

ILLINOIS POLLUTION CONTROL BOARD

July 7, 1995

SHELL OIL COMPANY,)
)
 Petitioner,)
)
 v.) PCB 95-102
) (Variance-Air)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

FRANK M. GRENARD OF JONES, WARE & GRENARD APPEARED ON BEHALF OF THE PETITIONER.

BONNIE R. SAWYER APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (J. Theodore Meyer):

On March 15, 1995, Shell Oil Company (Shell) filed a petition for variance from 35 Ill. Adm. Code 218.586 seeking to extend the date for compliance with requirements for Stage II gasoline vapor recovery from November 1, 1994 to December 31, 1996 for three of its retail gasoline dispensing facilities. (Pet. at 1.)¹ All three facilities seeking a variance are located in the Chicago ozone nonattainment area in Illinois. (Tr. at 10.)

A public hearing was held on May 25, 1995 before the Board hearing officer, Deborah Frank, in Chicago, Illinois. No members of the public were present. The Illinois Environmental Protection Agency (Agency) filed its recommendation prior to the hearing on May 1, 1995 and amended its recommendation during the hearing. Both parties declined to file post-hearing briefs.

The Board's responsibility in this matter arises from the Illinois Environmental 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

¹Petitioner's petition shall be referred to as (Pet. at _.); the Agency Recommendation shall be referred to as (Rec. at _.); and, the hearing transcript shall be referred to as (Tr. at _.).

Board is charged with the rulemaking and principal adjudicatory functions, and the Agency is responsible for carrying out the principal administrative duties.

As is discussed below, the Board finds that the petitioner has satisfied its burden of demonstrating that immediate compliance with Section 218.586 would result in an arbitrary or unreasonable hardship. Accordingly, we grant variance relief to the three facilities at issue in this matter. For petitioner's Glenview facility, the variance is granted from March 15, 1995 until June 30, 1995. For the two facilities in Arlington Heights, the variances are granted from March 15, 1995 until March 31, 1996.

BACKGROUND

Section 218.586 of the Illinois Administrative Code requires that gas stations located in Chicago's ozone nonattainment area install gasoline vehicle refueling vapor recovery systems. These systems, which are also known as "Stage II systems", were to have been installed and in operation by November 1, 1994 for stations dispensing between 10,000 and 100,000 gallons per month (35 Ill. Adm. Code 218.586(d)).

Shell is an owner and/or operator of 300 gasoline dispensing operations in Northeast Illinois. (Pet. at 1,4)). Shell originally requested, and was granted, three provisional variances from the compliance date of November 1, 1994 for three of its facilities because each was scheduled for demolition. (Pet. at 2.) One is located in Glenview, Illinois and two are located on Arlington Heights Road in Arlington Heights, Illinois. This order will address the Glenview operation separately from the two in Arlington Heights.

According to Exhibit Number 2 from the May 25th hearing, Shell's facility in Glenview has contracted to install Stage II vapor recovery systems beginning June 5, 1995. (Tr. at p-6, Exh. 2.) Since the Glenview station has obtained the proper building permits, both parties agree a variance until June 30, 1995 is appropriate. (Tr. at 32-33.)

In Arlington Heights, the Illinois Department of Transportation (IDOT) is conducting a road-widening project along Arlington Heights Road which will require the demolition and reconstruction of Shell's two facilities located there. (Pet. at 2.) Along with many other businesses undergoing demolition and/or reconstruction due to IDOT's project, both Shell stations are in the process of applying for permits with the Village of Arlington Heights. (Rec. at 6,7.) Petitioner lacks control over the issuance of the permits; therefore, the parties agreed that a variance would be appropriate to allow enough time for both facilities to acquire permits, demolish and reconstruct the

stations and install Stage II systems. (Rec. at 9,32.)

HARDSHIP

Shell's primary reason for the three facilities' inability to observe the November 1, 1994 compliance date is that compliance would require either closing the stations, or installing the Stage II equipment, only to then demolish, rebuild and re-equip the stations. Village permitting processes have also contributed to the delay in compliance. (Pet. at p.3,4.) However, permits have been received for the Glenview facility, thus allowing installation of the Stage II systems to proceed.

ENVIRONMENTAL IMPACT

In its petition, Shell claimed that the environmental impact of the three sites would be de minimis. The Agency disagreed, stating that the sites are in the Chicago ozone nonattainment area; that the variances sought would cover two ozone seasons; and, that they are inconsistent with the Clean Air Act's deadline of November 15, 1996 for the reduction of 15% of VOM emission reductions.

At hearing, the parties agreed that a variance until June 30, 1995 was sufficient for the Glenview facility since installation of the Stage II equipment, usually a five-day process, would begin on June 5, 1995. (Tr. at 12). Therefore, the environmental impact due to noncompliance of the Glenview station would be minimal. However, the Agency maintained that a variance until December, 1996 for both Arlington Heights facilities would include two ozone seasons, and would not follow the 15% reduction rate required by November, 1996. (Tr. at 11.)

