

ILLINOIS POLLUTION CONTROL BOARD
September 5, 1996

LAND AND LAKES COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 96-198
)	(Variance - Land)
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY)	
)	
Respondent.)	

JAMES A. CARROLL AND JOHN F. KENNEDY OF QUINLAN & CRISHAM, LTD.
APPEARED ON BEHALF OF PETITIONER;

MARK V. GURNIK APPEARED ON BEHALF OF RESPONDENT.

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

This matter comes before the Board on a petition for variance filed by Land and Lakes Company (Land and Lakes or petitioner) on March 18, 1996. The Illinois Environmental Protection Agency (Agency) filed its recommendation on April 11, 1996. Petitioner waived its right to a public hearing, however, the City of Chicago filed a written objection and request for hearing on April 18, 1996. A hearing was held at the Board's Chicago office on July 26, 1996. The City of Chicago did not attend the hearing and the parties did not present any testimony.

Petitioner is requesting a variance from the requirements of 35 Ill. Adm. Code 814.104(c). Section 814.104 requires owners or operators of all landfills permitted pursuant to Section 21(d) of the Act to file an application for significant modification of existing municipal solid waste landfill units. (415 ILCS 5/21(d).) This application must demonstrate how the facility will comply with the operating requirements set forth in Part 814. Section 814.104(c) requires that the application be filed within 48 months of the September 1990 effective date of Part 814 of the Illinois Administrative Code, i.e. by September 18, 1994. Petitioner is seeking a variance from March 19, 1996 to September 19, 1996.

The Board's responsibility in this matter arises from the Environmental Protection Act (Act) (415 ILCS 5/1 et seq.) The Board is charged therein with the responsibility to "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". (415 ILCS 5/35(a).) More generally, the Board's responsibility in this matter is based on the system of checks and

balances integral to Illinois environmental governance: the Board is charged with the rulemaking and principal adjudicatory functions, and the Agency is responsible for carrying out the principal administrative duties.

BACKGROUND

Petitioner owns and operates a municipal solid waste landfill in the Village of Dolton (Village), Illinois, Cook County known as River Bend Prairie (landfill). (Pet. at 1.)¹ The landfill has been in operation since 1975 (Pet. at 4.) The landfill is a non-hazardous waste landfill which employed 9 employees as of 1995 and accepts, on average, approximately 1,500 cubic gate yards a day. (Pet. at 4.)

The petitioner is currently seeking an expansion for the 68 acre landfill from the Village. (Pet. at 4-5.) Petitioner is seeking to expand its facility in order to continue to serve its community's needs. (Pet. at 4.) The expansion would increase capacity of approximately 10.8 million cubic gate yards. (Pet. at 4.) Petitioner states that it expects the Village to make a decision in July. (Pet. at 6.)

On March 18, 1991, the petitioner, in accordance with 35 Ill. Adm. Code 814.103, notified the Agency that it will be operated pursuant to 35 Ill. Adm. Code 814.Subpart E and then on March 23 1992 revised its notice indicating that it will be operated pursuant to 35 Ill. Adm. Code 814.Subpart D. (Ag. Rec. at 3.) The Agency requested a significant modification application on or before January 1, 1993, but on December 3, 1992 granted an extension until February 1, 1993. (Ag. Rec. at 4.) Petitioner submitted its significant modification on February 1, 1993 but was deemed not filed by the Agency due to deficiencies. (Ag. Rec. at 4.)

On June 9, 1993, the petitioner again revised its notification and stated that the facility would be operated pursuant to 35 Ill. Adm. Code 814.Subpart C. (Ag. Rec. at 4.) The Agency granted two requests to extend the deadline for submittal of the significant modification application until August 15, 1994. Petitioner filed a significant modification application on August 15, 1994 but withdrew the application on May 2, 1995. (Ag. Rec. at 4.) The Agency granted further extension up to March 19, 1996. (Ag. Rec. at 4.) Petitioner has obtained an interim permit from the Agency, #1993-406-IN, certifying its compliance with RCRA Subtitle D requirements. (Stip. at 2.)² The petitioner seeks the variance until after the decision of the Village concerning its expansion to avoid unnecessary duplication in filing the required significant modification.

