

ILLINOIS POLLUTION CONTROL BOARD
September 18, 1997

WASTE PROFESSIONALS, INC., d/b/a)	
PEKIN LANDFILL,)	
)	
Petitioner,)	PCB 97-228
)	(Variance - Land)
v.)	
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by R.C. Flemal):

This matter comes before the Board on the petition for variance filed by Waste Professionals, Inc. d/b/a Pekin Landfill (Waste Professionals). Waste Professionals seeks a short-term variance to allow it to continue to operate the Pekin Landfill until such time as the Board makes a decision on Waste Professionals' petition for adjusted standard from the same requirements (see AS 97-10¹, petition filed June 9, 1997; amended petition filed September 8, 1997).

By filing of September 15, 1997, Waste Professionals moved that the Board grant expedited decision in this variance proceeding by deciding this matter at today's September 18, 1997 Board Meeting. By separate filing of September 15, 1997, the Illinois Environmental Protection Agency (Agency) joined the motion for expedited decision. The motions are hereby granted.

The Board's responsibility in this matter arises from the Environmental Protection Act (Act) (415 ILCS 5/1 (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 required to appear in hearings on variance petitions. 415 ILCS 5/4(f) (1996). The Agency is also 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).

¹ In the Matter of: Petition of Waste Professionals, Inc., d/b/a Pekin Landfill, for Adjusted Standard from 35 Ill. Adm. Code Part 814, Subpart D.

For the following reasons, the Board finds that Waste Professionals has presented adequate proof that immediate compliance the regulations at issue would result in the imposition of an arbitrary or unreasonable hardship. Accordingly, the variance will be granted, subject to conditions set forth in the attached order.

PROCEDURAL HISTORY

The petition in this matter was initially filed with the Board on June 18, 1997. The Agency filed a variance recommendation in response to this initial petition on July 21, 1997; therein the Agency recommended that the variance be denied. By filing of August 4, 1997, Waste Professionals notified the Board that it had entered discussions with the Agency regarding possible amendments to the petition, and requested that the Board defer any decision in this matter pending filing of an amended petition.

The amended petition was filed on September 10, 1997.² In the amended petition Waste Professionals requests the same relief as in the initial petition, but proposes that a grant of variance be additionally conditioned to require a revised groundwater impact assessment, including groundwater modeling, and to require immediate cessation of operations upon failure of Waste Professionals to obtain adjusted standard relief. The amended petition further provides various new information by way of “clarification.”

On September 15, 1997, the Agency filed an amended variance recommendation in response to Waste Professionals’ amended petition. The Agency now recommends that the variance be granted. Waste Professionals has waived hearing, and no hearing has been held.

On September 17, 1997, Waste Management, Inc. filed a letter citing opposition to Waste Professionals’ proposal for variance and requested that the petition for variance be denied.³

NATURE OF THE FACILITY

Pekin Landfill is a 46.8 acre landfill located along Towerline Road in Elm Grove Township, Tazewell County, Illinois, approximately three miles south of the City of Pekin. Petition at Exh. A and B. The facility is zoned agriculture. Petition at 4.

Waste Professionals, Inc., is the operator of the facility. Eloyd and Frances Simpson are owners of the facility. Amended Petition at Exh. A.

² The initial petition will be cited herein as “Petition at .” and the amended petition will be cited as “Amended Petition at .”. The amended petition augments the initial petition.

³ Waste Management, Inc. also cited objection to Waste Professionals’ proposal for adjusted standard in AS 97-10, In the Matter of: Petition of Waste Professionals, Inc., d/b/a Pekin Landfill, for Adjusted Standard from 35 Ill. Adm. Code Part 814, Subpart D.

Pekin Landfill has been in continuous operation since 1970. Petition at 4. The landfill has most recently been permitted to accept general municipal solid waste, non-hazardous special waste (base residual waste, project waste, and treatment sludge), and municipal solid waste and construction and demolition debris. Amended Petition at Exh. A. The volume of wastes received is approximately 12,000 cubic yards per month. Petition at 6. The majority of the wastes are generated within Tazewell County and the contiguous counties. Petition at 4.

The only currently operated unit in the Pekin Landfill is a 1.9 acre lateral expansion area known as the Southwest Trench. Petition at 12. All other disposal units within the landfill are filled and either are closed or are undergoing closure. Petition at 3, 12. The Southeast Trench has capacity remaining, estimated at the end of September 1997, to be approximately 166,000 cubic yards. Petition at 15. It is for the purpose of utilizing this capacity that Waste Professionals has filed the instant petition.

Waste Professionals characterizes the Southeast Trench as “a state-of-the-art” unit that is lined with a geomembrane/compacted clay composite liner and contains a leachate collection system. Petition at 7; Amended Petition at 5. Leachate is removed from the existing leachate collection system into tanks, which are periodically drained and the contents hauled off-site for treatment and ultimate disposal at the City of East Peoria water treatment plant. Petition at 7.

STATUTORY AND REGULATORY FRAMEWORK

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.

