

ILLINOIS POLLUTION CONTROL BOARD
March 16, 1995

CERTIFIED PERFORMER, INC.)	
d/b/a KEITH'S UNION 76,)	
)	
Petitioner,)	
)	
v.)	PCB 94-327
)	(Variance-Air)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

JEFFREY A. BIVENS, APPEARED ON BEHALF OF PETITIONER;

BONNIE R. SAWYER, APPEARED ON BEHALF OF RESPONDENT.

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

On November 15, 1994, Certified Performer, Inc., d/b/a Keith's Union 76 (Certified), filed a petition for variance seeking relief from 35 Ill. Adm. Code 218.586 of the Board's air regulations relating to Stage II gasoline vapor recovery. The petitioner is requesting this variance for petitioner's retail gasoline dispensary at Routes 25 and 34 in Oswego, Illinois. On January 11, 1995, the Illinois Environmental Protection Agency (Agency) filed a recommendation that the Board grant the requested variance with conditions. On January 20, 1995, a hearing was held in Oswego, Illinois before Board hearing officer Deborah L. Frank. No members of the public were present at the hearing.

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 there with the responsibility of granting variance from Board regulations whenever it is found that compliance with the regulations would impose an arbitrary or unreasonable hardship upon the petitioner. (415 ILCS 5/35(a) (1992).) The Agency is required to appear in hearings on variance petitions. (415 ILCS 5/4(f) (1992).) The Agency is also charged, among other matters, 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) (1992).)

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

REGULATORY FRAMEWORK

The Clean Air Act Amendments of 1990 required that owners or operators of gasoline dispensing facilities located in moderate or above nonattainment areas install and operate gasoline vehicle refueling vapor recovery systems (Stage II systems). (Pet. at 2.)¹ The Board acted to adopt regulations which required installation of Stage II systems on August 13, 1992. (See, In the Matter of: Stage II Gasoline Vapor Recovery Rules Amendments to 35 Ill. Adm. Code 215, 218, and 219, R91-30, 135 PCB 415 (August 13, 1992).)

Section 218.586 requires the installation of Stage II systems for "any gasoline dispensing operation which dispenses an average monthly volume of more than 10,000 gallons of motor vehicle fuel per month". (35 Ill. Adm. Code 218.586(b).) Operations subject to the requirements of Section 218.586 shall demonstrate compliance according to the schedule set forth in Section 218.586(d). Section 218.586(d)(3) provides:

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.

REQUESTED RELIEF AND HARDSHIP

Petitioner's operation commenced construction before November 1, 1990, and dispenses an average monthly volume of less than 100,000 gallons of motor fuel per month. (Pet. at 3.) Therefore, petitioner was required to demonstrate compliance by November 1, 1994. Petitioner is requesting a eighteen-month variance until May 1, 1996, from the Board's Stage II vapor recovery regulations for its facility in Oswego, Illinois. (Pet. at 1.)

The petitioner is the operator of the facility and is negotiating for the purchase of the property. The facility employs eight people and is located at the intersection of Routes 25 and 34 a mixed residential, industrial and commercial area. (Pet. at 3.) The petitioner states that the facility dispenses an average of 30,000 gallons of gasoline per month. (Pet. at 3.) Petitioner estimates that the uncontrolled emission from the facility would be approximately 332.1 pounds of VOM [volatile organic material] per month. (Pet. at 3-4.)

¹ The petition will be cited as "Pet. at ___"; the Agency's recommendation will be cited as "Rec. at ___"; and the transcript will be cited as "Tr. at ___".

Prior to November 1, 1994, Petitioner retained an environmental engineering firm to install the Stage II system and to perform a limited soil characterization study if required. (Pet. at 4.) The results of the petitioner's soil characterization indicated the presence of petroleum contamination which may need to be remediated. (Pet. at 4.) The estimated cost for installation of the Stage II system was \$20,000 with an additional costs for soil remediation if necessary. (Pet. at 5.) Remediation may require additional costs for dismantling and re-installation of the Stage II System if it is installed prior to the remediation. Additionally, petitioner states that "... it is unreasonable and arbitrary to require Petitioner [sic] to install a Stage II System when contract negotiations for the purchase of the property may fall through." (Pet. at 5.) Petitioner has filed the 20 and 45 day reports on July 8, 1994 and plans on filing its site-classification with the Agency in June of 1995. (Pet. at 5.)

The Agency agrees that immediate compliance with Section 218.586 imposes an arbitrary or unreasonable hardship on the petitioner. (Rec. at 6.) Further, the Agency states that the petitioner has demonstrated that the petitioner would suffer a hardship if required to install a Stage II System by the required date of November 1, 1994. (Rec. at 6.)

