ILLINOIS POLLUTION CONTROL BOARD
May 16, 1996

MARATHON OIL COMPANY,	)	
	)	
Petitioner,	)	
	)	PCB 95-150
v.	)	(Variance - Air)
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

JOSEPH W. WRIGHT, OF MCBRIDE BAKER & COLES, APPEARED ON BEHALF OF PETITIONER;

RACHEL DOCTORS APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J. Yi):

This matter comes before the Board on the September 22, 1995, amended petition filed by Marathon Oil Company (Marathon) for variance pursuant to Section 35 of the Environmental Protection Act (Act). (415 ILCS 5/35.) In its amended petition Marathon seeks variance from 35 Ill. Adm. Code 216.361(a) concerning its emissions of carbon monoxide (CO) from its oil refinery located outside of Robinson, Illinois.

On November 20, 1995, the Illinois Environmental Protection Agency (Agency) filed its variance recommendation.[1] The Agency recommended that variance be denied based on the contentions that Marathon can and does comply with the current regulations, Marathon has not met its burden of demonstrating that compliance with the current regulations would constitute an arbitrary or unreasonable hardship and Marathon's compliance plan does not assure compliance at the end of the variance term.

Hearing was held March 20 and 21, 1995 in Robinson, Illinois, by Hearing Officer Deborah Frank. Marathon and the Agency each presented one witness and the parties agreed to incorporate the transcript from the still-pending proceedings in Marathon Oil Company v. Illinois Environmental Protection Agency, PCB 94-27, for the purposes of background information with respect to the operation of Marathon's facility and the Agency witness.[2]

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[1] Marathon's amended variance petition will be referred to as "Amend. Pet. at .", the Agency's recommendation will be referenced to as "Rec. at .".

[2] Marathon is requesting several variances for its facility located in Robinson, Illinois. In the matter PCB 94-27, Marathon is seeking a variance from the particulate limitations set

Marathon filed its post-hearing brief on April 11, 1996 and the Agency filed its on April 12, 1996.[3] On April 16, 1996 Marathon filed a reply brief and the Agency filed a reply brief on April 17, 1996.[4]

The Board's responsibility in this matter arises from the Environmental Protection Act (Act) (415 ILCS 5/1 et seq. (1994).) The Board is charged there with the responsibility of granting variance from Board regulations whenever it is found that immediate compliance with the regulations would impose an arbitrary or unreasonable hardship upon the petitioner. (415 ILCS 5/35(a).) The Illinois Environmental Protection Agency (Agency) is required to appear in hearings on variance petitions. (415 ILCS 5/4(f).) The Agency is also charged, among other matters, 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).)

Based on the record presented to it, and upon analysis of the requirements necessary for grant of variance, the Board finds that Marathon has not carried its burden of proof to justify retroactive variance relief. However, the Board finds Marathon has carried its burden of proof as to the requested prospective variance relief. Accordingly, the variance request will be granted in part and denied in part.

BACKGROUND

Marathon's facility is located on a 90 acre area outside of Robinson, Illinois and employs 570 persons with an annual payroll of $40 million. The facility has the capability of refining 175,000 barrels of crude oil a day. (Pet. Brief at 2.) As part of the facility Marathon operates a fluid bed catalytic cracking unit (FCCU) which is equipped with a CO boiler to burn CO as a fuel and to control CO emissions. (Amend. Pet. at 1.) The CO boiler converts the CO in the flue gas, which is exiting the FCCU unit, into CO_2 to meet emission specifications and to produce steam which is utilized in the process. (Tr. 94-27 at 9-12.)

Marathon conducted CO compliance tests on May 12, 1993, August 4-5, 1993 and March 14, 1995. The May 12, 1993 tests indicated CO emissions corrected to 50% on three runs to be 132.2 ppm, 138.8 ppm and 128.9 ppm with an average of 133.3 ppm. (Amend. Pet. at 2, Exhibit F.) The test results of August 4, 1993 were 270 ppm, 233 ppm and 226

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forth in 35 Ill. Adm. Code 212.381. The transcripts for the two different proceedings will be referenced to as "Tr. 95-150 at ." and "Tr. 94-27 at .".

[3] Marathon's post-hearing brief will be referenced to as "Pet. Brief at ." and the Agency's post-hearing brief will be referred to as "Ag. Brief at .".

[4] The hearing officer directed both parties to file reply briefs due to the simultaneous filing of the post-hearing briefs. Marathon's reply brief will be referenced to as "Reply at ." and the Agency's reply brief will be referred to as "Ag. Reply at .".

ppm with an average of 243 ppm. (Amend. Pet. at 2, Exhibit G.) The August 5, 1993 test results were 248 ppm, 243 ppm and 235 ppm the average being 242 ppm. (Amend. Pet. at 2, Exhibit G.) The results of the last test conducted on March 14, 1995 were 201 ppm, 165.5 ppm and 154.4 ppm having the average of 173.6 ppm. (Amend. Pet. at 2, Exhibit H.)

The Agency issued a Compliance Inquiry Letter (CIL) on March 2, 1995 with respect to an alleged violation of the 200 ppm corrected to 50% excess air limitation set forth at 35 Ill.Adm.Code 216.361(a) based on the results of a August 4-5, 1993 tests. In response to the CIL, Marathon conducted the March 14, 1995 test described above. (Amend. Pet. at 1.) The Agency issued a Pre-Enforcement Conference Letter (PECL) concerning the same alleged violation as in the CIL on April 19, 1995. (Amend. Pet. at 2.) However, as testified to by the sole Agency witness at hearing, Mr. Justice, the Agency reviews the average of three tests to determine if there is a violation of Section 216.361(a). (Tr. 95-150 at 40.) Therefore the Agency and Marathon agreed, when using the average of three results, the May and March tests show compliance. (Pet. Brief at 3, Ag. Brief at 3.) In addition, the Agency stated that it believed that the test results from August 1993 do not represent normal CO boiler operations because it believed that Marathon "tweaked" the FCCU to reduce the flow of air to control particulate matter emissions which resulted in higher CO emissions. (Ag. Rec. at 2 and 7-8.) Therefore the Agency is not pursuing an enforcement action against Marathon. (Ag. Rec. at 2.)

