ILLINOIS POLLUTION CONTROL BOARD
November 7, 1996

MARATHON OIL COMPANY,	)	
	)	
Petitioner,	)	
	)	PCB 96-254
v.	)	(Variance - Air)
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

JOSEPH S. WRIGHT, JR., MCBRIDE, BAKER & COLES, APPEARED ON BEHALF OF THE PETITIONER;

RONALD L. ANDES, IN-HOUSE COUNSEL FOR MARATHON OIL COMPANY, APPEARED ON BEHALF OF THE PETITIONER; AND

JAMES J. O'DONNELL, BUREAU OF AIR, DIVISION OF LEGAL COUNSEL, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF THE RESPONDENT

OPINION AND ORDER OF THE BOARD (BY J. Yi):

The original petition for variance was filed with the Illinois Pollution Control Board (Board), by Marathon Oil Company (Marathon), on June 14, 1996 and an amended petition for variance was filed on July 9, 1996.[1] Marathon seeks a variance from Board rules governing the emission of particulate matter from Fluid Catalytic Cracking Units (35 Ill. Adm. Code 212.381) and limiting opacity from that same unit (35 Ill. Adm. Code 212.123).[2]

The Board's responsibility in this matter arises from the Environmental Protection Act (Act) (415 ILCS 5/1 et seq. (1994)). The Board is charged therein with the responsibility of granting variances from Board regulations whenever it is found that compliance with the

[1] Marathon's amended petition will be referred to as "A. Pet. at ".

[2] Marathon has requested two other variances for its facility located in Robinson, Illinois. In Marathon Oil Company v. Illinois Environmental Protection Agency, (May 16, 1996), PCB 94-27, Marathon requested the exact same relief for a period starting on January 3, 1993 and ending November 15, 1995. The variance relief being wholly retroactive without special circumstances the Board denied the requested relief. In Marathon Oil Company v. Illinois Environmental Protection Agency, (May 16, 1996), PCB 95-150, where Marathon requested relief for the operation of its Carbon Monoxide boiler.

regulation would impose an arbitrary or unreasonable hardship upon the petitioner (415 ILCS 5/35(a) (1994).

The Illinois Environmental Protection Agency's (Agency) responsibility in this matter is to appear in hearings on variance petition (415 ILCS 514 (f) (1994)). The Agency is also charged 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) (1994)). The Agency filed its recommendation on July 19, 1996 recommending that the Board grant the variance with certain restrictions.[3]

A hearing was held on September 26, 1996 at the Crawford County Courthouse, Robinson, Illinois before Hearing Officer Deborah L. Frank.[4] Marathon filed a post-hearing brief on October 7, 1996.[5] At the close of the hearing the Agency waived its right to file a post-hearing brief. (Tr. at 68.)

As presented below, the Board finds that Marathon has met its burden of demonstrating that immediate compliance with the Board regulations at issue would result in an arbitrary or unreasonable hardship upon Marathon. Accordingly, the variance request will be granted with conditions.

BACKGROUND

Marathon operates a petroleum refinery near the city of Robinson in Crawford County, Illinois. The County is rural in nature and the City has a population of approximately 7,000 persons. The refinery is located on 900 acres and consists of 25 process units, 7 utility units and 6,100,000 barrels of storage capacity. The refinery has a rated capacity of 175,000 barrels of crude oil per day and the 5,250,000 gallons of gasoline produced daily constitutes a significant portion of that required in the midwestern market. (Generally A. Pet. at 1-3.)

As part of Marathon's refinery operations a Fluid bed Catalytic Cracking Unit (FCCU) is utilized. The FCCU is a process unit that is used to convert heavy gas oil material into more usable substances such as olefins, light cycle oil, slurry and "cat gasoline." (A. Pet at 2.) The process of converting heavy gas oil is accomplished through the use of a catalyst consisting of alumina/silica in the form of a fine powder. (A. Pet. at 2.) The catalyst is regenerated in the regenerator vessel and the flue gases leaving that vessel are directed to air pollution control devices: 6 pairs of cyclones for the control of particulate matter and a "CO Boiler" for the control of carbon monoxide. (A. Pet. at 2.) The subject of Marathon's variance request is the emission of the catalyst as particulate matter. (A. Pet. at 2.)

