status", which are found at 35 Ill. Adm. Code 602.105 and 602.106. In pertinent part they read:

²Flocculation is the process by which solids are formed in water through biological or chemical action so they can be separated from the water.

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

- (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.

The cumulative effect of these regulations is to provide that community 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 City requests a variance so that it be allowed to extend its water service while it continues to pursue compliance with the Atrazine 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. (415 ILCS 5/35(a)(1992).) 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, (1985), 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, and compliance is to be sought regardless of the hardship which the task of eventual compliance presents an individual polluter. (Monsanto Co. v. IPCB, (1977), 67 Ill.2d 276, 367 N.E.2d 684.) Accordingly, except in certain special circumstances, a variance petitioner is required, as a condition to grant of the variance, to commit to a plan which is reasonably calculated to achieve compliance within the term of the variance.

It is important to recognize that grant of variance from "Standards for Issuance" and "Restricted Status" neither absolves a petitioner from compliance with the drinking water standards at

issue, nor insulates 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.

COMPLIANCE PLAN

The City is committed to achieve compliance with the Atrazine standards through the use of the GAC system. The Agency states that "...the petitioner has sufficiently described and committed to measures and methods of control to be undertaken to achieve full compliance with the Act and the Board regulations." (Rec. at 6.)

ENVIRONMENTAL IMPACT

Atrazine is a organic chemical used as a herbicide which usually migrates into water supplies as the result of runoff into surface water during certain climatic conditions. (Rec. at 7.) There are no reports of short-term adverse effects from exposure at normal application rates and no long-term effects from continued exposure of just Atrazine to humans. (Rec. at 7-8.) Although there are no known effects of Atrazine, the United States Environmental Protection Agency (U.S.EPA) promulgated federal regulations establishing a MCL of 0.003 mg/l for Atrazine and monitoring schedules. (56 Fed. Reg. 3593-94) (January 30, 1991.) (Rec. at 9.) The federal regulations are part of the Primary Safe Drinking Water Act (40 C.F.R 141 (1992)) under the federal Safe Water Drinking Act (42 U.S.C. § 300f (1989)). (Rec. at 9.)

The City has made no formal assessment of the effect of the variance on the environment. The City believes that the variance will not pose any significant harm to the environment or the consumers for the limited period of the variance. (Pet. at 7.) The City also states that it is in compliance on a daily basis. (Pet. at 8.) The Agency states that "...grant of the requested variance would impose no significant injury to the public or to the environment for the limited time period of the requested variance..." (Rec. at 9.)

HARDSHIP

A grant of the requested variance only prohibits the Agency from legally denying construction or operating permits based on the City's violation of the standards, and does not make less strict the standards that petitioner must meet. The City asserts that a denial of the requested variance will prohibit the expansion of its services thereby having a negative impact on the economic viability of the entire service area. (Pet. at 8.)

The Agency believes that a denial of the variance would be

an arbitrary or unreasonable hardship to the petitioner. (Rec. at 10.) The Agency believes that the hardship resulting from denial of the variance from the effect of being on restricted status would outweigh the injury to the public from grant of the variance. (Rec. at 10.) Denial of a variance from the two rules imposing restricted status on the City would result in an arbitrary or unreasonable hardship because denial would require that the Agency: (1) publish the City on the Restricted Status List, and (2) deny construction and operating permits until compliance is achieved. The second action would prevent further development from taking place in the City, while the first might mislead developers and other persons who check this list and their contemplated economic activity might be delayed or discontinued. (Rec. at 11.)

The Agency observes that this grant of the variance from restricted status should affect only those users who consume water drawn from any newly extended water lines and states that an increase in the allowable concentration for these contaminants should cause no significant health risk for this limited population. (Rec. at 12.) 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. (Rec. at 12.) The Board notes that the granting of this variance should not cause any "increase in the allowable concentration of these contaminants," but agrees with the Agency's latter statement that compliance may be hastened.

CONSISTENCY WITH FEDERAL LAW

The Agency states that the requested variance may be granted consistent with the Safe Drinking Water Act, PL 93-523, as amended by PL 96-502, 42 U.S.C. §300(f)(1992), and the USEPA Drinking Water Regulations (40 CFR Part 141 (1991)), because the variance does not grant relief from compliance with the National Primary Drinking Water Regulations. (Rec. at 11.)

Granting a variance from the effects of restricted status affects State and not federal law and regulations. (Rec. at 11.) Therefore, a variance under the Act and Board regulations is not a variance from USEPA's National Primary Drinking Water Regulations. The Agency believes there should be no resulting risk to the State of Illinois of loss of its primary enforcement responsibility ("primacy") under the Safe Drinking Water Act. (Rec. at 12.)

