ILLINOIS POLLUTION CONTROL BOARD
September 21, 1995

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

MARK A. LAROSE, MARIA L. VERTUNO, OF GESSLER, HUGHES & SOCOL, LTD. APPEARED ON BEHALF OF PETITIONER.

KYLE NASH DAVIS OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (G. T. Girard):

This matter comes before the Board on a petition for variance from the requirements of 35 Ill. Adm. Code 814.104(c) filed by Community Landfill Corporation (CLC) on April 26, 1995. The Illinois Environmental Protection Agency (Agency) filed its recommendation on May 30, 1995, and CLC filed its response on June 6, 1995.

The Agency published notice of the petition on May 17, 1995. CLC waived its right to a public hearing; however, the Board received a written objection to the variance and written request for hearing filed June 13, 1995 by Jean Ann Robinson of Grundy County Office of Solid Waste Management. By its June 15, 1995 order, and pursuant to Section 37(a) of the Illinois Environmental Protection Act (Act), the Board accepted the June 13, 1995 letter and set the matter for hearing.

Hearing was held before Hearing Officer Deborah Frank on July 26, 1995 in the City of Morris, County of Grundy, Illinois. Several members of the public were present. Thereafter, the Board received CLC's post-hearing brief on August 8, 1995, the Agency's post-hearing brief on August 16, 1995, and CLC's reply brief on August 22, 1995. [1]

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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

CLC is requesting a variance from 35 Ill. Adm. Code 814.104(c), which requires submission of a significant modification permit application (SMPA) to the Agency. (Pet. at 1.) CLC is seeking retroactive relief from June 15, 1993 until 45 days after the granting of the variance.

The Board's responsibility in this matter arises from the Act, wherein the Board is charged 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)(1994).) More generally, the Board's responsibility in this matter is based on a system of checks and balances integral to Illinois environmental governance: the Board is charged with the rulemaking and principal adjudicatory functions, and the Agency is responsible for carrying out the principal administrative functions.

STATUTORY AND REGULATORY FRAMEWORK

Section 814.104 dictates that owners or operators of all existing municipal solid waste landfills permitted pursuant to Section 21(d) of the Act file a SMPA. The SMPA must demonstrate how the facility will comply with the operating requirements set forth in Part 814. Section 814.104(c) provides that a SMPA must 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 Agency requested an earlier deadline of June 15, 1993. (Rec. at Attachments D and E.) CLC asserts that a variance from that deadline is necessary as Morris and CLC were finalizing negotiations regarding the operator status of parcels A and B before submitting a SMPA. (Pet. at 3.)

In determining whether any variance is to be granted, the Act compels the Board to consider 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).)

Another feature of a variance is that it is, by its nature, a temporary reprieve from compliance with the Board's regulations. 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

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referred to as (Agency PHB at __.); and CLC's post-hearing reply shall be referred to as (PH Reply at __.).

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 a term of the variance.

BACKGROUND

Site Description and Operation

The site at issue in this case is the Morris Community Landfill in Morris, Illinois. (Pet. at 1.) It is undisputed that the entire facility is owned by the City of Morris (Morris). (Pet. at 2; Rec. at 1.) The facility 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, Parcel A was covered and has remained inactive since then. (*Id.*) Parcel B, which is approximately 64 acres in size, is operated by CLC, as a municipal solid waste landfill and accepts about 590,000 cubic yards of waste per year. (Pet at 5.)

Site Leases and Permits

Morris was issued a Development Permit in 1974 (permit 1974-22-DE), and an Operating Permit in 1976 (permit number 1974-22-OP) for the entire 119-acre site. (Agency PHB 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. (Rec. at 3; Attachment A; permit 1974-22-OP.) This permit named CLC as the operator of the entire 119-acre site. (*Id.*)

From 1987-1989, CLC also applied for and obtained local landfill siting approval and Agency permits for the expansion of Parcels A and B. (Pet. Br. at 10.)

In January 1989, Andrews Environmental Engineering, on behalf of CLC, submitted a Supplemental Permit Application to the development permit for the vertical expansion of both Parcels A and B. (Agency Ex. 2.) In the "Introduction" section, the application stated that

> The City of Morris was issued Illinois Environmental Protection Agency permit 1974-22-OP, for the operation of the Morris Community Landfill on July 30, 1976. This permit was transferred to Community Landfill Co. on July 20, 1982. The Community Landfill Co. operates the 119 acre site

> under provisions of a lease arrangement with the City. (*Id.*)

However, on June 5, 1989 the Agency issued Supplemental Permit 1989-005-SP 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.)