Marathon states that on March 8, 1996, it experienced a power failure and the entire refinery ceased operation causing the FCCU and the CO Boiler to be out of operation for approximately 5 days. (A. pet. at 2.) Marathon states that it has not conducted particulate

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[3] The Agency's recommendation will be referred to as "Ag. Rec. at ".
[4] The transcript from the hearing will be referenced to as "Tr. at ".
[5] Marathon's post-hearing brief will be referenced to as "Brief at ".

compliance tests since the emergency shut-down, but has regularly monitored various aspect of the operation of the FCCU/CO Boiler to assure compliance with applicable emission limitations. (A. Pet. at 2.)

Marathon explains that "[t]he monitoring relies upon a Continuous Opacity Monitor (COM) and a parametric monitoring program which measures catalyst losses". (A. Pet. at 3.) Marathon maintains that the COM monthly average opacity measurements for the period of January, 1996 to the date of this petition have ranged from 10 to 20 percent and have complied with Section 212.123. (A. Pet. at 3.)

Marathon states that the parametric monitoring program has indicated that the performance of the catalyst regeneration system, which includes the cyclone control devices, has declined. (A. Pet. at 3.) The mass balance for the period January, 1995 through April, 1996 showed an average catalyst loss of 35 pounds per hour with an average opacity of 8.8%. In April, 1996 the average jumped to 81 pounds per hour. (Tr. at 9-10.) In May, 1996 the mass balance calculations performed indicated catalyst losses at an average rate of 191.6 pounds per hour which Marathon indicates that "[t]his exceeds the allowable loss limit of 84.5 lbs./hr." (A. Pet. at 3, Exh. A.)

The parametric monitoring program data indicated that the particulate emissions, as measured by the Standard Reference Methods for both mass emissions and opacity, would, in all probability, violate 35 Ill. Adm. Code 212.381 and 212.123, respectively, in the near future. (A. Pet at 3.)

Marathon states that it cannot inspect or repair the cyclones while the FCCU is operating. (A. Pet at 3.) Marathon has, however, performed isokenetic tests to determine the particle size distribution so as to understand the possible reason for the unusual loss of catalyst. (A. Pet. at 3, Tr. at 13-17.) The results of these tests suggest that the reason is probably an opening (a hole or a crack) approximately 1/2 centimeter square located in the outlet plenum serving the second storage cyclone control device. (Tr. at 16-17.)

Marathon states that its options were to shut down the unit immediately, schedule a "turn-around" in July or August, or wait for the planned turn-around in October 1996. (A. Pet. at 5.) After consultation with the Agency, Marathon chose to keep the unit in service, to seek a variance from the Board and to schedule the turn-around immediately after the driving season. (Brief at 3.)

Marathon performed air quality modeling in cooperation with the Agency to assure itself, the Agency and the Board that increased emissions during the variance period would not threaten the environment. (A. Pet. at 4-5, Tr. at 57-66, Brief at 5.) Marathons states that the results of the test were that "[t]he contribution of the FCCU, even at assumed emission rates of 1000, 1250, 1500 and 1700 pounds per hour would not result in worst case maximum concentrations that approached the Ambient Air Quality Standards" for particulate matter. (A. Pet. 4-5, Exh C at 8, Brief at 5.)

On July 24, 1996 the FCCU was shut down again because of another power failure, and as it was being brought back up the unit began to approach the 30 percent opacity level even though it was operating at less than full capacity. (Tr. at 24-25, Brief at 4.) Marathon states that on July 24 or 25 Marathon made the decision to move the turn-around from October 5 to September 5 and notified its contractors shortly thereafter. (Tr. at 25, Brief at 4.) The decision to move the turn-around period to September 5 was done after Marathon filed the amended petition.

The FCCU turn-around began on September 5, 1996, whereafter Marathon has had the opportunity to inspect the unit and states that the increased emissions were the result of a hole in a secondary cyclone. (Tr. at 19, Brief at 4.)

