

ILLINOIS POLLUTION CONTROL BOARD
October 6, 1994

WASTE MANAGEMENT OF)	
ILLINOIS, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 94-212
)	(Variance)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by C.A. Manning):

On August 5, 1994, Waste Management of Illinois, Inc. (WMII) filed a petition for a six-month variance from the Illinois Pollution Control Board's (Board) requirements that WMII file a permit application demonstrating compliance with the operating requirements of 35 Ill. Adm. Code. 814 by September 18, 1994. On August 23, 1994, the Illinois Environmental Protection Agency (Agency) filed its recommendation that the variance be granted. On September 13, 1994, the City of Geneva filed a petition to intervene, and additionally filed a motion to incorporate the record in PCB 94-58, City of Geneva v. Kane County et al. WMII filed its response on September 23, 1994 and on October 3, 1994, the City of Geneva filed a motion for leave to file a reply to WMII's response along with the reply.

No hearing in this matter has been held, nor has the Board received a request for a hearing or an objection to our granting the variance pursuant to 35 Ill. Adm. Code 104.141. For reasons more fully set forth below, we grant the six-month variance as requested by WMII and deny both the City of Geneva's petition for intervention and the motion to incorporate the record of PCB 94-58. We will however, allow the City's motion for leave to file a reply.

PROCEDURAL MATTERS AND BACKGROUND

Our review of the City of Geneva's petition for intervention is governed by our procedural rule standard found in 35 Ill. Adm. Code 103.142. The City may intervene if it can show either that the City is so situated that it may be adversely affected by a final order of the Board, or that the City's claim or defense involves a common question of law for fact with the instant variance proceeding.

In this proceeding, WMII is seeking a six-month variance from the permit application filing requirement of 35 Ill. Adm. Code 814.104(c). Section 814.104 requires owners or operators of

Subpart "C" facilities which are existing units accepting chemical and putrescible wastes that will remain open for more than seven years beyond September 18, 1990, and are permitted pursuant to Section 21(d) of the Environmental Protection Act (415 ILCS 5/21(d)), to file an application for significant modification of existing municipal solid waste landfill units. Section 814.104(c) requires that the application be filed within 48 months of the September 1990 effective date of Part 814, or by September 18, 1994.

As the operator, WMII is required under this regulatory provision to submit a permit application for the existing portion of Settler's Hill Recycling and Disposal Facility in Kane County, Illinois (Settler's Hill). Having received site location suitability approval from Kane County for an expansion of Settler's Hill Landfill, which the Board recently affirmed in City of Geneva v. Kane County, at al. (July 21, 1994) PCB 94-58, WMII is additionally required to file an operating permit application regarding the approved expansion. In order to avoid undertaking duplicative efforts, WMII is seeking the instant six-month variance.

Geneva does not object to the Board's granting a variance; instead, Geneva seeks to be an intervenor in order to argue that the time requested by WMII is too short. Regarding the issue of common question of law or fact, the City argues that it meets this part of the intervention standard because Geneva allegedly has jurisdiction over the siting of Settler's Hill Landfill.¹ We find there is no common question of law or fact between the City's claim and this variance proceeding. Geneva is essentially seeking to obtain a declaratory judgment from the Board that WMII management must file an application for local siting approval from the City of Geneva. Whether WMII will receive an operating permit from the Agency without having sought and been granted local siting approval from the City of Geneva is still an open question. We declined to make such a determination on July 21, 1994 in City of Geneva v. Kane County, at al., PCB 94-58. We are declining again today to make that determination with regard to the City's motion for reconsideration of our final decision in

¹The issue of the City's concurrent jurisdiction was recently addressed in City of Geneva v. Kane County, at al. (July 21, 1994) PCB 94-58, wherein we upheld Kane County's siting approval, and additionally found that we had no authority at this stage of the proceedings to require WMII to seek site location suitability approval from Geneva, despite the City's claim that it shares concurrent jurisdiction with Kane County. We found that pursuant to Section 39(c), it was within the initial jurisdiction of the Agency, rather than the Board's, to determine whether WMII had obtained all the necessary local siting authority approval prior to submitting an operating permit application.

