

ILLINOIS POLLUTION CONTROL BOARD
November 2, 1995

SPECTRULITE CONSORTIUM, INC.,)
)
 Petitioner,)
)
 v.) PCB 96-6
) (Variance - Air)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
 Respondent.)

CONCURRING OPINION (by M. McFawn):

I concur. While Petitioner demonstrated that variance from Section 212.458(b)(25) may be granted without significant impact to health or the environment, Petitioner has offered no compliance plan and the majority has failed to require any type of compliance plan. The majority grants the variance absent a compliance plan on the grounds that the Illinois Environmental Protection Agency (Agency) will be the proponent of a rulemaking wherein Section 212.458 will be amended to allow Petitioner to operate two lines, as opposed to the single line to which it is currently restricted by rule. The majority finds that the speculative nature of this change in law "should not be an impediment to a finding of arbitrary or unreasonable hardship". While I agree that the lack of a compliance plan would not be an impediment to such a finding, I fail to understand why the majority addressed the lack of a compliance plan in the context of arbitrary and unreasonable hardship. Adequate proof of arbitrary or unreasonable hardship is statutorily required to obtain a variance, whereas once such a finding has been made petitioners are required to commit to a plan that is reasonably calculated to achieve compliance due to the nature of variances, which is a temporary reprieve from compliance with Board regulation. (Monsanto Co. v. IPCB (1977), 67 Ill.2d 276, 367 N.E.2d 684; City of Mendota v. IPCB (3rd Dist. 1987), 161 Ill. App.3d 203, 514 N.E.2d 218.)

Unlike the majority, I find that Petitioner has demonstrated arbitrary and unreasonable hardship because the most recent air modeling performed by the Agency, which was based upon recent revisions to the air emission source inventory, including significant revisions provided by Petitioner, demonstrates that Petitioner can be allowed to operate two magnesium pot furnace lines without significantly impacting air quality. Given the limited nature of the variance and this fact, Petitioner has demonstrated arbitrary and unreasonable hardship in the absence of the variance.

As for the majority's apparent suspension of the requirement for a variance petitioner to have a compliance plan, I disagree.

Heretofore, the Board has only granted variance where exceptional circumstances are found to exist. The Board has found that exceptional circumstances exist in those rare instances where a petitioner has proven that compliance technology does not yet exist, and additional time is needed to research the same. Alternatively, the Board has found exceptional circumstances to exist where more time is needed to seek a regulatory change, and the grant of variance is conditioned upon the establishment of an alternative compliance plan within a short timeframe if regulatory relief is not forthcoming. Given the speculative nature of rulemaking, the Board has refused to prejudge the outcome of the same even when the site-specific rulemaking is pending before the Board at the time the variance relief is granted. (Illinois Power Company v. IEPA, (June 22, 1989), PCB 88-97, 100 PCB 177, 180, 181; General Motors Corp. v. IEPA, (June 4, 1992), PCB 88-193, 134 PCB-001, 003-004; Borden Chemicals and Plastics Operating Limited Partnership v. IEPA, (October 25, 1990), PCB 90-130, 115 PCB 453, 456-457.)

Neither the majority nor Petitioner has provided basis to depart from precedent on this issue. I would require a compliance plan of Petitioner, and allow it to include a "speculative change in law" because the variance requested is for a limited duration, the environmental impact is minimal, and Petitioner has been and is continuing to investigate technological methods to achieve compliance, or at a minimum, achieve further reductions in its PM-10 emissions.

Accordingly, Petitioner should be required to continue its investigation into the alternative control technology described in its petition and adhere to the schedule likewise contained therein. Based upon it, Petitioner would complete installation of the newly developed pot covers on or about the expiration of this variance if the technology proves feasible. (See Petition of July 12, 1995 at pp. 4-5.) Furthermore, Petitioner should be required to propose its own site-specific rulemaking in sufficient time for the Board to consider the merits of the same prior to the expiration of this variance should the Agency fail to propose a rule amending Section 212.458(b)(25) sufficiently in advance of expiration.

For these reasons, I respectfully concur.

Marili McFawn
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, do hereby certify that the above concurring opinion was filed on the _____ day of _____, 1995.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board