

ILLINOIS POLLUTION CONTROL BOARD
July 7, 1995

POLYFOAM PACKERS CORPORATION,)	
)	
Petitioner,)	
)	
v.)	PCB 95-103
)	(Variance - Air)
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

CHARLES M. CHADD OF ROSS & HARDIES APPEARED ON BEHALF OF THE PETITIONER;

BONNIE SAWYER APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by E. Dunham):

On March 15, 1995, Polyfoam Packers Corporation (Polyfoam) filed a petition for variance from the requirements of 35 Ill. Adm. Code Part 218, Subparts TT and UU for a period of one year for its facility located in Wheeling, Illinois. The requested term of the variance is from March 15, 1995 until March 16, 1996. On April 6, 1995, Polyfoam filed an amended petition. The Illinois Environmental Protection Agency (Agency) filed its recommendation on April 24, 1995. The Agency recommends that the Board grant the petition for variance subject to conditions. A hearing on the petition was held on May 15, 1995 before hearing officer Deb Frank in Chicago, Illinois. The parties did not file post-hearing briefs.

On June 7, 1995, the attorney for petitioner submitted corrections to the transcripts. On June 12, 1995, the Agency filed a stipulation to the corrections to the transcript. The Board accepts the notice of corrections and incorporates them into the transcript.

The Board's responsibility in this matter arises from the Environmental Protection Act (Act) (415 ILCS 5/1 et seq. (1992).) 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) (1992).) 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.

Subpart TT requires sources with the potential to emit 25 tons per year or more of volatile organic material (VOM) to reduce VOM emissions with capture and control techniques by 81 percent overall. (35 Ill. Adm. Code. 218.946.) Compliance is required by March 15, 1995. (35 Ill. Adm. Code 218.106(c).) Subpart UU includes the recordkeeping and reporting requirements associated with the control requirements in Subpart TT.

BACKGROUND

Polyfoam owns and operates a polystyrene shape molding manufacturing facility in Wheeling, Illinois. The facility is located in the Chicago ozone nonattainment area. (Am. Pet. at 2.) Polyfoam employs 116 full-time employees at this facility, of which approximately 50 are involved in the operation of the manufacturing facility. (Am. Pet. at 2.)

Polyfoam purchases expandable polystyrene molding compound which contains pentane as a blowing agent. (Am. Pet. at 2.) Pentane is a volatile organic material and portions of the pentane are released to the atmosphere during the processing steps which consist of preliminary expansion, aging and molding. (Am. Pet. at 2.) The conditions of Polyfoam's operating permit limit potential emissions to 95.01 tons per year. (Am. Pet. at 3.) Actual emissions from the facility are estimated at 55 tons per year. (Am. Pet. at 5.)

The installation of an emission control device on the pre-expander is estimated to cost approximately \$250,000. (Am. Pet. at 3.) Polyfoam is currently evaluating several alternatives to move production from the Wheeling facility to reduce the facility's potential to emit VOM under 25 tons per year. (Am. Pet. at 4.) The alternatives being considered include moving some of the production to an existing facility in Effingham or opening a new facility outside of the Chicago ozone non-attainment area. (Am. Pet. at 4.) Polyfoam had intended to complete the transfer of production to its Effingham facility prior to the compliance deadline of March 15, 1995 but was delayed due to delays in the expansion of the Effingham facility and logistic issues with customers. (Am. Pet. at 5.) Polyfoam requires another twelve months to complete the transfer of production. (Am. Pet. at 5.)

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) (1992).) 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.

The cost of installing the necessary equipment at the facility is estimated at \$250,000. (Am. Pet. at 6.) Polyfoam has expended approximately \$140,000 for emission controls at its Waukegan facility and will be spending approximately another \$110,000 on those controls. (Am. Pet. at 7.) The modernization and expansion of its Effingham facility costs approximately \$2,000,000. (Am. Pet. at 7.) Polyfoam maintains that the expenditure at its Wheeling facility, which is not an ideal production facility, would result in an unreasonable burden on available capital. (Am. Pet. at 7.) Therefore, Polyfoam plans to transfer production from its Wheeling facility. (Am. Pet. at 7.) However, this transfer requires an additional twelve months for completion. (Am. Pet. at 7.) Polyfoam maintains that requiring the installation of controls while it arranges the transfer of production would unduly tax the financial capabilities of the company. (Am. Pet. at 7.)

The Agency agrees that petitioner would suffer an arbitrary and unreasonable hardship if required to install control equipment for the interim period prior to the transfer of production. (Rec. at 4.) The Agency believes that the hardship outweighs any environmental impact that may result from the granting of the variance. (Rec. at 4.)