¹ The petition for variance will be referred to as "Pet. at .", the Agency recommendation will be referred to as "Ag. Rec. at .".

² The joint exhibit #1, the Stipulation of Agreed Facts will be referenced as "Stip. at .".

REGULATORY FRAME WORK

Section 814.104(c) of the Board's regulations requires the operator of a landfill which remains open after September 18, 1994, to file an application for significant modification of its current permit no later than September 18, 1994, or at such earlier time as the Agency may require. (35 Ill. Adm. Code 814.104(c).) However, petitioner received an extension of time to file its significant modification until March 19, 1996 and has been operating under an interim permit issued on October 1, 1993. Petitioner is requesting an extension of this deadline until September 19, 1996 through the use of variance relief.

COMPLIANCE PLAN

Petitioner states that it "is in compliance with all Subtitle D requirements, as well as the Illinois requirements implementing the same". (Pet. at 5.) Petitioner states that it will submit the significant modification "no later than September 19, 1996". (Pet. at 8.) Therefore it appears that the compliance plan would be to wait until the Village makes its decision concerning the expansion and then file a significant modification which encompasses the entire site including the proposed expansion or just the current facility if siting is denied. Petitioner filed its application for siting with the Village on March 11, 1996. (Pet. at 4-5.) Pursuant to Section 39.3(e) if the Village fails to take final action within 180 days from the date of filing the application the applicant may deem the request approved. (415 ILCS 5/39.2.) Therefore, Petitioner will know by September 7, 1996 whether siting has been approved or not which leaves a short period of time to finalize the significant modification application prior to the end of the variance.

HARDSHIP

Petitioner states that it will incur an arbitrary and unreasonable hardship if the request for variance is denied because without the requested extension of time, it will incur "substantial costs and expenses to prepare and file two significant modification applications for River Bend Prairie, rather than one significant modification application upon siting approval of the expanded facility". (Pet. at 7.) Additionally petitioner states that it cannot, by law, file the significant modification application to include the expanded portion of the facility until after the Village of Dolton grants siting approval. (Pet. at 7.) Furthermore, petitioner argues that it will conserve the scarce resources of the Agency by granting the variance and avoiding the filing of two significant modifications. (Pet. 7-8.).

The Agency recognizes the costs associated with the submittal of two significant modifications but does not believe that the Agency's burden of reviewing two significant modification applications is the type of arbitrary or unreasonable hardship envisioned by the Act for the Board to weigh when considering a variance petition. (Ag. Rec. at 6.)

ENVIRONMENTAL IMPACT

Petitioner states that due to the nature of the regulation from which variance is sought there is no environmental impact expected by grant of variance. (Pet. at 8.) Petitioner reasons that since the regulation involves the submission of information only, rather than a deadline for the implementation of any requirements, there will be no environmental impact. (Pet. at 8.) The Agency states that it “generally concurs” with the qualitative impacts on the public as alleged by petitioner. (Ag. Rec. at 5.)

CONSISTENCY WITH FEDERAL LAW

Both Land and Lakes and the Agency agree that the grant of variance would not be inconsistent with the federal laws and regulations. (Pet. at 9, Ag. Rec. at 6.)

AGENCY RECOMMENDATION

The Agency does not oppose the granting of the variance from 35 Ill. Adm. Code Section 814.104(c), to allow Land and Lakes a six month extension, until September 19, 1996, to file its significant modification permit application for petitioner’s landfill. (Stip. at 3.) The Agency states that at the last inspection of the landfill it found no violations. (Ag. Rec. at 2.)

However, the Agency does express a concern that the variance should not be extended past the September 19, 1996 date. (Ag. Rec. at 5.) The Agency states “despite Petitioner’s alleged compliance with the requirements of Subtitle D, the Agency has received no documentation of the Petitioner’s alleged compliance with the requirements in 35 Ill. Adm. Code 814.302(a) and (b)”. (Ag. Rec. at 5.) The Agency concludes that “[b]ecause the Agency does not anticipate receiving the documentation prior to the submittal of the significant modification application, it would be very concerned about any extension of the submittal deadline beyond the requested deadline in the petition for variance, namely September 18, 1996.” (Ag. Rec. at 5.)