On April 13, 1995, however, the United States Environmental Protection Agency (USEPA) issued a Notice of Violation (NOV) to Marathon with respect to violation of Section 216.361(a) based on the August and March test results. (Amend. Pet. at 2.) Marathon states that USEPA has since filed a civil action against Marathon alleging violations of the CO limitations, as incorporated in Illinois' State Implementation Plan (SIP), based on the August 1993 test results. (Pet. Brief at 3.)

Marathon is requesting the Board to grant a variance from the 35 Ill.Adm.Code 216.361(a) CO limitation of 200 ppm corrected to 50% excess air and replace that limitation for the duration of the variance with a limitation of 500 ppm corrected to 50% air excess. (Amend. Pet. at 3.) Marathon in its amended petition requests that the variance retroactively start from August 4, 1993 and end August 4, 1997 "…or such other period as may be necessary to accomplish the compliance program." (Amend. Pet. at 3.) However, Marathon states in its post-hearing brief that the variance duration should be from August 4, 1993 through August 1, 1996. (Brief at 8.)

STATUTORY LANGUAGE

The Board's authority to grant variances is set forth in Title IX of the Act. Specifically Section 35 of the Act states:

> To the extent consistent with applicable provisions of the Federal Water Pollution Control Act, as now or hereafter amended, the Federal Safe Drinking Water Act (P.L. 93-523), as now or hereafter amended, the Clean Air Act as

amended in 1977 (P.L. 95-95), and regulations pursuant thereto, and to the extent consistent with applicable provisions of the Federal Resource Conservation and Recovery Act of 1976 (P.L. 94-580), and regulations pursuant thereto,

a) The Board may grant individual variances beyond the limitations prescribe 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. However, the Board is not required to find that an arbitrary or unreasonable hardship exists exclusively because the regulatory standard is under review and the costs of compliance are substantial and certain.

HARDSHIP AND ENVIRONMENTAL IMPACT

Marathon states that "[t]here should be no mistake as to why Marathon seeks a variance…[i]t is because the USEPA has chosen to enforce the Board regulations, despite the fact that IEPA has declined to do so." (Pet. Brief at 4.) Marathon is claiming that the hardship is the enforcement action by USEPA and that during Marathon's investigation of the compliance alternatives it determined that the current and projected refinery operations, given the design and the operation of its CO boiler, may result in exceedences causing future non-compliance. (Amed. Pet. at 2-3.) Marathon states that it has conducted "ambient air modeling and determined that there was no adverse affect from its emissions on the community and certainly no ambient air quality violations". (Pet. Brief at 4, Pet. Exh. #3, Tr. 95-150 at 12.)[5]

Mr Samuel testified that Marathon was concerned that it was operating close to the applicable limitation for CO emissions and conducted investigations to determine methods of compliance. (Tr. at 18-19.) Mr. Samuels testified that Marathon discovered from the investigation that due to catalyst and other improvements over the years the CO boiler was not operating as originally designed, so that prior to being exposed to the flame in the CO boiler, the air and CO mixing was not sufficient. (Tr. 95-150 at 19-20.) Marathon further determined that, given these mixing considerations, an 1800 degree Fahrenheit adiabatic flame temperature must be maintained to combust the CO. (Tr. 95-150 at 19-23.) Therefore, the compliance plan includes installation of an optical pyrometer, a flame sensing temperature measurement device, so that it would be able to maintain the necessary 1800 degree Fahrenheit over all boiler operating ranges. (Tr. 95-150 at 22.) Marathon also intends to make other improvements to achieve a flatter cross-sectional flame pattern that does not allow CO to escape through the higher temperature flame. (Tr. 95-150 at 23.)

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[5] Marathon's exhibits will be referenced to as "Pet. Exh. at." and the Agency's exhibits will be referred to as "Ag. Exh. at .".

Additionally, Mr. Samuels testified that in order to achieve compliance, Marathon will have to operate the CO boiler at 180,000 pounds power steam (also referred to as pounds per hour) and that Marathon wishes to operate the CO boiler at a lower rate, 160,000 pounds per hour, and still achieve compliance. (Tr. 95-150 35-37.) Marathon is asserting that if the variance is granted the environmental impact would be minimal and that to "…shut down the FCCU in the absence of adverse environmental consequences would certainly have caused Marathon (and the community) an arbitrary and unreasonable hardship." (Pet. Brief at 5.) Thus, Marathon is arguing that the hardship of the pending enforcement action and the probability of future non-compliance and related shut down or purchase of a new CO boiler to acheive compliance outweighs any environmental impact which might be caused by the variance such that immediate compliance would cause an arbitrary or unreasonable hardship.

