ILLINOIS POLLUTION CONTROL BOARD
September 21, 1995

COMMUNITY LANDFILL CORPORATION,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 95-137
	)	(Variance-Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent.	)	

DISSENTING OPINION (by J. Theodore Meyer):

I respectfully dissent from the majority opinion in this matter. The unreasonable hardship experienced by Community Landfill Corporation (CLC) outweighs the negligible environmental impact in this case; therefore, I would have granted CLC a 45-day prospective variance.

Relief Requested

CLC requested a variance from the requirements of 35 Ill. Adm. Code 814.104(c). (Pet. at 1.)[1] Section 814.104(c) requires a significant modification application to be filed within 48 months of the September 1990 effective date, i.e. by September 18, 1994, unless the Agency requests an earlier date. (In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills (August 17, 1990), R88-7 at 21, 114 PCB 503.) In the instant matter, the Illinois Environmental Protection Agency (Agency) requested an earlier deadline of June 15, 1993. CLC needed a variance from that deadline so that the City of Morris (Morris) and CLC could finalize the operator status of the landfill and sign a new lease before submitting a significant modification application. (Pet. at 3.)

Site Description and Operation

The Morris Community Landfill consists of two parcels: Parcel A to the east of Ashley Road and Parcel B to the west of Ashley Road. (Pet. at 1, Exhibit A.) Parcel A is approximately 55 acres in size and was used by Morris as a municipal solid waste landfill until June 1980. (PH Br. at 2.) At that time,

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[1]Hereinafter, CLC's petition shall be referred to as (Pet. at __.); the Agency's recommendation shall be referred to as (Rec. at __.); and CLC's response shall be referred to as (Reply at __.). The hearing transcript shall be referred to as (Tr. at __.); CLC's hearing exhibits shall be referred to as (CLC Ex. __.); and the Agency's hearing exhibits shall be referred to as (Agency Ex. __.). CLC's post-hearing brief shall be referred to as (PH Br. at __.); the Agency's post-hearing brief shall be referred to as (Agency PHB at __.); and CLC's post-hearing reply shall be referred to as (PH Reply at __.).

Parcel A was covered and has remained inactive since then. (Id.) Parcel B, which is approximately 64 acres in size, is operated as a municipal solid waste landfill and accepts about 590,000 cubic yards of waste per year. (Id.)

Site Leases and Permits

Morris was issued a Development Permit in 1974, and an Operating Permit in 1976 for the entire 119-acre site. (Pet. PH at 4-5.) In 1982, Morris leased the operating rights of Parcel B to CLC . (Tr. at 143; CLC Ex.6(A).). Also in 1982, CLC obtained from the Agency a modification of the landfill's operating permit to reflect this transfer of operator rights to CLC; however, this permit named CLC as the operator of the entire 119-acre site. (Rec. at 3; Attachment A.)

Despite the Agency's mischaracterization, from 1982 to the present, CLC operated Parcel B of the landfill while Morris operated Parcel A. (Pet. at 2.) In January 1989, Andrews Environmental Engineering, on behalf of CLC, submitted a Supplemental Permit Application to the development permit for the vertical expansion of the landfill. (Agency Ex. 2.) On June 5, 1989 the Agency issued Supplemental Permit 1989-005 which recorded the ownership and operational status of the site in the special conditions section as follows:

> 1. This permit is for vertical expansion of both Parcel A and B. The City of Morris is the owner and operator of Parcel A, and the owner of Parcel B. The Community Landfill Corporation is the operator of Parcel B.

(CLC Ex. 6(B).) The supplemental permit further stated:

> 22. In case of conflict between the application and the plans submitted and these special conditions, the special conditions of this permit shall govern development and operation of the subject site.

(Id. at 5.)

Lease Negotiations

In August 1992 negotiations began between CLC and Morris regarding the renewal of CLC's lease, and specifically, the re-activation and operation of Parcel A due to the anticipated closing of Parcel B. (Pet. at 10.) At hearing Mayor Feeney and City Engineer Richard Schweickert described the complex issues at stake during these negotiations. Since CLC began operating Parcel B the citizens of Morris have enjoyed many benefits, including: no charge for accepting construction and demolition materials; free trash pick-up and recycling; royalties in excess of $1,249,150; tax receipts totaling over $723,107; road and park

improvements donated by CLC; and, free assistance with snow removal. (Tr. at 152, 194-96, 201-04, PH Br. at 3.) If Morris failed to renew the lease with CLC, Morris Community Landfill would probably be closed and the citizens of Morris would lose these benefits.

Negotiations continued until November 1994, at which time Morris approved an amendment to the contract with CLC which granted CLC the leasing rights to operate Parcel A, and required CLC to obtain from the Agency the necessary operating permits for operation of Parcel A and closure of Parcel B. (PH Br. at 7.) Therefore, not until November 1994 were the rights to Parcel A conferred upon by the landowner, Morris, to CLC.

