

ILLINOIS POLLUTION CONTROL BOARD  
February 16, 1995

MUKHTIAR SINGH, )  
 )  
Petitioner, )  
 )  
v. ) PCB 94-314  
 ) (Variance-Air)  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
 )  
Respondent. )

WALTER ZARNECKI APPEARED ON BEHALF OF THE PETITIONERS;

BONNIE R. SAWYER APPEARED ON BEHALF OF RESPONDENT;

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

On October 31, 1994, Mukhtiar Singh filed a petition for variance seeking relief from 35 Ill. Adm. Code 218.586 of the Board's air regulations relating to Stage II gasoline vapor recovery. The petitioner is requesting this variance for petitioner's retail gasoline dispensary at West Irving Park Road in Hanover Park, Illinois. On December 20, 1994, the Illinois Environmental Protection Agency (Agency) filed a recommendation that the Board grant the requested variance with conditions. On January 11, 1995, a hearing was held in Chicago, Illinois before Board hearing officer June Edvenson. No members of the public were present at the hearing.

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 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).)

As presented below, the Board finds that petitioner has met its burden of demonstrating that immediate compliance with the Act or Board regulations at issue would result in an arbitrary or unreasonable hardship upon petitioner. Accordingly, the variance request will be granted.

REGULATORY FRAMEWORK

The Clean Air Act Amendments of 1990 required that owners or operators of gasoline dispensing facilities located in moderate

or above nonattainment areas install and operate gasoline vehicle refueling vapor recovery systems (Stage II systems). (Pet. at 2.)<sup>1</sup> The Board acted to adopt regulations which required installation of Stage II systems on August 13, 1992. (See, In the Matter of: Stage II Gasoline Vapor Recovery Rules Amendments to 35 Ill. Adm. Code 215, 218, and 219, R91-30, 135 PCB 415 (August 13, 1992).)

Section 218.586 requires the installation of Stage II systems for "any gasoline dispensing operation which dispenses an average monthly volume of more than 10,000 gallons of motor vehicle fuel per month". (35 Ill. Adm. Code 218.586(b).) Operations subject to the requirements of Section 218.586 shall demonstrate compliance according to the schedule set forth in Section 218.586(d). Section 218.586(d)(3) provides:

Operations that commenced construction before November 1, 1990, and dispense an average monthly volume of less than 100,000 gallons of motor fuel per month must comply by November 1, 1994.

#### REQUESTED RELIEF AND HARDSHIP

Petitioner's operation "commenced construction before November 1, 1990, and dispenses an average monthly volume of less than 100,000 gallons of motor fuel per month". (Pet. at 2.) Therefore, petitioner was required to demonstrate compliance by November 1, 1994. Petitioner is requesting a six-month variance until May 1, 1995, from the Board's Stage II vapor recovery regulations for its facility in Hanover Park, Illinois. (Pet. at 2; Rec. at 2.)

The facility employs two people and is located at the intersection of Barrington Road and Kingsbury Road in a mixed residential and commercial area. (Pet. at 2.) The petitioner states that the facility dispenses an average of 35,000 gallons of gasoline per month. (Pet. at 2-3.) Petitioner estimates that the uncontrolled emission from the facility would be approximately 290 pounds of VOM [volatile organic material] per month.<sup>2</sup> (Pet. at 3.)

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<sup>1</sup> The petition will be cited as "Pet. at \_\_\_"; the Agency's recommendation will be cited as "Rec. at \_\_\_"; and the transcript will be cited as "Tr. at \_\_\_".

<sup>2</sup> The petition is inconsistent in that petitioner also asserts that the uncontrolled VOM emissions from its facility are estimated at 400 pounds of VOM per month. (Pet. at 3, points 7 and 11.)

Prior to November 1, 1994, Petitioner retained an environmental engineering firm to install the Stage II system and to perform a limited soil characterization study if required. (Pet. at 3.) The estimated cost for installation of the Stage II system was \$40,000 with an additional \$15,000 estimated for soil remediation if contamination was discovered. (*Id.*) The petitioner is a small business with annual sales of about \$450,000 and a net profit of about \$30,000. (Pet. at 3.) The petitioner asserts that it will be necessary to seek financial assistance to complete the installation of the Stage II system. (*Id.*) The procedure to obtain these loans "is likely to take 60 to 90 days, i.e. around January of February, 1995", according to petitioner. (Pet. at 3.) At that time of year the petitioner argues that installation would be difficult if not impossible due to inclement weather. (*Id.*) The petitioner also maintains that the contractors which install the Stage II systems are very busy and need "adequate lead time". (Pet. at 3.)