The Agency states in its recommendation that it agrees that there would be no measurable environmental effect on the ambient air quality if the variance was granted; however, it later asserts in its post-hearing reply brief that "…it is not possible to discern from the modeling what the air quality effects would be from granting the variance". (Rec. at 6, Ag. Reply at 7.) Regardless of the environmental impact, the Agency argues that Marathon has not demonstrated that arbitrary or unreasonable hardship would result if the variance was denied. (Rec. at 6-8, Ag. Brief at 3-7, Ag. Reply at 2.) The Agency states that compliance is being achieved and that Marathon has not demonstrated how the continued operation of the CO boiler will cause hardship. (Rec. at 7-8, Ag. Brief at 4.) Citing to Marathon Oil Company v. Illinois Environmental Protection Agency and the Illinois Pollution Control Board, 610 N.E. 2d 789 (5th Dist. 1993), the Agency acknowledges that Marathon is not required to establish that a violation has occurred prior to the petition for variance, but argues that Marathon must establish that it will be out of compliance in the future with some certainty. (Ag. Brief at 4, Ag. Reply at 2.) In fact the Agency contends that Marathon believes that it is operating in compliance and that it will continue to do so. (Ag. Brief at 3-4, Res. Exh. #2.) The Agency asserts that Marathon has presented no evidence that demonstrates to a certainty that it will exceed the CO limitations in the future and has presented only limited evidence of future enforcement. (Ag. Brief at 4-5, Ag. Reply at 2.) The Agency argues that in this case Marathon "is simply seeking to use the Board's variance process as a shield against federal action" and that "making improvements to the CO boiler in response to a pending USEPA enforcement inquiry, does not demonstrate that there would be an arbitrary and unreasonable hardship if the Petition was not granted." (Ag. Brief at 6.) Finally the Agency argues that the Board has held that relief in the form of a variance will not be granted to avoid an enforcement action citing to Quaker Oats Co. v.IEPA, (July 19, 1984), PCB 83-107, and North Shore Sanitary District v. IEPA, (December 17, 1992), PCB 92-92. (Ag. Reply at 2.)

REQUESTED VARIANCE

As stated above, Marathon states in its amended petition that it is requesting a variance from the CO limitation set forth in Section 216.361(a) starting from August 4, 1993 through

August 4, 1997, or for such period as is necessary to complete the compliance program. (Amend. Pet. at 3.) Additionally, during the term of the of the variance Marathon requests the limit of CO corrected to 50% excess air at 500 ppm. (Amend. pet. at 3.) However, in its post-hearing brief Marathon requests the duration of the variance to be from August 4, 1993 through and including August 1, 1996 without any mention of the suggested limitation for that period of 500 ppm as stated in the amended petition. (Pet. Brief at 8.)

Marathon asserts that the only purpose for a variance is "to allow an individual to operate outside of the limits of a rule without being prosecuted." (Pet. Brief at 5.) In this case, Marathon argues that the variance should start retroactively because "[i]f the circumstances that justify a shield from prosecution exist, there is no logical reason why past circumstances are any less compelling than future circumstances." (Pet. Brief at 5.) Marathon acknowledges that the Board requires petitioners to file promptly and looks to unusual circumstances in granting variances retroactively, but argues that there is no explanation for the need of prompt filing. (Pet. Brief at 6.) Marathon states that the threat of prosecution was not anticipated until after the completion of the investigation of a compliance program and that when USEPA expressed an interest in seeking penalties for the past violations Marathon acted diligently in seeking compliance with the alleged violations. (Pet. Brief at 6, Reply Brief at 2.)

The Agency asserts that if justification exists for the grant of a variance Marathon has not justified a retroactive start or the limitation of CO at 500 ppm during the duration of the variance. (Rec. at 4, Ag. Brief at 8-9.) Citing to DMI, Inc. v IEPA, (Dec. 19, 1991), PCB 90-227, Deere & Co. v. EPA, (September 8, 1988), PCB 88-22, and North Shore Sanitary District v. IEPA, (December 17, 1992), PCB 92-92, the Agency contends that Marathon has not presented any special circumstances which would justify the grant of a variance retroactively. (Rec. at 4, Ag. Brief at 8, Ag. Reply at 3.) Additionally the Agency argues that Marathon has not diligently sought relief or compliance. (Rec. at 4, Ag. Brief at 8-9.) The Agency asserts that almost two years passed after the August test before Marathon took action due to USEPA issuance of the NOV. (Rec. at 4, Ag. Brief at 9.) The Agency maintains that companies should not be allowed to wait until the threat of enforcement materializes before they seek to remedy a situation. (Ag. Brief at 8.) Finally, the Agency contends that when the Board has granted retroactive variance unusual circumstances existed or the petitioner diligently sought a remedy. (Ag. Reply 4-6.) The Agency argues that in this case Marathon has not presented any evidence to support a retroactive variance grant. (Ag. Reply at 3.)

CONSISTENCY WITH FEDERAL LAW

Marathon does not state that the variance would be or would not be consistent with federal law and Illinois' state implementation plan (SIP). Instead Marathon states that the SIP

is promulgated pursuant to Section 110 of the Clean Air Act (42 U.S.C. Section 7410) which provides for the implementation and maintenance of ambient air quality which Marathon's emissions did not cause or contribute to a violation. Therefore, Marathon concludes that there is no valid reason to believe that the variance is inconsistent with federal law. (Pet. Brief at 7.)

The Agency states that Section 216.361(a) has been approved by USEPA as part of the Illinois SIP for CO and thus any variance granted to Marathon would have to be submitted to USEPA as a SIP revision or amendment. (Rec. at 5, Ag. Brief at 7-8.) The Agency surmises that in all likelihood USEPA would not approve the SIP revision to include the requested variance. (Rec. at 5-6.) The Agency argues that Marathon has not presented evidence that the grant of variance relief would be consistent with federal law as required by Section 35 of the Act and the Board's procedural rules. (Ag. Brief at 8.)

