

ILLINOIS POLLUTION CONTROL BOARD
September 19, 1996

ILLINOIS LANDFILL, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 95-162
)	(Variance - Land)
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

On June 5, 1995 Illinois Landfill Inc. (ILI) filed a petition for variance from the requirements of 35 Ill. Adm. Code 814.104(c). On June 29, 1995 the Illinois Environmental Protection Agency (Agency) filed its recommendation that the petition be granted. On May 22, 1996 ILI filed an amended petition (Am.Pet.) and waived hearing. On June 10, 1996 the Agency filed an amended recommendation (Am.Rec.).

On July 17, 1996 the Board received an objection and request for hearing filed by William J. Regan. On August 1, 1996 the Board directed that a hearing be held. Hearing was held before Board hearing officer Deborah Frank on August 21, 1996 in Danville, Vermilion County, Illinois. Three members of the public testified at hearing. In addition, on August 26, 1996 the Board received a public comment (P. C.) from William J. Regan and ILI filed a response (P.C. Res.) on August 28, 1996.

The Board previously granted a variance to ILI from the requirements of 35 Ill. Adm. Code 814.104(c) until September 18, 1995. (Illinois Landfill, Inc. v. IEPA, PCB 94-200 (December 1, 1994) (hereinafter "PCB 94-200").) ILI seeks an extension of that variance for one year until September 18, 1996.

For the reasons discussed below, the Board will grant the variance as requested by ILI.

BACKGROUND

ILI currently owns and operates a landfill in Hoopeston, Vermilion County, Illinois. (Am. Pet. at 2.) The landfill is a permitted facility with an area of 39.2 acres and a waste boundary of about 33 acres. (Am. Pet. at 5.) The estimated remaining airspace volume for refuse is approximately 1,402,044 cubic yards based on an April 1994 filed survey. (*Id.*)

ILI employs 18 full time employees and accepts waste generated within Vermilion, Iroquois, and Ford counties. (Am. Pet. at 6.) The existing service area encompasses an approximately 100 mile radius from the landfill. (*Id.*)

On November 25, 1992 ILI submitted an application to the City of Hoopeston for siting approval for expansion of the ILI landfill. Hoopeston approved siting, and that approval was appealed to the Board. (Slates v. Illinois Landfills, Inc., PCB 93-106 (September 23, 1993) (hereinafter PCB 93-106); Am. Pet. at 3.) The Board reversed Hoopeston's siting approval and on December 14, 1994 the Appellate Court reversed and remanded the decision of the Board. (Illinois Landfills, Inc. v. IPCB, et al, 4-94-0041 (April 28, 1994) (4th Dist.)) The mandate of the Appellate Court issued on April 28, 1995. (Am. Pet. at 3.) On November 7, 1995 the application for site approval for expansion was approved by Hoopeston.

STATUTORY AND REGULATORY FRAMEWORK

In determining whether a variance is to be granted, the Act requires the Board to decide if 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 petitioner bears the burden of proving that its claimed hardship outweighs the public interest in attaining compliance with regulations designed to protect the public. (Willowbrook Motel v. Pollution Control Board, 135 Ill.App.3d 343, 481 N.E.2d 1032 (1st Dist. 1977).) Only by such a showing can the claimed hardship rise to the level of arbitrary or unreasonable hardship.

In addition, a variance, by its very nature, is a temporary reprieve from compliance with the Board's regulations, and compliance is to be sought regardless of the hardship which eventual compliance presents an individual polluter. (Monsanto Co. v. Pollution Control Board, 67 Ill.2d 276, 287, 367, N.E.2d 684, 688 (1977).) Accordingly, 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, unless certain special circumstances exist.

ILI is seeking variance relief from 35 Ill. Adm. Code 814.104(c). The Board's rules at Section 814.104 require that all owners or operators of landfills file an application for significant modification to permits for existing facilities. Section 814.104(c) states:

The application shall be filed within 48 months of the effective date of this Part, or at such earlier time as the Agency shall specify in writing pursuant to 35 Ill. Adm. Code 807.209 or 813.201(b).

