

ILLINOIS POLLUTION CONTROL BOARD  
September 13, 1989

UNITED CITY OF THE )  
VILLAGE OF YORKVILLE, )  
 )  
Petitioner, )  
 )  
v. ) PCB 89-84  
 ) (Variance)  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
 )  
Respondent. )

DANIEL J. KRAMER APPEARED ON BEHALF OF THE PETITIONER.

BOBELLA GLATZ, APPEARED ON BEHALF OF THE RESPONDENT.

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

This matter comes before the Board on a petition filed by the United City of the Village of Yorkville (Yorkville) on May 15, 1989 and amended on June 7, 1989. Yorkville is seeking an extension of a prior variance from 35 Ill. Adm. Code 602.105(b), Standards of Issuance and from 35 Ill. Adm. Code 602.106(b) Restricted Status, but only to the extent those rules involve 35 Ill. Adm. Code 604.301(a), which concerns the maximum allowable concentration (MAC) of radium in a public water system. The extension is requested until May 9, 1992.

The petitioner waived its right to a hearing on this matter and the Board received no objection from the public. Consequently no hearing has been held. On June 14, 1989 the Illinois Environmental Protection Agency (Agency) filed a variance recommendation recommending that the requested variance extension be granted subject to conditions.

Yorkville, which is located in Kendall County, owns and operates a deep well water supply system. The system includes two deep wells, one shallow well, pumps and distribution facilities which serve a population of approximately 3,500 people as well as commercial and industrial consumers.

The Agency in its Recommendation stated that the radium water quality sampling results were as follows:

An analysis was reported to Petitioner on January 25, 1984 of an annual composite of four consecutive quarterly samples or the average of the analyses of four samples obtained at quarterly intervals. The analyses showed a radium-226 content of 5.6

pCi/l and the radium-228 content was 2.2 pCi/l. The combined radium-226 and radium-228 content was therefore 7.8 pCi/l, exceeding the 5 pCi/l standard. A second analysis was reported to Petitioner on December 8, 1986. The combined radium-226 and radium-228 content was 11.7 pCi/l, also exceeding the 5pCi/l standard.

(Ag. Rec., p.3).

Additionally, the Board received a letter from Yorkville's city engineer/administrator, on June 7, 1989, outlining current sampling frequencies. This letter stated that the city has been taking monthly samples from the two deep wells since the first of the year. The purpose of these samples is to establish a data base from which to calculate the proper amount of shallow well water to blend with the deep well water to achieve compliance with the MAC for radium. The letter states:

The average Ra-226 and Ra-228 at Well #3 is 6.6 pCi/L and 3.2 pCi/L respectively, while the Ra-226 at Well #4 is 5.4 pCi/L and 3.0 pCi/L respectively.

(June 7, 1989, Am. Pet., p.1).

The Board construes this letter an amendment to the petition.

#### HISTORY

On May 9, 1986 the Board granted Yorkville a variance from 35 Ill. Adm. Code 602.105(a) and 602.106(b) as those Sections relate to the combined radium standard of Section 604.301(a) subject to conditions. The variance expired May 9, 1989. Yorkville was to investigate compliance methods and submit a Compliance Report to the Agency's Division of Public Water Supplies nine months after the grant of the variance. Construction of installations, changes or additions of Yorkville's public waterway were to begin at a time which would bring Yorkville into compliance by May 9, 1989.

On April 16, 1987 the Board granted a request by Yorkville to modify the May 9, 1989 variance. Yorkville requested an additional 6 months in which to present a detailed plan for compliance and subsequently apply for necessary permits needed to implement a compliance alternative. This variance allowed Yorkville to submit its Compliance Report 15 months after the May 9, 1986 grant of variance. Three months after submission of the report Yorkville was to apply for necessary permits for construction of installations needed for achieving compliance. Construction was to begin at a time which would bring the city

into compliance by May 9, 1989. Effectively, this variance extension required that the Compliance Report be submitted to the Agency by August 9, 1987.

On October 13, 1987 Yorkville filed a Petition for Extension of Radium Variance to obtain permits. Yorkville requested that the time allowed between filing of the Compliance Report and the application for construction permits be extended to 6 months. This request if granted would have allowed the deadline for filing for permits to be extended to February 9, 1988.

On October 15, 1987 the Board issued an Order stating that the October 13th petition was deficient under Section 104.121 of the Board's Procedural Rules. Also, the Board stated that the petition failed to explain why Yorkville required a six month extension of the prior variance. The Board required that the deficiencies be corrected within 45 days. The October 13, 1987 petition is set forth as Exhibit G to Yorkville's instant variance petition. It is significant to note that the 1987 petition asserts that Yorkville has committed to a compliance plan of blending with shallow, low radium water and that the compliance report had been timely filed with the Agency.