COMPLIANCE PLAN

As the result of USEPA's civil action Marathon conducted an investigation of compliance alternatives. (Pet. Brief at 3.) The alternatives that Marathon investigated were to build a new CO boiler at a cost of $25 million, close the FCCU and the refinery, submit a program for compliance, and seek a variance or seek a site specific rule change. (Amend. Pet. at 3 and Pet. Brief at 4-5.) Marathon has filed a petition seeking a site specific rule which has been docketed as R95-15. (Amend. Pet. at 3.) Marathon's compliance plan associated with this variance is to make certain upgrades to the current CO boiler to prevent exceedences. (Amend. Pet. at 3, Exhibit I.) Mr. Samuels testified that Marathon developed the compliance plan to achieve burner temperature of 1800 degrees Fahrenheit adiabatic flame temperature. (Tr. 95-150 at 19-20.) The compliance plan includes revision of the refinery's gas burners, inspection and repair of the boiler dampers, installation of a flame temperature measuring device and new CO burners, and further testing to optimize the improved CO boiler. (Amend. Pet. at 3, Exhibit I.) Marathon's compliance plan for modifying the CO boiler is scheduled to end on June 14, 1997 with most of the modifications finished by the end of November 1996. (Amend. Pet. at 3, Exhibit I.) At hearing Marathon's witness explained the reasoning behind the compliance plan (the result of the changes being reduced CO) and the other possible alternatives investigated by Marathon. (Tr. 95-150, at 19-23.) Additionally, on cross-examination Marathon's witness testified that the mechanical parts of the boiler wear out with time and periodic repairs are necessary. (Tr. 95-150 at 32.)

The Agency does not assert that the completion of the compliance plan will not be achieved by Marathon at the end of the requested variance period. Further, the Agency agrees that the suggested modifications to the CO boiler should take place, but contends that the compliance plan does not guarantee compliance and therefore does not meet the prerequisite of granting the requested variance. (Ag. Rec. at 6 and 8.)

DISCUSSION

The purpose of a variance has been stated many times by the Board and the courts. In Monsanto Company v. Pollution Control Board, (June 1, 1977), 67 Ill.2d 276, 10 Ill.Dec. 231, 367 N.E.2d 684, 688, the Supreme Court, in determining whether variances can be permanent, stated that the Act's ultimate goal is for all polluters to be in compliance and that "[t]he variance provisions afford some flexibility in regulating speed of compliance, but a total exemption from the statute would free a polluter from the task of developing more effective pollution-prevention technology". The Appellate Court, citing to Monsanto in City of Mendota v. Pollution Control Board, (3rd Dist. 1987), 112 Ill. Dec. 752, 757, 514 N.E.2d 218, stated "[t]he variance provisions of the Act are intended to afford some flexibility in regulating the speed for compliance." Finally the Appellate Court in Celotex Corporation v. Illinois Pollution Control Board (4th Dist 1978), 65 Ill. App. 3rd 776, 22 Ill. Dec. 474, 382 N.E.2d 864, 866, phrased the purpose as "[t]he issues in a variance proceeding focus upon whether compliance should be excused for a period of time."

The Board in following Monsanto and the other cases stated "[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." (American River Transportation v. Illinois Environmental Protection Agency, (August 24, 1995), PCB 95-147.) The Board has also stated:

> "[m]oreover the Board is displeased with a request for a variance which has a term, but for a few days, which is after the fact. While the Board allows that there may be circumstances where the latter condition might validly arise, it also believes that after-the-fact grants of variance are generally inconsistent with the intent of variance relief as enunciated by the Environmental Protection Act. At the minimum, it is not the intent of a variance to legitimatize past failure to comply with rules and regulations." (Modine Co. v. Illinois Environmental Protection Agency, (December 22, 1987), PCB 85-154, 84 PCB 735.)

Thus, as the courts and the Board have found, the purpose of variances is to provide for a period of time to allow individuals to come into compliance with the otherwise applicable rules and regulations when immediate compliance would cause an arbitrary or unreasonable hardship.

The Board and the courts have interpreted the justification necessary in deciding when immediate compliance with the applicable rules and regulations would cause an arbitrary or unreasonable hardship. In Marathon, the 5th District Appellate Court, in reversing the Board, stated the following:

> When deciding whether to grant or deny a variance request, the Board is required to balance the hardship of continued compliance on the business against the adverse impact the variance will have on the environment. * * * The party requesting the variance has the burden of establishing that the hardship resulting

> from denial of a variance outweighs any injury to the public or the environment from a grant of the variance. * * * Specifically if the one requesting the variance demonstrates only that compliance will be difficult, that proof alone is insufficient basis upon which to grant the variance. The petitioner must go further and show that the hardship it will encounter from the denial of the variance will outweigh any injury to the public or environment from the grant of the variance. (Marathon at 793.)

Also in Marathon the Appellate Court found that Section 35(a) of the Act does not require that petitioner demonstrate that it is out of compliance with the rule or regulation prior to seeking a variance. It found that "evidence presented was 'adequate proof' that continued compliance with the current water-quality standards will impose an arbitrary or unreasonable hardship". (Marathon at 793.) In doing so the Appellate Court stated that when the petitioner presents "unrefuted" evidence that it will violate the Board's rule in conducting or increasing its normal business, a hardship is established requiring the Board to determine if such hardship outweighs any injury to the environment. (Marathon at 794.)

The Board has stated that the burden is on petitioner to show that its claimed hardship outweighs the public interest in attaining immediate 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 a 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.) Additionally the Board has stated that when determining hardship:

> The Board must emphasize that under the Act variances are not to be granted merely because the petitioner has shown that it cannot comply with regulations despite its efforts to achieve compliance. Rather, a shield from an enforcement action is only given to a petitioner who would suffer an arbitrary or unreasonable hardship. * * * Certainly, most persons would view any defense to an enforcement action as a hardship. But it does not automatically follow that such a defense is an arbitrary or unreasonable hardship. (Village of Sauget v. Illinois Environmental Protection Agency, (November 3, 1988), PCB 88-18, 93 PCB 281.)