In August 1992 negotiations began between CLC and Morris regarding the re-activation and operation of Parcel A. (Pet. at 10.) Negotiations continued until November 1994, at which time Morris approved an amendment to the contract with CLC, granting CLC the leasing rights to operate Parcel A, and requiring CLC to obtain the necessary operating permits for operation of Parcel A and closure of Parcel B from the Agency. (PH Br. at 7.) A supplemental operating permit was issued on April 20, 1993 which indicated that the SMPA for the entire facility was due on June 15, 1993. (Rec. at Attachment E.) CLC stipulates that under this most recent supplemental permit, it was required to submit a SMPA no later than June 15, 1993. (PH Br. at 5, Agency Ex. 1(C).) Neither an appeal nor a request for an extension of this requirement was received by the Agency. (Rec. at 4.)

RELIEF SOUGHT

CLC is seeking a retroactive variance, claiming that a submission of the SMPA on or before June 15, 1993 would have been an unreasonable burden because it was not the operator at that time. (Pet. at 11.) CLC also maintains that submission of a SMPA on or before June 15, 1993 would have required submission of a second SMPA once CLC became the operator of Parcel A. (Pet. at 11-12.) CLC asserts that this duplicative effort would have been costly and unreasonable for both the Agency and CLC. (*Id.*) CLC claims that a timely submission of a SMPA for parcels A and B might even have proved inaccurate if Morris decided not to grant operator status for Parcel A to CLC after June 15, 1993. (Reply at 3.) However, negotiations were successful and CLC is now the operator of parcels A and B, and as such, seeks a retroactive variance from the deadline set forth in Section 814.104(c).

AGENCY RECOMMENDATION

The Agency sets forth several arguments opposing the requested variance. In its recommendation, the Agency first asserts that Morris is the owner and CLC the operator of the entire 119-acre landfill. (Rec. 2-3). To support its position, the Agency notes that in the 1982 modification of the operating permit, the Agency granted the right "to Community Landfill Company to operate a solid waste disposal site consisting of 119.2 acres...". (Rec. at Attachment A.) As further evidence of CLC's operator status, the Agency pointed to CLC's January 1989 application for supplemental permit, which specifically stated that "Community Landfill Co. operates the 119 acre site under provisions of a lease arrangement with the City." (Agency Ex. 2.)

The Agency also asserted that the 1989 supplemental permit to the development permit should not be read as an Agency transfer of operating rights of parcel A and B, but simply an expression of the contractual relationship between CLC and Morris. (Rec. at 3, footnote.) Therefore, the Agency believes that CLC always had the duty to submit a SMPA no later than June 15, 1993 as required by Permit No. 1993-066-SP. (Rec. at 4.) The Agency contends that CLC cannot blame contract negotiations for missing its deadline. (*Id.*)

As its second argument against granting the requested variance, the Agency placed on record a continuing objection to CLC's standing in the present matter. The Agency maintains that if CLC asserts that it was not the operator of Parcel A as of the June 15, 1993 deadline, then a necessary party to the action is missing, namely, Morris, the alleged operator of Parcel A. (Agency PHB at 15.) The Agency argues that the Board can only grant variances to those parties bound by compliance to the Illinois Environmental Protection Act (Act) and the Board's regulations. (415 ILCS 5/35(a); Agency PHB at 17.) Thus, the Agency maintains that as of the June 15, 1993 deadline, both Morris and CLC had the duty to submit a SMPA. Both Morris and CLC should be parties to a request for a variance from that deadline according to the Agency's interpretation.

Third, the Agency argues that CLC did not demonstrate the mandatory criteria necessary for granting the variance request. (Agency PHB at 20.) Specifically, the Agency maintains that CLC did not demonstrate that denial of the requested variance would result in an "arbitrary or undue hardship". (Agency PHB at 21.) Since, according to the Agency, anyone can file a SMPA on behalf of an owner or operator, CLC cannot use its negotiations with Morris as the reason for non-compliance. (*Id.* at 18-19, 22.) The Agency also contends that the only hardship suffered by CLC was self-imposed and purely economic in nature. (*Id.* at 23; Rec. at 8.) Therefore, the Agency recommends that CLC's petition be

denied, or, in the alternative, that CLC be granted a variance only from the date of the final order in this matter. (Rec. at 7.)

Finally, even if a variance was to be granted, the Agency asserts that it should not be applied retroactively. (Agency PHB at 12.) The Agency cites to numerous Board decisions[2] in support of its argument that the Board is disinclined to apply variance rulings retroactively. (*Id.*) Exceptions to this policy are made only when petitioners have shown extraordinary circumstances, a factor which the Agency states is not evident in the present matter. (*Id.*)

COMPLIANCE PLAN

CLC has been operating Parcel B of the Morris Community Landfill pursuant to Operating Permit No. 1974-22-OP and its amendments since 1982. (Pet. at 7-8.) In addition, CLC claims that the landfill is in substantial compliance with all Resource Conservation and Recovery Act Subtitle D requirements, as well as the Illinois regulations which implement them. (*Id.*)

Future compliance plans include filing an application for significant modification to expand and operate Parcel A and to close Parcel B "within 45 days after a favorable variance decision". (Pet. at 9.) CLC will also prepare and file a supplemental permit application to modify the developmental permit for Parcel A to allow operations to continue while the Agency reviews and acts on the SMPA. (*Id.*) CLC is unaware of any other course of action that would allow for compliance with Section 814.104(c). (*Id.* at 11.)