On January 21, 1988 the Board entered an order dismissing the October 13, 1987 petition due to Yorkville's failure to correct the petition's deficiencies.

On January 18, 1989 Yorkville filed another petition for extension of prior variance.

On January 19, 1989 the Board issued an order finding the January 18th petition deficient for failure to submit the appropriate filing fee. Also, the Board stated that the petitioner failed to submit a compliance plan to the extent required by 35 Ill. Adm. Code 104.121(f). The Board granted a 21-day period for payment of the filing fee and a 45-day period to include a compliance plan.

On March 27, 1989 the Board entered an order dismissing the January 18th petition for failure to pay the required filing fee.

On May 9, 1989 Yorkville's variance, which was granted on May 9, 1986, expired. On May 15, 1989 Yorkville filed the Instant Petition for Extension of Prior Variance.

Yorkville's petition explains the need for the instant variance request as follows:

That due to the failure of treatment methods [namely the Iso-clear System (see Pet. p.2)] discussed by the United City of the Village of Yorkville, and the inability to find an adequate shallow water supply for blending

purposes, has prohibited the City from complying with the deadline of May 9, 1989.

(Pet., p.6).

The May 15, 1989 petition states that Yorkville has explored a substantial number of alternatives to bring the water system in compliance with the MAC for radium. Yorkville states that after a costly exploratory drilling program a shallow well was recently discovered which could provide an adequate water supply. This well would provide water of sufficient quality and quantity to mix with the deep well water and thus bring water quality into compliance with the radium MAC. However, petitioner states that the cost of the well and transmission pipeline is currently beyond the City's financial resources.

Additionally, Yorkville has begun negotiating with the City of Plano for purposes of construction of a pipeline between the two cities to obtain shallow water from Plano for purposes of blending. However, the cost of this project is also beyond the current financial capabilities of Yorkville.

Therefore Yorkville requests a 3 year extension to simultaneously pursue two alternative plans.<sup>1</sup>

One plan consists of the purchase of water from the city of Plano and the construction of a transmission pipeline from Plano to Yorkville. The second plan consists of the purchase of the newly discovered well site and construction of pipeline and treatment facilities.

On July 17, 1989 Yorkville filed a motion for expedited decision in this matter. In that motion, Yorkville states that a large subdivision is currently ready to install extensions of city water mains and to provide service for model homes within 30 days.

The Agency in its Recommendation, filed June 14, 1989, recommends that the Board grant a three year variance.

The Agency states that the risk associated with this contaminant at levels found in Yorkville's water is very low.

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<sup>1</sup> At one point in the petition, Yorkville requested an extension of the completion deadline from May 9, 1989 to May 9, 1991 for purposes of compliance with radium MAC. Later in the petition, Yorkville requested a variance extension for an additional 2 year period of time. Finally, in summary, Yorkville prays the Board grant a variance for a period of 3 years from May 9, 1989.

The Agency believes an incremental increase in the allowable concentration for the contaminant in question even up to a maximum of four times the MAC 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 this recommended variance.

(Ag. Rec., p.5).

The Agency believes that grant of the requested variance, for the limited time period requested, would impose no significant injury on the public or on the environment. The Agency states that denial of the variance would be an arbitrary and unreasonable hardship to the petitioners. The Agency states that "[f]ailure of the Iso-Clear [treatment] method was beyond the control of the petitioner". Denial of a variance from 35 Ill. Adm. Code 602.105 Standards for Issuance would require the Agency to continue to deny construction and operating permits until compliance is achieved.

#### FINDINGS

Considering all the facts, it is apparent that the failure of the Iso-Clear system is not relevant to the issue of arbitrary or unreasonable hardship in the instant variance request. While the Board granted an extension of certain variance conditions (by its April 16, 1987 Order) based in part on Yorkville's desire to explore the Iso-Clear system as a possible compliance option, it is clear that Yorkville never committed to using the Iso-Clear system as its chosen compliance plan.

As Exhibit D to the instant Petition, Yorkville attaches a report by Baxter and Woodman, Environmental Engineers, dated September 1, 1987. Yorkville refers to this report as its Compliance Report. The report discusses various compliance alternatives. In its discussion of the Iso-Clear process, it states:

The Isoclear process very likely will not be approved for use by the Illinois Environmental Protection Agency and be commercially available in sufficient time to allow the City to comply with the required deadline. It had been hoped that the testing and documentation of this process would be complete by this time. Unfortunately, however, the required testing has not yet been started.

(Pet., Exh. D, p.22).