Hardship

In this case Marathon does not argue that maintaining or achieving compliance with the current standards has created a hardship which outweighs the adverse impact on the environment. In fact, Marathon does not state that it is currently out of compliance. Marathon does state, however, that it expects to be out of compliance in the future which would necessitate closure in order to come into compliance. It argues that the future closure of the facility to achieve compliance and the ongoing enforcement by USEPA has created a hardship that outweighs the environmental impact if the variance is denied.

While the threat of future enforcement may be hardship that is a product of the requirement of immediate compliance, the hardship of ongoing enforcement actions as the result of a past violation is not a hardship from which variance relief may be granted. As stated above, the purpose of variance relief is to afford some flexibility in regulating the speed for compliance with its rules and regulations. It is not the purpose of a variance to provide an enforcement shield for past non-compliance, especially when compliance has already been achieved. Since the Board's inception it has held that "one cannot qualify for a variance simply by ignoring a compliance date and thereafter applying for a variance" because this behavior "would lead to the preposterous proposition that the very existence of violation is a ground for excusing it". (Decatur SD, PCB 71-037, 1 PCB 360, (March 22, 1971).) This general principle, that a variance provides prospective relief, is evident in the Board's treatment of retroactive variance requests.

The Board has determined that in the absence of unusual or extraordinary circumstances, the Board renders variances effective on the date the Board order is issued. (LCN Closers, Inc. v. EPA, (July 27, 1989), PCB 89-27, 101 PCB 283, 286; Borden Chemical Co. v. EPA, (December 5, 1985), PCB 82-82, 67 PCB 3, 6; City of Farmington v. EPA, (February 20, 1985), PCB 84-166, 63 PCB 97; Hansen-Sterling Drum Co. v. EPA, (January 24, 1985), PCB 83-240, 62 PCB 387, 389; Village of Sauget v. EPA, (December 15, 1983), PCB 83-146, 55 PCB 255, 258; Olin Corp. v. EPA, (August 30, 1983), PCB 83-102, 53 PCB 289, 291.) Although the Board does not generally grant variances retroactively, upon specific justification retroactive variances have been granted. (Deere & Co. v. EPA, (September 8, 1988), PCB 88-22, 92 PCB 91.) The Board stated that the reasoning behind the general rule is to discourage untimely filed petitions for variance, i.e. variances filed after the start of the claimed arbitrary or unreasonable hardship creating the desire for a retroactive start, and because the failure to request relief in a timely manner is a self-imposed hardship. (Fedders-USA v. EPA, (April 6, 1989), PCB 86-47, 98 PCB 15, 19, DMI, Inc. v. EPA, (February 23, 1987), PCB 88-132, 96 PCB 185, 187 and American National Can Co. v. EPA, (August 31, 1989), PCB 88-203, 102 PCB 215, 218.)

As the appellate court discussed in Monsanto, "(t)he Board can provide relief from the hardship of immediate compliance and yet retain control over a polluter's future conduct by granting a temporary variance". (Monsanto, 67 Ill.2d 276, 288 (1977) (emphasis added).) The very concept of a wholly retroactive variance would eliminate the Board's ability to retain any control over the polluter's activity during the term of the variance.

The Monsanto court further examined the Board's authority to grant the variance and any conditions attached thereto. The court found that the Board's authority to decide whether a regulation imposes an arbitrary or unreasonable hardship on an individual polluter which would justify variance, is essentially a quasi-judicial decision. (Id. at 289.) However, the Board's authority to impose conditions upon that variance is not quasi-judicial, but "in a word, rule-making power, in the sense that its focus is on future conduct and its efficacy depends upon agency expertise". (Id. at 290.) The Board's power in this regard is "tantamount to the quasi-legislative power to make prospective regulations and orders". (Ibid.) In the instant

matter Marathon is requesting a partial retroactive variance which would preclude the Board from attaching any conditions which may be necessary to effectuate the policies of the Act.

As stated, the Board has granted variances with "retroactive" inception dates under certain circumstances. The Board has made a variance retroactive to the date on which the Board would have rendered a decision where there was a procedural delay in the proceeding through no fault of the petitioner, and as the result of confusion over interpretation of federal regulations. (See Allied Signal, Inc. v. EPA, (November 2, 1989), PCB 88-172, 105 PCB 7, 12; Morton Chemical Div. v. EPA, (February 23, 1989), PCB 88-102, 96 PCB 169, 181 and Union Oil Co. of California, (February 20, 1985) PCB 84-66, 63 PCB 75, 79.) We have also used a shorter period than the statutory time for decision to back-date a variance where we have otherwise viewed the petition as timely filed prior to the date on which the petitioner required the relief. (Monsanto Co. v. EPA, (April 27, 1989), PCB 88-206(B), 98 PCB 267, 273.) These types of partially retroactive variances are entirely consistent with the Board's general principle of rarely granting retroactive variances. In these cases, the Board did little more than move the starting date to the latest date on which the Act would have required a Board decision, i.e. the 120-day decision deadline, were it not for a waiver of that deadline.

