

ILLINOIS POLLUTION CONTROL BOARD
January 11, 1995

ATKINSON LANDFILL)	
COMPANY, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 94-259
)	(Variance)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

LEE CUNNINGHAM, GARDNER, CARTON & DOUGLAS APPEARED ON BEHALF OF PETITIONER;

JOHN J. KIM APPEARED ON BEHALF OF RESPONDENT.

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

This matter comes before the Board upon a petition for variance filed by Atkinson Landfill Company, Inc. (ALC) on September 20, 1994. ALC requests an extension of time from the requirement that it file an application for significant modification of the operating permit¹ for Henry County Landfill #2 (Landfill #2). The request is for the period from September 18, 1994 to January 18, 1996.

The Board's responsibility in this matter arises from the Environmental Protection Act (Act) (415 ILCS 5/1 et seq. (1992).) The Board is charged there with the responsibility of granting variance from Board regulations whenever it is found that immediate compliance with the regulations would impose an arbitrary or unreasonable hardship upon the petitioner. (415 ILCS 5/35(a).) The Illinois Environmental Protection Agency (Agency) is required to appear in hearings on variance petitions. (415 ILCS 5/4(f).) The Agency is also charged, among other matters, 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).)

ALC's September 20, 1994 petition contained a waiver of hearing request. On October 13, 1994 Carolyn Van Opdorp filed with the Board a written objection to grant of variance. Responding to the objection, the Board exercised its discretion pursuant to Section 37(a) of the Act (415 ILCS 537(a)) and by

¹ The requirement is found in the Board's solid waste management regulations at 35 Ill. Adm. Code 814.104(c).

Board order of October 20, 1994 set the matter for public hearing. The public hearing was held on December 9, 1994 in Cambridge, Illinois. The parties and members of the public attended the hearing.

The Agency filed its recommendation and response to petition for variance on October 20, 1994, recommending that the variance be granted with reservation.

ALC seeks a sixteen-month variance from the requirements of 35 Ill. Adm. Code 814.104(c). Section 814.104 requires owners or operators of all landfills permitted pursuant to Section 21(d) of the Act to file an application for significant modification of their permits for existing municipal solid waste landfill units. This application must demonstrate how the facility will comply with the operating requirements set forth in Part 814. Section 814.104(c) requires that the application be filed within 48 months of the September 1990 effective date of Part 814 of the Illinois Administrative Code, (*i.e.*, by September 18, 1994). ALC's Landfill #2 is permitted pursuant to Section 21(d) of the Act and is therefore subject to the Section 814.104(c) deadline.

For the reasons set forth below, we grant the requested variance.

BACKGROUND

Landfill #2 is located on a site of approximately 31.2 acres, 1200 feet east of Atkinson Road and immediately north of U.S. Route 80, in the NW 1/4 of section 2 T16N R4E 4th P.M. (Pet. at 2.)² Landfill #2 is surrounded by unreclaimed strip mines and a variety of other land uses including agricultural and light commercial lands; a trailer park and a few homes which are located within one-half mile of the landfill. (*Id.*)

Landfill #2 was originally owned by the City of Atkinson and began operations as a municipal solid waste landfill in 1980. ALC purchased Landfill #2 and approximately one hundred adjoining acres in 1992. (Pet. at 2.) Landfill #2 remains permitted to receive municipal solid waste and accepts between 200 and 300 cubic yards per day or between 73,000 and 109,500 gate cubic yards per year of waste. (*Id.*) As of the date of filing of the petition, ALC claimed that Landfill #2 was expected to reach its currently permitted capacity as early as January 1, 1995. (*Id.*)

² Petitioner Atkinson Landfill Company, Inc.'s petition is cited in the form "Pet. at x."; citation to the recommendation submitted by the Agency is in the form "Rec. at x."; and citation to the hearing transcript is in the form "Tr. at x.".

However, ALC believes through reconfiguration of Landfill #2 that the life of the permitted site could be extended. (Id.)

Accordingly, ALC hopes to expand Landfill #2 both horizontally and vertically. (Pet. at 2.) Local siting approval³, pursuant to Section 39.2 of the Act (415 ILCS 5/39.2), will be necessary before a permit for this expansion can be granted.

