

ILLINOIS POLLUTION CONTROL BOARD
May 5, 1994

AUBURN, DIVERNON, GIRARD,)	
PAWNEE, THAYER, VIRDEN)	
WATER COMMISSION,)	
)	
Petitioner,)	
)	
v.)	PCB 94-86
)	(Variance)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by E. Dunham):

This matter comes before the Board on the March 14, 1994, filing by petitioner, Auburn, Divernon, Girard, Pawnee, Thayer, Virden Water Commission (Water Commission), of a petition for variance. On April 18, 1994, the Water Commission filed a motion for expedited decision. The Board hereby grants that motion.

The Water Commission seeks relief from 35 Ill. Adm. Code 602.105(a), "Standards for Issuance", and 602.106(a), "Restricted Status", but only to the extent those rules involve the maximum contaminant level (MCL) for atrazine in 35 Ill. Adm. Code 611.310(c). The Water Commission requests a variance for five years or until analysis pursuant to 35 Ill. Adm. Code 611.684 shows compliance with the standard regulating atrazine, whichever comes first. The Water Commission waived hearing and an objection to the variance requesting a hearing was not filed therefore, a hearing was not held.

On April 4, 1994, the Illinois Environmental Protection Agency (Agency) filed its variance recommendation. The Agency recommends that the variance be granted for a period of approximately 2½ years, subject to certain conditions. The Agency also recommends that the variance expire on October 1, 1996, the date that the Water Commission has agreed to obtain compliance with the atrazine standard. The petitioner did not file a reply to the recommendation.

The Board's responsibility in this matter arises from the Environmental Protection Act (Act) (415 ILCS 5/1 et seq. (1992)). The Board is charged therein with the responsibility to "grant individual variances beyond the limitations prescribed in this Act, whenever it is found upon presentation of adequate proof, that compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship." (415 ILCS 5/35(a) (1992).) More generally, the Board's responsibility in this matter is based on the system of checks

and balances integral to Illinois environmental governance: the Board is charged with the rulemaking and principal adjudicatory functions, and the Agency is responsible for carrying out the principal administrative duties.

The requested variance is not a variance from the atrazine standard. The variance is also not a variance from U.S. EPA's national primary drinking water regulations and does not suspend the effect of the Safe Drinking Water Act (SDWA), PL 93-523, as amended by PL 96-502, 42 U.S.C. 300(f) (1989). The requested variance relates only to the standards of issuance and restricted status provisions of the Board's regulations.

For the following reasons, the Board finds that the Water Commission 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. Accordingly, the variance is granted, subject to conditions set forth in the attached order.

BACKGROUND

The Water Commission owns and operates a water treatment and distribution system. The Water Commission provides potable water for the residents and commercial and industrial customers in Auburn, Divernon, Girard, Pawnee, Thayer, and Virden and Nilwood. The Water Commission serves a population of approximately 14,000. Approximately 430 retail customers throughout the 30 mile distribution system are serviced by the Water Commission. Water rates are established by ordinance. Water is drawn from Otter Lake. Otter Lake is a 765 surface acre lake constructed in 1968 with 39 miles of shoreline. (Pet. at 4.)

On August 16, 1993, the Agency notified the Water Commission that the maximum contaminant level for atrazine had been exceeded. (Pet. at 5.) The average of samples collected over one year was 0.005 mg/l exceeding the MCL for atrazine of 0.003 mg/l. (Pet at 5.) The Agency also informed the Water Commission that it would be placed on the restricted status list.¹ (Exh. B.) The Water Commission is not on restricted status for exceeding any other contaminant. (Ag. Rec. at 7.) The Water Commission believes that atrazine has been used on farm fields that drain into the Otter Lake Watershed Basin. Atrazine is not removed by the current treatment at the water treatment facility.

¹ Public water supplies on the restricted status list will not be issued permits for water main extensions, except for certain limited situations or unless a variance has been granted.

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. 1989, ch. 111 ½, 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.

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 finished water supplies. The Water Commission requests that it be allowed to extend the water service while they pursue compliance with the atrazine standard, 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 (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 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.

A grant of variance from "Standards for Issuance" and "Restricted Status" does not absolve a petitioner from compliance with the drinking water standards at issue, nor does it insulate 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

A resource planning committee consisting of members of the agricultural community, agribusiness leaders, business leaders and local government was established in June of 1992. The committee was formed to define concerns with respect to water quality, soil erosion, fish and animal wildlife, recreation, sedimentation and shoreline erosion in the Otter Lake Watershed.