REQUESTED RELIEF

In its amended petition Marathon requested the Board to grant variance from 35 Ill. Adm. Code 212.123 and 35 Ill. Adm. Code 212.381 from June 24, 1996 to and including December 31, 1996, on certain conditions discussed below under the "Compliance Plan" portion of the opinion and that the particulate emissions shall not exceed 450 pounds per hour during the period of the variance. (Pet. at 8.) However, Marathon in its post-hearing brief requests that variance be granted "commencing on June 14, 1996 and ending on September 5, 1996" making the variance request wholly retroactive. (Brief at 7.) Marathon requests this change in variance relief because the FCCU was shut down for repairs and improvements on September 5, 1996 instead of October 5 as planned due to the second power failure. (Brief at 7.)

REGULATORY FRAMEWORK

Marathon Oil Company seeks a variance from the Board's rule governing the emission of particulate matter from FCCU (35 Ill. Adm. Code 212.381) and the Board's rule limiting opacity from that same unit (35 Ill. Adm. Code 212.123).

Section 212.381 Catalyst Regenerators of Fluidized Catalytic Converters

Sections 212.321 and 212.322 shall not apply to catalyst regenerators of fluidized catalytic converters. No person shall cause or allow the emission rate from new and existing catalyst regenerators of fluidized catalytic converters to exceed in any one-hour period the rate determined using the following equations:

$E = 4.10\ (P)^{0.67}$ for P less than or equal to 30 tons per hour.
$E = (55.0\ (P)^{0.11})-40.0$ for P greater than 30 tons per hour.

where:

E = allowable emission rate in pounds per hours, and
P = catalyst recycle rate, including the amount of fresh catalyst added, in tons per hour.

Opacity limits are found in the Board's regulations at 35 Ill. Adm. Code 212.123. Section 212.123 reads in its entirety:

> Section 212.123 Limitations for All Other Sources
>
> a) No person shall cause or allow the emission of smoke or other particulate matter, with an opacity greater than 30 percent, into the atmosphere from any emission source other than those sources subject to Section 212.122.
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> b) Exception: The emission of smoke or other particulate matter from any such emission source may have an opacity greater than 30 percent but not greater than 60 percent for a period or periods aggregating 8 minutes in any 60 minute period provided that such more opaque emissions permitted during any 60 minute period shall occur from only one such emission source located within a 305 m (1000 ft) radius from the center point of any other such emission source owned or operated by such person, and provided further that such more opaque emissions permitted from each such emission source shall be limited to 3 times in any 24 hour period.

The pertinent part of Section 212.123 is subsection (a), which establishes that opacity may not exceed 30 percent. It is undisputed that this limit is applicable in this instant circumstance. The opacity limit allows excursions up to 60 percent opacity and a general standard of 30 percent. Marathon has adopted 30 percent opacity as its own internal standard of compliance.

Section 212.381 expresses the limits in pounds per hour of particular matter that may be emitted, from new and existing catalytic regenerators of FCCU, to exceed in any one-hour period the rate determined from a formula based upon the rate of catalyst use. Marathon's catalyst use varies, but it has adopted an emission rate of 84 pounds per hour as its own internal standard of compliance. Marathon states that when data for the facility at issue are entered into the pertinent equation of Section 212.381, the emission limit calculates to approximately 81 pounds per hour (lb/hr). (Pet at 3.)

HARDSHIP

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 (415 ILCS 5/35(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, (1985) 135 Ill. App. 3d 343, 481 N.E. 2d 1032). Only with such a showing can the claimed hardship rise to the level of arbitrary or unreasonable hardship.

Marathon claims in its amended petition that its monitoring program indicates that in all probability that mass emissions and opacity would violate 35 Ill. Adm. Code 212.381 and

212.123 in the near future. (A. pet. at 3.) Therefore Marathon asserts that it is faced with immediate shut-down for repairs to assure compliance. In its amended petition Marathon states that it cannot inspect and repair the cyclones while the FCCU is operating and shutting down the FCCU during the summer gasoline season would result in a loss of 2,500,000 gallons of gasoline production per day, at a cost of approximately $1,700,000 per day over the 35 day shutdown period. (Pet. at 3.) Shutting down the FCCU without a 3 week advance notice would increase the cost of the turn-around by an additional $4,000,000 to $6,000,000 depending upon the length of notice provided and contractor availability. (Pet. at 6.) In its post-hearing brief Marathon contends that a summer turn-around would have resulted in costs of approximately $6,900,000. (Brief at 5.) Marathon also explains that depending on the length of the turn-around in the summer months the expense of the shut-down would increase along with the time spent during the turn-around. (Brief at 5-6.)