At issue in the instant matter are solid waste disposal regulations originally adopted by the Board in 1990.⁴ These regulations require, among other matters, that certain landfills in

⁴ See In the Matter of: Development, Operation and Reporting Requirements for Non-Hazardous Waste Landfills (August 17, 1990), R88-7.

existence as of the September 18, 1990 effective date of the regulations either close or comply with progressively more stringent operating and closure requirements. The progression of more stringent requirements is marked by two benchmark dates, one on September 18, 1992 (two years after the effective date), and the second on September 18, 1997 (seven years after the effective date).

In 1991 the prior owners of Pekin Landfill elected to proceed on a path which would require closure of the facility under the seven-year time frame, as provided at 35 Ill. Adm. Code 814, Subpart D.⁵ Operation of the landfill has been in accordance with this timeframe, including the issuance of a significant modification (sig-mod) permit to Waste Professionals, in compliance with requirements of 35 Ill. Adm. Code 814.104, in April 1996 and reissued in October 1996. Petition at 5; Amended Petition at Exh. A. The significant modification permit specifically allows for operations only until September 18, 1997.

COMPLIANCE PLAN

Waste Professionals intends to attain compliance by obtaining an adjusted standard from the regulations at issue. The petition requesting the adjusted standard has been filed with the Board, and the Board is currently awaiting the Agency's required response to the petition.

The relief requested in the adjusted standard is identical to the relief requested in the instant variance petition with the exception of the term of the adjusted standard. In particular, the adjusted standard is requested to be effective for a period not to exceed fourteen months beginning on September 18, 1997 (*i.e.*, to November 18, 1998).

Both Waste Professionals and the Agency view the variance as an interim measure designed to allow continued use of the Pekin Landfill while the merits of the adjusted standard are under review by the Agency and ultimately by the Board. Amended Petition at 2; Agency Rec. at 1, 3. Accordingly, Waste Professionals and the Agency agree to have the variance terminate upon any of (a) unfavorable review of the groundwater impact assessment by the Agency, (b) denial of the adjusted standard by the Board, or (c) grant of the adjusted standard by the Board. Amended Petition at 2; Agency Rec. at 3. Waste Professionals further agrees to initiate closure upon either (a) or (b) occurring. Petition at 10.

Waste Professionals contends that there is no other feasible method of compliance other than ceasing operations. Petition at 17, 19.

ENVIRONMENTAL IMPACT

⁵ Subpart D is titled "Standards for Existing Units Accepting Chemical or Putrescible Wastes That Must Initiate Closure Within Seven Years." Subpart D consists of just two sections, Sections 814.401 and 814.402. Section 814.401 sets out the scope and applicability of Subpart D, and Section 814.402 prescribes the operation and closure standards that apply to Subpart D landfills.

Waste Professionals states that grant of variance would have few environmental costs, or health, welfare and social costs, because it calls only for a continuation of activities already in process that have not had these negative impacts. Petition at 10. Waste Professionals further contends that the liners and leachate collection system afford protection that will not allow contaminants to impact groundwater. Petition at 7.

As demonstration of the absence of impact on the groundwater, Waste Professionals agrees to conduct groundwater modeling to demonstrate that the concentration of all the constituents of the leachate at the edge of or outside the zone of attenuation of the Southeast Trench do not exceed the applicable groundwater standards of 35 Ill. Adm. Code 811.20, within 32 years of closure of the Southeast Trench. Amended Petition at 2-4. Waste Professionals further agrees to submit the model results to the Agency no later than September 30, 1997 (Amended Petition at 3), and to immediately commence closure of the Southeast Trench if the results are unacceptable to the Agency (Amended Petition at 2).

The Agency observes that the period of 32 years is identical to the post-closure care period for landfills subject to Subpart D. Agency Rec. at 3. It also observes that absent conditioning the instant variance on the submission of the modeling data, there would be no modeling results required at all for the Pekin Landfill. Agency Rec. at 3. The Agency nevertheless believes that "the proposed modified groundwater impact assessment is necessary to clarify the environmental impact of continuing operations at this site." Agency Rec. at 4.

Waste Professionals asserts that grant of variance would have some small environmental benefits in decreasing the necessity for transporting solid wastes to other landfills, with a corresponding decrease in environmental impacts associated with vehicle traffic. Petition at 11.

HARDSHIP

Waste Professionals contends that failure of the Southeast Trench to be filled according the original plans is due to the loss of a customer in 1992 who had previously accounted for approximately 45% of the Pekin Landfill's gate receipts. Petition at 13. The result has been not only a loss in revenue, but an inability to reach permitted final contours of the landfill. Petition at 14. Waste Professionals contends that the cost of bringing the Southeast Trench up to contour absent use of waste would itself cost \$227,900. Petition at 20.

The Agency observes that it will need approximately 90 days to thoroughly review the groundwater impact assessment information to be submitted by Waste Professionals; until this review is completed, the Agency contends that it will not be able to comment further on the petition for adjusted standard. Agency Rec. at 4. Thus, there is introduced a minimum of a three months gap between the September 18, 1997 scheduled closure and the earliest date that Waste Professionals could expect support from the Agency on the adjusted standard petition.

