

ILLINOIS POLLUTION CONTROL BOARD
December 19, 1996

J.M. SWEENEY CO.,	)	
	)	
Petitioner,	)	
	)	PCB 96-184
v.	)	(Variance - Air)
	)	
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

STEVEN P. KAISER, THE JEFF DIVER GROUP, APPEARED ON BEHALF OF PETITIONER;

SHEILA G. KOLBE APPEARED ON BEHALF OF RESPONDENT.

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

This matter comes before the Board on a petition for variance filed February 28, 1996 by J.M. Sweeney Co. (Sweeney). Sweeney filed an amended petition for variance on May 10, 1996. The petition requests an extension of variance from Board regulations which require installation of Stage II vapor recovery systems. (35 Ill.Adm.Code 218.586 (1994).) The Board previously granted Sweeney a variance from Section 218.586 in J.M. Sweeney Co. v. IEPA, (September 21, 1995) PCB 94-297¹, that expired March 31, 1996. Sweeney now seeks an extension of the variance until March 31, 1997 to allow time for Sweeney to conduct site remediation activities, and to reconstruct its gasoline dispensing facility in Lake Zurich, Lake County, Illinois. Sweeney also requests the Board to retroactively apply any grant of variance to March 31, 1996.

The Illinois Environmental Protection Agency (Agency) filed its recommendation on June 28, 1996, and a modified recommendation on October 18, 1996. The Agency asserts that an arbitrary or unreasonable hardship would continue to result if the requested relief is denied and therefore recommends grant of variance until March 31, 1997. (M.Rec. at 3.)²

¹ The previous variance order shall be cited as (PCB 94-297 at ____).

² The amended petition for variance will be cited as (Am.Pet. at ____); the Agency's recommendation will be cited as (Rec. at ____.) and the Agency's modified recommendation will be cited as (M.Rec. at ____).

Hearings were held September 20, 1996 and October 18, 1996 in Lake Zurich, Illinois before Hearing Officer June Edvenson.³ No members of the public attended. (Tr.1 at 5.) Sweeney filed its post hearing brief on October 23, 1996 and the Agency filed its post-hearing response on November 1, 1996.⁴

For the reasons set forth below, the Board finds that to require immediate compliance with the Board's regulations requiring installation of Stage II vapor recovery systems before Sweeney completes site remediation and reconstruction would continue to impose an arbitrary or unreasonable hardship on Sweeney. The Board further finds that Sweeney has demonstrated satisfactory progress toward achieving compliance during the term of its prior variance. The Board finds that unusual circumstances in this matter justify a retroactive application of the variance. The Board therefore grants Sweeney an extension of its prior variance, subject to certain conditions set forth in the attached order.

The Board's responsibility in this matter arises from the Illinois Environmental Protection Act (Act). (415 ILCS 5/1 *et seq.* (1994).) The Board is charged with the responsibility of granting variance from Board regulations whenever it is found that immediate compliance with the regulations would impose an arbitrary or unreasonable hardship upon the petitioner. (415 ILCS 5/35(a).) A request for extension of variance may be extended from year to year upon a showing of satisfactory progress during the prior variance. (415 ILCS 5/36(b).) The Agency is required to appear at hearings on variance petitions (415 ILCS 5/4(f)), and is charged, among other things, 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).)

BACKGROUND

J.M. Sweeney Co., founded in 1912, is a family-owned gasoline dispensing operation. Sweeney has a wholesale operation as well as six retail operations. The retail facility at issue was acquired in 1979, and is located at the southwest corner of Rand Road (Route 12) and Miller Road in Lake Zurich, Lake County, Illinois (hereinafter referred to as facility or site). (Tr.1 at 16-17.) Sweeney employs eight full-time employees and four part-time employees at this facility, which is open 5 a.m. to midnight and receives approximately 215 patrons per day. (Tr.1 at 25.) John Gerlesits, vice president of operations, testified at hearing that Sweeney's Lake Zurich facility is located in a well-traveled area; in fact, Route 12 is a major access road to Wisconsin. The surrounding area is rural in nature, with a golf course and well-established, upscale homes nearby. Mr. Gerlesits testified that Sweeney is committed to reconstructing its Lake Zurich facility to make it a more attractive and safer location. (Tr.1 at 21-25.)