ENVIRONMENTAL IMPACT

Marathon conducted modeling of the increased particular matters from the FCCU and provided the Agency with those results. The Agency states that Marathon facility, located in Crawford County, occupies 900 acres; the nearest residence is approximately 1/2 mile from the facility; and Crawford County is in an attainment area for all criteria pollutants. (Ag. At 2.) Furthermore the Agency states that "[t]he nearest air monitoring station is located approximately 50 miles northwest at Charleston, Illinois; this station has measured no exceedences of the standard for total suspended particulates (TSP) for the past 6 years". (Ag. At 2.) The Agency finally states that "[b]ased upon the Agency's analysis of the data submitted in Marathon, granting the variance will not cause an exceedence of the National Ambient Air Quality Standards" for TSP. (Ag. at 2.)

COMPLIANCE PLAN

A variance, by its very nature, is a temporary reprieve from compliance with the Board's Regulations, compliance is to be pursued regardless of the hardship which eventual compliance presents an individual petitioner. (Monsanto Co. v. IPCB, 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 terms of the variance, unless certain special circumstances exist.

Marathon, in its amended petition, proposed the following "Compliance and Testing Program" to be imposed as a condition of the variance if granted as requested:

(a) Conduct FCCU mass emission tests according to USEPA methods 1-4 and 5 within 30 days of issuance of this variance;

(b) Conduct subsequent mass emission tests according to the same methods within 30 days of receipt of the first test results;

(c) Work with General Electric Corporation and UOP Company for the purpose of developing inspection and repair plans for the catalyst regenerator system during the turn-around period;

(d) Shutdown the FCCU for turn-around on or before October 8, 1996;

(e) Complete repairs to the FCCU regenerator and regenerator cyclone system by November 15, 1996;

(f) Conduct mass emission stack testing per USEPA approved Methods 1-4 by December 15, 1996;

(g) Submit mass emission test results to IEPA by January 15, 1997; and

(h) Provide monthly summary reports to IEPA during the variance period.

(i) If the Mass Emissions per USEPA approved Methods 1-4 and 5 exceeds 450 1b./hr (avg. for three test runs) Marathon will shutdown the FCCU (within three weeks after receiving the final test report) for required repairs and turnaround.

(Pet. at 6-7.)

The Agency reviewed Marathon's amended petition and compliance plan contained therein and stated "[b]ecause an unreasonable hardship will exist in the absence of the requested relief, the Agency recommends that petitioner's request for variance relief be granted subject to the following":

A. Marathon shall conduct a stack test of the FCCU's particulate matter emissions within twenty-one days of the issuance of the variance.

B. Marathon shall submit the results of the stack test to the Agency within 7 days of receipt.

C. Marathon shall continue to work with General Electric and UOP Company to develop inspection and repair plans for the FCCU system during the turnaround.

D. Marathon shall shutdown the FCCU for turnaround on or before September 5, 1996.

E. Marathon shall make all necessary repairs to the FCCU/Regenerator during the turnaround period.

F. Marathon shall conduct a stack test of the FCCU for mass particulate emissions upon completion of repairs and within 15 days of the FCCU startup. Marathon shall submit the stack test results within seven days of receipt of the Agency.

G. Parametric monitoring shall be performed daily and compiled on a 30-day rolling average. These records shall be available for Agency inspection.

H. Based upon the parametric monitoring, if the 30-day rolling average for particulate matter emissions exceed 400 pounds per hour, Marathon shall conduct a stack test within fifteen days and every fifteen days thereafter, as long as the 30-day rolling average particulate matter emissions exceed 400 pounds per hour.

I. If any of the following limits are exceeded, based upon Marathon's receipt of an expedited opacity report and/or particulate matter emission stack test report from its consultant, Marathon shall begin to shutdown the FCCU. The shut down of the FCCU will be completed within 21 days of exceeding any of the following limits:

1. If the opacity exceeds 45% for a period of more than 12 consecutive hours.
2. If the opacity exceeds 60% for more than 24 minutes in any 24-hour period.
3. If the mass emissions exceed 450 pounds per hour.

J. Any complaints regarding emissions from Marathon shall be forwarded to the Regional Office in Collinsville within twenty-four hours.