The Water Commission entered a letter of commitment with the Agency on February 24, 1994. (Pet. at 6.) The letter of commitment requires the Water Commission to conduct a multifaceted program to comply with the atrazine MCL by October 1, 1996. (Ag. Rec. at 6.) The Water Commission has committed to a compliance plan that will utilize control of atrazine into Otter Lake through watershed management practices and treatment of atrazine. (Ag. Rec. at 6.) The Agency asserts that the Water Commission has sufficiently described and committed to measures and methods of control to be undertaken to achieve full compliance. (Ag. Rec. at 7.) The requirements of the letter of commitment have been incorporated into the conditions of this variance.

HARDSHIP

The Water Commission is aware of numerous projects in the geographic area that envision the extension of water mains to serve new customers. (Pet. at 4.) Imposition of the restricted status would mean that permits for the water main extensions would be denied. (Ag. Rec. at 11.) Economic growth dependent on the extension of the water mains would not be allowed. (Ag. Rec. at 11.) This negatively impacts prospective home purchasers as well as business developers and the area's tax base. (Ag. Rec. at 11.) The Water Commission contends that extension of the water mains will not cause any significant harm to the environment or to the people served by the extensions. (Pet. at 11.)

The Agency agrees that denial of the variance would impose an arbitrary or unreasonable hardship on the Water Commission. (Ag. Rec. at 8.)

ENVIRONMENTAL IMPACT

Although the Water Commission has not undertaken a formal assessment of the environmental effects of the requested variance, it contends that the granting of the variance for the limited time period will not cause any significant harm to the environment or to the people now served or to be served by potential water main extensions. (Pet. at 9.)

The Agency states that there are no reports of long-term effects from continued exposure to atrazine. (Ag. Rec. at 9.) Studies have shown that atrazine can cause changes in blood parameters in rats and mice, increase liver and kidney weights in rats, affect the hearts of dogs and mice, and decrease rat weanling body weights in the second generation of offspring in a 2-generation reproduction study. (Ag. Rec. at 9.)

The Agency recommendation also presents the following information concerning atrazine. Two cancer bioassays have been conducted with atrazine. (Ag. Rec. at 10.) One study with mice showed no tumors in excess of the numbers seen in the control group. (Ag. Rec. at 10.) A recent study with rats produced an excess number of mammary gland tumors in the female rats. (Ag. Rec. at 10.) This study is still being evaluated. (Ag. Rec. at 10.) The U.S. EPA regards atrazine as a possible human carcinogen, but does not regulate it as a carcinogen (i.e. regulations are based upon its non-cancer effects using the reference dose). (Ag. Rec. at 10.) In recognition of the possible adverse health effects from atrazine the U.S. EPA established a maximum contaminant level of 0.003 mg/l for atrazine. (Ag. Rec. at 10.)

The Agency believes that an increase in the allowable concentration for the contaminant in question should cause no significant health risk for the limited population served by new water main extensions for the time period of the variance. (Ag. Rec. at 10.) The Agency contends that the granting of this variance should not affect the status of the rest of the population drawing water from the existing water lines, except insofar as the variance by its conditions may hasten compliance. (Ag. Rec. at 14.) The Agency believes that grant of the requested variance would impose no significant injury to the public or the environment for the limited time period. (Ag. Rec. at 11.)

CONSISTENCY WITH FEDERAL LAW

The Agency states that the requested variance may be granted consistent with the SDWA and corresponding regulations (40 CFR Part 141) because the variance does not grant relief from compliance with the federal primary drinking water regulations. (Ag. Rec. at 12.) 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. (Ag. Rec. at 13.) 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. (Ag. Rec. at 13.) The Agency asserts that petitioner will remain subject to the possibility of enforcement for violations of the MCL for the contaminant in question under state and federal law. (Ag. Rec. at 13.) The Agency concludes that because continuing progress is being made towards compliance, it is unlikely that U.S. EPA will object to the issuance of the recommended variance. (Ag. Rec. at 13.)

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 Water Commission. In assessing the environmental impact of grant of this variance, the Board places great weight on the fact that the atrazine exceedance is not great, that the violation is not of longstanding duration, and that grant of this variance with its conditions will commit the Water Commission to correction of its problem within roughly thirty months. Under these circumstances, the Board agrees with the parties that granting this variance does not pose a significant health risk to those persons served by the new water main extensions, assuming that compliance is achieved during the period of the variance.