PCB 94-58, and we decline to make that determination in this context. This variance proceeding is not the proper forum to determine Geneva's jurisdiction over the local siting of a landfill expansion. The sole issue pending in this matter is whether we will grant WMII's request for additional time to satisfy the Board's regulatory permit requirements, a request to which Geneva does not object.

Geneva also claims it will be adversely affected by a final decision of the Board if we merely granted a variance for a six-month period because there would be inadequate time for WMII to seek site location suitability approval from the City of Geneva prior to WMII filing its permit application with the Agency. Geneva believes the local siting process would take more than a year. We find that Geneva is not so situated to be adversely affected by a final order of this Board. Geneva has not demonstrated any harm resulting from our granting a six-month variance. In the event that WMII should submit a local siting approval application to the City of Geneva, it is WMII who would be harmed by that process not being completed prior to the expiration of the six-month extension, and not Geneva. If, for some reason, WMII is in need of additional time in which to file a permit application, WMII can seek another variance upon a proper showing. (35 Ill. Adm. Code 104.123.) For these reasons, we find that the City of Geneva has not met the standard for granting intervention and deny both the City of Geneva's petition for intervention and the motion to incorporate the record of PCB 94-58.²

STATUTORY FRAMEWORK

With regard to the variance proceeding, 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 with the responsibility of granting variances 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).) The Agency is required to appear in hearings on variance petitions. (415 ILCS 5/4(f).) The Agency is also charged, among other things, 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).)

In determining whether any variance is to be granted, the

²At the October 6, 1994 meeting of the Board, a separate vote was taken on the City of Geneva's petition for intervention. The vote was 3 to 3; therefore, the petition is deemed denied for failing to receive the majority vote of the Board. However, the three members who would have granted intervention concur in the grant of this variance.

Act requires the Board to determine whether a petitioner has presented adequate proof that immediate compliance with the Board regulation at issue would pose an arbitrary or unreasonable hardship. (415 ILCS 5/35(a) (1992).) Furthermore, the burden is on petitioner to show that its claimed hardship outweighs the public interest in attaining compliance with regulations designed to protect the public. (Willowbrook Motel v. Pollution Control Board (1st Dist. 1977), 135 Ill.App.3d 343, 481 N.E.2d 1032.) Only with such showing can the claimed hardship rise to the level of arbitrary or unreasonable hardship. (We Shred It, Inc. v. Illinois Environmental Protection Agency (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, and compliance is to be sought regardless of the hardship which the task of eventual compliance presents an individual polluter. (Monsanto Co. v. Pollution Control Board (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 the grant of a variance, to commit to a plan which is reasonably calculated to achieve compliance within the term of the variance.

HARDSHIP

Under Section 814.104(c), WMII is required to file an application for significant modification by September 18, 1994. Upon completion of the siting process for the proposed expansion, WMII is required to re-file its application for significant modification, incorporating the changes resulting from the expansion. WMII seeks a six-month variance from the September 18, 1994 filing deadline in order to avoid filing a piecemeal application, and duplicative efforts.

Each owner or operator must file an application for a significant modification for existing units demonstrating compliance with current and new Illinois Solid Waste Regulations by September 18, 1994. (See 35 Ill. Adm. Code Section 814.104(b) and (c) and Section 814.302.) As it exists now, Settler's Hill Landfill is approximately 291 acres and is currently designed and permitted to accept municipal solid waste, demolition and construction wastes and special waste. It accepts between 3000 and 4000 gate cubic yards of waste per day. From April 1, 1993 through March 31, 1994, Settler's Hill accepted 1,044,218 cubic yards of waste. The landfill employs 20 people and has an annual payroll of \$890,000.