The Board has also granted retroactive variances where there are unavoidable, special, or extraordinary circumstances. (American National Can Co. PCB 88-203, 102 PCB 215, 218 (11 days after filing, where petitioner diligently sought compliance and there was no reason to anticipate the need for a variance until it was too late to timely file); Minnesota Mining and Manufacturing Co. v. EPA, (August 31, 1989), PCB 89-58, 102 PCB 223, 226) (day after filing, where petitioner learned of error that resulted in non-compliance only shortly before filing); Fedders- USA, PCB 86-47, 98 PCB 19 (date of filing, where extended proceeding for prior variance ended only a short time before filing); Pines Trailer Co. v. EPA, (June 30, 1988), PCB 88-10, 90 PCB 485, 488; Bloomington/Normal Sanitary District v. EPA, (Mar. 10, 1988), PCB 87-207, 87 PCB 21, 22 (nine days after filing, where there were unexpected construction delays and the petitioner made a good faith effort at compliance); Classic Finishing Co. v. EPA, (June 20, 1986), PCB 84-174(B), 70 PCB 229, 233 (date of filing first amended petition, where there was a change in company ownership, an ongoing compliance effort that resulted in updatings of the petition and eventual compliance before the date of the Board decision, and due to nature of the materials involved and the technology-forcing nature of the underlying regulation); Chicago Rotoprint Co. v. EPA, No. PCB 84-151, 63 PCB 91 (Feb. 20, 1985) (35 days after filing, where need for variance was not known earlier).) The Board has also occasionally applied an effective date that ante-dates the filing of the petition under the extreme of such circumstances. Deere & Co., 92 PCB 94 (Sept. 8, 1988) (20 days prior to filing, where petitioner diligently sought relief and good faith efforts appeared to have resulted in compliance prior to the Board decision); Midwest Solvents Co. of Illinois v. EPA, (Apr. 5, 1991), PCB 84-5, 57 PCB 369, 371 (nine days before filing, where the petitioner was diligent in seeking relief and the delay in filing arose through procedural confusion over the extension of a prior provisional variance). Other cases underscore the fact that the timelines of filing is a primary factor in consideration of the "special circumstances."

Timeliness of filing is a primary factor in considering "special circumstances". First, in considering "special circumstances" the Board has routinely refused to apply a retroactive inception date where either the petitioner filed late without explanation or where delay resulted through some fault of the petitioner. (LCN Closers, Inc., 101 PCB 283, 286; DMI, Inc., 96 PCB 185, 187; Borden Chemical Co., 67 PCB 3, 6; City of Farmington, 63 PCB 97, 98; Hansen-Sterling Drug Co., 62 PCB 387, 389; Village of Sauget, 55 PCB 255, 258; Olin Corp., 53 PCB 288, 291.) Second, a "principle consideration in the granting of retroactive relief is a showing that the petitioner has diligently sought relief and has made good faith efforts at achieving compliance". (Deere, 92 PCB 91.) The Board is not inclined to grant retroactive relief, absent a showing of unavoidable circumstances, because the failure to request relief in a timely manner is a self-imposed hardship. (American Can Co., 102 PCB 215.)

The Board has also articulated that a petitioner's hardship must not be self-imposed by petitioner's inactivity or own decisionmaking. (EPA v. Lindgren Foundry Co., (September 25, 1970), PCB 70-1, 1 PBC 11 (1970); Ekco Glaco Corporation v. IEPA and IPCB, 542 N.E. 2d 147 (1st Dist. 1989); Willowbrook Motel, 481 N.E. 2d at 1036.) In PCB 87-41, Ekco Glaco v. IEPA, the Board found that "Ekco Glaco's problems arise from the delay caused by decisions it has made in attempting to secure compliance and its failure to commit to a particular compliance option. The Board cannot find that those problems constitute an arbitrary or unreasonable hardship." Ekco Glaco, PCB 87-41 at 4, aff'd in Ekco Glaco Corp. v. IEPA and IPCB, 542 N.E.2d 147 (1st Dist. 1989.) The Appellate Court affirmed the Board's denial of an extension of variance in Ekco notwithstanding Ekco's argument that the denial would lead to a shutdown which would adversely impact Ekco and its local customers.

In this case Marathon does not state any similar special or extraordinary circumstances which would allow for a retroactive inception date of roughly three years. Marathon argues instead that if the circumstances that justify a shield from prosecution exist, there is no logical reason why past circumstances are any less compelling than future circumstances. We disagree. As stated above Marathon's hardship as a result of the ongoing USEPA enforcement action is not the type of hardship envisioned by the Act that would warrant variance relief. The hardship created by ongoing enforcement action, barring unusual circumstances, is a self-imposed hardship for which the variance provisions were not developed to provide relief. To find otherwise the variance provisions would eviscerate the Act's enforcement provisions.

The purpose of a variance is to allow the regulated industry to remain operational for a period of time while compliance is being sought. The variance provisions are not intended to allow a regulated industry to operate out of compliance and to seek an enforcement shield through the use of the variance provisions when an enforcement action is initiated. As stated above, the hardship of enforcement action only follows or is the result of the requirement of immediate compliance with the otherwise applicable rules and regulations. The threat of enforcement or ongoing enforcement is not in and of itself a hardship that the Act envisioned the Board weigh against the environmental impact when determining whether variance relief is justified. For this reason, and because Marathon has not claimed any unusual or special circumstances, we find that retroactive variance relief in this case is not warranted.