ILI had previously received a variance such that the application for significant modification was due September 18, 1995. ILI is now seeking a variance to extend the deadline for the filing of a significant modification permit application to September 18, 1996 for the ILI facility in Hoopeston, Illinois. (Am. Pet. at 2.) ILI is further requesting that the Board grant the relief retroactively to September 18, 1995. (*Id.*)

HARDSHIP AND ENVIRONMENTAL IMPACT

ILI in its previous variance request maintained that a hardship would exist if ILI was required to submit the significant modification permit (sig mod) application for its site by

September 18, 1994 because ILI was attempting to obtain siting approval for an expansion of its landfill. (PCB 94-200 at 3.) ILI argued that the expense and effort of preparing and filing a sig mod application in 1994 would be a hardship if the 1994 sig mod application were rendered obsolete by successful siting approval, which would require submission of another sig mod application. (*Id.*) The Board agreed that ILI's claimed hardship outweighed the public interest in having ILI comply with the September 18, 1994 deadline for submission of a sig mod application and granted a variance until September 18, 1995. (PCB 94-200 at 5.)

ILI maintains that it was unable to comply by September 18, 1995 as the granting of local siting approval was not complete. Thus, ILI would have been required to file a sig mod application for the facility as the facility existed and a second sig mod application would have been necessary when the siting process was complete. ILI states:

Being required to prepare multiple permit applications, at a potential cost approaching several hundred dollars when one will potentially suffice is an arbitrary and unreasonable hardship. Not only would it be a hardship for ILI in terms of the timing and cost but potentially would also result in Agency review and issuance of a separate permit for significant modification which would become obsolete at about the same time as issued.

(Am.Pet. at 12.)

ILI maintains that the requested variance will have no effect on the environment as ILI is required to continue to comply with its existing permits. (Am.Pet. at 10.)

CONSISTENCY WITH FEDERAL LAW

ILI asserts and the Agency agrees that granting this variance would be consistent with federal law. (Am. Pet. at 12; Am. Rec. at 4.)

COMPLIANCE PLAN

ILI's plan for compliance is to file the sig mod application by the end of the variance period. (Am.Pet. at 10-11.) A number of the components of the sig mod application have been prepared in conjunction with the siting approval application. (*Id.*) Further, ILI maintains that the only alternatives for compliance, other than submission of two sig mod applications, would be to seek a site-specific change in the rule. (Am.Pet. at 11.) ILI believes that such relief would be more extensive than necessary for ILI. (*Id.*)

AGENCY RECOMMENDATION

The Agency "generally concurs" with the facts as presented by ILI in ILI's amended petition for variance. (Am. Rec. at 3.) The Agency "acknowledges" the duplicative nature of filing two sig mod applications as well as the "arduous" task for both ILI and the Agency in preparing and reviewing two sig mod applications. (Am.Rec. at 4.) The Agency "believes that ILI's requested relief is reasonable in duration, particularly when taking into consideration the extenuating circumstances beyond ILI's control." (Am. Rec. at 4.) Therefore, the

Agency recommends that ILI be granted a variance until September 18, 1996 to file its sig mod application. (Ag. Rec. at 5.)

OBJECTORS

The testimony at hearing indicated that the adjacent farm of Mr. Regan has been experiencing ponding on areas of the farm. (Tr. at 16.) In addition, the drainage tile for that area is clogged with clay. (Tr. at 17.) The ponding and drainage problems are caused by the landfill according to Mr. Regan, Mr. Sam Martin and Mr. Allen Decker. The problems have resulted in a loss of crops from Mr. Regan's farm. (Tr. at 18.)

Mr. Regan in his written comment asserts that ILI has a history of noncompliance with the Board's regulations and the provisions of the previous variance. (P.C. 1-2.) Mr. Regan also asserts that ILI has not demonstrated that the claimed hardship outweighs the public interest in attaining compliance. (P.C. 3-4.) Mr. Regan argues that the Board should deny the requested variance. (*Id.*)

The Board is not persuaded that the objections raised by Mr. Regan have a direct bearing on the variance requested by ILI. ILI is requesting the variance so that it may submit one sig mod permit application to the Agency, rather than two. Mr. Regan's objection is based on allegations that, if found to be true, could lead to a finding that ILI has not operated the landfill according to Illinois environmental law and Board regulations. However, the Board does not make such findings in a variance proceeding. Rather, the finding that ILI may have violated environmental law would be made in an enforcement proceeding.