³ The transcript from the first hearing will be cited as (Tr.1 at ____); the transcript from the second hearing will be cited as (Tr.2 at ____); and petitioner's exhibits will be cited as (Pet. Exh. ____).

⁴ These filings shall be cited as (PH Br. at ____.) and (PH Resp. at ____.) respectively.

In January 1994, Sweeney performed tank tightness tests on its underground storage tanks (USTs) located at the facility. One UST did not pass the test and Sweeney hired Professional Tank Services, Ltd. (PTS) to determine if a petroleum release had occurred. PTS conducted a limited soil investigation and concluded that a leak had occurred; on January 20, 1994 Sweeney notified Illinois Emergency Management Agency of the release. (PCB 94-297 at 2; Tr.1 at 25-26.)

Thereafter, Sweeney embarked on early action clean-up activities, including submittal of a 20-day report to the Agency on February 7, 1994, and a 45-day report on March 18, 1994. (Pet. Exh. 7, 8.) On September 8, 1994 the Agency received Sweeney's site classification plan and in December 1994, the Agency received a modification to the 45-day report. (Pet. Exh 9, 10.) The Agency notified Sweeney by letter dated June 15, 1995, that the Agency had classified the site as high priority. (Pet. Exh. 11.)

Sweeney hired RAPPs Engineering to prepare its groundwater investigation report and its corrective action plan (CAP). (Tr.1 at 39-41.) On January 8, 1996, on Sweeney's behalf, RAPPs submitted a Phase II groundwater investigation report and CAP. Sweeney received the Agency's letter of completeness on January 16, 1996 and the Agency's letter of rejection on January 19, 1996. RAPPs submitted a second Phase II groundwater investigation report and CAP on July 18, 1996 that the Agency rejected, and a third submittal on September 16, 1996 that the Agency deemed modifiable on October 11, 1996. (M.Rec. at Exhibit 2.)

Sweeney is requesting an extension of its prior variance to allow time to receive approval of its CAP, implement remediation at the site, and reconstruct its facility. Sweeney states that reconstruction will include relocation of its convenience store to the southeast corner of its lot; relocation of gasoline dispensing units to the north side of its lot; reconstruction of curbs for easier, safer access to its facility; and an addition of separate parking spaces for store customers. (Tr.1 at 23-25, 33-35.)

REGULATORY FRAMEWORK

In determining whether any variance is to be granted, the Act requires the Board to ascertain 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).) Furthermore, the burden is upon petitioner to show that its claimed hardship outweighs the public interest in attaining compliance with regulations designed to protect the public. (Willowbrook Motel v. PCB, 135 Ill. App. 3d 343, 481 N.E.2d 1032 (1st Dist. 1977).) Only upon such showing can the claimed hardship rise to the level of arbitrary or unreasonable hardship. In addition, the Board may grant a request for extension of variance on a year to year basis, but only upon a showing of substantial progress toward achieving compliance. (415 ILCS 36(b).)

A variance, by its very nature, is a temporary reprieve from compliance with the Board's regulations, and compliance is to be pursued regardless of the hardship which eventual compliance presents an individual petitioner. (Monsanto Co. v. PCB, 67 Ill.2d 276, 367 N.E.2d 684 (1977).) Accordingly, as a condition to the granting of variance, a variance

petitioner is required to commit to a plan which is reasonably designed to achieve compliance within the term of the variance, unless certain special circumstances exist.