In addition to retroactive variance relief, Marathon is also requesting prospective relief on the claimed hardship related to achieving or maintaining compliance in the future. We find, based on the record, that Marathon has demonstrated to a sufficient certainty that future hardship will be incurred. Marathon has presented evidence which demonstrates that future non-compliance is inevitable. Such evidence includes the test results from August 4 and 5, 1993 and March of 1995; the statements made in the amended petition and the testimony Mr. Samuels on pages 19-21, 29-34, 36-37 of the transcript concerning the maintenance that is required on the CO boiler due to the wearing of the mechanical parts and the desired operational practices. In Sonoco Products Company v. IEPA, PCB 88-60 (92 PCB 97, September 8, 1988), the petitioner was in compliance at the time of the variance request, but would have been out of compliance at anticipated increased production levels. In Sunoco, the Board found that in light of this and other factors the petitioner would suffer arbitrary or unreasonable hardship if denied its requested variance (Id. at 92 PCB 102.) Marathon's situation is similar to that of Sunoco in that the deterioration of the CO boiler demonstrates with a sufficient degree of certainty future non-compliance and the alternatives to meeting immediate compliance create a hardship. In Village of Diamond V. Illinois Environmental Protection Agency, (August 11, 1994) PCB 94-132, the Board stated that "[w]hile no violation is evident based on recent past analysis of gross alpha particle activity, the analysis for the first two quarters of the current sampling period indicates that the average for the upcoming sample period will exceed the MCL of 15.0 pCi/L standards." (Id. at 3.) Although there is no admission on the part of Marathon that it is operating out of compliance or that achieving compliance is onerous, there is strong indication that if no action is taken by Marathon it will not be able to achieve compliance.

Additionally Marathon states that if repairs are not made to the boiler it will not be able to operate the boiler in its full range of operation and still maintain compliance. During cross-examination Marathon's witness stated that it wants to modify the burners in order to ensure compliance in the full range of boiler operation which sometimes is below the 180,000 pounds per hour mark which is currently required to maintain compliance. We believe that given Marathon's inability to utilize the boiler at the lower mark, the age of the boiler and the alternatives of compliance, it has demonstrated a hardship will occur in the future with sufficient certainty. Thus a hardship exists which the Board must weigh against the environmental impact of granting the variance while Marathon is implementing its compliance plan.

The burden of proof is on petitioner to demonstrate that the hardship of immediate compliance with 35 Ill. Adm. Code 216.361(a) outweighs the environmental impact of the emissions during the term of the variance if granted. Marathon states that, based on the ambient air modeling it conducted, it has determined that there was no adverse affect from its emissions on the community and certainly no ambient air quality violations. Marathon's Exhibit #3 entitled "Atmospheric Dispersion Modeling of Carbon Monoxide Emissions from the CO Boiler at the Robinson Refinery" summarizes that the operation of the CO boiler at 400 ppm corrected for 50% excess air flue gas loading is of no environmental concern. (Pet. Ex. #3 at 11.) However, Marathon does not present any information on the environmental

impact if the variance were to be granted with the interim limitation of 500 ppm corrected for 50% excess air as requested. Therefore the Board can only weigh the environmental impact of the variance if granted with a maximum limitation of 400 ppm against the hardship of compliance. The Agency is correct in stating that modeling done by Marathon up to the 400 ppm emission rate does not include all sources of CO in the area and that while the modeling was done utilizing numbers corrected for excess air, which the standards do not. However, we believe that the expected emission levels are significantly lower than the standard and accordingly we find, based on the record, that the environmental impact during the variance will be minimal. Additionally, the Board has found on prior occasions that the impact of Marathons CO emissions will not interfere with attaining the ambient air quality and would not cause an immediate health hazard when there higher CO emission levels for Marathon than presented in this record. (See Marathon Oil Company v. Environmental Protection Agency, (January 9, 1975), PCB 74-147, 15 PCB 169, Marathon Oil Company v. Environmental Protection Agency, (December 11, 1975), PCB 75-389, 23 PCB 269 Marathon Oil Company v. Environmental Protection Agency, (August 5, 1976), PCB 76-159, 23 PCB 269.) We also find, based on the record, in weighing the hardship created by requiring immediate compliance with the 35 Ill. Adm. Code 216.361(a) against the possible environmental impact if the variance was granted, that Marathon has demonstrated that immediate compliance would cause an arbitrary or unreasonable hardship.

Compliance Plan

The Agency states that the compliance plan does not guarantee compliance at the end of the requested variance and therefore, does not support granting variance relief. The Agency does not state why the compliance plan will not achieve compliance and did not present any evidence or any legal argument to support its reasoning. We find, based on the record, that Marathon's compliance plan is sufficient. Marathon has presented evidence discussing how the proposed compliance plan was developed and how it will achieve compliance.

Consistency with Federal Law

The requirement of a submission to USEPA for a SIP amendment does not make the grant of a variance inconsistent with federal law. (See Olin Corporation v. Illinois Environmental Protection Agency, (February 7, 1991), PCB 89-72, and Polyfoam Packers Corp. v. Illinois Environmental Protection Agency, (July 7, 1995), PCB 95-103.) In General Chemical Corporation v. Illinois Environmental Protection Agency, (February 4, 1993), PCB 92-217, the Agency stated that under the Clean Air Act a SIP submittal is required for any variance from the applicable emissions in a nonattainment area. Marathon states that there is no reason to believe that a grant of the requested variance would be inconsistent with federal law. We agree. The record demonstrates that ambient air quality will not be affected during the term of the variance and we do not believe that the requirement of a SIP amendment makes the requested variance relief inconsistent with federal law.

Requested Variance Relief

Since the Board has determined that the retroactive variance relief requested by Marathon is unwarranted, the starting date of the variance would normally be the date of this order. However, as stated previously, the Board has granted short retroactive starting dates when, due to no fault of petitioner, there have been procedural delays. In this case Marathon filed its amended petition on September 22, 1995; thus absent procedural delays the decision of the Board would have been due January 19, 1996 pursuant to Section 38 of the Act. As the result of procedural delays created by the Agency and three requests for rescheduling of the hearing, the variance period will start from January 19, 1996. As for the ending date, Marathon's request is contradictory. However, based on the compliance plan submitted as Pet. Exh. #6, which states that the testing and optimization period is to end on June 14, 1997 and that the requested end date in the amended petition is August 4, 1997, the variance term will end on August 4, 1997.

