

ILLINOIS POLLUTION CONTROL BOARD  
July 8, 1998

CITY OF SALEM,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 98-1
	)	(Variance - Land)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by M. McFawn):

Before the Board is a "Petition for Variance" filed by the City of Salem, Illinois, seeking a variance from either 35 Ill. Adm. Code 814.401(a) or in the alternative the requirements of 35 Ill. Adm. Code 814.Subpart C to the extent they exceed the requirements of 35 Ill. Adm. Code 814.Subpart D. For the reasons set forth below, the petition is denied.

PROCEDURAL HISTORY

The City of Salem (Salem) filed its "Petition for Variance" on July 2, 1997. On July 28, 1997, the Illinois Environmental Protection Agency (Agency) filed its "Recommendation," in which it recommended that the variance be denied. On September 12, 1997, Salem filed a "Motion for Leave to File Instant Petitioner's Response to Agency Recommendation" and "Petitioner's Response to Agency Recommendation" (Response). By an order adopted on September 18, 1997, the Board granted Salem's motion and accepted its Response. Salem waived a hearing and no other person requested a hearing; accordingly, no hearing was held.

STATUTORY AND REGULATORY FRAMEWORK

The Board's jurisdiction and authority in this matter arise from the Environmental Protection Act (Act), 415 ILCS 5 (1996). 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) (1996). The Agency is 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) (1996).

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) (1996). 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, 135 Ill. App. 3d 343, 481 N.E.2d 1032, (1st Dist. 1977). Only with such a showing can the claimed hardship rise to the level of arbitrary or unreasonable hardship.

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. IPCB, 67 Ill.2d 276, 367 N.E.2d 684 (1977). 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. Accordingly, a variance petition is required under 35 Ill. Adm. Code 104.121(f) to include:

A detailed description of the existing and proposed equipment or proposed method of control to be undertaken to achieve full compliance with the Act and regulations, including a time schedule for the implementation of all phases of the control program from initiation of design to program completion and the estimated costs involved for each phase and the total cost to achieve compliance[.]

The petition before the Board seeks a variance from either 35 Ill. Adm. Code 814.401(a), or the requirements of 35 Ill. Adm. Code 814.Subpart C to the extent they exceed the requirements of 35 Ill. Adm. Code 814.Subpart D. Subparts C and D set forth standards for landfills. Subpart C sets forth standards for landfills which are to remain open beyond seven years after the effective date of Part 814; Subpart D sets forth the standards for landfills which will close within seven years. The requirements of Subpart C are considerably more stringent than those of Subpart D. Section 814.401(a) provides (emphasis added):

The standards in [Subpart D] are applicable to all existing units of landfills, including those exempt from permit requirements in accordance with Section 21(d) of the Act, that have accepted or accept chemical and putrescible wastes. Based on an evaluation of the information submitted pursuant to Subpart A and any Agency site inspection, units that meet the requirements of this Subpart shall initiate closure between two and seven years after the effective date of this Part.

Part 814 was effective September 18, 1990; accordingly, the latest date for landfills subject to Subpart D to initiate closure was September 18, 1997.

### FINDINGS OF FACT

The Board finds the facts set forth here based upon the affidavits of Roger D. Kinney and Ronald R. Steward, verifying the factual assertions in Salem's petition and the Agency's recommendation, respectively.

Salem is a municipality in Marion County, Illinois, which owns and operates a municipal solid waste and non-hazardous special waste landfill located in the city. Salem operates the landfill as part of the ongoing municipal services provided to its residents. The landfill includes two units of approximately eleven acres each: a southern unit which operated under Subpart D, and a northern unit (currently under development) which will operate under Subpart C.

The Agency originally received notice that the landfill (a single unit at the time) would be complying with Subpart C. A "significant modification" permit application was received by the Agency on September 13, 1993. The first application was denied as incomplete in a letter dated October 6, 1993, and deemed not filed 35 days after that letter since Salem did not address deficiencies identified in the letter. A second application was received by the Agency on September 16, 1994. This application was also identified as incomplete in a letter dated October 14, 1994. A third application was received on May 15, 1995. This application also did not meet requirements. At Salem's request, this application was not denied, but kept pending while siting for a proposed expansion was resolved. On December 20, 1995, the Agency received an addendum to the application, which proposed treatment of part of the landfill as a Subpart D unit and part as a Subpart C unit. On June 2, 1997, after five additional submissions of additional information during 1996 and 1997, Salem was issued a significant modification permit evidencing that as of that date it had adequately demonstrated that the southern unit of the landfill met the requirements of Subpart D and the northern unit would be developed and operated so as to meet the requirements of Subpart C.