STATUTORY FRAMEWORK

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. (*We Shred It, Inc. v. IEPA*, (November 18, 1993), PCB 92-180 at 3.)

A further feature of a variance is that it is, by its nature, a temporary reprieve from compliance with the Board's regulations. Compliance is to be sought regardless of the hardship which the task of eventual compliance presents an individual polluter. (*Monsanto Co.*

v. IPCB (1977), 67 Ill.2d 276, 367 N.E.2d 684.) Accordingly, except in certain special circumstances, a variance petitioner is required, as a condition to a variance grant, to commit to a plan which is reasonably calculated to achieve compliance within the term of the 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.)

DISCUSSION

This case is very similar to *USA Waste Services, Inc., v. Illinois Environmental Protection Agency*, (July 21, 1994), PCB 94-92, where the Board granted a six month variance from 35 Ill. Adm. Code 814.104(c) while petitioner sought an expansion of its facility.¹ The Board stated “[r]equiring USA Waste to file an application prior to completion of the siting process for its proposed expansion would result in USA Waste subsequently filing a second, largely duplicative application, and would unnecessarily waste the time and resources of USA Waste and the Agency”. (*Id.* at 4.) Based on the record, the Board finds that to deny variance and require immediate compliance with 35 Ill. Adm. Code 814.104(c) (and Land and Lakes' extended compliance date of March 19, 1996) would impose an arbitrary and unreasonable hardship on Land and Lakes.

However, unlike the variance relief granted to *USA Waste Services Inc.*, here most of the requested relief is retroactive. As stated above, the Board, absent unusual circumstances, ordinarily does not grant retroactive relief. In *Atkinson Landfill Company, Inc. v. Illinois Environmental Protection Agency*, (January 11, 1995), PCB 94-259, the Board found that petitioner deserved a retroactive variance because it filed the variance petition two days after the significant modification application was due which showed due diligence and because

¹ See also *Envirte Corporation, d/b/a County Environmental of Livingston v. Illinois Environmental Protection Agency*, (August 11, 1994), PCB 94-161.

Atkinson Landfill Company was negotiating for necessary permits and siting approval for its facility. (*Id.* at 8-9.)

The situation presented to us in this case mirrors the situation in *Atkinson Landfill Company, Inc.* Land and Lakes filed its petition for variance the day before its significant modification application was due and it is in the process of expanding its facilities. There also appears to be a long history between the Agency and this facility in determining what type of facility it is and under what permitting structure it should follow. Although the filing for the variance and these other circumstances are under the control of Land and Lakes, (which should have filed its petition for variance at least 120 days prior to March 19, 1996) due to the nature of the regulation petitioner seeks relief, the diligence Land and Lakes has shown thus far and the similarities shared by Land and Lakes and other petitioners who have received variance grant, the Board will grant retroactive relief in this case.

CONCLUSION

The Board finds that to require immediate compliance with 35 Ill. Adm. Code 814.104(c) would cause an arbitrary and unreasonable hardship and therefore grants variance relief. Additionally, due to the special circumstances surrounding the variance request, the Board will grant the short retroactive variance. Therefore, Land and Lakes Company is granted variance from 35 Ill Adm. Code 814.104(c) starting on March 19, 1996 and ending on September 19, 1996.

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

ORDER

Land and Lakes Company is hereby granted a variance from 35 Ill. Adm. Code 814.104(c) starting on March 19, 1996 and terminates on September 19, 1996 for its facility located in the Village of Dolton, Illinois known as River Bend Prairie. Within forty-five days of the date of this order, Land and Lakes Company shall execute and forward to:

Mark V. Gurnik
 Division of Legal Counsel
 Illinois Environmental Protection Agency
 2200 Churchill Road
 P.O. Box 19276
 Springfield, IL 62794-9276

a certificate of acceptance and agreement to be bound by all the 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:

I (We), _____, hereby accept and agree to be bound by all terms and conditions of the order of the Illinois Pollution Control Board in PCB 96-198, September 5, 1996.

Petitioner

Authorized Agent

Title

Date

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act, (415 ILCS 5/41 (1992)), provides for appeal of final orders of the Board 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, 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