During the variance period Marathon has requested that a CO limitation of 500 ppm apply. The Agency argues that Marathon has not presented evidence as to why a limitation of 500 ppm CO limitation should apply. The data submitted in relation to the tests show that the highest reading of CO was 270 ppm corrected to 50% excess air. As stated, above Marathon's exhibit #3 concerning the environmental impact of CO emissions only modeled up to 400 ppm of CO utilizing numbers corrected for 50% excess air. Since the highest recorded level of CO emission for Marathon in the record is 270 ppm and Marathon has not presented any evidence to justify the 500 ppm limitation, the Board will set a CO limitation of 300 ppm corrected to 50% excess air during the variance period.

Additionally, the Board has the authority to add conditions to carry out the purposes of the Act. Marathon stated at hearing and expressed to the Agency in its response to the Agency's CIL that it does not expect future violations. Marathon states that one method of achieving compliance is to operate the burners at 1800 Fahrenheit adiabatic flame temperature and the CO boiler at 180,000 pounds per hour. Although the Board will not require Marathon to maintain compliance by these means, the Board will grant the variance subject to the condition that Marathon must use all methods it is currently utilizing to achieve compliance and maximize the reduction of CO emissions throughout the variance term to the best of its abilities.

CONCLUSION

Based on the record before the Board, we find that Marathon has demonstrated that to require immediate compliance with 35 Ill. Adm. Code 216.361(a) would result in an arbitrary or unreasonable hardship. However, Marathon has not demonstrated that retroactive variance relief for the three years requested is warranted. Therefore, for the reasons stated above, the Board grants Marathon a variance from 35 Ill. Adm. Code 216.361(a) starting from January 19, 1996 and ending August 4, 1997. Additionally during the variance term a CO limitation of 300 ppm shall apply instead of 200 ppm as set forth in 35 Ill. Adm. Code 216.361(a) subject to conditions.

Finally, we note that many phases of Marathon's compliance plan as contained in its petition should already have been completed. We are not including the past completion dates as provided in Marathon's exhibit #6.

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

ORDER

The Marathon Oil Company located in Robinson, Illinois is granted a variance from 35 Ill. Adm. Code 216.361(a) for the period starting January 19, 1996 and ending August 4, 1997 subject to the following conditions:

1) During the term of the variance Marathon Oil Company's carbon monoxide (CO) emissions from its fluid bed catalytic cracking unit's (FCCU) CO boiler shall not exceed 300 parts per million (ppm) corrected for 50% excess air.

2) Marathon Oil Company shall utilize all available means to minimize CO emissions from its CO boiler during the term of the variance.

3) Marathon Oil Company shall implement its plan of compliance as contained in its exhibit I of its amended petition summarized as follows:

A. Revise Refinery Gas Burners:

This phase of the project will address the existing refinery gas burner system. The current refinery gas burners are of two different sizes. The new system is to be sized so that only one sized burner is used in the boiler. This will provide uniformity of combustion and turn down on the boiler operation. Engineering work will be required to determine the proper size and improvements required to the burners. Procurement of these burner tips will be in time for implementation at turnaround. Revising the refinery gas burners shall be completed on or before October 30, 1996.

B. Inspection and Repair of Boiler Damper Controls:

This phase of the project is to inspect and repair, if needed, the damper controls and other portions of the damper system that cannot be accessed while the boiler is operating. Planning work will be required for the inspection techniques and requirements. Inspections and repairs of the Boiler damper controls shall be completed on or before November 30, 1996.

C. Flame Temperature Measuring Device:

This phase of the project will be to install flame temperature measuring device that will monitor flame temperature. This will allow the boiler flame to be controlled to maintain optimum CO combustion temperatures. Engineering work will be required to specify and design the installation of the instrument. This phase of the compliance plan shall be completed on or before October 31, 1996.

D. C.O. Burner Improvements:

This phase of the project will be to review the CO burners to potentially increase the mixing of air and CO for better combustion. Engineering work will be required to perform this study and detail the fabrication and installation of the new CO burners. The CO burner improvements shall be completed on or before October 31, 1996.

E. Boiler Testing and Optimization:

This phase of the project will be to optimize the boiler based on the new modified systems that are installed during the turn around. Testing will be required as part of the evaluation and optimization process and shall be completed on or before June 14, 1997.

4) Marathon Oil Company shall submit progress reports every four (4) months to the Illinois Environmental Protection Agency addressed to:

John B. Justice
Regional Manager, Field Operations, Bureau of Air
Illinois Environmental Protection Agency
2009 Mall Street
Collinsville, Il. 62234

If Petitioner chooses to accept this variance subject to the above order, within 45 days of the date of this order Petitioner shall execute and forward to:

Rachel Doctors
Division of Legal Counsel
Illinois Environmental Protection Agency

2200 Churchill Road
Post Office Box 19276
Springfield, Illinois 62794-9276

a Certification of Acceptance and Agreement to be bound to all terms and conditions of this variance. The 45-day period shall be held in abeyance during any period that this matter is being appealed. Failure to execute and forward the Certificate within 45 days renders this variance void and of no force and effect as a shield against enforcement of rules from which variance was granted. The form of said Certification is as follows:

CERTIFICATION

I (We),_____, hereby accept and agree to be bound by all terms and conditions of the order of the Pollution Control Board in PCB 95-150, May 16, 1996.

_____
Petitioner

_____
Authorized Agent

_____
Title

_____
Date

IT IS SO ORDERED.

Board members G. Tanner Girard and J. Theodore Meyer dissenting, and Member Meyer also concurring in part.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) 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 _____ day of _____, 1996, by a vote of _____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board