

ILLINOIS POLLUTION CONTROL BOARD
December 7, 1995

CITY OF OTTAWA,)
)
 Petitioner,)
)
 v.) PCB 96-72
) (Variance - Public Water Supply)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

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

This matter is before the Board upon the filing on September 29, 1995 by the City of Ottawa (City) of a petition for extension of variance. The City requests extension of the variance granted by the Board in PCB 90-100¹. The City 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 604.301 (radium-226 and radium-228). The City requests an extension of the variance for five years from November 8, 1995, until November 8, 2000, or until the United States Environmental Protection Agency (USEPA) adopts revised radium standards.

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 responsibility of granting variance from Board regulations whenever it is found that compliance with the regulations would impose an arbitrary or unreasonable hardship upon the petitioner. (415 ILCS 5/35(a).) The Illinois Environmental Protection Agency (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).)

On November 6, 1995 the Illinois Environmental Protection Agency (Agency) filed its variance recommendation (Rec.) *instanter*. The Agency recommends that the variance extension be granted for relief from 35 Ill. Adm. Code 602.105(a), "Standards

¹ City of Ottawa v. Illinois Environmental Protection Agency, PCB 90-100, November 8, 1990, 116 PCB 29.

for Issuance", and 602.106(a)², "Restricted Status", subject to certain conditions. The City waived hearing and none was 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. Accordingly, the variance extension will be granted, subject to conditions set forth in the attached order.

BACKGROUND

The City of Ottawa is located in LaSalle County, Illinois. The City provides potable water supply and distribution for approximately 18,000 residential, industrial, governmental, and commercial utility customers. (Rec. at 3.) The City's water supply consists of four deep wells, storage tanks, pumps, and distribution facilities. (*Id.*) The City is not part of a regional public water supply.

On March 5, 1987 in docket PCB 86-179 the Board first granted the City a two-year variance from 35 Ill. Adm. Code 602.105(a), Standards of Issuance, and from 35 Ill. Adm. Code 602.106(b), Restricted Status, for combined radium-226 and radium-228. In docket PCB 88-180 the Board extended that variance an additional two years until March 5, 1991. In docket PCB 90-100, the Board granted the City a third extension of variance, which expired on November 8, 1995. According to the Agency, the City is not presently on restricted status for exceeding any other contaminant. (Rec. at 5.)

The City claims to have complied with the conditions set forth in the City's most recent variance, PCB 90-100. (Pet. at 1-2.) For example, the City has collected and tested composite quarterly samples, published public notices concerning its radium variance, took all reasonable measures to minimize the radium levels in its finished water, and submitted bi-annual progress reports to the Agency. (Pet. at 1.)

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:

² The Agency recommends variance from 35 Ill. Adm. Code 602.106(a), rather than 602.106(b) as requested by the City.

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 ½, 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.

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 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 that 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, and does not 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.

A standard for combined radium in drinking water was first adopted as a National Interim Primary Drinking Water Regulation (NIPDWR) 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 an "interim" limit, this standard nevertheless is the maximum contaminant levels under both federal and Illinois law, and will remain so unless modified by the USEPA³.

Since its original promulgation, the current radium standard has been under review at the federal level. The USEPA first proposed revision of the standard 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, 1991⁴ USEPA announced a proposal 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 extended to September 1995. However, Congress has prohibited funds to promulgate final radiological 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 radium standard, the USEPA would not force any municipality to spend funds to comply with the federal combined standard.

COMPLIANCE PLAN

As directed in Board order PCB 90-100, the City has completed work at Well 12 and remains on hold with regards to Wells 8 and 10. (Pet. at 2.) The City wishes to continue to stay action with respect to Wells 8 and 10 until after the

³ In anticipation of USEPA revision of the radium standard, the legislature amended the Illinois Environmental Protection Act at Section 17.6 in 1988 to provide that any new federal radium standard immediately supersedes the current Illinois standard.