Sweeney is seeking an extension of a prior variance from the Board's air regulations which require installation of Stage II vapor recovery equipment. (35 Ill. Adm. Code 218.586.) Section 218.586, titled Gasoline Dispensing Operations - Motor Vehicle Fueling Operations, provides in pertinent part that:

- b) The provisions of subsection (c) below shall apply to any gasoline dispensing operation which dispenses an average monthly volume of more than 10,000 gallons of motor vehicle fuel per month. Compliance shall be demonstrated in accordance with the schedule provided in subsection (d) below.

- d) In conjunction with the compliance provisions of Section 218.105 of this Part, operations subject to the requirements of subsection (c) above shall demonstrate compliance according to the following:

- 3) Operations that commenced construction before November 1, 1990, and dispense an average monthly volume of less than 100,000 gallons of motor fuel per month must comply by November 1, 1994.

COMPLIANCE PLAN

Sweeney states that it has made satisfactory progress toward achieving compliance during its prior variance. Specifically, the Board's order requested that a site classification be determined during the term of the variance. Sweeney states that, upon discovering a petroleum release at its site, Sweeney conducted early action activities, and in June 1995 the Agency notified Sweeney that the site was classified as high priority. (Tr.1 at 32, Pet. Exh. 11.) As a result, Sweeney contends that site remediation must be conducted at its facility.

Sweeney states that, beginning in January 1996, it submitted three groundwater investigation reports and corrective action plans in accordance with the Act and Board regulations, the last of which the Agency deemed modifiable on October 11, 1996. (Tr. at 39-46.) At hearing, Michael Younger, RAPPs Engineering, stated that remediation and reconstruction efforts would be more expensive if conducted during winter months but anticipates that these activities can be accomplished prior to March 31, 1996. (Tr.1 at 104.) Mr. Younger recommended that Stage II equipment be installed after remediation and reconstruction occur to avoid disturbing the equipment or having to install it twice. (Tr.1 at 106.)

The Agency agrees that Sweeney achieved satisfactory progress toward compliance during the prior variance; however, the Agency points out that Sweeney did not submit its first

groundwater investigation report and CAP until January 1996, less than three months before its variance expired. The Agency contends that it has 120 days to review groundwater investigation reports and CAPs, and that Sweeney did not leave enough time for the Agency to review the submitted materials prior to the termination of its variance. (PH Resp. at 4-5.)

ARBITRARY AND UNREASONABLE HARDSHIP

Sweeney contends that the situation in which the Board previously found an arbitrary or unreasonable hardship to exist, thereby granting Sweeney the prior variance, continues to exist. Specifically, John Gerlesits testified at hearing that Sweeney cannot install Stage II vapor recovery systems prior to site remediation and before reconstruction of its facility, including relocation of gasoline dispensing units. (Tr.1 at 47-48.) Sweeney further contends that, although a modifiable CAP is in hand, demolition, remediation and installation activities are more difficult and expensive to accomplish during winter months. Therefore, Sweeney argues, an immediate shut down of its facility would impose an arbitrary or unreasonable hardship. (Tr.1 at 47-51.)

The Agency agrees with Sweeney that an arbitrary or unreasonable hardship continues to exist if Sweeney were compelled to immediately comply with Section 218.586 before site remediation is completed. (PH Resp. at 6-7.) However, the Agency states that offsetting the hardship is the fact that Sweeney has emitted uncontrolled VOMs for two consecutive ozone seasons, and will continue to emit VOMs during the requested variance extension; therefore, the Agency recommends that if Stage II equipment is not installed by March 31, 1997, the facility be shut down on April 1, 1997 until such installation occurs. (PH Resp. at 7; Tr.1 at 9-10.)

ENVIRONMENTAL IMPACT

Sweeney states that its VOM emissions are a small percentage of total emissions in the Chicago ozone nonattainment area; that its emissions are in a portion of the air shed that is not the principle area of concern; and that the requested variance is during a portion of the year when ozone formation is less rapid and less intense. (Am.Pet. At 5.)