CONCLUSION

Based on the record, the Board finds that the City has presented adequate proof that immediate compliance with the "Standards for Issuance" and "Restricted Status" regulations

would impose an unreasonable hardship on the City pursuant to Section 35(a) of the Act. The Board will grant this variance for a period of one year subject to conditions similar to those recommended by the Agency. The Board's grant of this variance does not relieve the City from the Atrazine standard as set forth at 35 Ill. Adm. Code 611.311(b), the variance is for the limited purposes of allowing the City to obtain the necessary permits from the Agency to extend its water supply system.

The Agency recommends that the term of the variance be limited to 12 months or less for the reasons recounted above. Pursuant to the conditions recommended by the Agency and adopted by the Board hereunder, the City, in consultation with the Agency, will be required to continue its sampling program to determine as accurately as possible the Atrazine levels in its water supply. The petitioner will send to the consumers a notification that it has been given a variance from 35 Ill. Adm. Code 602.105(a) "Standards for Issuance", and 602.106(a), "Restricted Status", but only as these rules relate to the Atrazine standard of 35 Ill. Adm. Code 611.311(c).

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

ORDER

The City of Paris is hereby granted a one-year variance from 35 Ill. Adm. Code 602.105(a), "Standards for Issuance", and 602.106(a), "Restricted Status", as they relate to the standard for Atrazine as set forth in 35 Ill. Adm. Code 611.311(b), subject to the following conditions:

- (A) The variance commences from the date of this order and ends on January 1, 1996.
- (B) In consultation with the Agency, petitioner shall continue its sampling program to determine as accurately as possible the level of Atrazine in its public water supply. Until this variance expires, petitioner shall collect and analyze quarterly samples of its water from its entry point into the distribution system at locations approved by the Agency, in accordance with 35 Ill. Adm. Code 611.680. Analysis shall be done by the Agency laboratory or a laboratory certified by the State of Illinois for Atrazine analysis so as to determine the concentration of the contaminant in question. These results of the analyses in question shall be reported to the Illinois Environmental Protection Agency, Compliance Assurance Section, Division of Public Water Supplies, 2200 Churchill Road, Springfield, IL 62794-9276, within 30

days of receipt of each analysis. 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. If the petitioner elects to conduct weekly or monthly analyses for Atrazine, the petitioner shall report the results of analyses of to the Agency within 30 days of receipt of the analyses.

- (C) 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, the petitioner will send to each user of its public water supply a written notice to the effect that petitioner has been granted a variance from 35 Ill. Adm. Code 602.105(a), Standards of Issuance, and 35 Ill. Adm. Code 602.106(a), Restricted Status, as it relates to the maximum contaminant level for Atrazine.
- (D) If results of analyses performed on samples pursuant to 35 Ill. Adm. Code 611.648 show a violation of the Atrazine maximum concentration limit (MCL), then public notice shall be made pursuant to 35 Ill. Adm. Code 611.851(b).
- (E) Until full compliance is reached, petitioner shall take all reasonable measures with its existing equipment to minimize the level of the contaminant in question in its finished drinking water.
- (F) Within six (6) months after the date of this variance, petitioner shall submit to the Agency's DPWS/FOS, a Compliance Report, that shall describe in detail the compliance measures including the design and additional construction measures (as well as any modifications) that have been necessary to bring petitioner's public water supply into compliance with the Atrazine MCL. If further compliance measures are necessary, the petitioner shall include in the Compliance Report milestones for each compliance measure including compliance with the Atrazine MCL that are required to bring the petitioner into compliance including, but not limited to:
 - 1. Dates of applications for all permits necessary for construction of installations changes or additions to the public water supply needed for achieving compliance with federal and State statutes and regulations;
 - 2. Date for advertisements of bids for said

construction;

3. Dates for initiation of construction allowed by the construction permits;
4. Dates for completion of said construction; and
5. Dates for achieving compliance with federal and State statutes and regulations.

Petitioner shall also submit with this Compliance Report a statement regarding the financial resources that are or may be available to bring their public water supply into compliance with all federal and State statutes and regulations, listed in this compliance plan.

- (G) One (1) month prior to the close of the variance petitioner shall also submit an updated Compliance Report of sufficient detail to demonstrate the progress made by the petitioner in achieving the milestones and goals outlined in the first Compliance Report.
- (H) All reports and correspondence that is required by this Board order shall be sent to:

Illinois Environmental Protection Agency
Field Operations Services
2200 Churchill Road
P.O. Box 19276
Springfield, IL 62794-9276

IT IS SO ORDERED.

If the City of Paris chooses to accept this variance subject to the above order, within forty-five days of the grant of the variance, the City must execute and forward the attached certificate of acceptance and agreement to:

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

Once executed and received, that certificate of acceptance and agreement shall bind the Village 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:

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 95-4, March 16, 1995.

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.

Board Member J. Theodore Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 16th day of March, 1995, by a vote of 6-1.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board