

ILLINOIS POLLUTION CONTROL BOARD  
March 28, 1991

NORTH SUBURBAN PUBLIC UTILITY	)	
COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 90-229
	)	(Variance)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

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

This matter comes before the Board upon the filing by the North Suburban Public Utility Company ("North Suburban") on December 10, 1990 of a Petition for Extension of Variance ("Pet."). North Suburban seeks relief from 35 Ill. Adm. Code 602.105(a), "Standards for Issuance", and 602.106(b), "Restricted Status", to the extent those rules relate to violation by North Suburban's public water supply of the 5 picocuries per liter ("pCi/l") combined radium-226 and radium-228 standard of 35 Ill. Adm. Code.Subtitle F<sup>1</sup>. The variance extension is requested for one year.

The Illinois Environmental Protection Agency ("Agency") filed its Variance Recommendation ("Rec.") on January 18, 1991<sup>2</sup>. The Agency recommends that variance be granted, subject to conditions. North Suburban waived hearing and no hearing has been held.

Based on the record before it, the Board finds that North Suburban has presented adequate proof that immediate compliance with the Board regulations at issue would impose an arbitrary or unreasonable hardship. Accordingly, the variance will be granted, subject to conditions consistent with this Opinion and as set forth in the attached Order.

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<sup>1</sup> The standard for combined radium was formerly found at 35 Ill. Adm. Code 604.301(a); effective September 20, 1990 it was recodified to 35 Ill. Adm. Code 611.330(a) (see Illinois Register, Volume 14, Issue 40, October 5, 1990).

<sup>2</sup> The Agency's Recommendation is accompanied by a motion to file instant. That motion is hereby granted.

BACKGROUND

North Suburban provides a public utility water service and sanitary sewer service in unincorporated areas in proximity to Glenview, Illinois under certificates of public convenience and necessity granted by the Illinois Commerce Commission. North Suburban is an Illinois corporation and a public utility within the meaning of the Illinois Public Utilities Act.

North Suburban was initially notified of noncompliance with the combined radium standard by the Agency on November 16, 1984 (Rec. ¶10). The observed combined radium content then was 9.4 pCi/l (Rec. ¶11); the most recent analysis shows a combined radium content of 7.8 pCi/l (Id.).

REGULATORY FRAMEWORK

In recognition of a variety of possible health effects occasioned by exposure to radioactivity, the United States Environmental Protection Agency ("USEPA") has promulgated a maximum concentration limit for drinking water of 5 pCi/l of combined radium-226 and radium-228. Illinois subsequently adopted the same limit as the maximum allowable concentration under Illinois law. Pursuant to Section 17.6 of the Illinois Environmental Protection Act (Ill. Rev. Stat. 1989, ch. 111  $\frac{1}{2}$ , par. 1017.6), any revision of the 5 pCi/l standard by the USEPA will automatically become the standard in Illinois.

The action that North Suburban requests here is not variance from the maximum allowable concentration for radium. Despite the action taken by the Board in the instant matter, this standard will remain applicable to North Suburban. Rather, the action North Suburban requests is the temporary lifting of prohibitions imposed pursuant to 35 Ill. Adm. Code 602.105 and 602.106. 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 Environmental Protection Act (Ill. Rev. Stat. 1981, ch. 111  $\frac{1}{2}$ , 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.

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 Illinois regulations not found in federal law. It is this prohibition which North Suburban requests be lifted. Moreover, grant of the requested variance would not absolve North Suburban from compliance with the combined radium standard, nor insulate North Suburban from possible enforcement action brought for violation of those 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 (Ill. Rev. Stat. 1989, ch. 111 ½, par. 1035(a)). 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. IPCB (1977), 135 Ill.App.3d, 481 N.E.2d, 1032). Only with such showing can the claimed hardship rise to the level of arbitrary or unreasonable hardship.

Lastly, a variance by its nature is 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 that 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.

#### PRIOR VARIANCE AND COMPLIANCE PLAN

North Suburban requests extension of the variance granted by the Board on March 19, 1987 in PCB 86-199<sup>3</sup>. Under the terms of this prior variance, North Suburban was to try to obtain Lake Michigan water for the purposes of blending with water derived from its well system (see conditions (B) and (C) at 76 PCB 360).

