

ILLINOIS POLLUTION CONTROL BOARD
August 20, 1987

ALLIED-HASTINGS BARREL AND)
DRUM SERVICE, INC.,)
)
Petitioner,)
)
v.) PCB 86-21
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

ORDER OF THE BOARD (by J. Anderson):

On August 12, 1987, the Agency moved for modification of the Board's August 6 Order in this matter. On August 18, petitioner filed a reply in opposition.

For the reasons expressed below, the Agency's motion is denied. The Board granted petitioner a variance on February 19, 1987. The variance order required, among other things, that a Certificate of Acceptance be submitted within 45 days, or not later than April 6, 1987. Petitioner filed a conditional acceptance with the Board on March 30, 1987. This acceptance was rejected by the Board on April 1, 1987 and Petitioner was granted leave to refile by April 15, 1987. Petitioner then filed an acceptance on April 27, 1987. In its August 6, 1987 Order the Board agreed that Petitioner had filed the Certificate of Acceptance 12 days late, but went on to state that "(t)he Board will accept the late filing", and that "the variance is in effect." It is this portion of the Order that the Agency requests be modified.

The essence of the Agency's argument is that the enforceability of variance conditions hinges on the ability of the Agency to determine when they are applicable. This in turn

hinges on the petitioner's execution of the Certificate of Acceptance.*

The Agency queries "When is an acceptance too late? Is it too late after suit is filed? Could a petitioner, in court as a defendant for violating a regulation decide that, some months after a variance order, then would be a good time to accept the variance after all?" The Agency then goes on to relate that:

In the case of Nesco Steel Barrel Co. v. IEPA, PCB 84-81, the Board granted a variance on January 22, 1987. The Order contained the normal acceptance requirement, which would indicate a deadline for acceptance of March 9, 1987. On April 27, 1987 the Agency referred a request to the Illinois Attorney General that suit be filed against Nesco Steel Barrel Company for, among other things, violations of 35 Ill. Adm. Code Section 215.204(j), the subject of the variance. As a matter of courtesy, Agency counsel informed Nesco's counsel that the referral had been made. After that, Nesco, by counsel, submitted the Certification of Acceptance (filed with the Board on May 5, 1987). The acceptance was not only submitted to the Board and the Agency, but also to the Chief of the Environmental Control Division of the Attorney General's Office in Springfield. When are the variance conditions enforceable? The delay mocks the Board and Agency and the People.

In reply, petitioner argues that, as the 45 day period for acceptance of a variance is a period determined by the Board and not mandated by the Act, that there is no restriction upon the Board's ability to extend that period save for that of common sense and the need to avoid real and actual prejudice in a given

* See Citizens Utilities Company v Illinois Pollution Control Board (1972), 289 N.E.2d 642, in which the Second District Appellate Court said that conditions on the grant of a variance are not binding until the petitioner accepts the variance with those conditions. In reaching that conclusion, the Court understood that a petitioner may consider the conditions too onerous and decide not to proceed with the variance. Id. at 646. See also Flintkote Company v. Illinois Pollution Control Board (1977), 53 Ill. App. 3d 665, 368 N.E.2d 984, 11 Ill. Dec. 376, in which the Board had granted a variance with a condition that required a Certificate of Acceptance within 35 days. Since this was within the time allowed for appeal, the 35-day time for acceptance could force a petitioner to accept conditions so as to preclude it from effective appeal. The Court therefore reversed that part of the Order.

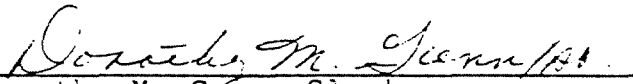
situation. In contrast to the specific example cited by the Agency, petitioner asserts that the Agency has made no allegation or demonstration that the Agency's enforcement program was compromised by petitioner's late filing and the Board's acceptance thereof.

The Agency has failed to persuade the Board that the Agency will be prejudiced by the Board's acceptance of the late filing in this particular case. It should also be noted that the Board's standard certification of acceptance requires that it be filed with the Agency and not the Board. The Agency may therefore be aware of problems of which the Board is not. If the Agency has experience of a general or systematic abuse of the variance acceptance process, this should be brought to the Board's attention in the context of the Board's ongoing revision of its procedural rules, so that a rule of general applicability can be considered. The Board additionally notes that where, as in the example cited, a late filing has not been affirmatively authorized by the Board, that no valid acceptance has been made.

Again, the Agency's motion is denied.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 20th day of August, 1987, by a vote of 6-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board