CONSISTENCY WITH FEDERAL LAW

The Agency believes the December 31, 1996 variance originally sought in this case would interfere with the attainment of the National Ambient Air Quality Standard for ozone in the Chicago area, and also would be inconsistent with the Clean Air Act's goal of reaching VOM emission reductions of 15 percent by November 15, 1996. (Rec. at 5.) However, during the hearing the parties suggested a June 30, 1995 date for the Glenview station, and a March 31, 1996 date for both Arlington Heights stations. (Tr. at 31-33.) These variances end before the November 15, 1996 deadline; therefore the variances will not be inconsistent with federal law.

CONCLUSION

In deciding 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 and unreasonable hardship upon the petitioner. (415 ILCS 5/35(a) (1992).) The burden is placed 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. 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 arbitrariness or unreasonableness.

The Board has reviewed the record, the Agency's recommendation, and the hardship which would have been imposed on Shell, as balanced against the minimal adverse environmental impact by the Glenview facility, and the short-term adverse environmental impact by the two Arlington Heights facilities. On this foundation, the Board finds that Shell has presented adequate proof that immediate compliance with 35 Ill. Adm. Code 218.586(d) would result in an arbitrary and unreasonable hardship. Although it is well established that the term of variance begins on the date the Board renders its decision, exceptions will be allowed upon showing of unusual or extraordinary circumstances. (See, e.g. DMI, Inc. v. IEPA (December 19, 1991), PCB 90-277, 128 PCB 245-249.) In view of the facts in this case, the Board finds that the instant circumstances warrant the short retroactive start of the variance. Accordingly, variances are hereby granted, subject to conditions consistent with this opinion and order, in the following manner:

The variance relief being granted for the Glenview facility shall run from March 15, 1995 through June 30, 1995. If Stage II vapor recovery controls are not installed by June 30, 1995, the Glenview station must cease to dispense gasoline.

The variance relief being granted for both Arlington Heights stations shall run from March 15, 1995 through March 31, 1996. If Stage II vapor recovery controls are not installed by March 31, 1996, both Arlington Heights stations must cease to dispense gasoline.

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

ORDER

- A. Petitioner's Glenview facility is hereby granted a variance from 35 Ill. Adm. Code 218.586(d) as this section pertains to the requirements that Stage II gasoline vapor recovery equipment be installed at its facility located at 2000 West Willow Road, Glenview, Illinois.

1. The variance begins on March 15, 1995 and expires on

June 30, 1995.

2. If Stage II equipment is not installed and operational at the Glenview station by June 30, 1995, the facility shall cease gasoline dispensing operations and must not resume dispensing gasoline until Stage II equipment is operational.

- B. Petitioner's two Arlington Heights' facilities are hereby granted a variance from 35 Ill. Adm. Code 218.586(d) as this section pertains to the requirements that Stage II gasoline vapor recovery equipment be installed at these facilities, one located at 934 South Arlington Heights Road, Arlington Heights, Illinois, and one located at 3 West Algonquin Road, Arlington Heights, Illinois.

1. The variance begins on March 15, 1995 and ends on March 31, 1996, or 60 days after notification to Shell Oil Company from IDOT that the road widening project on Arlington Heights Road will be abandoned for any reason, whichever is sooner.

2. If Stage II equipment is not installed and operational at either station by March 31, 1996, that station (or stations) shall cease gasoline dispensing operations and must not resume dispensing gasoline until Stage II equipment is operational.

- C. All three of petitioner's facilities in this case shall immediately notify the Agency of the date of installation of Stage II vapor recovery equipment or within 14 days after installation, whichever is applicable. Notification shall include the address of the facility. Such notice to the Agency shall be sent to:

Mr. Terry Sweitzer
Illinois Environmental Protection Agency
Bureau of Air
P.O. Box 19276
2200 Churchill Road
Springfield, Illinois 62794-9276

IT IS SO ORDERED.

If each of Shell's facilities chooses to accept this variance subject to the above order, within 45 days of the grant of variance, each of the facilities' owner or registered agent 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, Illinois 62794-9276

Once executed and received, the certificate of acceptance and agreement shall bind the Shell facility 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 the certificate is as follows:

CERTIFICATE OF ACCEPTANCE

I (We), _____,
have read the Illinois Pollution Control Board's July 7, 1995'
opinion and order. I (We) hereby accept and agree to be bound by
all terms and conditions of the order.

Facility _____

Authorized Agent _____

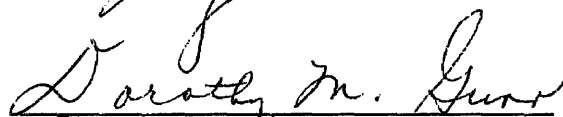
Title _____

Facility Address _____

Date _____

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 Rule of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.)

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


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board