

ILLINOIS POLLUTION CONTROL BOARD
August 11, 1994

ENVIRITE CORPORATION,)	
d/b/a COUNTY ENVIRONMENTAL OF)	
LIVINGSTON,)	
)	
Petitioner,)	
)	PCB 94-161
v.)	(Variance)
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

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

This matter comes before the Board on a petition for variance filed by Envirite Corporation (Envirite) on May 26, 1994. The Illinois Environmental Protection Agency (Agency) filed its recommendation on June 30, 1994. Envirite filed its response to the recommendation on July 11, 1994. Petitioner waived its right to a public hearing and no hearing was held.

Envirite 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. 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. Envirite is seeking an extension of the filing requirement until the completion of its pending siting approval.

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.

BACKGROUND

Petitioner owns and operates the Livingston Landfill and the Livingston Residual Waste Landfill in Livingston County, Illinois. (Pet. at 2.) The Livingston Landfill has a permitted facility and waste boundary area of about 79 and 52 acres respectively. (Pet. at 6.) The Livingston Residual Waste Landfill currently has a permitted facility and waste boundary of 94 and 55 acres, respectively. (Pet. at 6.) The two facilities are located adjacent to each other approximately three miles north of Pontiac, Illinois. (Pet. at 2.) The facilities serve the non-hazardous waste disposal needs of Enviro's Harvey, Illinois hazardous waste treatment plant as well as the non-hazardous special waste and general municipal waste needs of Pontiac, Livingston County and surrounding areas. (Pet. at 2.) Enviro has sixteen full-time employees. (Pet. at 6.)

Stricter state and federal regulations which resulted in numerous landfill closures, coupled with changing market conditions, have resulted in a steady increase in waste receipts at the Livingston Landfill in recent years. (Pet. at 3.) Enviro is seeking to expand its facility in order to continue to serve its customers needs. (Pet. at 3.) The expansion would include both a lateral and vertical expansion resulting in two waste disposal units at the facility. (Pet. at 3.) On April 29, 1994, petitioner filed its request for local siting approval for a regional pollution control facility with Livingston County. (Pet. at 3.) Livingston County must take final action on the siting request within 180 days of the filing or before October 26, 1994. (Pet. at 3.)

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).) The Agency requested that petitioner file its applications for significant permit modification by February and June 1994. (Pet. at 2.) However, petitioner has requested an extension of this deadline which has not yet been acted upon by the Agency. (Pet. at 2.)

AGENCY RECOMMENDATION

The Agency generally concurs with the facts expressed in the petition. (Ag. Rec. at 2.) The Agency acknowledges the duplicative nature of filing two significant modification applications pursuant to Section 814.104(c) and 813.201(a) for the same facility as well as the arduous task imposed on both the petitioner and the Agency in preparing and reviewing the two applications. (Ag. Rec. at 3.)

The Agency believes that the variance request is unreasonable in terms of its duration. (Ag. Rec. at 4.) The Agency contends that an appeal could last for a substantial period of time, possibly years. (Ag. Rec. at 4.) The Agency recommends that the variance be granted with conditions for a period of six months from September 18, 1994. (Ag. Rec. at 5.) The Agency recommends that petitioner be required to submit an application for supplemental permit establishing compliance or assurance of compliance with leachate monitoring, gas monitoring and groundwater monitoring as prescribed in 35 Ill. Adm. Part 811. (Ag. Rec. at 5.)

PETITIONER'S RESPONSE

Petitioner argues that the Agency failed to explain or justify its recommendation that the variance be granted for a six month period. (Resp. at 2.) Petitioner contends that a six month variance is unreasonably short and fails to address the objective of the variance. (Resp. at 2.) Petitioner contends that a six month period will not encompass the time period for the first step in the appeal process i.e. appeal of the County Board's decision to the Pollution Control Board. (Resp. at 3.) The petitioner further contends that if an extension of the variance were needed, petitioner would need to file a petition for extension only two months after the variance was granted. (Resp. at 4.) Petitioner requests that the variance be granted for 12 months from the date the siting decision becomes final. (Resp. at 5.) In the alternative, petitioner requests that the Board grant the variance for a period of one year from September 18, 1994. (Resp. at 5.) Petitioner believes that a period of one year provides for the possibility of an appeal and also allows petitioner the opportunity to request an extension of the variance if the siting decision is further appealed. (Resp. at 5.) As a second alternative, petitioner requests that the Board grant the variance for alternate periods dependant on whether the siting decision is appealed. (Pet. at 6.)

