

ILLINOIS POLLUTION CONTROL BOARD  
October 16, 1997

CITY OF SALEM, CITY OF FREEPORT	)	
and KNOX COUNTY,	)	
	)	
Petitioners,	)	PCB 98-14
	)	(Variance - Land)
v.	)	
	)	
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by M. McFawn):

This matter comes before the Board on the “Joint Petition for Variance” filed by the City of Salem, City of Freeport, and Knox County (Petitioners). Petitioners, operators of municipal solid waste landfills, seek a one-year variance from the landfill financial assurance requirements set forth in 35 Ill. Adm. Code 811.700(b) and (f). Petitioners seek their variance pending adoption by the Board of rules recently added to federal regulations found at 40 CFR 258 (landfill regulations under Subtitle D of the Resource Conservation and Recovery Act of 1976 (RCRA)). The United States Environmental Protection Agency amended Part 258 on November 27, 1996 (61 Fed. Reg. 60327), to include certain new tests by which local government units can meet landfill financial assurance requirements. Although these tests are not currently part of Illinois’ regulatory scheme, they are part of a rulemaking proceeding currently pending before the Board, RCRA Subtitle D Update, USEPA Regulations (July 1, 1996 through December 31, 1996), R97-20. Petitioners, the only entities in Illinois impacted by the new rule, believe that they meet the federal tests, and seek a variance so they will not be out of compliance with Illinois regulations pending adoption by the Board of rules identical in substance to the federal rules.

The Board's jurisdiction and authority in this matter arise from the Environmental Protection Act (Act), 415 ILCS 5 (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 Illinois Environmental Protection Agency (Agency) is 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).

For the reasons set forth herein, the Board finds that Petitioners have presented adequate proof that immediate compliance with the regulations at issue would result in the

imposition of an arbitrary or unreasonable hardship. Accordingly, the variance will be granted, subject to the conditions set forth in the Order below.

### PROCEDURAL HISTORY

The petition in this matter was initially filed with the Board on July 9, 1997. The Agency filed a variance recommendation in response to this initial petition on August 11, 1997; therein the Agency recommended that the variance be granted, albeit with a different termination date than that requested by Petitioners (April 9, 1998, instead of July 9, 1998). On August 18, 1997, Petitioners filed a response to the Agency's recommendation, in which they stated that they had no objection to the termination date suggested by the Agency. Petitioners waived a hearing in this matter, and no hearing was held.

### 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.

Under the circumstances of this variance petition, the statutes governing the Board's procedures for adopting rules identical in substance to federal RCRA regulations are also germane, most significantly Section 22.40(a) of the Act (415 ILCS 5/22.40(a) (1996)), which provides:

In accordance with Section 7.2, the Board shall adopt rules that are identical in substance to federal regulations or amendments thereto promulgated by the Administrator of the United States Environmental Protection Agency to implement Sections 4004 and 4010 of the Resource Conservation and Recovery Act . . . insofar as those regulations relate to municipal solid waste landfill unit program. The Board may consolidate into a single rulemaking under this Section all such federal regulations adopted within a period of time not to exceed six months. \*\*\*

The provisions and requirements of Title VII of this Act shall not apply to rules adopted under this subsection (a). Section 5-35 of the Illinois Administrative Procedures Act relating to the procedures for rulemaking shall not apply to regulations adopted under this subsection (a).

Section 7.2 of the Act, referenced in Section 22.40 above, provides that identical-in-substance rulemaking proceedings shall be completed within one year after the adoption of the corresponding federal rule. 415 ILCS 5/7.2(b) (1996).

Illinois' landfill financial assurance regulations are found at 35 Ill. Adm. Code 811.Subpart G. Of significance to our analysis are 35 Ill. Adm. Code 811.700(f) and (g), which provide:

- f) On or after April 9, 1997, no person, other than the State of Illinois, its agencies and institutions, shall conduct any disposal operation at a [municipal solid waste landfill] unit that requires a permit under subsection (d) of Section 21 of the Act, unless that person complies with the financial assurance requirements of this Part.
- g) The standards adopted in this subpart that are identical in substance to the federal Subtitle D regulations that are individually indicated as applicable to [municipal solid waste landfill] units shall not apply to such units until April 9, 1997.

### DISCUSSION

The federal amendments to 40 CFR 258 which added Section 258.74(f), providing the new financial assurance tests which are the subject of this variance petition, were effective April 9, 1997, the same date on which, under 35 Ill. Adm. Code 811.700(f) and (g), the financial assurance requirements of 35 Ill. Adm. Code 811.Subpart G became applicable to Petitioners. From Exhibit A to the Petition, it appears that the Agency took the position that parties subject to these rules had ninety days from the effective date to come into compliance, *i.e.*, until July 8, 1997; it also appears from Exhibit 1 that the parties anticipated that identical-in-substance rules would be adopted by the Board in June or July. Due to the press of other business, however, the Board had not adopted identical-in-substance rules by that date. (A proposal for public comment was issued in the R97-20 rulemaking proceeding on August 7, 1997.) While the Board anticipates that the rules will be adopted well within the one-year period set forth in Section 7.2(b) of the Act, the result is a gap period of several months during which the requirements of Subpart G have been applicable to Petitioners but the alternative compliance options added to the federal rules have not been available to them under Illinois' regulations.

