

ILLINOIS POLLUTION CONTROL BOARD  
February 16, 1995

THE UNO-VEN COMPANY, )  
 )  
 Petitioner, )  
 )  
 v. ) PCB 94-282  
 ) (Variance - Air)  
 ILLINOIS ENVIRONMENTAL )  
 PROTECTION AGENCY, )  
 )  
 Respondent. )

KIRK M. MINCKLER OF SONNENSCHNEIN, NATH & ROSENTHAL APPEARED ON BEHALF OF PETITIONER;

BONNIE R. SAWYER 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 The UNO-VEN Company (UNO-VEN) on October 4, 1994. UNO-VEN seeks variance from the Stage II vapor recovery (Stage II) compliance date of November 1, 1994 found at 35 Ill. Adm. Code 218.586(d)(3). The term of the requested variance is from November 1, 1994 to July 1, 1995.

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 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).)

The Agency filed its variance recommendation (Rec.) on November 17, 1994. The Agency recommends grant of the variance with conditions.

Hearing was held on January 18, 1995 before hearing officer June C. Edvenson. UNO-VEN presented the testimony of Gail Ann Bordy, Retail Sales Manager for The UNO-VEN Company. The Agency presented testimony of Terry A. Sweitzer, Manager of the Agency's Air Monitoring Section and Administrator of the Illinois Stage II Vapor Recovery Program.

As presented below, the Board finds that UNO-VEN has met its burden of demonstrating that immediate compliance with 35 Ill. Adm. Code 218.586(d)(3) would impose an arbitrary or unreasonable hardship. Accordingly, the variance request will be granted subject to conditions as discussed below.

#### BACKGROUND

UNO-VEN is an Illinois general partnership that owns twenty-three service stations in Illinois. (Petition at p. 2.) All but one of these stations is in compliance with the Stage II requirements. (Rec. at ¶6.) That one station, which is the subject matter of the instant variance request, is located at One Roosevelt Road, Villa Park, Illinois. UNO-VEN intends to reconstruct the Villa Park facility, and requests that installation of Stage II vapor recovery equipment not be required prior to the reconstruction.

35 Ill. Adm. Code 218.586 establishes air emission control requirements applicable to motor vehicle fueling operations (MVFO) located in the Chicago ozone nonattainment area. The purpose of the requirements is to limit emissions of gasoline vapors into the air. Gasoline vapors are volatile organic materials (VOM) that contribute to the formation of ozone in the lower atmosphere. Limiting emissions of VOM is one of the methods for controlling unwanted ozone formation.

Among the MVFO regulations is a requirement that certain MVFOs install Stage II vapor recovery equipment no later than November 1, 1994. (Section 218.586(d)(3).) It is uncontested that this provision applies to UNO-VEN's Villa Park facility.

Stage II vapor recovery equipment is designed to capture VOM emissions during the fueling of vehicle tanks. The emissions consist of gasoline vapors displaced from the motor vehicle tank by dispensed liquid gasoline as the tank is filled. The Stage II equipment captures vapors that exit the vehicle's fuel fillpipe, thereby preventing the escape of the vapors into the atmosphere. The captured vapors flow through a vapor passage in the fuel pump nozzle into a vapor hose and then through vapor lines to the underground storage tank.

#### HARDSHIP AND ENVIRONMENTAL IMPACT

UNO-VEN contends that requiring immediate installation of the Stage II equipment would cause a financial hardship. UNO-VEN has entered into a pre-annexation agreement (see Attachment to Petition) with officials of the Village of Villa Park and the City of Oakbrook Terrace. Under the terms of that agreement, UNO-VEN will close the facility at issue. The existing station will then be razed and a new station will be rebuilt at the

facility as part of a City of Oakbrook Terrace development. (Petition at p. 3.) Closing of the existing station will occur no later than April 1, 1995.

UNO-VEN contends that installing Stage II equipment prior to the closing and razing of the existing station would cause UNO-VEN to lose its total investment in that Stage II system. (Petition at p. 4.) UNO-VEN estimates the cost of the Stage II system to be \$55,000. (Id.) The Agency agrees with this cost estimate. (Rec. at ¶13.)

UNO-VEN contends that the environmental harm that would be occasioned by delaying installation of the Stage II equipment would be not significant. (Petition at p. 4-5.) UNO-VEN notes that facility will be closed before the beginning of the 1995 ozone season<sup>1</sup>. (Id.)

The Agency observes that if the Villa Park facility is closed on April 1, 1995 and only reopened after Stage II equipment is installed, the environmental impact resulting from granting this variance should be relatively insignificant. (Rec. at ¶12.) The Agency also observes that because there would be no VOM emissions during the ozone season, attainment of the National Ambient Air Quality Standard for ozone in the Chicago area should not be notably hampered by grant of the variance. (Rec. at ¶16.)

#### CERTIFICATE OF ACCEPTANCE

The Agency requests, should the Board grant the instant variance, that the Board use a new form of the certificate of acceptance. (Rec. at ¶19D.) The Board believes that this request provides the opportunity for the Board to address general matters regarding the certificate of acceptance.