The Agency agrees that immediate compliance with Section 218.586 imposes an arbitrary or unreasonable hardship on the petitioner. (Rec. at 4-5.) Further, Terry Sweitzer, testifying on behalf of the Agency, stated that he had reviewed the petition and the supporting documents submitted by the petitioner. (Tr. at 10.) Mr. Sweitzer testified that "these documents demonstrate that the petitioner would suffer a hardship if required to install a Stage II vapor recovery system by the required date of November 1st, 1994". (Tr. at 10.)

#### ENVIRONMENTAL IMPACT

Petitioner has asserted conflicting estimates for VOM emissions from its facility; however, the Agency estimates the emissions from the facility to be 409.5 pounds of VOM per month. (Pet. at 3; Rec. at 2-3.) Regardless of the level of emissions from the petitioner's facility, petitioner asserts that the increased emissions from the facility would only be approximately .00007% of the total VOM emissions per day in the Chicago area. (Pet. at 4.) Therefore, petitioner argues the increased air emissions during the requested period for the variance would have "a negligible impact on the Chicago area's ozone nonattainment status". (Pet. at 4.)

The Agency disagrees with the calculations of the percentage of total VOM emissions per day set forth by petitioner. (Rec. at 4.) The Agency estimates that the emissions from the facility would be .002 % of the total VOM emissions per day in the Chicago area. (*Id.*) The Agency states that while the emissions from this facility are not significant when compared to the total Chicago area VOM emissions; "the ozone problem in Chicago is largely attributable to numerous smaller sources that, when aggregated, add up to significant emissions". (Rec. at 4.) Therefore, the Agency is recommending that the variance be

granted with the condition that the variance will not extend into the 1995 ozone season. (Rec. at 4.)

#### CONSISTENCY WITH FEDERAL LAW

Petitioner states that the requested relief is consistent with the Clean Air Act. (Pet. at 4.) The Agency states that "allowing the conditional relief presented by the Agency in this Recommendation is not inconsistent with the CAA because there will be no VOM emissions during the ozone season". (Rec. at 5.)

#### CONCLUSION

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 and unreasonable hardship upon the petitioner. (415 ILCS 5/35(a) (1992).) Furthermore, the burden is on 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 (1985), 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.

Based upon the record before it and upon review of the hardship petitioner would encounter, and the environmental impact that would result from grant of variance, the Board finds that petitioner has presented adequate proof that immediate compliance with the regulations at issue would result in an arbitrary and unreasonable hardship. Petitioner has requested that the variance commence November 1, 1994 and end May 1, 1995. The Board notes 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 DMI, Inc. v. IEPA, PCB 90-227, 128 PCB 245-249, December 19, 1991.) In view of the facts of this case including the Board's knowledge of contractor and equipment shortages associated with installation of Stage II equipment, and the Agency's recommendation of no significant environmental impact, the Board finds that the instant circumstances warrant the short retroactive start of the variance. However, the Board will only grant the relief until March 31, 1995, as recommended by the Agency. The Board is convinced that the Stage II system should be in place prior to the beginning of the 1995 ozone season and petitioner indicated at hearing that it "would make every effort to comply by April 1". (Tr. at 13.)

The requested variance accordingly will be granted, subject to conditions consistent with this opinion.

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

ORDER

The Board hereby grants the petitioner, Mukhtiar Singh, a variance from 35 Ill. Adm. Code 218.586, Gasoline Dispensing Operating-Motor Vehicle Fueling Operations, subject to the following conditions:

1. The variance is for a period of five months commencing November 1, 1994, and expiring March 31, 1995;
2. If Stage II gasoline vapor recovery equipment is not installed and operating by March 31, 1995, the facility will cease gasoline dispensing operations until such time as the Stage II equipment is installed and operational;
3. Petitioner shall notify the Agency upon installation of any Stage II equipment within 14 days after its installation. Notification shall include the address of the facility. Such notice shall be sent to:

Illinois Environmental Protection Agency  
Attn: Mr. Terry Sweitzer  
Bureau of Air  
P.O. Box 19276  
Springfield, Il 62795-9276

IT IS SO ORDERED.

If the petitioner chooses to accept this variance subject to the above order, within forty-five days of the grant of the variance, the petitioner must execute and forward the attached certificate of acceptance and agreement to:

Bonnie R. Sawyer  
Division of Legal Counsel  
Illinois Environmental Protection Agency  
P. O. Box 19276  
2200 Churchill Road  
Springfield, IL 62794-9276

Once executed and received, that certificate of acceptance and agreement shall bind the petitioner to all terms and conditions of the granted variance. The 45-day period shall be held in abeyance during any period that this matter is appealed. Failure to execute and forward the certificate within 45-days renders this variance void. The form of certificate 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 94-314, February 16, 1995.

Petitioner \_\_\_\_\_

Authorized Agent \_\_\_\_\_

Title \_\_\_\_\_

Date \_\_\_\_\_

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1989, ch. 111 1/2 par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

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.

Dorothy M. Gunn  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board