The report concludes:

It is our recommendation, based on the above considerations, that the City of Yorkville proceed with Alternate 5: blending of shallow well water with the deep well water to achieve a radium concentration of less than 5 pCi/l in the finished water. It is our opinion that the use of the shallow wells will provide the City with a reliable source of quality water, utilize a treatment process which has low operational costs and requires minimal operator attention, and eliminate the disposal problems and safety hazards associated with concentrated radium wastes.

To complete the shallow well blending alternative by the May 9, 1989 deadline, we recommend the City consider the following schedule for inclusion in the Compliance Report required by Illinois Pollution Control Board....

(Id. at 24).

Also attached to the instant petition, as Exhibit G, is the October 13, 1987 petition of Yorkville. In that petition, which was subsequently dismissed due to Yorkville's failure to remedy informational deficiencies of the petition, Yorkville states that it has "timely filed its written Compliance Report to the [Board] with a copy to the [Agency] electing as its method of solving its existing radium difficulty by drilling additional shallow wells".

Therefore, as of the Fall of 1987, Yorkville had committed to a plan to utilize shallow water wells and not the Iso-Clear system as a method of achieving compliance. Failure of the Iso-Clear system has no real bearing on Yorkville's inability to comply with the radium standards in accordance with the previous variance.

The September 1, 1987 engineering report sets forth a schedule to implement a blending plan and achieve compliance by May 9, 1989. With respect to the proposed schedule of implementation, the report cautions:

This schedule is very tight and provides little buffer in the event the City encounters delays in project financing or in acquisition of well sites and easements. It will be important that the financing and legal aspects of this project proceed simultaneously with the engineering to avoid delays that may prevent project completion by the deadline date.

(Pet., Exh. D, p.25).

It appears that exploratory drilling for a shallow water source was not completed until sometime before June 24, 1988. (Pet., Exh. E). Evidently, the drilling done prior to June 24, 1988 did not discover any suitable water supply, because the instant petition states that Yorkville has "recently discovered" a test well which has an adequate supply of water for the purposes of blending. Apparently, this well is being considered the basis of one of the currently proposed compliance alternatives. The Board notes that when Yorkville encountered timing problems with respect to carrying out the conditions of the previously granted variance, it should have (and could have) pursued a variance modification or extension much earlier.<sup>2</sup>

One might infer from one passage in the Petition that Yorkville was not all too anxious to implement a compliance plan:

That it is the belief of the United City of the Village of Yorkville that said [1991 variance] deadline would enable either legislation to be adopted by the United States Congress permitting an adequate financial resource for the construction of the necessary shallow water or pipeline improvements, whichever alternative is ultimately adopted by the City, or in the alternative that legislation to raise the current radium levels as set forth in the attached Exhibit "H" shall have passed by said time, greatly reducing the cost of compliance herein.

(Pet., p.6).

The Board points out that Section 35(a) of the Act states:

The Board may 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. However, the Board is not required to find that an arbitrary or unreasonable hardship exists exclusively because the regulatory standard is under

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<sup>2</sup> The Board notes that Yorkville filed petitions on October 13, 1987 and January 18, 1989 which were both dismissed because of Yorkville's failure to comply with Board Orders.

review and the costs of compliance are substantial and certain. (emphasis added).

A variance temporarily relieves a person from complying with regulations or Orders of the Board while that person takes actions to ultimately achieve compliance. Variances are not to be utilized in succession indefinitely as a means of attaining defacto permanent relief. Department of Army v. Illinois Environmental Protection Agency, PCB 87-38, 81 PCB 257, 266 (September 17, 1987). Container Corporation v. Illinois Environmental Protection Agency, PCB 87-183, slip op. at 3 (June 2, 1988). Compliance with Board regulations is an ultimate goal of the Act. Monsanto Co. v. Illinois Pollution Control Board, 67 Ill. 2d 276, 367 N.E. 2d 684, 688 (1977).

Yorkville was first notified that its water exceeded radium standards in January of 1984. Now, more than 5½ years later, Yorkville is still out of compliance. While it seems to have selected a method to achieve compliance - blending with low radium water - it still has not committed to a particular plan by which the blending will be accomplished.

Given the circumstances of this case, the Board does not find that Yorkville's failure to comply with the terms of the previous variance is completely justified. Yorkville has still not even taken the minimal step of selecting a firm compliance plan, which it committed to do by summer of 1987. The dilatory actions of Yorkville should not be rewarded with an extension of the variance as requested by Yorkville. To grant such a variance under these circumstances would be an affront to the municipalities which have diligently pursued compliance, often at great expense. The Board has denied variances based upon the reasoning that any hardship resulting from a denial would be self-imposed due to the petitioner's own delay in developing and implementing an adequate compliance plan. eg. Village of Lemont v. Illinois Environmental Protection Agency, PCB 86-54, 71 PCB 396, 399 (July 31, 1986). As a result, Yorkville's request for a three-year variance is denied.