The Agency maintains that Sweeney's facility is located in the Chicago severe ozone nonattainment area; as such, the Agency remains concerned with the reduction of VOM emissions, and is engaged in a massive effort to reduce those emissions, as required by the federal Clean Air Act. (Rec. at 6.) The Agency argues that the state of Illinois cannot accept any setbacks in the effort to reduce VOM emissions, and installation of Stage II vapor recovery systems are necessary to control the large source category of emissions presented by gasoline dispensing facilities. Although the Agency calculates emissions from Sweeney's facility to be less than .001 percent of the total daily VOM emissions in Chicago, the Agency argues that an extension of variance would allow uncontrolled emissions to occur during two consecutive ozone seasons, and reiterates that Chicago's ozone problem is largely attributed to an aggregation of emissions from numerous small sources. (Rec. at 6-7.)

However, the Agency recognizes that Sweeney is seeking relief from Stage II requirements in order to mitigate potential damage to another environmental medium, and that the environment is best served by expeditious remediation of any contamination caused by the petroleum release. Therefore, the Agency concurs that the hardship incurred if Sweeney were required to immediately install Stage II equipment prior to site remediation outweighs the environmental impact resulting from the facility's emission of uncontrolled VOM emissions during the variance period. (Rec. at 7.)

CONSISTENCY WITH FEDERAL LAW

Pursuant to Section 35 of the Act, the Board may grant variances only if they are consistent with the provisions of the Clean Air Act. (42 U.S.C. 7401 *et seq.*) The Agency states that the Board may grant the requested relief without violating the Clean Air Act or any regulations promulgated thereto. By providing notice of Sweeney's petition for variance and by holding hearings, the Agency and the Board have adequately met the notice and public participation requirements. The Agency asserts that it will submit any grant of variance extension to the United States Environmental Protection Agency (USEPA) as a State Implementation Plan amendment. (Rec. at 10-11.)

DISCUSSION

As a preliminary matter, the Board notes that in its post-hearing brief, the Agency renewed its objection to the admission of Petitioner's Exhibit 5 at hearing. The Agency asserts that evidence regarding Sweeney's installation of Stage II vapor recovery systems at its five other retail facilities is irrelevant. The Agency further argues that if this evidence is found relevant, then evidence of compliance achieved by other companies with multiple facilities is also relevant. The Board finds that the evidence is relevant, and therefore affirms the hearing officer's ruling admitting Petitioner's Exhibit 5.

As to the substantive issues, the Board finds the hardship that existed during the prior variance continues to exist for Sweeney. Specifically, the Board finds that an arbitrary or unreasonable hardship would result if Sweeney were required to install Stage II vapor recovery systems before completion of site remediation and facility reconstruction. As stated by both parties at hearing, once vapor recovery lines are placed in the ground they cannot be disturbed by demolition or construction activities, nor is it sensible to install such equipment only to remove it and re-install it after the facility is reconstructed. (Tr.1 at 36, 106, Tr.2 at 11.)

The Board further finds that Sweeney has made substantial progress towards achieving compliance during the term of its prior variance. Namely, Sweeney has hired an engineering firm to conduct early action activities; received Agency approval of a site classification; and received approval of its corrective action plan, as modified by the Agency in its October 11, 1996 letter. Sweeney asserts that remediation and reconstruction activities will occur as soon as weather permits, after which the Stage II vapor recovery equipment will be installed. The Board therefore grants Sweeney an extension of its prior variance.

The Agency recommended that the facility be shut down should Sweeney fail to install Stage II equipment by March 31, 1997. The Board concurs, noting that Sweeney has operated its Lake Zurich facility during the past two ozone seasons without vapor recovery equipment, and that sufficient time exists for Sweeney to install such equipment prior to the termination of this variance extension. The Agency also recommended that, in the event Sweeney is unable to obtain an approved or modifiable CAP on or before March 31, 1997, no further variance extensions be granted. (M.Rec. at 5.) Since Sweeney has received a modifiable CAP, the Board deems this recommendation to be moot.

