

ILLINOIS POLLUTION CONTROL BOARD
August 8, 1991

VILLAGE OF BENSENVILLE,)
)
 Petitioner,)
)
 v.) PCB 91-66
) (Variance)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

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

This matter is before the Board on the April 22, 1991 filing by petitioner Village of Bensenville (Village) of a petition for variance extension. The Village seeks relief from 35 Ill. Adm. Code 602.105(a), "Standards for Issuance", and 602.106(a), "Restricted Status", to the extent those rules relate to violation by the Village's public water supply of the 5 picocuries per liter ("pCi/l") combined radium-226 and radium-228.¹ The Village requests a two-year variance.

On May 29, 1991, the Illinois Environmental Protection Agency (Agency) filed its variance recommendation. The Agency recommends that the variance be granted subject to certain conditions. The Village waived hearing and none has been held.

For the following reasons, the Board finds that the Village 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 Village is a municipality located in DuPage County. The Village provides potable water supply and distribution for a population of 5,500 residential and 1,100 industrial and commercial utility customers, representing some 17,800 residents and 1,100 industries and businesses employing approximately 20,000 people as of 1991. (Pet. 4.) The water system includes 5 deep wells, pumps, and distribution facilities. (Pet. 5.)

¹ The standard for combined radium was formerly found at 35 Ill. Adm. Code 604.301(a); effective September 20, 1990 it was recodified at 35 Ill. Adm. Code 611.330(a).

The Village was first advised that its water supply exceeded the maximum allowable concentration for combined radium in a December 9, 1985 letter from the Agency. That December 1985 analysis showed a combined radium content of 9.8 pCi/l. (Pet. 5; Rec. 4.) On May 22, 1986, in docket PCB 86-42, the Board granted the Village a five-year variance from restricted status for combined radium. That variance expired on May 22, 1991, and the Village seeks to extend that variance. The most recent analysis of the Village's water showed a combined radium content of 18.2 pCi/l. (Rec. 4.)

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 Village requests that it be allowed to extend its water service while it pursues compliance with the radium 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. (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. Pollution Control Board (1977), 135 Ill.App.3d 343, 481 N.E.2d, 1032). Only with such showing can the claimed hardship rise to the level of arbitrary or unreasonable hardship. Where, as here, the petitioner seeks to extend a variance, the petitioner must show satisfactory progress.

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.

It is to be noted that 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.

Standards for radium in drinking water were first adopted as national Interim Primary Drinking Water Regulations (NIPDWRs) by the USEPA in 1976. The standards adopted were 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 "interim" limits, these standards nevertheless are the maximum allowable concentrations under both federal and Illinois law, and will remain so unless modified by the USEPA.²

Over much of the fifteen years since their original promulgation, the current radium standards have been under review at the federal level. The USEPA first proposed revision of the standards 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). Most recently, on June 19, 1991, USEPA announced a proposal to modify the radium standards.³ USEPA proposes to replace the 5 pCi/l combined radium standard by separate standards of 20 pCi/l each for radium-226 and

² 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.

³ Publication occurred at 56 Fed.Reg. 33050, July 18, 1991.

radium-228. Under the USEPA's calendar, these standards are scheduled for promulgation by April 1993 with an effective date of October 1994.

COMPLIANCE PLAN

The Village intends to obtain Lake Michigan water (which has a low radium content) to replace the water currently supplied by its deep wells. The Village and several neighboring municipalities have begun construction of a Lake Michigan water transmission system. DuPage County passed a referendum in November 1985 to issue bonds to construct the system. The Village and other municipalities have secured allocations from the State of Illinois to use Lake Michigan water and have executed numerous contracts with each other, the City of Chicago, financial institutions, governmental and private property owners, and contractors. The total cost for the water transmission system is over \$350,000,000. The Village states that although the primary purpose of this program is to cease using the dwindling supply of groundwater and assure the public of an adequate supply of high quality Lake Michigan water, the program will also eliminate the radium in the public water supply. (Pet. 6.) The Village states that Lake Michigan water will be delivered by 1992, with the first full year of operation anticipated in 1993. (Pet. 7.)

HARDSHIP

The Village contends that the hardship resulting from denial of the requested variance outweighs any injury to the public from granting the variance. (Pet. 9-10.) The Village argues that denial of the requested variance would result in an arbitrary and unreasonable hardship because construction requiring the extension of the water supply system could not resume. The Village states that such a halt in construction hurts prospective home buyers as well as business developers and the Village's tax base. (Pet. 9.) The Village also contends that it has a great need for expansion of the water distribution system in order to serve the domestic and fire protection requirements of its customers. (Pet. 9.) It maintains that the water system must be improved to assure adequate quantities of water throughout the service area, reliable water service, and fire protection. (Pet., Attach. 2.) The Village plans to construct 4,600 feet of 12-inch water main to eliminate severe flow restrictions. 2,800 feet of that 12-inch main is already under construction. The Village also intends to construct 36,250 feet of watermain to provide the Village with 12-inch water main loops. Additionally, in order to eliminate dead end water mains, the Village plans to construct an additional 7,950 feet of water main. (Pet., Attach. 2.)

The Agency agrees that denial of the variance would impose an arbitrary or unreasonable hardship on the Village. (Rec. 7, 8.)