However, it is also apparent that Yorkville has, at some expense, attempted to locate a shallow water supply through exploratory drilling. Those attempts were not successful, and as a result, Yorkville appears to have encountered some timing problems with implementing the conditions of the previous variance.

Additionally, Yorkville states that "a large subdivision is currently ready to install extension of City water mains, and to provide service for model homes within the next '30' days".

The Agency asserts that a grant of a variance, even to the extent requested by Yorkville, "should cause no significant health risk for the limited population served by the new water main extensions". (Ag. Rec., p.5).



Although the Board believes that Yorkville has not justified a variance extension to the extent requested, the Board finds the circumstances to be such that a complete denial of a variance would impose an arbitrary or unreasonable hardship. In reaching this conclusion, the Board has essentially given Yorkville the "benefit of the doubt" that the timing of its actions under the previous variance were taken in good faith and not solely for the purposes of delay in the hope that the radium standards would be changed. Therefore, the Board will grant Yorkville a variance which will enable the issuance of permits to allow the extension of water mains to the development which is referenced in Yorkville's July 17, 1989 Motion For Expedited Decision. The Board reached a similar outcome in City of Geneva v. Illinois Environmental Protection Agency, PCB 86-225, 79 PCB 45 (July 16, 1987).

Obviously, if Yorkville desires a variance which would enable other extensions of its water mains or extensions beyond the limited time frame of the variance granted herein, Yorkville must pursue another variance request.

The variance granted today will expire December 31, 1989. This should give sufficient time to obtain the necessary permits to extend the water mains to the development referenced in Yorkville's motion for expedited decision.

A condition of the variance requires Yorkville to send notices of the the variance to users of the water supply along with the first set of water bills issued during the variance period. A similar provision was recommended by the Agency and was also a condition of the 1986 variance.

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

#### ORDER

The United City of the Village of Yorkville (Yorkville) is hereby granted variance from 35 Ill. Adm. Code 602.105(a), Standards of Issuance, and 602.102(b), Restricted Status, as those Sections relate to the combined radium standard set forth by Section 604.301(a) only to the extent and for the purpose of the issuance of permits to extend water main service to the development referenced in Yorkville's July 17, 1989 Motion for Expedited Decision. The variance is subject to the following conditions.

- 1) This variance shall expire December 31, 1989.
- 2) Along with the first set of water bills issued during the period of this variance, Yorkville shall send to each user of its public water supply a written notice of the variance. The notice shall inform the public that

Yorkville has been granted a variance from Illinois regulations (35 Ill. Adm. Code 602.105(a), Standards of Issuance and 602.106(b), Restricted Status) to allow limited extension of water main service despite the fact that Yorkville's water supply is not in compliance with the 5 picocuries per liter standard for combined radium-226 and radium-228 (35 Ill. Adm. Code 604.301(a)). The notice shall also state the average content of combined radium-226 and radium-228 of the most recent samples taken from the water supply.

- 3) Within 45 days after the date of this Order, the United City of the Village of Yorkville shall execute and send to the Agency a Certificate of Acceptance of this variance by which it agrees to be bound by the terms and conditions contained herein. The executed Certificate shall be sent to:

Illinois Environmental Protection Agency  
 Attention: Bobella Glatz  
 Enforcement Programs  
 P.O. Box 19276  
 2200 Churchill Road  
 Springfield, IL 62794-9276

The 45-day period shall be held in abeyance for any period during which this matter is appealed. Failure to execute and forward the Certificate within 45 days renders this Variance void and of no force and effect. The form of the certification shall be as follows:

CERTIFICATION

I, (We) \_\_\_\_\_, having read the Order of the Illinois Pollution Control Board in PCB 89-84, dated September 13, 1989, understand and accept the Order, realizing that such acceptance renders all terms and conditions thereto binding and enforceable.

\_\_\_\_\_  
 Petitioner

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

\_\_\_\_\_  
 Title

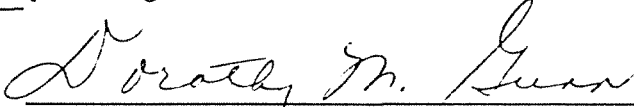
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 Date

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1987 ch. 111  $\frac{1}{2}$  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.

Board members J.D. Dumelle, J.Theodore Meyer 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 13<sup>th</sup> day of September, 1989, by a vote of 4-3.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board