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<sup>3</sup> See: North Suburban Public Utility Company v. Illinois Environmental Protection Agency, PCB 86-199, 76 PCB 356, March 19, 1987.

North Suburban requests that the record in PCB 86-199 be incorporated into the instant record (Pet. ¶11). However, North Suburban has not met the filing requirements for incorporation of a record, as found at 35 Ill. Adm. Code 101.106(a). The incorporation request is accordingly denied.

North Suburban has been successful in obtaining Lake Michigan water, through contract with adjoining municipalities, in amount equivalent to approximately 45% of North Suburban's total needs (Pet. ¶3); the remaining 55% continues to be provided from groundwater sources (Id.). Nevertheless, even with this amount of Lake Michigan water available for blending, North Suburban apparently cannot consistently provide water at less than 5 pCi/l.

Now, under terms of a Water Supply Agreement dated June 8, 1990 between North Suburban and the Village of Niles, North Suburban will obtain Lake Michigan water sufficient to meet all its water supply requirements (Pet. ¶6). Given the low radium concentration of Lake Michigan water, North Suburban should be in compliance with the radium standard following full conversion from well water.

North Suburban estimates that construction of all facilities necessary to interconnect the North Suburban service area with Niles will require approximately one year (Id. ¶9). It is this one year period for which North Suburban requests variance.

#### HARDSHIP

If North Suburban is unable consistently to provide water at or below the radium standard, it would presumably be placed on Restricted Status following expiration of its current variance in March 1991. When on Restricted Status, North Suburban would be unable to extend service to new customers. This would act to the detriment of customers who need public water supply for functional use of property.

#### PUBLIC INTEREST

The Agency contends that there will be little or no adverse impact caused by the granting of variance (Rec. ¶16). In support of this contention, the Agency references testimony presented by Richard E. Toohey, Ph.D. of Argonne National Laboratory at the hearing held on July 30 and August 2, 1985 in R85-14, Proposed Amendments to Public Water Supply Regulations, 35 Ill. Adm. Code at 602.105 and 602.106, and to updated testimony presented by Dr. Toohey in the Board's hearing on the Braidwood variance, PCB 89-212 (Rec. ¶15).

The Agency believes that while radiation at any level creates some risk, the risk associated with North Suburban's water is very low (Rec. ¶14). In summary, the Agency states:

The Agency believes that the hardship resulting from denial of the recommended variance from the effect of being on Restricted Status would outweigh the injury of the public from grant of that variance. Considering the likelihood of no significant injury to the public

from continuation of the present level of the contaminant in question in the Petitioner's water for the limited period of the variance, the Agency concludes that denial of a variance from the effects of Restricted Status would impose an arbitrary or unreasonable hardship upon Petitioner.

The Agency observes that this grant of variance from restricted status should affect only those users who consume water drawn from any newly extended water lines. 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. Grant of variance may also, in the interim, lessen exposure for that portion of the population which will be consuming more effectively blended water. In so saying, the Agency emphasizes that it continues to place a high priority on compliance with the standards.

(Rec. ¶28 and ¶29)

#### CONCLUSION

The Board finds that, in light the facts and circumstances of this case, denial of variance would impose an arbitrary or unreasonable hardship upon North Suburban. The Board also agrees with the parties that no significant health risk will be incurred by persons who are served by any new water main extensions, assuming that compliance is timely forthcoming. In reaching these conclusions, the Board notes that it gives weight to North Suburban's compliance efforts to date, the apparent imminency of compliance, and the small amount by which the combined radium standard is exceeded. Accordingly, variance will be granted.

North Suburban's request for a one-year term of variance is premised solely on the time needed for facility development; it does not recognize the time needed for a demonstration of compliance. A demonstration of compliance requires that the concentration in an annual composite of consecutive quarters or the average of the analyses of four consecutive quarterly samples be less than the 5 pCi/l standard, pursuant to 35 Ill. Adm. Code 611.Subpart Q (formerly 35 Ill. Adm. Code 605.105(a)). Thus, the accumulation of data necessary to demonstrate compliance may require as much as a year after the date on which North Suburban asserts it will have the facilities necessary to attain compliance. In recognition of this needed additional year, the variance will be granted for two years, with the second year intended for the compliance demonstration. Should compliance be demonstrated earlier, the variance will alternatively terminate at the earlier date.