The Agency points out that CLC has been out of compliance with Section 814.104(c) since June 15, 1993, and believes the request for variance is CLC's effort "to create an 'enforcement shield'". (Rec. at 7.)

HARDSHIP

Under Section 814.401(c), CLC is required to file a SMPA by

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[2] American National Can v. IEPA, PCB 88-203, 102 PCB 215 (August 31, 1989); Minnesota Mining and Manufacturing v. IEPA, PCB 89-58, 102 PCB 203 (August 31, 1989); Pines Trailer Co. v. IEPA, PCB 88-10, 90 PCB 485 (June 30, 1988); Bloomington/Normal Sanitary District v. IEPA, PCB 87-207, 87 PCB 21 (March 10, 1988); Classic Finishing Co. v. IEPA, PCB 84-174, 70 PCB 229 (June 20, 1986); Chicago Rotoprint Co v. IEPA, PCB 84-151, 63 PCB 91(February 20, 1985); Deere & Co. v. IEPA, PCB 92-92; Midwest Solvent Co. v. IEPA, PCB 84-5, 57 PCB 369 (April 5, 1984); Town & Country Gas & Food Mart v. IEPA, PCB 95-97.

September 18, 1994, unless the Agency specifies an earlier date. The Agency in this matter set an earlier date of June 15, 1993. (Rec. at Attachment D.) CLC contends that submitting a SMPA was impossible until Morris granted CLC the ability to operate Parcel A. CLC further asserts that the variance would also avoid wasting the Agency's resources and time in needlessly reviewing duplicate applications. (Pet. at 9-10.)

The Agency believes that any hardship that petitioner may experience would be self-imposed and economic in nature which does not fall within the category of "arbitrary and unreasonable" as contemplated by the Act. (Rec. at 5.) The Agency states:

> It appears uncontroverted that petitioner knew of its obligations to comply with the Board's regulations, and voluntarily elected to forgo compliance. . . Petitioner chose not to comply.

(Rec. at 5-6.)

ENVIRONMENTAL IMPACT

CLC maintains that during the term of the variance, continued operations will have no impact on the environment; and that the variance is consistent with federal law. (Pet. at 10, 12.)

CONSISTENCY WITH FEDERAL LAW

Although agreeing that no issues exist regarding compliance with federal law, the Agency stated that a 27-month failure to comply with the filing date created a negative environmental impact because the Agency was not updated on matters critical to inspecting the landfill. (Rec. at 7-8.)

DISCUSSION

The Board first notes the issue raised by the Agency concerning the status of CLC as operator of Parcel A in 1993. The Board need not make a decision regarding the status of Parcel A to determine the merits of this case. While the record does not clearly demonstrate that CLC was the operator for Parcel A in 1993, the record does undisputedly show CLC was the operator of Parcel B. Regardless of the status of Parcel A, CLC admits it was responsible for submitting a SMPA by June 15, 1993 for Parcel B. (PH Br. at 5.)

Next, the Board will address CLC's request for a retroactive variance in this case. As the Agency correctly stated in its post-hearing brief, the Board generally renders variances effective from the date of the Board order granting the variance. (Modine Manufacturing Corp. (Modine), PCB 88-25, 124 PCB 163

(July 25, 1991).) The Board has long-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 a violation is a ground for excusing it." (Decatur SD, PCB 71-037, 1 PCB 360 (March 22, 1971).) Further, "the 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, PCB 88-203, 102 PCB 215 (August 31, 1989). *See also* City of Minonk v. IEPA, PCB 89-140 (April 26, 1990).) It is neither the intent of the Act, nor the nature of a variance to legitimize past failure to comply with rules and regulations. (Modine 124 PCB 166-67.)

The Board has on limited occasions granted variances with retroactive inception dates under special circumstances, which include: where the delay occurred through no fault of the petitioner (Allied Signal, Inc. v. EPA, PCB 88-172, 105 PCB 7, (November 2, 1989); where there was confusion over an interpretation of federal rules, and where the Agency changed its view during the course of the proceeding (Morton Chemical Div. v. EPA, PCB 88-102, 96 PCB 169 (February 23, 1989).) An important caveat to the "special circumstances" exception is the Board's emphasis on the petitioner's due diligence and timeliness of filing which are primary factors in considering special circumstances. (Modine, 124 PCB at 166.)