Unreasonable Hardship; Environmental Harm

In reviewing the record, it is clear that the Agency's change in position as to the operator's identity for each parcel of the landfill caused some of the hardship experienced by CLC. As mentioned, the Agency gave CLC operator status to the entire 119-acre landfill site in the 1982 operating permit, despite the fact that Morris leased to CLC only the operating rights of Parcel B. (Rec. at 3, Pet. at 2.) Yet, in 1989, in the special conditions section of a supplemental permit, the Agency described CLC as being the operator of Parcel B only, an apparent change in position. (Rec. at Ex. B.) Realizing that this language is found in a supplemental permit to the development permit, not the operating permit, I nevertheless believe that CLC was justified in thinking that it was the operator of Parcel B only.

Under the assumption that it was not the operator of parcel A, in 1982 CLC began negotiating with Morris to renew its lease. (PH Br. at 6.) Negotiations were complicated and continued for over 2 years. (Id.) It would have been an unreasonable burden for CLC to submit a significant modification application by the June 15, 1993 deadline, before knowing whether or not it had the city's permission to operate Parcel A. Although, as the Agency mentioned, anyone can apply for significant modification, that "anyone" must have some nexus with the landfill owner or operator. CLC did not have a connection to Parcel A until Morris granted it permission to operate Parcel A.

Also, CLC would have had to submit 2 substantially similar applications had it met the deadline. As mentioned in previous Board cases, requiring a petitioner to submit duplicative significant modification applications presents an unreasonable hardship. (Atkinson Landfill Company, Inc. v. IEPA, January 11, 1995, PCB 94-259; Envirite Corporation, d/b/a County Environmental of Livingston v. IEPA, (August 11, 1994) PCB 94-161; Macon County Landfill v. IEPA, (August 11, 1994) PCB 94-158; USA Waste Services, Inc. v. IEPA, (July 21, 1994) PCB 94-92.) Therefore, based on the Agency's apparent change in position as

to the operator identity of Parcel A, and CLC's subsequent reliance on the Agency's change in position, it is reasonable that CLC believed it had to obtain Morris' permission to operate Parcel A before submitting a significant modification application. Requiring CLC to submit a significant modification application for both parcels of Morris Community Landfill on or before the June 15, 1993 deadline would have been impossible and therefore imposed an unreasonable hardship on CLC.

I also find that the delay in compliance resulted in little potential for environmental harm because Parcel A was inactive during the time period in question. (CLC PHB at 2.) Therefore, since the hardship experienced by CLC, the City of Morris and the citizens of Morris, outweighs any negligible environmental harm, I find that a variance should be granted in this matter.

Retroactive Variance Relief

I agree with the majority in denying CLC a variance that would apply retroactively to June 15, 1993. "[T]he Board is inclined not 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 National Can Co. v. EPA, (August 31, 1989) PCB 88-203, 102 PCB 215.) If a party can only demonstrate that compliance would have been difficult, it has not plead a sufficient basis upon which to grant relief. (Marathon Oil Co. v. IEPA and IPCB, 242 Ill.App.3d 200, 610 N.E.2d 789 (5th Dist. 1993).)

Although the Board has granted variances with retroactive inception dates under special circumstances, including delays due though no fault of the petitioner, or where the Agency changed its view during the course of the proceeding, an important distinction in these cases was the petitioner's due diligence and timeliness of filing. (Allied Signal, Inc. v. EPA, (November 2, 1989) PCB 88-172, 105 PCB 7); Morton Chemical Div. v. EPA, (February 23, 1989) PCB 88-102, 96 PCB 169.)

Here, the Agency's change in position as to the identity of the operator of Parcel definitely factored into CLC's non-compliance with the significant modification application deadline. This confusion was not the exclusive fault of CLC. However, a 22-month lapse of time between June 15, 1993 and April 26, 1995, the filing of CLC's variance petition, suggests that some of the hardship asserted by CLC was self-imposed. I am also perplexed by the lack of an attempt to seek an extension of the deadline. By an Agency letter dated March 15, 1993, Morris was alerted to the fact that the Agency did not consider it to be the operator of parcel A, the assumption both Morris and CLC were working under during negotiations. Thus, CLC had two months in which to file an extension of the significant modification

deadline in order to clarify the issue, yet none was filed. This inactivity denotes a lack of due diligence or good faith effort in complying with the regulations. CLC's late filing of a petition for variance can also be read as an attempt to obtain a shield from enforcement, an act the Board abhors. Finally, deference must be given to the Agency's recommended denial of the variance in this matter. Therefore, I believe that, although a retroactive application of the variance in this matter is not warranted, CLC should have been given a variance until November 6, 1995 to submit its significant modification application.

For these reasons, I respectfully dissent.

J. Theodore Meyer
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above dissenting opinion was filed on the 26th day of September, 1995.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board