ENVIRONMENTAL IMPACT

Petitioner has asserted estimates for VOM emissions from its facility to be 332.1 pounds per month. (Pet. at 3.) Petitioner asserts that the increased emissions from the facility would only be approximately .000004% of the total VOM emissions per day in the Chicago area. (Pet. at 6.) The Agency estimates that the petitioner's daily VOM emissions will constitute .0004% of the Chicago non-attainment area daily emissions. (Rec. at 3.) Therefore, petitioner argues the increased air emissions during the requested period for the variance would have "a negligible impact on the Chicago area's ozone nonattainment status." (Pet. at 6.)

Although the Agency disagrees with the calculations of the percentage of total VOM emissions per day set forth by petitioner, it does agree that the emissions are insignificant. (Rec. at 3.) The Agency states that while the emissions from this facility are not significant when compared to the total Chicago area VOM emissions; "the ozone problem in Chicago is largely attributable to numerous smaller sources that, when aggregated, add up to significant emissions." (Rec. at 3.) However, the Agency believes that hardship of requiring installation of the Stage II System outweighs the negligible environmental impact of allowing the variance. (Rec at 5.) Therefore, the Agency recommends granting of the variance with conditions. (Rec. at 5.) One condition to the Agency's

recommendation of grant is that Petitioner will install the Stage II System no later than March 31, 1996. (Rec. at 7.)

CONSISTENCY WITH FEDERAL LAW

Petitioner states that the requested relief is consistent with the Clean Air Act. (Pet. at 6.) The Agency states that the grant of the variance should not notably hamper the State's efforts of complying with federal law. (Rec. at 5.)

CONCLUSION

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) (1992).) 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 it and upon review of the hardship petitioner would encounter, and the environmental impact for the 1995 ozone season that would result from grant of variance, the Board finds that petitioner has presented adequate proof that immediate compliance with the regulations at issue would result in an arbitrary and unreasonable hardship. The Board agrees with the Agency statements that the emissions will have a negligible environmental impact on the 1995 ozone season if the variance is allowed. Petitioner has requested that the variance commence November 1, 1994 and end May 1, 1996. The Board notes that it is 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 DMI, Inc. v. IEPA, PCB 90-227, 128 PCB 245-249, December 19, 1991.) In view of the facts of this case including the Board's knowledge of contractor and equipment shortages associated with installation of Stage II equipment, and the Agency's recommendation of no significant environmental impact, the Board finds that the instant circumstances warrant the short retroactive start of the variance. The Board is convinced that the Stage II system should be in place prior to the beginning of the 1996 ozone season and petitioner indicated at hearing that it agrees to the Agency's recommended conditions. (Tr. at 5.) The requested variance accordingly will be granted, subject to conditions consistent with this opinion.

Lastly, the Board notes that the Agency requests that the Board use a form of the certificate of acceptance that is

different from the traditional certificate. The Board declines this request for reasons addressed in a separate order. (See UNO-VEN Company v. IEPA, PCB 94-282, slip op. February 16, 1995.)

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

ORDER

The Board hereby grants the petitioner, Certified Performer, Inc., d/b/a Keith's Union 76, a variance from 35 Ill. Adm. Code 218.586, Gasoline Dispensing Operating-Motor Vehicle Fueling Operations, subject to the following conditions:

1. The term of the variance begins on November 1, 1994 and terminates as prescribed below.
2. If the site classification concludes that no further remediation is necessary, petitioner will complete installation of Stage II equipment within forty-five (45) days of the Agency's concurrence with this conclusion.
3. If the site is classified as low priority, petitioner will complete installation of Stage II equipment within forty-five (45) days of the Agency's concurrence with this classification.
4. If remediation is required but the method selected will not interfere with Stage II equipment, petitioner will install Stage II equipment within forty-five (45) days of the approval of this method.
5. If the site is classified, and requires further remediation, petitioner will install Stage II equipment within forty-five (45) days of completion of the remediation, but in no case later than March 31, 1996.
6. Petitioner shall notify Terry Sweitzer of the Illinois Environmental Protection Agency as to the classification of this site within fourteen (14) days of receipt of site classification approval. Such notice shall be sent to:

Mr. Terry Sweitzer
Illinois Environmental Protection Agency
Bureau of Air
P.O. Box 19276
Springfield, Illinois 62794-9276

- 7. Petitioner shall notify the Illinois Environmental Protection Agency of the installation of any Stage II vapor recovery equipment within fourteen (14) days of the installation. Notification shall include the address of the facility and be sent to Mr. Terry Sweitzer at the address provided in condition #5.

IT IS SO ORDERED.

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:

Bonnie R. Sawyer
 Division of Legal Counsel
 Illinois Environmental Protection Agency
 P. O. Box 19276
 2200 Churchill Road
 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 94-327, March 16, 1995.

Petitioner _____

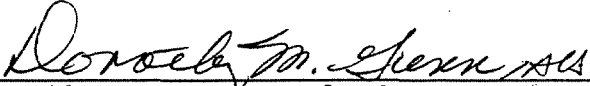
Authorized Agent _____

Title _____

Date _____

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1989, ch. 111 1/2 par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 16th day of March, 1995, by a vote of 7-0.


Dorothy M. Gunn, Clerk
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board