

ILLINOIS POLLUTION CONTROL BOARD
November 8, 1972

INCINERATOR, INC.)
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 v.) #72-416
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 ENVIRONMENTAL PROTECTION AGENCY)

Opinion of the Board on Motion for Temporary Extension
(by Mr. Currie):

On October 31, 1972, we denied the company's request for temporary extension of a variance pending decision on a petition for extension on the merits. This opinion states our reasons.

Our order of September 30, 1971 (EPA v. Incinerator, Inc., #71-69, 2 PCB 505) found the company in violation of particulate emission regulations and of the statutory prohibition of air pollution, imposed a penalty, and ordered the facility shut down until filing of an adequate control program and institution of interim measures to reduce pollution. On receipt of the program and representations that adequate interim measures had been established, we stayed the shut-down order pending a hearing on the program and interim improvements. 2 PCB 607 (Oct. 14, 1971). After hearing we ordered the company to complete the construction of scrubbers to eliminate violations of the emission regulations in eleven months, according to the timetable submitted by the company (#71-324, 3 PCB 167 (Nov. 23, 1971)). The program was thus to be completed in late October 1972.

The present variance petition seeks a brief extension of the period for compliance, to January 31, 1973, alleging that unforeseen complications in arranging for electrical service for the scrubbers and damage to the equipment during delivery have caused delays beyond the company's control. Deeming the extension minor and the alleged reasons for delay reasonable unless rebutted, we indicated at our meeting of October 24 we would decide the case without hearing on the basis of the Agency's recommendation.

The company thereupon filed an emergency motion asking us to grant a temporary extension of the variance on the basis of the petition alone, pending receipt of the Agency's views and final decision of the case. The reason for this request

is that the existing variance, as the company computes the eleven months, expired on October 24 and that continued operation therefore subjects it to the risk of prosecution until final Board action is taken on the petition itself.

We denied the request for an interim extension pending decision on the petition. We have granted such extraordinary relief three times in special situations not duplicated here. The first was GAF Corp. v. EPA, #71-11 2 PCB 17 (June 23, 1971), in which our earlier order had expressly provided for an interim extension upon timely filing of a control program. The other two were Commonwealth Edison Co. v. EPA, #72-295, 5 PCB ____ (Oct. 3, 1972), and Commonwealth Edison Co. v. EPA, #72-350, 5 PCB ____ (Oct. 10, 1972). In both those cases the company had filed a renewal petition more than 90 days before expiration of an existing variance, giving assurance of a decision before the variance expired because the statute requires us to decide within 90 days. In #72-350, after an initial decision not to schedule a hearing, we concluded a hearing should be held at a time too late to permit us to decide within 90 days. In #72-295, hearing was postponed beyond the 90-day period at the Agency's request to permit the Agency to complete a system-wide study of Edison's environmental problems. The petitioner in both cases was understandable unwilling to waive its right to a prompt decision in the absence of assurance that it would be protected from prosecution during the period of litigation. The extension was granted because the company had done all it could to assure a decision prior to the expiration of the original variance and the delay was for the convenience of the Board in ascertaining the facts.

There is no express authorization of interim variances in the statute. The statute requires "adequate proof" (§ 35); it requires public notice and a 21-day opportunity for public comment (§ 37); it requires the opportunity for Agency investigation and the filing of a recommendation (id.). Our procedural rules likewise make no mention of interim relief (PCB Regs., Ch. 1, Part IV). Indeed Rule 405(c) expressly forbids the granting of a petition without hearing before 21 days have elapsed, in recognition of the importance of Agency and public comment in assessing the merits of a petition. Ex parte relief is clearly not favored, and the entire statutory scheme evinces an elaborate effort to assure that the Board does not grant permission to do what the law forbids without the opportunity for public and Agency participation.

GAF was based on our interpretation of our authority to impose reasonable conditions on the grant of a variance,

which we read to allow automatic extension, within the one-year limitation of the statute for the original variance, upon the occurrence of a stated condition; this is the equivalent of a longer variance that terminates if the stated condition does not occur. In both Edison cases the requisite public notice had been published, ample time for public and Agency comment allowed, and in one case the Agency recommendation received. Moreover, in both cases the interim relief sought was within the period contemplated by the original order for completion of the program. In light of the equities favoring interim relief and the un rebutted representations in the petitions, we found adequate proof to justify a brief extension to enable us to determine the facts necessary to an informed decision as to further relief, where the alternative was to take final action without adequate information because of the 90-day decision rule. These cases are analogous to many in which we have granted brief variances contemplating further extension upon submission of further information such as a control program for Board evaluation. See, e.g., GAF Corp. v. EPA, #71-11, 1 PCB 481 (April 19, 1971); Southern Illinois Power Cooperative v. EPA, #72-238, 5 PCB ____ (Oct. 17, 1972).

The present case is wholly different. The required time for public and Agency comment has not expired. No provision of a prior order purported to authorize interim relief without compliance with the usual statutory requirements. The period contemplated in the original order for completing the entire program has expired. We lack authority to grant the relief requested, as we are specifically forbidden by our own rule, noted above, to grant any variance without waiting 21 days for comments. To grant the same relief under some other name would undermine the purpose of the statute and rules to assure public participation. In the present case to grant interim relief would to a very large extent moot the entire case, since the new compliance date we are asked to approve is so near at hand. As for the equities, even if we had power to grant the request we would not be inclined to do so; for here, in contrast to the Edison cases, the petition for extension was filed at the very end of the original variance period (filing date October 19, 1972), giving us no possible opportunity to make a decision on the merits before the variance expired. Any hardship created by the risk of prosecution prior to our decision on the extension request was brought about by the petitioner's own delay in filing the petition. A petitioner may not bootstrap himself into obtaining the relief he seeks simply by filing for it at the last minute.

We note that the absence of a variance does not require the incinerator to be shut down; it simply leaves the company

subject to the risk of prosecution, with whatever penalties the Board or court might find appropriate if a complaint were filed and proof made. The same facts demonstrating arbitrary or unreasonable hardship in a variance proceeding would constitute a defense to a complaint under § 31(c) of the statute, and a variance if ultimately granted would wipe the slate clean. If the variance is one that ought to be granted the petitioner need have no fear of operation in the interim.

The issue here presented was fully litigated and decided adversely to interim relief in Lipsett Steel Products, Inc. v. EPA, #70-50, 1 PCB 345 (March 22, 1971) (see record in that case for argument and decision on motion for temporary relief, and see the description of that proceeding in EPA v. Lipsett Steel Products, Inc., #71-43, 2 PCB 81, 83 (July 8, 1971)).

For all the above reasons, without prejudice to our future decision on the petition for extension itself, the motion for interim extension pending decision on the petition in the present case was denied.

I, Christan Moffett, Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion on Motion for Temporary Extension this _____ day of _____, 1972, by a vote of _____.