As of the date of filing of the petition, ALC indicated that it intended to file the siting approval request in November or December 1994. (Pet at 2.) However, there is no indication in the hearing record that the siting approval request had been filed as of the date of hearing (December 9, 1994), apparently due to delay in ALC's obtaining annexation of the necessary lands. (Tr. at 17.)

STATUTORY 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 regulation at issue would pose an arbitrary or unreasonable hardship. (415 ILCS 5/35(a) (1994).) Furthermore, the burden is on petitioner to show that its claimed hardship outweighs the public interest in attaining immediate compliance with regulations designed to protect the public. (Willowbrook Motel v. Pollution Control Board (1st Dist. 1977), 135 Ill.App.3d 343, 481 N.E.2d 1032). Only with such a showing can the claimed hardship rise to the level of arbitrary or unreasonable hardship. (We Shred It, Inc. v. Illinois Environmental Protection Agency (November 18, 1993) PCB 92-180 at 3.)

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. Pollution Control Board (1977), 67 Ill.2d 276, 367 N.E.2d 684.) Accordingly, except in certain special circumstances, a variance petitioner is required as a condition to the grant of a variance, to commit to a plan which is reasonably calculated to achieve compliance within the term of the variance.

³ This siting approval process is commonly known as the "SB-172" process after the Senate Bill in which it was originally promulgated.

HARDSHIP

Pursuant to the Board regulations at 35 Ill. Adm. Code 814.104(c), ALC was required to file its application for significant modification by September 18, 1994. It is from this requirement that ALC seeks variance. The purpose of the variance is to allow ALC to obtain approval for an expanded facility prior to filing the significant modification application. (Pet. at 4.)

ALC claims that unforeseen ownership complications which arose regarding the annexation of the surrounding properties have delayed its ability to proceed with the necessary local site approval process. (Pet. at 4.) According to ALC, when it purchased the landfill and the surrounding properties in November 1992, the existing landfill site was permitted for development, but only a portion of the site was permitted for operation. (Id.) Additionally, the existing landfill site was located within the corporate limits, while the surrounding property was located in unincorporated Henry County. (Id.) ALC and the City of Atkinson (City) contemplated various annexations to the City and subsequent expansions, vertically and horizontally, of the landfill. (Id.) According to ALC, it was these unforeseen complications in the annexation of the properties which have delayed the ability to proceed with the necessary local site approval process. (Id.) ALC claims it therefore has been delayed in making a complete application for significant modification. (Id.) However, ALC believes that the City is now prepared to proceed with and complete the annexation, enabling ALC to complete an application for local siting approval for the proposed expansion by early 1995. (Pet. at 4,5; Tr. at 17.)

ALC seeks a sixteen-month (16) variance from the September 18, 1994 filing deadline in order to allow it to complete the siting process for the proposed expansion prior to filing its application for significant modification, thus avoiding the duplicative efforts of filing a second application. ALC asserts that the variance would also avoid wasting the Agency's resources and time in needlessly reviewing a second application that would become wholly obsolete upon the filing of the significant modification application for the expanded facility. (Pet. at 5.) The Agency acknowledges the duplicative nature of potentially filing two significant modification applications pursuant to 35 Ill. Adm. Code 814.104(c) and 814.201 for the same facility depending upon the local government's decision in reviewing ALC's application for local siting approval. (Rec. at 3.) The Agency also recognizes the arduous task imposed on both the petitioner and the Agency in preparing and reviewing the two applications which would ultimately serve the same purpose. (Id.)

CONSISTENCY WITH FEDERAL LAW; ENVIRONMENTAL IMPACT

ALC asserts that its existing Landfill #2 is in substantial compliance with all Resource Conservation and Recovery Act Subtitle D requirements as set forth in 40 C.F.R. Part 258, as well as with the Illinois regulations implementing them. (Pet. at 3.) Supporting this assertion is the Agency's issuance to ALC of Interim Permit #1993-425-IN on October 1, 1993 for the existing Landfill #2. (Id.)

Additionally, ALC asserts that the variance will have no adverse environmental impact, since it seeks only a variance from the deadline for the submission of information rather than a deadline for the implementation of any requirements. (Pet. at 5.) ALC contends that it is committed to upgrading operations at the site relative to practices used prior to ALC's purchase of the site. (Id. at 5, 6.) The Agency agrees that the variance requested by ALC would not be inconsistent with applicable federal law. (Rec. at 4.)