K. Marathon shall submit monthly summary reports to the Agency during the variance period.

L. A copy of all test results and reports required to be submitted to the Agency pursuant to this variance shall be submitted to each of the following offices:

Dave Kolaz, Manager
Compliance & Systems Management
Bureau of Air
Illinois Environmental Protection Agency
P.O. Box 19276
Springfield, IL 62794-9276

John Justice, Regional Manager
Field Operations Section
Bureau of Air
Illinois Environmental Protection Agency
2009 Mall Street
Collinsville, IL 62234

M. This variance shall expire on October 31, 1996.

(Ag. at 4-6.)

Marathon states in its post-hearing brief that it has accepted the Agency's conditions and has complied with them throughout the period. (Brief at 4, Tr. at 21-23.) Based on condition "H" Marathon performed a stack test but the results of that stack test have not been included in this record. (Tr. at 23-24.)

CONSISTENCY WITH FEDERAL LAW

Marathon did not state in either its amended petition, post-hearing brief or at hearing whether the grant of the variance will be consistent with federal law. The Agency simply states in its recommendation that "[t]he USEPA has approved 35 Ill. Adm. Code 212.123(b) and 212.381 and, therefore, granting the petition for variance will require a SIP revision". (Ag. at 3.)

DISCUSSION

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 upon the petitioner. (415 ILCS 5/35(a) (1996).) Furthermore, the burden is on 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 (1985), 135 Ill. App.3d 343, 481 N.E. 2d 1032.) Only with such a showing can the claimed hardship rise to the level of arbitrary or unreasonable hardship.

Based upon the record before us and upon review of the hardship petitioner would encounter, and the environmental impact that would result from grant of variance, we find that Marathon has presented adequate proof that immediate compliance with the regulations at issue would result in an arbitrary or unreasonable hardship on petitioner.

Hardship and Environmental Impact

The hardship being claimed by Marathon in this matter, future noncompliance, is similar as that claimed in Marathon Oil Company v. Illinois Environmental Protection Agency, (May 16, 1996), PCB 95-150, where the Board granted variance relief. In doing so the Board in Marathon stated "[w]hile the threat of future enforcement may be hardship that is a product of the requirement of immediate compliance, the hardship of ongoing enforcement actions as the result of a past violation is not a hardship from which variance relief may be granted." (Op. at 10.) In this case Marathon is claiming that future non-compliance and the expense associated to immediately assure compliance when weighed against the environmental impact demonstrates that an arbitrary and unreasonable hardship would result if the requested variance is denied.

The Board recognizes that a claimed hardship of future non-compliance is a hardship that may be weighed against the environmental impact during the term of the variance. (See Marathon Oil Company v. Illinois Environmental Protection Agency and Illinois Pollution Control Board, (5th Dist. 1993), 242 Ill.App.3d. 200; 610 N.E.2d 789; 182 Ill. Dec. 920.) The Board also has long held that it does not grant variance where variance is not necessary, and variance is normally not necessary where there is no showing of violation of the standard from which variance is sought. (Village of Wheeling v. IEPA (July 10, 1980), PCB 80-59, 39 PCB 53; City of Rolling Meadows v. IEPA (July 10, 1980), PCB 80-60, 39 PCB 62; The Village of Elk Grove v. IEPA (January 10, 1985), PCB 84-158, 62 PCB 295; City of West Chicago v. IEPA (June 13, 1985), PCB 85-2, 64 PCB 249; Village of Minooka v. IEPA (September 20, 1985), PCB 85-100, 65 PCB 527; City of Spring Valley v. IEPA (January 5, 1989), PCB 88-181, 95 PCB 57; Village of North Aurora v. IEPA (February 8, 1990), PCB 89-66, 108 PCB 25.) However the Board has also found that the variance is necessary even though the quantum of evidence necessary to prove violation of the standard in an enforcement action has not been demonstrated if special circumstances exist. (See Village of North Aurora v. Illinois Environmental Protection Agency, (February 8, 1990), PCB 89-66.) In Village of North Aurora the Board stated "the Board has in a number of circumstances granted variance, particularly in the radium/gross alpha situation, where results from single samples or fewer than the number of samples required pursuant to 35 Ill. Adm. Code 605.105(a) showed excess readings." (Id. at 9.) Therefore, a wholly retroactive variance based on a claimed hardship of future non-compliance would not be necessary if there has been no showing of non-compliance during the term of the wholly retroactive variance, unless special circumstances exist.