Given that the Board is required under Section 22.40 of the Act to adopt rules identical in substance to the new additions to 40 CFR 258, and that the Board anticipates adoption of such rules in the relatively near future, the Board finds that requiring Petitioners to incur the additional expense of meeting other compliance options under Subpart G pending completion of the R97-20 rulemaking proceeding would result in arbitrary and unreasonable hardship for Petitioners. For the same reasons, the Board finds that this hardship is not outweighed by public interest in attaining compliance with the current regulations. Considering also that compliance with the requested variance will result in compliance with the applicable regulations upon adoption of the new rules, the Board concludes that the requested variance should be granted.

In reaching this conclusion the Board is not ruling that a pending rulemaking may, in all cases, constitute a compliance plan which will justify granting of a variance. Of special significance in this case is the "identical-in-substance" character of R97-20, and that the Board is required under Section 22.40 to adopt such rules. We do not at this time address the issue of whether any other rulemaking would suffice as a compliance plan.

The only element of the requested variance with which the Agency takes issue is the term of the variance. Petitioners initially requested the variance for a term of one year from the date of their petition, *i.e.*, through July 9, 1998. The Agency suggests, based on the term of the RCRA Subtitle D extension,<sup>1</sup> that the term should be through April 9, 1998, or thirty days after adoption of the rules proposed in R97-20, whichever comes first. As noted, Petitioners have indicated that they have no objection to this term for the variance.

Although the Board does not as a matter of course grant retroactive variances, *i.e.*, variances that begin prior to the date of the Board orders granting them, the Board has acknowledged that under certain circumstances such variances are appropriate. See DMI, Inc. v. Illinois Environmental Protection Agency (Dec. 19, 1991), PCB 90-227. Given Petitioners' reasonable expectation that the new rules would be in place prior to the date by which compliance was mandated, and the fact that compliance will be achieved with the imminent adoption of rules in R97-20, the Board concludes that it is appropriate in this case to begin the term of the variance on the date of filing of the petition. See American National Can Co. v. Illinois Environmental Protection Agency (Aug. 31, 1989), PCB 88-203; Pines Trailer Corp. v. Illinois Environmental Protection Agency (Jun. 30, 1988), PCB 88-10. Accordingly, the term of the variance will be from June 9, 1997, through April 9, 1998, or thirty days after adoption of rules in R97-20.

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<sup>1</sup> 40 CFR 258.70(c) authorizes the Director of an approved State to waive financial assurance requirements for up to one year after the effective date (*i.e.*, through April 9, 1998) for cause.

ORDER

The City of Salem, the City of Freeport, and Knox County are hereby granted a variance from 35 Ill. Adm. Code 811.700(b) and (f), and 811.706, under which they may provide financial assurance as required under 35 Ill. Adm. Code 811.Subpart G by meeting the requirements of 40 CFR 258.74(f). This compliance option is in addition to the mechanisms allowed under Sections 811.700(b) and 811.706. The term of this variance shall be from July 9, 1997, through the earlier of April 9, 1998, or the date 30 days after the adoption by the Board of rules in rulemaking proceeding R97-20.

Each petitioner shall execute a copy of a certificate of acceptance of this variance and forward that copy to counsel for the Agency. Each petitioner shall forward said copy within 14 days of the date of adoption of this order, and the certificate shall take the following form:

CERTIFICATE OF ACCEPTANCE

\_\_\_\_\_ hereby accepts and agrees to be bound by all the terms and conditions of the order of the Pollution Control Board adopted on October 16, 1997, in PCB 98-14.

\_\_\_\_\_  
Petitioner

By: \_\_\_\_\_  
Authorized Agent

\_\_\_\_\_  
Title

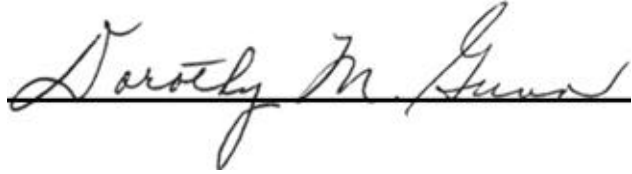
\_\_\_\_\_  
Date

IT IS SO ORDERED.

Chairman C.A. Manning abstained.

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 16th day of October 1997, by a vote of 6-0.

A handwritten signature in cursive script that reads "Dorothy M. Gunn". The signature is written in black ink and is positioned above a solid horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board