COMPLIANCE PLAN

A variance is 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 grant of variance, to commit to a plan which is reasonably calculated to achieve compliance within the term of the variance.

Polyfoam intends to transfer production from its Wheeling facility to reduce the VOM emissions from the Wheeling facility to under 25 tons per year. The petition did not contain a detailed schedule outlining the steps toward compliance but petitioner submitted a more detailed compliance schedule to the Agency. (Rec at 6.) The Agency believes that the compliance schedule is generally sufficient but believes that the date for submitting a construction permit application for a new facility should be moved up to November 1, 1995 in order to meet the March 15, 1996 date for compliance. (Rec. at 6.) The Agency also asserts that it is critical that petitioner shift a sufficient portion of production from the Wheeling facility by the end of

the variance period. (Rec. at 6.)

ENVIRONMENTAL IMPACT

Current emissions from the facility will not increase during the term of the variance. (Am. Pet. at 6.) Polyfoam intends to bring the facility into compliance by lowering the VOM emissions to below 25 tons per year. (Am. Pet. at 6.) Polyfoam maintains that the environmental impact of the emissions will be no different than its current status. (Am. Pet. at 6.)

The Agency emphasizes that the environment is adversely impacted from VOM emissions during the ozone season. (Rec. at 3.) However, the Agency believes that the hardship petitioner will suffer outweighs the impact from allowing uncontrolled VOM emissions from the facility during the 1995 ozone season. (Rec. at 3.)

CONSISTENCY WITH FEDERAL LAW

Polyfoam asserts that the variance is not contrary to federal law. (Am. Pet. at 7.) The current U.S. EPA approved State Implementation Plan (SIP) for Illinois continues to include an exemption for facilities such as Polyfoam's facility. (Am. Pet. at 8.) Polyfoam maintains that it is in compliance with the approved SIP. (Am. Pet. at 8.) However, if granted, this variance will need to be submitted to the U.S. EPA for approval as a SIP revision if it approves the amendments to Subpart TT as part of Illinois' SIP during the term of the variance. (Rec. at 5, Am. Pet. at 9.)

CONCLUSION

Based upon the record, the Board finds that requiring Polyfoam to comply with the requirements of 35 Ill. Adm. Code Part 218, Subparts TT and UU for its Wheeling facility would impose an arbitrary and unreasonable hardship on Polyfoam. The Board finds that any environmental impact that may result from the granting of the variance is outweighed by the hardship that Polyfoam would incur if required to install the emission controls at its Wheeling facility while transferring production to other facilities.

Petitioner requests that the variance commence on March 15, 1995, the compliance date of the regulation. The Board notes that it is a well established practice that the term of a variance begins on the date the Board renders its decision unless unusual or extraordinary circumstances are shown. (See, e.g. DMI, Inc. v. IEPA (December 19, 1991), PCB 90-277, 128 PCB 245-249.) Petitioner had planned to be in compliance with the regulation by the compliance date but due to unforeseen delays in the transfer of operations from the Wheeling facility to other facilities,

petitioner was unable to reduce its emissions prior to the compliance date. In view of the facts of this case, the Board finds that the instant circumstances warrant the short retroactive start of the variance.

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

ORDER

Polyfoam Packers Corporation is hereby granted a variance from the requirements of 35 Ill. Adm. Code Part 218, Subparts TT and UU for its Wheeling facility subject to the following conditions:

1. The variance shall commence on March 15, 1995 and expire on March 16, 1996, or until such time as Polyfoam has achieved the necessary reductions at its Wheeling facility, whichever comes first.
2. During the term of this variance the emissions from the facility shall not exceed the current emission level of 55 tons per year.
3. At the time of the expiration of this variance the subject facility shall be in compliance with the regulations on VOM emissions.
4. Any construction permit required to shift production capabilities from the subject facility must be applied for by November 1, 1995.

Within forty-five days of the date of this order, petitioner shall execute and forward to:

Illinois Environmental Protection Agency
Compliance Unit for the Bureau of Air
2200 Churchill Road, P.O. Box 19276
Springfield, Illinois 62794-9276

a Certificate of Acceptance and agreement to be bound 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 and of no force and effect as a shield against enforcement of rules from which this variance is granted. 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 95-103 dated July 7, 1995.

Petitioner

Authorized Agent

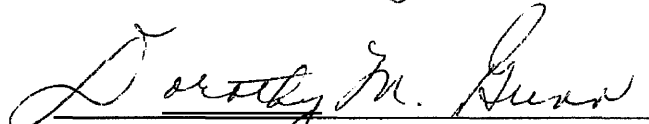
Title

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 7th day of July, 1995, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board