⁴ Publication occurred at 56 Fed. Reg. 33050, July 18, 1991.

proposed USEPA Standard is published to "allow additional time to analyze the effects of the proposed Standard on the Petitioner's compliance plan". (*Id.*)

According to the petitioner, if the USEPA increases the combined radium standard to only 9 pCi/l, the City's current blending efforts would be sufficient to achieve compliance. (*Id.*)

HARDSHIP

The City contends that a 1990 estimation determined it would cost approximately \$140,000 to complete the rehabilitation of Well 8 and \$155,000 to rehabilitate Well 10. (Pet. at 2.) However, if the radium standards are increased slightly the petitioner would be in compliance and there would be no reasons for or benefits to completing those rehabilitations. (*Id.*)

The Agency believes that grant of the requested extension would impose no significant injury to the public or to the environment for the time period requested and that denial would be an arbitrary or unreasonable hardship upon petitioners. (Rec. at 10.) Denial of the requested extension of variance would require the Agency to deny construction and operating permits until compliance is achieved. (*Id.*) According to the Agency, the result of placing the City of Ottawa on restricted status would mean no new water main extension permits could be issued and further development within the City would be prevented. (*Id.*)

ENVIRONMENTAL IMPACT

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 City of Braidwood in City of Braidwood v. IEPA, (June 21, 1990), PCB 89-212, in support of the assertion that the variance "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 8-9.)

CONSISTENCY WITH FEDERAL LAW

The Agency states that the requested extension of variance 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 extension

of variance does not grant relief from compliance with the national primary drinking regulations. (Rec. at 10-11.) 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 11.) 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 petitioner 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 requested 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 City of Ottawa. 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 City may be affected by pending 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. Although final promulgation of these standards continues to be delayed, there remains reasonable prospect that they will become effective in the near future.

New radionuclide standards from USEPA could significantly alter the City's need for a variance or alternatives for achieving compliance. In recognition of this situation, as recommended by the Agency, the variance will contain suitable time frames to account for the effects of any USEPA alteration (or notice of refusal to alter) of the radium standards.

The Board further notes that Ottawa requests that the instant variance commence as of November 8, 1995, the date that the prior variance terminated. (Pet. at 1.) Although the Board does not ordinarily backdate the start of a variance (see e.g., DMI, Inc. v. IEPA, PCB 90-277, December 19, 1991, 128 PCB 245-9), the Board has done so under unusual or extraordinary

circumstances. The Board believes that such circumstances exist here. USEPA was required pursuant to consent decree⁵ to promulgate the new radium standards no later than September 1995; Ottawa could have reasonably expected that USEPA would meet this deadline, and hence that the instant action would not have been necessary. Furthermore, granting the variance retroactively for the short time of 29 days allows the original variance and today's extension to run consecutively. In turn, this alleviates the requirement, pursuant to Section 602.106(b), that the Agency retroactively include Ottawa on its six-month list of restricted water supplies for so short a period of time. Such listing could lead to confusion among those consulting the list. For these reasons the Board finds that a short retroactive grant of the requested variance is warranted.

Finally, the Board emphasizes that today's action is solely a grant of variance extension from standards of issuance and restricted status. The City is not granted a variance from compliance with the combined radium standard, and today's action does not insulate the City 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 the variance should not affect the status of the rest of the City's population drawing water from existing water lines (*Id.*).

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

ORDER

The City of Ottawa is hereby granted, effective November 8, 1995, 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 U.S. 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

⁵ Rec. at 8-9; see also Miller v. Browner, No. 89-6328-Ho (D.C. Or., 1990), amendment entered February 22, 1994.

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 terminates on the earliest of the following dates:
- (1) Two years following the date of USEPA action; or
 - (2) November 8, 2000; 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), petitioner 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, petitioner shall collect quarterly samples of water from the distribution system at locations approved by the Agency. Petitioner 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 petitioner, 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, petitioner shall apply to the Agency at the address below for all permits necessary for the construction, installation, changes or additions to petitioner'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, petitioner shall advertise for bids, to be submitted within 60 days, from contractors to do the necessary work described in the construction permit. The petitioner shall accept appropriate bids within a reasonable time. Petitioner 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 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 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, petitioner will send to each user of its public water supply a written notice to the effect that petitioner 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, 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(b) Restricted Status, as they relate to the MCL standard in question.
- (I) Until full compliance is achieved, petitioner shall take all reasonable measures with its existing

equipment to minimize the level of contaminants 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 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 City of Ottawa chooses to accept this extension of variance subject to the above order, within forty-five days of the date of this order, the City of Ottawa 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 96-72, December 7, 1995.

Petitioner

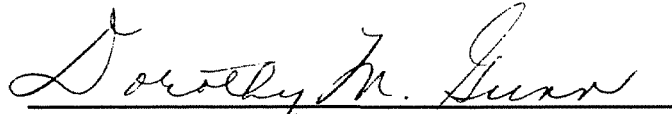
Authorized Agent

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 7th day of December, 1995, by a vote of 6-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board