Owner or operator must also demonstrate that new landfills, in this case the expansion approved by the Kane County Board, will be in compliance with Subpart C of Section 811. According to the petitioner, this demonstration will vary significantly

from an application filed solely for an existing landfill. WMII asserts that the variance would also avoid wasting the Agency's resources and time in needlessly reviewing a second application that would soon become obsolete. The Agency acknowledges that requiring petitioner to prepare and the Agency to review an unnecessary second application would needlessly waste the time and resources of both parties. (Agency Rec. at 3.)

As discussed above, WMII has sought both a horizontal and vertical expansion of the landfill, and reconfiguration of the existing landfill area, which the Kane County Board has already approved. The expansion design will provide a maximum capacity of 5,500,000 additional compacted cubic yards of waste. However, prior to filing the permit application for expansion with the Agency, WMII must negotiate a new Operating Agreement with Kane County. It is the need to renegotiate the Operating Agreement, and WMII's desire to avoid piecemeal filings, which gives rise to WMII's request for an additional six months in which to file the application for significant modification of an existing municipal solid waste landfill.

COMPLIANCE WITH OTHER REGULATIONS; ENVIRONMENTAL IMPACT

Petitioner asserts that it is in compliance with the existing Resource Conservation and Recovery Act Subtitle D requirements (Pet. at 4) and is operating pursuant to an interim permit issued in October, 1993. The landfill has a low permeability soil liner, final cover in place on certain portions of the landfill area, and systems in place for leachate collection, treatment and control, gas collection and control, and groundwater monitoring. Additionally, WMII asserts that the variance will have no adverse environmental impact; the September 18, 1994 deadline from which WMII seeks a variance is a deadline for submission of information, rather than a deadline for the implementation of any requirements. Such information will be submitted no later than six months from this deadline. The Agency agrees that WMII's requested variance would be consistent with all applicable federal law.

AGENCY RECOMMENDATION

The Agency recommends that the variance be granted, without conditions. The Agency has investigated the facts alleged in the petition, and pursuant to 35 Ill. Adm. Code 104.180(b), has made an effort to ascertain the views of the persons who might be affected by the grant of the requested variance; the Agency has published in a newspaper of general circulation in the county where the facility is located and for which the variance is sought, a legal notice and solicitation to ascertain the views of those persons who might be affected. In addition, the Agency has sent notice of the petition to the appropriate state legislators and county officials. As of the date of the Agency's

recommendation, the Agency has received no responses to the newspaper notice. Accordingly, the Agency is of the opinion that a six-month extension is reasonable under the circumstances of this case, and recommends that the Board grant the petition for variance.

CONCLUSION

Based on the petition and Agency recommendation, the Board finds that requiring WMII to comply with the Section 814.104(c) deadline for filing its application for significant modification of the Settler's Hill Landfill would impose an arbitrary or unreasonable hardship on WMII. As discussed above, a variance is a temporary reprieve from the Board's regulations for which a petitioner agrees to commit to a plan to achieve compliance within the term of the variance. WMII has agreed to submit a complete permit application, known as an application for significant permit modification, which will satisfy the compliance requirements. We therefore grant WMII the requested six-month variance from the deadline set forth in 35 Ill. Adm. Code 814.104(c). WMII now has until March 18, 1995 to file its application for significant modification, at which time it must demonstrate facility-wide compliance. Additionally, the City of Geneva's motion to intervene is denied for having failed to receive a majority vote of the Board.

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

ORDER

Waste Management of Illinois, Inc. ("WMII") is hereby granted a variance from 35 Ill. Adm. Code 814.104(c) to terminate on March 18, 1995.

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

Robert J. Scherschligt
 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 Pollution Control Board
in PCB 94-212, dated October 6, 1994.

Petitioner

Authorized Agent

Title

Date

IT IS SO ORDERED.

R.C. Flemal, G.T.Girard and E.Dunham concurring.

Section 41 of the Environmental Protection Act (415 ILCS
5/41 (1992)) 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 opinion and order was
adopted on the 6th day of October 1994, by a vote of
6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board