DISCUSSION

The purpose of a variance has been stated many times by the Board and the courts. In Monsanto Company v. Pollution Control Board, (June 1, 1977), 67 Ill.2d 276, 10 Ill. Dec. 231, 367 N.E.2d 684, 688, the Supreme Court, in determining whether variances can be permanent, stated that the Act's ultimate goal is for all polluters to be in compliance and that "[t]he variance provisions afford some flexibility in regulating speed of compliance, but a total exemption from the statute would free a polluter from the task of developing more effective pollution-prevention technology". The Appellate Court, citing to Monsanto in City of Mendota v. Pollution Control Board, (3rd Dist. 1987), 112 Ill. Dec. 752, 757, 514 N.E.2d 218, stated "[t]he variance provisions of the Act are intended to afford some flexibility in regulating the speed for compliance." Finally the Appellate Court in Celotex Corporation v. Illinois Pollution Control Board (4th Dist. 1978), 65 Ill. App. 3rd 776, 22 Ill. Dec. 474, 382 N.E.2d 864, 866, phrased the purpose as "[t]he issues in a variance proceeding focus upon whether compliance should be excused for a period of time."

The Board previously found a hardship which outweighed the public interest was present for ILI. (PCB 94-200 at 5.) ILI has diligently sought siting approval during the time that the original variance was in place and has been granted such approval. In this proceeding ILI has committed to compliance no later than September 18, 1996. Therefore, the Board finds that the hardship involved in submitting two significant modification permit applications

outweighs the public interest in achieving immediate compliance. ILI is operating under permits and ILI maintains it is complying with those permits. Therefore, granting this variance will have no environmental impact at this time.

Retroactive Variance

ILI has requested a retroactive variance. 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.)

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 finds that granting this variance from September 18, 1995 is consistent with the Board’s previous decisions as ILI has timely and diligently sought relief. This case is similar to Land and Lakes Company v. IEPA, PCB 96-198 (September 5, 1996), (Land and Lakes) where the requested relief was mostly retroactive. In Land and Lakes, the Board granted the relief because of the nature of the regulation involved, the diligence Land and Lakes had shown and the similarities shared by Land and Lakes and other petitioners who have received variances from these regulations. (Land and Lakes at 6.) ILI filed a petition requesting an extension of its variance almost one hundred days prior to the expiration of the variance. ILI did not receive siting approval until November 1995, over a month after the expiration of the prior variance. Thus, the ILI timely sought the extension of the prior variance while pursuing local siting approval. Therefore, retroactive relief is appropriate.

CONCLUSION

ILI has diligently sought siting approval for expansion of ILI's landfill during the period of the previous variance. ILI has demonstrated that submission of a significant modification permit for the ILI facility by September 18, 1995 would have been an arbitrary and unreasonable hardship. Further, the record demonstrates that the granting of the variance will have no adverse environmental impact. Therefore, the Board grants ILI a retroactive variance for submission of ILI's significant modification permit application beginning on September 18, 1995 and ending September 18, 1996.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

Illinois Landfill Inc. is hereby granted a variance from 35 Ill. Adm. Code 814.104(c) which begins on September 18, 1995 and terminates on September 18, 1996.

IT IS SO ORDERED.

If petitioner chooses to accept this variance subject to the above order, within 45 days of the date of this order, petitioner shall execute and forward to:

Robert J. Scherschligt
 Illinois Environmental Protection Agency
 P.O. Box 19276
 2200 Churchill Road
 Springfield, Illinois 62794-9276

a Certification of Acceptance and Agreement to be bound to all terms and conditions of this variance, and such certification shall be in the form specified by the Board. 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 and of no force and effect as a shield against enforcement of the rules from which this variance is granted.

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 95-162, September 19, 1996.

Petitioner _____

Authorized Agent _____

Title _____

Date _____

IT IS SO ORDERED.

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 order was adopted on the ____ day of _____, 1996, by a vote of _____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board