In this case the Board finds that special circumstances exist that strongly indicate exceedences did occur causing the variance to be necessary. Those circumstances are the May mass balance calculations and the mass emissions exceeding the 400 pounds per hour that triggered the stack test pursuant to the Agency's conditions. Additionally, the record is not clear as to whether Marathon during the course of the retroactive variance term actually maintained compliance. The monitoring program adopted by Marathon and accepted by the Agency cannot demonstrate whether compliance has been achieved. Therefore, since there is no way for Marathon to demonstrate non-compliance or compliance and there is a strong indication of violation based on this record, the Board will find that sufficient evidence of hardship exists here for us to determine that a variance is necessary. We find that hardship existed that can be weighed against the environmental impact during the requested variance term.

The environmental impact as indicated by the modeling conducted by Marathon shows that there will be minimal if any impact during the variance term. The Agency states that it agrees that the impact would be minimal. Therefore, when weighing the minimal environmental impact against the claimed hardship, the Board finds that an arbitrary or unreasonable hardship would result absent a grant of the requested variance.

Retroactive variance

Marathon's original variance relief as stated in the amended petition requested variance from 35 Ill. Adm. Code 212.123 and 35 Ill. Adm. Code 212.381 from June 24, 1996 to and including December 31, 1996. In its post-hearing brief it requests variance for a period of June 14, 1996 until September 5, 1996. In Marathon Oil Company v. Illinois Environmental Protection Agency, (May 16, 1996), PCB 95-150, the Board stated the following:

> The Board has determined that in the absence of unusual or extraordinary circumstances, the Board renders variances effective on the date the Board order is issued. (LCN Closers, Inc. v. EPA, (July 27, 1989), PCB 89-27, 101 PCB 283, 286; Borden Chemical Co. v. EPA, (December 5, 1985), PCB 82-82, 67 PCB 3, 6; City of Farmington v. EPA, (February 20, 1985), PCB 84-166, 63 PCB 97; Hansen-Sterling Drum Co. v. EPA, (January 24, 1985), PCB 83-240, 62 PCB 387, 389; Village of Sauget v. EPA, (December 15, 1983), PCB 83-146, 55 PCB 255, 258; Olin Corp. v. EPA, (August 30, 1983), PCB 83-102, 53 PCB 289, 291.) Although the Board does not generally grant variances retroactively, upon specific justification retroactive variances have been granted. (Deere & Co. v. EPA, (September 8, 1988), PCB 88-22, 92 PCB 91.) The Board stated that the reasoning behind the general rule is to discourage untimely filed petitions for variance, i.e. variances filed after the start of the claimed arbitrary or unreasonable hardship creating the desire for a retroactive start, and because the failure to request relief in a timely manner is a self-imposed hardship. (Fedders-USA v. EPA, (April 6, 1989), PCB 86-47, 98 PCB 15, 19, DMI, Inc. v. EPA, (February 23, 1987), PCB 88-132, 96 PCB 185, 187 and American National Can Co. v. EPA, (August 31, 1989), PCB 88-203, 102 PCB 215, 218.)
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> As the appellate court discussed in Monsanto, "[t]he Board can provide relief from the hardship of immediate compliance and yet retain control over a polluter's future conduct by granting a temporary variance". (Monsanto, 67 Ill.2d 276, 288 (1977) (emphasis added).) The very concept of a wholly retroactive variance would eliminate the Board's ability to retain any control over the polluter's activity during the term of the variance.
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> The Board has also granted retroactive variances where there are unavoidable, special, or extraordinary circumstances. (American National Can Co. PCB 88-203, 102 PCB 215, 218 (11 days after filing, where petitioner diligently sought compliance and there was no reason to anticipate the need for a variance until it was too late to timely file); Minnesota Mining and Manufacturing Co. v. EPA, (August 31, 1989), PCB 89-58, 102 PCB 223, 226) (day after filing, where petitioner learned of error that resulted in non-compliance only shortly before filing); Fedders- USA, PCB 86-47, 98 PCB 19 (date of filing, where extended proceeding for prior variance ended only a short time before filing); Pines Trailer Co. v. EPA, (June 30, 1988), PCB 88-10, 90 PCB 485, 488; Bloomington/Normal Sanitary District v. EPA, (Mar. 10, 1988), PCB 87-207, 87 PCB 21, 22 (nine days