The 22-month lapse of time between the June 15, 1993 SMPA deadline and the April 26, 1995 filing of CLC's variance petition suggests that the hardship asserted by CLC was self-imposed. The Board also observes that CLC did not attempt to seek an extension of the deadline for filing a SMPA which further persuades the Board that CLC is suffering a self-imposed hardship. CLC and Morris received a letter from the Agency in October of 1992 which indicated that the SMPA deadline was June 15, 1993. (Rec. at Attachment D.) This was followed by a supplemental operating permit in April of 1993 which also indicated that the SMPA was due by June 15, 1993. 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, which the Board has consistently found to be an inappropriate use of the variance process. (Sauget v. IEPA, PCB 88-18, 93 PCB 283 (November 3, 1988); Quaker Oat v. IEPA, PCB 83-107, 57 PCB 370 (January 12, 1984).)

CLC attempts to analogize its situation to the one in Atkinson Landfill Company, Inc. v. IEPA, PCB 94-259 (January 11, 1995). However, the Board finds important distinctions between the instant case and the circumstances that led the Board to grant a variance to the Atkinson Landfill Company, Inc.

(Atkinson). First, Atkinson filed its request for variance two days after the September 18, 1994 deadline for significant modification applications, thus demonstrating due diligence. (Atkinson at 1.) CLC filed its request on April 26, 1995, over 27 months past the deadline. (Pet. at 1.) CLC attempts to rely on the completion of lease negotiations to explain the lateness of its filing. However, the record clearly demonstrates CLC's intent to use Parcel A in the late 1980s. In fact, the record contains evidence that CLC applied for and obtained local siting approval and Agency permits for the expansion of Parcel A in the 1987-1989. (Pet. at 10.) The local siting process is a lengthy, expensive process and shows that CLC made an extensive investment in the possible operation of Parcel A well before the 1993 deadline to submit the SMPA.

Secondly, Atkinson sought a 16-month variance while Atkinson was negotiating and applying for the necessary permits and siting approvals. CLC requests a 27-month variance from the Agency-imposed June 15, 1993, SMPA deadline, only after the completion of negotiations and then cites those same negotiations as the reason a variance is needed. The Board thus believes that CLC's lack of due diligence and late filing are significant distinguishing features of the present case which justify a denial of the requested variance. Indeed, CLC's situation is remarkably similar to those cases in which we denied retroactive application of a variance because of lethargic attempts at compliance: the filing of a variance petition to avoid enforcement; and a late filing of the petition. (*See* Quaker Oat, PCB 83-107, 57 PCB 370 (January 12, 1984); Hansen STE, PCB 83-240, 62 PCB 389 (January 24, 1985).) Therefore, after carefully weighing the record in this case, and past Board precedent, the Board finds that a retroactive variance in this case is not warranted.

The Board further finds that CLC has failed to establish that a hardship exists which would warrant variance relief. CLC's asserted hardship was that it would have been forced to file a SMPA for parcel B and then later file a subsequent and superseding SMPA for both parcels. (Pet. at 11.) CLC stated that this course of action would have ▒substantially increased engineering fees, would have wasted the time and effort of CLC and its engineers▒ and would have taken additional resources of the Agency. (Pet. at 11-12.) However, because CLC chose to ignore the June 15, 1993, deadline, only one SMPA is now necessary and, thus, the stated hardship no longer exists.

Further, the Board notes that the record indicates that in the late 1980's CLC had received approval for expansion of Parcel A. (Pet. at 10.) This conclusively indicates that CLC was planning to operate Parcel A. Therefore CLC was in a position to know that it would need to submit a SMPA for both parcels prior to June 15, 1993. CLC chose not to ask for an extension of time

to file the SMPA in a timely manner. Thus, the Board finds that any hardship which may now exist is self-imposed. (See Decatur SD, PCB 71-037, 1 PCB 360 (March 22, 1971); American National Can Co. v. EPA, PCB 88-203, 102 PCB 215 (August 31, 1989); and City of Minonk v. IEPA, PCB 89-140 (April 26, 1990).)

For the foregoing reasons, the Board is unpersuaded that the variance in this matter is warranted. Therefore, the Board denies the variance.

CONCLUSION

Based upon the record, the Board finds that CLC has not demonstrated that an arbitrary and unreasonable hardship exists which warrants the granting of a variance in this matter. Therefore, the Board denies CLC's request for variance

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

ORDER

Community Landfill Corporation (CLC) request for variance is hereby denied.

Board Member J. Theodore Meyer dissents.

IT IS SO ORDERED.

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 Rule of the Supreme Court of Illinois establish filing requirements. (*See also* 35 Ill. Adm. Code 101.246, Motions for Reconsideration.)

I, Dorothy Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 21st day of September, 1995, by a vote of 6-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board