Today's action is solely a grant of variance from standards of issuance and restricted status. The Water Commission is neither granted a variance from compliance with the atrazine standard, nor does today's action insulate the Water Commission in any manner against enforcement for violation of this standard.

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

ORDER

The Auburn, Divernon, Girard, Pawnee, Thayer, Virden Water Commission is hereby granted a variance from 35 Ill. Adm. Code 602.105(a), "Standards for Issuance", and 602.106(a), "Restricted Status", but only as they relate to the maximum contaminant level (MCL) for atrazine as set forth in 35 Ill. Adm. Code 611.311(c) subject to the following conditions:

- (A) The variance shall expire on October 1, 1996 or when analysis pursuant to 35 Ill. Adm. Code 611.684, or any analytical standard then in effect, shows compliance with the MCL for atrazine, whichever shall occur first.

- (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 distribution system at locations approved by the Agency, in accordance with 35 Ill. Adm. Code 611.648(c). Analysis shall be done by a laboratory certified by the State of Illinois for atrazine analysis so as to determine the concentration of atrazine. The results of the analyses in question shall be reported to:

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 analyses results 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 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(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 MCL for atrazine, then public notice shall be made pursuant to 35 Ill. Adm. Code 611.851, 611.854, and 611.855.
- (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) By May 1, 1994, the petitioner shall submit to the Agency's DPWS/FOS, a Preliminary Report, that shall describe in detail, the compliance measures investigated by the petitioner in order to bring their public water supply into compliance with the MCL for atrazine. Petitioner shall

consider and investigate the measures for compliance with the atrazine MCL as follows:

- a. treatment technology,
 - b. location of a new source,
 - c. connection to another public water supply,
 - d. blending with an alternative source, and
 - e. use of watershed management program measures.
- (G) In the Preliminary Report, petitioner shall identify the measures and develop compliance schedules necessary to bring the facility into compliance with State and federal law and regulations for the atrazine concentration in the finished water on or before October 1, 1996.
- (H) The Agency shall review the Preliminary Report submitted by the petitioner including the compliance plan and compliance schedules and shall accept or reject the Preliminary Report, the compliance plan, the compliance schedule, or any other part of this report. If the Agency rejects the Preliminary Report or any part thereof, the Agency shall describe the deficiencies in detail. Petitioner shall have 30 days to make the necessary changes from receipt of the Agency's description of the deficiencies. If the petitioner fails to provide a Preliminary Report acceptable to the Agency, the Agency shall notify the Board of the failure to comply with the conditions of the Board order.
- (I) 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 construction measures that are necessary to bring petitioner's public water supply into compliance with the MCL for atrazine. The Compliance Report shall contain milestones for each compliance measure including, but not limited to:
- a. 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;
 - b. Date for advertisements of bids for said construction;
 - c. Dates for initiation of construction allowed by the construction permits;
 - d. Dates for completion of said construction; and
 - e. Dates for achieving compliance with federal and State statutes and regulations.

- (J) 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 statute and regulations, listed in the compliance plan.
- (K) Petitioner shall also submit, every six (6) months after the date of the Compliance Report, an updated report of sufficient detail to demonstrate the progress made or impediment encountered by the petitioner in achieving the milestones and goals outlined in the initial Compliance Report. Each updated report shall quote each of the milestones and immediately below each paragraph state what steps have been taken to comply with that paragraph.
- (L) Failure to comply with the conditions of this Board order shall constitute a violation of this Board order and subject the petitioner to the enforcement and penalty provisions of Sections 18 and 42 of the Act.
- (M) All reports and correspondence that are 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

- (N) Within forty-five 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
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 Pollution Control Board in
PCB 94-86, May 5, 1994.

Petitioner

Authorized Agent

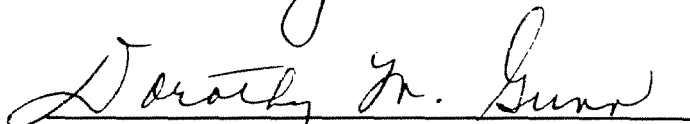
Title

Date

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act, 415 ILCS
5/41, 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.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control
Board, hereby certify that the above opinion and order was
adopted on the 5th day of May, 1994, by
a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board