after filing, where there were unexpected construction delays and the petitioner made a good faith effort at compliance); Classic Finishing Co. v. EPA, (June 20, 1986), PCB 84-174(B), 70 PCB 229, 233 (date of filing first amended petition, where there was a change in company ownership, an ongoing compliance effort that resulted in updatings of the petition and eventual compliance before the date of the Board decision, and due to nature of the materials involved and the technology-forcing nature of the underlying regulation); Chicago Rotoprint Co. v. EPA, No. PCB 84-151, 63 PCB 91 (Feb. 20, 1985) (35 days after filing, where need for variance was not known earlier).) The Board has also occasionally applied an effective date that ante-dates the filing of the petition under the extreme of such circumstances. (Deere & Co., (Sept. 8, 1988), 92 PCB 94,(20 days prior to filing, where petitioner diligently sought relief and good faith efforts appeared to have resulted in compliance prior to the Board decision); Midwest Solvents Co. of Illinois v. EPA, (Apr. 5, 1991), PCB 84-5, 57 PCB 369, 371 (nine days before filing, where the petitioner was diligent in seeking relief and the delay in filing arose through procedural confusion over the extension of a prior provisional variance).) Other cases underscore the fact that the timeliness of filing is a primary factor in consideration of the "special circumstances."

Timeliness of filing is a primary factor in considering “special circumstances”. First, in considering “special circumstances” the Board has routinely refused to apply a retroactive inception date where either the petitioner filed late without explanation or where delay resulted through some fault of the petitioner. (LCN Closers, Inc., 101 PCB 283, 286; DMI, Inc., 96 PCB 185, 187; Borden Chemical Co., 67 PCB 3, 6; City of Farmington, 63 PCB 97, 98; Hansen-Sterling Drug Co., 62 PCB 387, 389; Village of Sauget, 55 PCB 255, 258; Olin Corp., 53 PCB 288, 291.) Second, a “principle consideration in the granting of retroactive relief is a showing that the petitioner has diligently sought relief and has made good faith efforts at achieving compliance”. (Deere, 92 PCB 91.) The Board is not inclined to grant retroactive relief, absent a showing of unavoidable circumstances, because the failure to request relief in a timely manner is a self-imposed hardship. (American Can Co., 102 PCB 215.)

The Board has also articulated that a petitioner’s hardship must not be self-imposed by petitioner’s inactivity or own decisionmaking. (EPA v. Lindgren Foundry Co., (September 25, 1970), PCB 70-1, 1 PBC 11 (1970); Ekco Glaco Corporation v. IEPA and IPCB, 542 N.E. 2d 147 (1st Dist. 1989); Willowbrook Motel, 481 N.E. 2d at 1036.) In PCB 87-41, Ekco Glaco v. IEPA, the Board found that “Ekco Glaco’s problems arise from the delay caused by decisions it has made in attempting to secure compliance and its failure to commit to a particular compliance option. The Board cannot find that those problems constitute an arbitrary or unreasonable hardship.” Ekco Glaco, PCB 87-41 at 4, aff’d in Ekco Glaco Corp. v. IEPA and IPCB, 542 N.E.2d 147 (1st Dist. 1989.) The Appellate Court affirmed the Board’s denial of an extension of variance in Ekco

notwithstanding Ekco's argument that the denial would lead to a shutdown which would adversely impact Ekco and its local customers.

Marathon does not make an argument and simply states "Mindful of the Board's many precedents requiring a special showing for the grant of a retroactive variance, Marathon respectfully requests and the Board hereby grants a variance from Sections 212.123 and 212.381 commencing on June 14, 1996 and ending on September 5, 1996".

We find that special circumstances exist to grant the requested retroactive relief. In this case Marathon did not learn of the possible need for variance relief until April 1996 when it discovered that its averaged emission limits jumped to 81 lbs\hr. After several weeks of investigation and contact with the Agency, Marathon filed its petition for variance on June 14, 1996. At that time Marathon anticipated plant turn-around was to begin on October 5, 1996. Due to its concern and a second power failure Marathon moved its planned turn-around up to September 5 from October 5 in an attempt to correct the problem as soon as possible. Since the hearing was not until September 26, 1996 and the post-hearing brief was not filed until October 7, 1996 the variance requested is unavoidably wholly retroactive.