The Board also notes that promulgation of a new radium standard by the USEPA might significantly alter North Suburban's compliance circumstance, even perhaps removing the need for a continued variance from Restricted Status. Although it now uncertain whether USEPA will complete promulgation of a new radium standard during the two-year variance period at issue here, the Board will also make the termination of variance dependent upon the date of USEPA alteration (or notice of refusal to alter) of the radium standard.

North Suburban is to bear in mind that today's action is solely a grant of variance from Restricted Status. North Suburban is not being granted variance from compliance with the combined radium standard, nor does today's action insulate North Suburban in any manner against enforcement for violation of that standard.

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

ORDER

Petitioner, North Suburban Public Utility Company, is hereby granted variance from 35 Ill. Adm. Code 602.105(a), Standards of Issuance, and 602.106(b), Restricted Status, as they relate to the standard for radium in drinking water of 35 Ill. Adm. Code.Subtitle F, subject to the following conditions:

- (A) For the purposes of this Order, the date of USEPA action shall consist of the earlier of the:
  - (1) Effective date on any regulation promulgated by the U.S. Environmental Protection Agency ("USEPA") 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 concentration 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) March 28, 1993; or
  - (2) When analysis pursuant to 35 Ill. Adm. Code 611.Subpart Q, or any compliance demonstration method then in effect, shows compliance with any

standards for radium in drinking water then in effect; or

- (3) One year following the date of USEPA action.
- (C) Compliance shall be achieved with any standards for radium then in effect no later than the date on which this variance terminates.
- (D) In consultation with the Illinois Environmental Protection Agency ("Agency"), Petitioner shall continue its sampling program to determine as accurately as possible the level of radioactivity in its wells and finished water. Until this variance terminates, Petitioner shall collect quarterly samples of water from its distribution system at locations approved by the Agency. Petitioner shall composite the quarterly samples for each location separately and shall have them analyzed annually by a laboratory certified by the State of Illinois for radiological analysis 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 the most recent result to:

Illinois Environmental Protection Agency  
Compliance Assurance Section  
Division of Public Water Supplies  
P.O. Box 19276  
2200 Churchill Road  
Springfield, Illinois 62794-9276

- (E) Within three months of the grant of this variance, Petitioner shall apply to the Agency at the address below for all permits necessary for construction of installations, changes, or additions to Petitioner's public water supply needed for achieving compliance with the maximum allowable concentration for combined radium, or with any standards for radium in drinking water then in effect:

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

- (F) Within three months 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. Petitioner shall accept appropriate bids

within a reasonable time. Petitioner shall notify the Agency at the address in condition (E) of each of the following actions: 1) advertisement for bids, 2) names of successful bidders, and 3) whether Petitioner accepted the bids.

- (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 shall send to each user of its public water supply a written notice to the effect that Petitioner has been granted by the 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 radium standard.
- (H) 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 shall send to each user of its public water supply a written notice to the effect that Petitioner is not in compliance with standard for radium. The notice shall state the average content of radium in samples taken since the last notice period during which samples were taken.
- (I) Until full compliance is achieved, Petitioner shall take all reasonable measures with its existing equipment to minimize the level of combined radium, radium-226, and radium-228 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 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.

Within 45 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, Post Office Box 19276, Springfield, Illinois 62794-9276, a



Certification of Acceptance and Agreement to be bound 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 and of no force and effect as a shield against enforcement of rules from which variance was granted. 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 Pollution Control Board in PCB 90-229, March 28, 1991.

\_\_\_\_\_  
Petitioner

\_\_\_\_\_  
Authorized Agent

\_\_\_\_\_  
Title

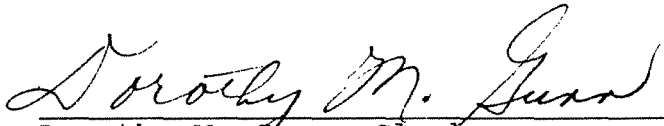
\_\_\_\_\_  
Date

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1989 ch. 111 ½ 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.

IT IS SO ORDERED.

Board Members Jacob D. Dumelle, J. Theodore Meyer, and Bill Forcade dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 28<sup>th</sup> day of March, 1991, by a vote of 4-3.

  
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Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board