CONSISTENCY WITH FEDERAL LAW

Waste Professionals observes that the Board has the authority to grant the requested relief because the closure standard that is the subject of the instant variance does not implement any federal law or program. A grant of variance could therefore not be inconsistent with federal law. Petition at 20-21.

DISCUSSION

The Board finds that Waste Professionals and the Agency have demonstrated that immediately compliance with the regulations at issue, which can be achieved only through ceasing operations at the Pekin Landfill, constitutes a hardship upon Waste Professionals. The Board further finds that the hardship outweighs any negative environmental impact that can be expected to occur in the short time period during which the variance would be in effect. Indeed, the Board believes that the agreement of Waste Professionals to conduct groundwater modeling otherwise not required, offers the strong prospect of greater environmental protection through better opportunity to understand and react to any possible problems occasioned by past or future operations at the landfill. Under this combination of circumstances, the Board finds that denial of the requested variance would constitute an arbitrary or unreasonable hardship. The variance will accordingly be granted, subject to the conditions recommended by the parties.

Having so found, the Board nevertheless notes that it 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. The Board believes that the instant matter presents such special circumstances.

As an additional matter, the Board observes that neither Waste Professionals nor the Agency address the issue of what the termination date of the variance should be in the absence of a timely completed record in the adjusted standard proceeding. The Board does not believe that the variance should remain in effect if the adjusted standard petition stalls due to unindustrious pursuit of the petition. According to the Agency's recommendation, the Board can expect the recommendation in the adjusted standard by January 1, 1998. With additional time for Board deliberation, the Board believes that the adjusted standard should be resolved no later than February 20, 1998. The Board will accordingly condition the variance to terminate no later than this date.

Finally, the Board notes that the conclusions it reaches based upon the record of this variance proceeding do not prejudice merits of the pending adjusted standard petition.

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

ORDER

Waste Professionals, Inc., d/b/a Pekin Landfill (Waste Professionals), is hereby granted a variance from the landfill closure date of 35 Ill. Adm. Code 814, Subpart D subject to conditions as listed below.

1. The variance commences on September 18, 1997 and terminates on the earlier of the following dates:
 - a. the date of issuance by the Board of a final determination to either grant or deny an adjusted standard in the proceeding before the Board docketed as adjusted standard AS 97-10; or
 - b. February 20, 1998.
2. Notwithstanding the provisions of 35 Ill. Adm. Code 814.401 and 814.402, during the period of variance Waste Professions may continue to accept waste for disposal in the Southeast Trench only of its Tazewell County, Illinois landfill, pursuant to the terms of its existing operating permit.
3. On or before September 30, 1997, Waste Professionals shall file with the Illinois Environmental Protection Agency (Agency) an application to modify its existing operating permit to demonstrate that the concentrations of all the constituents of the leachate at the edge of or outside the zone of attenuation of the Southeast Trench do not exceed the applicable groundwater quality standards of 35 Ill. Adm. Code 811.320, within 32 years of closure of the Southeast Trench, such demonstration to be made using the results of a groundwater contaminant transport (GCT) model for the Southeast Trench, meeting the standards of 35 Ill. Adm. Code 811.317(c).
4. In the event that this variance expires by the terms of condition 1 above, or in the event that the Agency should deny the application for permit referenced in condition 3, Waste Professionals shall immediately commence closure of the Southeast Trench pursuant to the standards set forth at 35 Ill. Adm. Code 811.
5. After commencement of closure, Waste Professionals may accept waste for disposal or for use in close and post-closure care only as authorized in authorized closure and post-closure care plans.

CERTIFICATION

If Waste Professionals chooses to accept this variance subject to the above order, within forty-five days of the date of this order, Waste Professionals shall execute and forward to:

Michelle M. Ryan
Illinois Environmental Protection Agency
Division of Legal Counsel
1021 N. Grand Avenue East
Springfield, Illinois 62702

a Certificate of Acceptance and agreement to be bound 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 and of no force and effect as a shield against enforcement of rules from which this variance is granted. The form of the certificate is as follows.

I (We), _____, hereby accept and agree to be bound by all terms and conditions of the order of the Illinois Pollution Control Board in PCB 97-228, September 18, 1997.

Petitioner

Authorized Agent

Title

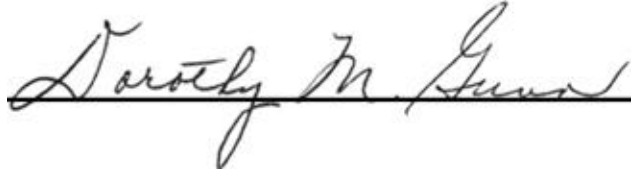
Date

IT IS SO ORDERED.

Board Member J. Theodore Meyer dissented.

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 145 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 opinion and order was adopted on the 18th day of September 1997, by a vote of 6-1.

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

mDorothy M. Gunn, Clerk
Illinois Pollution Control Board