Since the variance being requested can only be retroactive the proposed conditions proposed by both the Agency and Marathon must be altered to conform with the current circumstances. Since the time frame of the variance has already passed, any condition that required action during the variance period will be changed to comport with the variance being retroactive.

Consistency with Federal Law

Additionally the Board finds that the grant of the requested relief is consistent with federal law. As stated in Marathon Oil Company v. Illinois Environmental Protection Agency, (May 16, 1996), PCB 95-150:

> The requirement of a submission to USEPA for a SIP amendment does not make the grant of a variance inconsistent with federal law. (See Olin Corporation v. Illinois Environmental Protection Agency, (February 7, 1991), PCB 89-72, and Polyfoam Packers Corp. v. Illinois Environmental Protection Agency, (July 7, 1995), PCB 95-103.) In General Chemical Corporation v. Illinois Environmental Protection Agency, (February 4, 1993), PCB 92-217, the Agency stated that under the Clean Air Act a SIP submittal is required for any variance from the applicable emissions in a nonattainment area. Marathon states that there is no reason to believe that a grant of the requested variance would be inconsistent with federal law. We agree. The record demonstrates that ambient air quality will not be affected during the term of the variance and we do not believe that the requirement of a SIP amendment makes the requested variance relief inconsistent with federal law.

(Op. at 14.)

Although Marathon did not put forth an argument or statement as to whether the grant of the variance is consistent with federal law, the Board finds that grant of variance relief in this case is similar to that in Marathon's last variance and is likewise consistent with federal law.

CONCLUSION

The Board finds based on the record that Marathon has demonstrated that denial of the variance relief would result in an arbitrary or unreasonable hardship. Additionally, the Board finds that special circumstances exist to justify granting a retroactive variance. Therefore, the Board grants Marathon a variance from 35 Ill. Adm. Code 212.123 and 212.381 from June 14, 1996 until September 5, 1996, subject to the conditions in the order below.

ORDER

The Board hereby grants the petitioner, the Marathon Oil Company, a variance from 35 Ill. Adm. Code 212.123 and 212.381, from June 14, 1996 until September 5, 1996 for its petroleum refinery located near the City of Robinson in Crawford County subject to the following conditions:

1) Petitioner conducts FCCU mass emission tests according to USEPA methods 1-4 and 5 within 30 days of issuance of this variance;

2) Petitioner conducts subsequent mass emission tests according to the same methods within 30 days of receipt of the first test results;

3) Any complaints regarding emissions from Marathon shall be forwarded to the Regional Office in Collinsville within twenty-four hours.

4) A copy of all test results and reports required to be submitted to the Agency pursuant to this variance shall be submitted to each of the following offices:

Dave Kolaz, Manager
Compliance & Systems Management
Bureau of Air
Illinois Environmental Protection Agency
P.O. Box 19276
Springfield, IL 62794-9276

John Justice, Regional Manager
Field Operations Section
Bureau of Air
Illinois Environmental Protection Agency
2009 Mall Street
Collinsville, IL 62234

7) Petitioner's emission did not exceed a 30 day rolling average for particulate matter emissions of 450 pounds per hour based on the parametric monitoring during the variance period;

8) Petitioner's opacity did not exceed 45% for a period of more than 12 consecutive hours or exceeded 60% for more than 24 minutes in any 24 hour period during the variance period; and

9) The variance period commenced on June 14, 1996 and expired on September 5, 1996.

IT IS SO ORDERED.

Board Member M. McFawn dissented.
Board Member K. Hennessey abstained.

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

James J. O'Donnell
Illinois Environmental Protection Agency
Division of Legal Counsel
P.O. Box 19276
Springfield, IL 62794-9276

Once executed and received, that certificate of acceptance and agreement shall bind the petitioner 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:

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 96-254, November 7, 1996.

Petitioner _____

Authorized Agent _____

Title _____

Date _____

Section 41 of the Environmental Protection Act (415 ILCS 5/41) provides for the appeal of final Board orders within 35 days of the date of service of this order. (See also 35 Ill. Adm. Code 101.246, Motion 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