AGENCY RECOMMENDATION

The Agency believes that the time period requested by petitioner, from September 18, 1994 to January 18, 1996, is necessary and commensurate with the steps yet to be taken regarding application for local siting approval. (Rec. at 4.) The Agency conditions that belief and its recommendation with the position that ALC's facility has experienced compliance difficulties in the past. (Id.) These difficulties have resulted, inter alia, in the issuance of several administrative citations to ALC. (Id.) However, the Agency acknowledges that the extension of time requested, sixteen months, is necessary. (Id.) The Agency asserts that its "position is not tantamount to approval of ALC's petition, it also is not an objection to the relief requested" by ALC (Id.). Therefore the Agency recommends, with reservation, that ALC be granted a variance from Section 814.104(c) for a period of sixteen months commencing on September 18, 1994. (Id.)

PUBLIC PARTICIPATION

The hearing in this matter was attended by members of the public who posed questions and offered statements for the record. (See Tr. at 29-40.) Among concerns raised were whether the facility had a licensed operator and why that operator could pick up trash on Monday and Fridays mornings and not be at the landfill. (Tr. at 25.) The commenters suggested that there was an inadequate amount of time to respond to the Agency's publication of the legal notice in the local newspaper. (Tr. at 26.) A question of what specific violations were incurred at the landfill prior to ALC's taking over the facility was raised. (Tr. at 26.) The commenters stated that the City had already

denied the annexation request earlier in the week before the hearing. (Tr. at 27.)

Finally, the commenters expressed concern that the landfill's proximity to wetlands, small ponds, and larger lakes makes such a long time period, 16 months, too long to project if anything would go wrong in the environment. (Tr. at 40.) They are especially concerned that the Board consider the landfill's proximity to the surrounding wildlife and land.

CONCLUSION

The Board will grant ALC a variance from 35 Ill. Adm. 814.104(c) for a period of sixteen months, from September 18, 1994 to January 18, 1996. Based upon the record, the Board finds that requiring ALC to comply with the Section 814.104(c) deadline for filing its application for significant modification of Landfill #2 would impose an arbitrary or unreasonable hardship on ALC. The Board finds that the granting of the variance will not result in an adverse impact on the environment.

As discussed above, a variance is a temporary reprieve from the Board's regulations for which a petitioner agrees to commit to a plan to achieve compliance within the term of the variance. ALC has agreed to submit a complete permit application, known as an application for significant permit modification, satisfying Section 830.104 and thereby demonstrating compliance with Section 830.302 upon expiration of the variance.

Requiring ALC to file an application prior to completion of the siting process for its proposed expansion would result in ALC subsequently filing a second, largely duplicative application, and would unnecessarily waste the time and resources of ALC and the Agency. ALC accordingly will be granted the requested sixteen-month variance from the deadline set forth in 35 Ill. Adm. Code 814.104(c). ALC will now have until January 18, 1996 to file its application for significant modification, at which time it must demonstrate facility-wide compliance with Section 814.302.

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

ORDER

Atkinson Landfill #2 Company, Inc. (ALC) is hereby granted a variance from 35 Ill. Adm. Code 814.104(c). This variance commences on September 18, 1994 and terminates on January 18, 1996.

IT IS SO ORDERED.

If Petitioner chooses to accept this variance subject to the above order, within 45 days of the date of this order Petitioner shall execute and forward to:

John J. Kim
 Division of Legal Counsel
 Illinois Environmental Protection Agency
 2200 Churchill Road
 Post Office Box 19276
 Springfield, Illinois 62794-9276

a Certification of Acceptance and Agreement to be bound to all terms and conditions of this variance. The 45-day period shall be held in abeyance during any period that this matter is being 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 variance was granted. The form of said Certification is as follows:

CERTIFICATION

I (We), _____,
 hereby accept and agree to be bound by all terms and conditions of the order of the Pollution Control Board in PCB 94-259, January 11, 1995.

 Petitioner


 Authorized Agent

 Title

 Date

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (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 11th day of January, 1995 by a vote of 6-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board