ENVIRONMENTAL IMPACT

Although the Village has not undertaken a formal assessment of the environmental effects of its requested variance, it contends that there will be minimal or no adverse impact caused by the granting of the variance. (Pet. 7.) The Agency agrees with the Village's assertion. (Rec. 4-5.) The Agency cites the testimony presented by Richard E. Toohey, Ph.D., of Argonne National Laboratory, at the July 30 and August 2, 1985 hearings for the Proposed Amendments to Public Water Supply Regulations 35 Ill. Adm. Code 602.105 and 602.106 (R85-14) in support of the assertion that the variance will not result in any adverse environmental impact. (Pet. 14; Rec. 5) The Agency also refers to updated testimony presented by Dr. Toohey in the Board's hearing on a variance requested by the City of Braidwood in PCB 89-212. (Rec. 5.)

While the Agency believes that radiation at any level creates some risk, the risk associated with the Village's water supply is very low. (Rec. 5.) The Agency states that "an incremental increase in the allowable concentration for the contaminants in question even up to a maximum of two times the MCL for the contaminants in question should cause no significant health risk for the limited population served by new water main extensions for the time period of this recommended variance." (Rec. 5) In summary, the Agency states as follows:

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. In light of the likelihood of no significant injury to the public from continuation of the present level of the contaminants in question in the Petitioner's water for the limited time period of the variance, and the possibility of compliance with a new MCL standard by less expensive means if the standard is revised upward, 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. In so saying, the Agency emphasizes that it continues to place a high priority on compliance with the standards.

(Rec. 8-9.)

CONSISTENCY WITH FEDERAL LAW

The Agency states that the requested variance may be granted consistent with the Safe Drinking Water Act (42 U.S.C. 300(f)) and corresponding regulations (40 CFR Part 141) because the variance does not grant relief from compliance with the federal primary drinking regulations. (Rec. 7.)

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 Village of Bensenville. The Board notes that the Village has provided only minimal information on the issue of arbitrary or unreasonable hardship as it relates to an inability to extend water mains. No specific information regarding possible new development was provided, for example. However, given the Village's need to upgrade and expand its water system for domestic and fire protection needs, the Board will grant the variance.

The Board notes that the Village has only requested a two-year variance. However, the Village states that it anticipates delivery of Lake Michigan water beginning in 1992, "with its first full year of operation anticipated in 1993." (Pet. 7.) Assuming that delivery does not begin until 1992, the two-year requested variance would be insufficient pursuant to 35 Ill. Adm. Code 611.731(a) which requires four quarterly samples to establish compliance. Hence, the Board will grant this variance for a maximum period of three years, with the third year being solely for the purpose of testing, subject to certain conditions which could result in an earlier termination of this variance.

Today's action is solely a grant of variance from standards of issuance and restricted status. The Village is not granted variance from compliance with the combined radium standard, nor does today's action insulate the Village in any manner against enforcement for violation of these standards.

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

ORDER

The Village of Bensenville is hereby granted 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) Variance shall terminate on the earliest of the following

dates:

- (1) August 8, 1994; or
 - (3) When analysis pursuant to 35 Ill. Adm. Code 611.720(d) and 611.731(a), or any compliance with standards then in effect, shows compliance with standards for radium in drinking water then in effect.
- (B) Compliance shall be achieved with any standards for radium then in effect no later than the date on which this variance terminates.
- (C) The Village shall report to the Agency within 6 months of the grant of this variance as to the status of obtaining Lake Michigan water and shall submit to the Agency a copy of the fully executed contract between the Village and all other interested parties.
- (D) Construction of all installations, changes or additions necessary to achieve compliance with the maximum contaminant level in question shall be completed no later than two years from the grant of this variance. The third year of the variance is to be used solely to prove compliance.
- (E) In consultation with the Illinois Environmental Protection Agency ("Agency"), the Village shall continue its sampling level of radioactivity in its wells and finished water. Until this variance terminates, the Village shall collect quarterly samples of its water from its distribution system at locations approved by the Agency. The Village shall composite the quarterly samples from each location separately and shall analyze them annually by a laboratory certified by the State of Illinois radiological analysis so as to determine the concentration of radium-226 and radium-228. At the option of the Village, 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
2200 Churchill Road
Springfield, Illinois 62794-9276
- (F) 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, the Village will send to each user of its public water supply a written notice to the effect that the Village 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(a) Restricted Status, as they relate to the radium standard.

- (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, the Village will send to each user of its public water supply a written notice to the effect that the Village 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) Until full compliance is achieved, the Village shall take all reasonable measures with its existing equipment to minimize the level combined radium-266 and radium-228, in its finished drinking water.
- (I) The Village 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 forty-five days of the date of this Order, the Village shall execute and forward to:

Stephen C. Ewart
 Division of Legal Counsel
 Illinois Environmental Protection Agency
 P.O. Box 19276
 2200 Churchill Road
 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. The form of 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 91-66, August 8, 1991.

Petitioner

Authorized Agent

Title

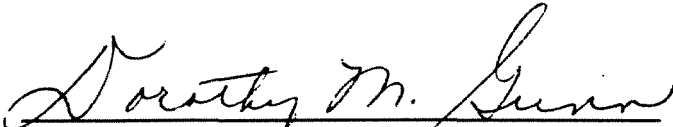
Date

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.

IT IS SO ORDERED.

J.D. Dumelle concurred, and B. 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 8th day of August, 1991, by a vote of 6-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board