Development of the northern unit for operation by Salem will require approximately one year from the date this variance petition was filed. Salem seeks a variance to keep the southern unit open until the northern unit is operational. If the southern unit is required to close prior to that time, Salem will incur the costs and suffer the inconvenience of trucking the city's waste to another landfill, as well as lose income from tipping fees for the time between closure of the southern unit and opening of the northern unit.

### DISCUSSION

Salem's variance petition contains no compliance plan, as required by 35 Ill. Adm. Code 104.121(f). Based upon the petition, even if the requested variance were granted, Salem would never achieve compliance with the regulations from which a variance is requested. Should variance from Section 814.401(a) be granted, by definition compliance would be impossible, *i.e.*, if Salem is granted a variance from the closing date of September 18, 1997, and its landfill continues to receive waste for one year thereafter, then there is no way for the landfill to have closed by September 18, 1997. Yet closure by September 18, 1997, would be

required for compliance with Section 814.401(a). Furthermore, a variance for one year from various requirements of Subpart C would not result, at the end of that year, in compliance by Salem with the requirements of Subpart C. Salem is not proposing to upgrade the southern unit of the landfill to Subpart C specifications.

The only way in which Salem could possibly come into compliance would be through its petition for an adjusted standard, pending before the Board under docket number AS 98-2. The Board faced a similar situation in Waste Professionals, Inc. v. Illinois Environmental Protection Agency (September 18, 1997), PCB 97-228. In Waste Professionals, the Board noted

[I]t is unusual to grant variance where the only compliance plan is to have the regulation at issue changed at some future date. As the Board has long held, a proposal for prospective regulatory relief does not constitute a compliance plan and cannot be the basis for finding arbitrary or unreasonable hardship. Nevertheless, the Board has under special circumstances found exception to this rule. Waste Professionals, slip op. at 6.

In Waste Professionals, the Board found that special circumstances were present, and granted Waste Professionals a variance. Several important circumstances, however, distinguish that case from this one. The variance in Waste Professionals was granted upon the recommendation of the Agency and with inclusion of a number of agreed conditions. The term of the variance was relatively short, and was intended only to facilitate Board consideration of an adjusted standard petition. Although the entire landfill in Waste Professionals did not meet Subpart C requirements, the trench which Waste Professionals sought to keep open did. In this case, by contrast, the Board finds no special circumstances which would warrant granting Salem a variance based only on a pending adjusted standard petition.

Additionally, Salem has not established that compliance with the Subpart D closure date would result in an arbitrary or unreasonable hardship. In this case, the Board finds that the hardship suffered by Salem is substantially self-imposed. Salem (like every other landfill operator in Illinois) has been on notice of the closing deadline for Subpart D landfills for years. From the chronology set forth above the Board concludes that Salem's inability to obtain the necessary permits in time to complete development of the northern unit prior to the date by which the southern unit was required to close was due more to Salem's failure to timely submit the necessary applications and information to the Agency, than time necessary for review of that information. A self-imposed hardship cannot be the unreasonable or arbitrary hardship upon which the grant of a variance can be predicated. Willowbrook Motel Partnership v. Illinois Environmental Protection Agency (September 8, 1983), PCB 81-149. It was clear that the hardship faced by the petitioner in Waste Professionals was due to an external factor, *i.e.*, unanticipated loss of a major customer of the landfill.

Salem has provided no compliance plan, nor has Salem demonstrated that it would suffer an arbitrary or unreasonable hardship if the variance is denied. The Board thus finds

that Salem is not entitled to a variance from the closure deadline of Subpart D, or from the requirements of Subpart C to the extent they exceed the requirements of Subpart D.

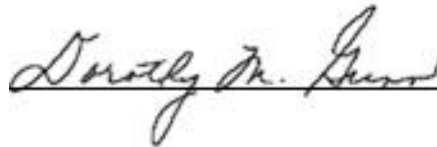
CONCLUSION

For the foregoing reasons, the petition of the City of Salem for a variance from 35 Ill. Adm. Code 814.401(a), or in the alternative for the requirements of 35 Ill. Adm. Code 814.Subpart C which exceed the requirements of 35 Ill. Adm. Code 814.Subpart D, is denied.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 172 Ill. 2d R. 335; 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 order was adopted on the 8th day of July 1998 by a vote of 5-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board