Use of the certificate of acceptance as a standard element in the issuance of a variance arose in response to the appellate court's decision in Citizens Utilities Company v. IPCB (1972, 9 Ill.App. 3d 158, 289 N.E.2d 642). The court noted that when the Board issues a variance, it may statutorily impose such conditions as policies of the Act may require. The court also noted, however, that the conditions only attach to grant of variance, and are not binding until the petitioner accepts the variance upon the terms imposed. The certificate of acceptance was thereafter adopted by the Board, in cooperation with the Agency, as the accepted method of documenting that the petitioner accepted and agreed to be bound by the terms of the variance.

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<sup>1</sup> The ozone season is defined by the United States Environmental Protection Agency as the annual period from April 1 through October 31.

Over time, various "tunings" of the form and function of the certificate of acceptance have been undertaken. Among functional tunings has been placement by the Board of instructions regarding petitioner's execution of the certificate of acceptance outside the body of the variance order. At times in the past instructions on executing the certificate of acceptance have been inserted as an actual condition of the grant of variance<sup>2</sup>. This latter practice was objectional because, whereas compliance with the conditions (terms) of the variance is necessary as a matter of law once the variance is accepted, agreement to be bound by the terms of the variance is optional. It is therefore inappropriate to list the certificate of acceptance as a condition (term) of the Board's grant of a variance.

In its instant variance recommendation the Agency suggests not only that the Board issue a full order with conditions, but that the Board repeat the full language of that order within the body of the certificate of acceptance. (Rec. at ¶20 and Exhibit 1; Tr. at p. 17-18.) The Board declines the suggestion of repeating the variance language within the certificate of acceptance. A Board order is enforceable on its own. Attempting to repeat the language of the order in a second document presents the opportunity for a separate, conflicting statement of the Board order. It is a risk that is unnecessary and unwise to assume.

#### CONCLUSION

The Board agrees with the Agency that UNO-VEN has demonstrated that immediate installation of the Stage II equipment would constitute a hardship for UNO-VEN. The Board also finds that, so long as the installation is undertaken expeditiously, the accumulated environmental harm will be small and that the hardship thereby rises to the level of arbitrary or unreasonable hardship. On this basis, the Board will grant the requested relief with conditions.

The principal conditions are that UNO-VEN will close its Villa Park facility on or before April 1, 1995, and that it will not reopen the station to dispense gasoline until Stage II vapor recovery equipment is operational. These conditions have been requested by the Agency (Rec. at ¶19), and agreed to by UNO-VEN (Tr. at 11-12). The Board finds that these conditions are necessary.

There are two additional issues regarding the term of the variance. As regards the start of the variance, the Board notes

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<sup>2</sup> Agency variance recommendations, including the recommendation in the instant matter, still often follow this older practice.

that it is well established practice that the term of a variance begins on the date the Board renders its decision, unless unusual or extraordinary circumstances are shown. (See, e.g., DMI, Inc. v. IEPA, PCB 90-227, 128 PCB 245-249, December 19, 1991.) Here UNO-VEN requests that start of the variance be retroactive to November 1, 1994. In view of UNO-VEN's good record of achieving compliance at its other facilities, the unique conditions at the Villa Park facility, and absence of emissions during the ozone season, the Board finds that the instant circumstances are sufficiently unusual to warrant the short retroactive start of the variance requested by UNO-VEN and recommended by the Agency.

As regards the termination of the variance, the Board notes that UNO-VEN initially requested that the variance extend to July 1, 1995 (Petition at p. 2.) Subsequently UNO-VEN has accepted the Agency's recommendation that the variance be for five months and that UNO-VEN not reopen the facility after April 1, 1995 unless Stage II equipment has been installed. (Tr. at p. 11-12.) Under these circumstances, the Board believes that the variance itself need not extend beyond April 1, 1995.

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

#### ORDER

The UNO-VEN Company is hereby granted variance from 35 Ill. Adm. Code 218.586 for its facility located at One Roosevelt Road, Villa Park, Illinois, subject to the following conditions:

- 1) The term of the variance is for the five-month period from November 1, 1994 to April 1, 1995.
- 2) UNO-VEN shall close the facility at issue on or before April 1, 1995. UNO-VEN may not reopen the facility for the purposes of dispensing gasoline until Stage II vapor recovery equipment is installed and operational.
- 3) In the event that UNO-VEN is unable to pursue the reconstruction plans outlined in its petition in this matter, UNO-VEN shall install Stage II vapor recovery equipment at the facility in question within 30 days of the abandonment of the reconstruction plans, and in no case may UNO-VEN dispense gasoline after April 1, 1995 unless the Stage II vapor recovery equipment has been installed and is operational.

- 4) Petitioner shall notify the Illinois Environmental Protection Agency of the installation of any Stage II vapor recovery with 14 days of the installation. Notice must include the address of the facility and be by letter posted to:

Mr. Terry Sweitzer, P.E.  
Manager, Air Monitoring Section  
Illinois Environmental Protection Agency  
Division of Air Pollution Control  
P.O. Box 19726  
Springfield, Illinois 62794-9276

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:

Bonnie R. Sawyer  
Division of Legal Counsel  
Illinois Environmental Protection Agency  
P.O. Box 19726  
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 94-282,  
February 16, 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 16<sup>th</sup> day of February, 1995 by a vote of 7-0.

  
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Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board