Retroactive Application

Regarding the inception date for the requested variance, the Board notes its well-established rule of beginning the term of a variance on the date the Board renders its decision, absent unusual or extraordinary circumstances. (DMI, Inc. v. IEPA (December 19, 1991), PCB 90-227, 128 PCB 245-249.) The reasoning behind this general rule is to discourage untimely filed petitions for variance. (Fedders-USA v. EPA, (April 6, 1989), PCB 86-47, 98 PCB 15, DMI, Inc. v. EPA, (February 23, 1987), PCB 88-1332, 96 PCB 185.) As stated in DMI, Inc., if a petitioner wishes a variance to commence on a certain date, its petition must be filed at least 120 days prior to the desired inception date. (Id.) However, where the petition was otherwise timely filed before the prior variance expired, the Board has moved the starting date to the latest date by which the Act would have required a Board decision, i.e., the 120-day decision deadline. (Monsanto Co. v. EPA, (April 27, 1989), PCB 88-206(B), 98 PCB 267.) This type of partially retroactive variance is entirely consistent with the Board's underlying principle of rarely granting retroactive variances.

Here, Sweeney requests that the term of its variance commence retroactively on March 31, 1996, the date its prior variance expired. (Am.Pet. at 6.) In reading the record, the Board finds that unusual circumstances warrant a retroactive application of this variance request. Specifically, the Board finds that Sweeney's attempts to secure a CAP approval from the Agency required more time than anticipated. The result of this delay was an uncertainty as to what type of remediation would be required and how it would affect installation of Stage II equipment. Sweeney could not reasonably install Stage II equipment before knowing whether or not it would have to be removed to conduct site remediation. Therefore, the Board will grant a retroactive inception date of March 31, 1996 in this matter.

CONCLUSION

The Board finds that an arbitrary or unreasonable hardship continues to exist for Sweeney if it were required to achieve immediate compliance with the Board's requirements for installation of Stage II vapor recovery systems. The Board further finds that Sweeney has demonstrated substantial progress toward achieving compliance during its prior variance. Therefore, the Board grants Sweeney an extension of its prior variance. The variance will retroactively commence on March 31, 1996 and terminate on March 31, 1997.

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

ORDER

Petitioner, J.M. Sweeney Co. (Sweeney), is hereby granted variance from the requirements found in 35 Ill. Adm. Code 218.586 for its facility located at 24545 West Miller Road, Lake Zurich, Lake County, Illinois. This grant of variance shall begin on March 31, 1996, and is subject to the following conditions:

1. Variance shall terminate on March 31, 1997.
2. Sweeney shall notify the Agency of the installation of any Stage II vapor recovery equipment within 14 days of its installation. Notification shall include the address of the facility and shall be sent to:

Mr. Dave Kolaz
Illinois Environmental Protection Agency
Bureau of Air
Compliance and Systems Management Section
P.O. Box 19276
Springfield, Illinois 62794-9276

3. If Sweeney fails to install Stage II equipment on or before March 31, 1997, Sweeney shall close its gasoline dispensing facility located at 24545 West Miller Road, Lake Zurich, Lake County, Illinois on or before April 1, 1997. Said facility shall not resume gasoline dispensing operations until Stage II equipment is installed and operational.

IT IS SO ORDERED.

If Sweeney chooses to accept this variance subject to the above order, within forty-five days of the grant of variance, Sweeney must execute and forward the attached certificate of acceptance and agreement to:

Tina Archer
Division of Legal Counsel
Illinois Environmental Protection Agency
P.O. Box 19276
2200 Churchill Road
Springfield, Illinois 62794-9276

Once executed and received, that certificate of acceptance and agreement shall bind Sweeney 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 the certificate is as follows:

CERTIFICATION

I (We), _____, hereby accept and agree to be bound by all the terms of the Order of the Pollution Control Board in PCB 96-184, December 19, 1996.

Petitioner

Authorized Agent

Title

Date

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders 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 "Motions 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 _____ day of _____, 1996, by a vote of _____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board