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) (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. (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 grant of 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), Envirite is required to file an application for significant modification by September 18, 1994. Upon completion of the siting process for the proposed expansion, if the expansion is approved, Envirite will be required to re-file its application for significant modification, incorporating the changes resulting from the expansion. Petitioner seeks a variance from the September 18, 1994 filing deadline in order to allow it to complete the siting process for the proposed expansion prior to filing its application for significant modification, thus avoiding the duplicative efforts of filing a second application. Petitioner 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. Petitioner states that it can avoid \$190,000 in costs which would be incurred to prepare two separate permit applications. (Pet. at 13.)

COMPLIANCE WITH OTHER REGULATIONS; ENVIRONMENTAL IMPACT

Envirite maintains that during the term of the variance, it will continue operations under the terms of its existing permits in accordance with 35 Ill. Adm. Code 814.105(b). Petitioner maintains that the requested variance will have no impact on the environment. (Pet. at 13.) Petitioner represents that the variance is consistent with federal law. (Pet. at 16.)

CONCLUSION

Based upon the record, the Board finds that requiring Envirite to comply with the Section 814.104(c) deadline for filing its application for significant modification of the landfill would impose an arbitrary and unreasonable hardship on Envirite. 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. Petitioner has agreed to submit a complete permit application, known as an application for significant permit modification, satisfying Section 814.104, thereby demonstrating compliance with Section 814.302 upon expiration of the variance.

Requiring Envirite to file an application prior to completion of the siting process for its proposed expansion would result in petitioner subsequently filing a second, largely duplicative application, and would unnecessarily waste the time and resources of petitioner and the Agency. We therefore grant petitioner a variance from the deadline set forth in 35 Ill. Adm. Code 814.104(c).

Petitioner requests that the variance be granted from September 18, 1994 until 12 months after the siting decision is final. The Agency recommends that the variance be granted for six months from September 18, 1994. The Board does not find any support for the six months duration recommended by the Agency and finds that six months is an inadequate period if the siting decision is appealed.

The Board will not grant a variance for an indefinite period because the length of a variance is limited to five years. (415 ILCS 5/36(b) (1992), Lone Star Industries v. IEPA (October 29, 1992), PCB 92-134.) The term of the variance requested by the petitioner represents an indefinite period as it relates to the undeterminable date of a final decision in the siting process. If the siting approval is appealed it is possible that the length of this variance would exceed five years. Therefore, the Board will grant the variance for a period of 12 months from September 18, 1994.

Envirite is now given until September 18, 1995, to file its application for significant modification, at which time it must demonstrate facility-wide compliance with Section 814.302.

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

ORDER

Envirite is hereby granted a variance from 35 Ill. Adm. Code 814.104(c) to terminate on September 18, 1995 for Livingston Landfill and the Livingston Residual Waste Landfill in Livingston County, Illinois. Within forty-five days of the date of this order, Envirite shall execute and forward to:

John Burds
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 94-161, August 11, 1994.

Petitioner

Authorized Agent

Title

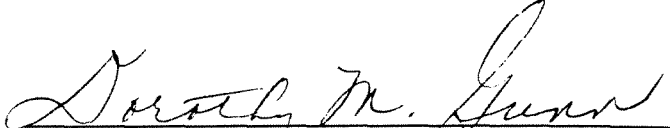
Date

IT IS SO ORDERED.

M. McFawn concurred.

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 11th day of August, 1994, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board