

ILLINOIS POLLUTION CONTROL BOARD  
March 16, 1995

THE SOUTHLAND CORPORATION, )  
 )  
 Petitioner, )  
 )  
 v. ) PCB 94-380  
 ) (Variance-Air)  
 ILLINOIS ENVIRONMENTAL )  
 PROTECTION AGENCY, )  
 )  
 Respondent. )

MICHAEL J. WALL, OF ROTHSCHILD, BARRY & MYERS APPEARED ON BEHALF OF PETITIONER;

BONNIE R. SAWYER APPEARED ON BEHALF OF THE RESPONDENT.

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

On December 13, 1994, The Southland Corporation (Southland) filed a petition for variances 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 these variances for two facilities: the petitioner's retail gasoline dispensary at 799 West Northwest Highway in Palatine, Illinois (Palatine facility); and the petitioner's retail gasoline dispensary at 500 Skokie Boulevard, Wilmette, Illinois (Wilmette facility). On January 17, 1995, the Illinois Environmental Protection Agency (Agency) filed a recommendation that the Board grant the requested variances 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 in the Act 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 variances will be granted with conditions as requested by the Agency.

## 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 adopted regulations on August 13, 1992, which required installation of Stage II systems. (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

Southland operates 29 gasoline dispensing facilities in Illinois under the name of Citgo Quik Mart and 7-Eleven Stores (Pet. at 3; Tr. at 10.) Before November 1, 1994, Southland had completed Stage II equipment installations at 25 facilities. (Tr. at 11.) Of the four remaining facilities, Southland was granted provisional variances from the Stage II installation requirements for stores in Glenview and Northbrook, Illinois, and subsequently has completed installation of Stage II equipment. (Tr. at 11.) The Palatine and Wilmette facilities at issue are the only Southland facilities which still require installation of Stage II equipment. (Tr. at 11.)

Palatine Facility

Southland's Palatine facility dispenses an average of 91,534 gallons of fuel per month and is subject to the November 1, 1994, deadline for installing Stage II equipment (Pet. at 5) found in Board regulations (35 Ill. Adm. Code 218.586(b)). Southland estimates that uncontrolled emission from the facility would be

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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 hearing transcript will be cited as "Tr. at \_\_\_".

approximately 1,071 pounds of volatile organic material (VOM) per month (Pet. at 5), which represents .0019 percent of total VOM emissions per day in the Chicago area. (Rec. at 3.) The Palatine facility is operated by twelve full and part time employees in a mixed residential and commercial area. (Pet. at 4.) Southland originally requested a variance until May 1, 1995, from the Board's Stage II vapor recovery regulations for the Palatine facility. (Pet. at 8; Rec. at 2.)

Southland asserts that a substantial effort was made to meet the November 1, 1994, deadline for installing Stage II equipment at the Palatine facility. (Pet. at 5.) All necessary permits to complete below ground work were applied for well in advance of the deadline and state permits were granted in September 1994. (Pet. at 5.) The local permit from the city of Palatine was applied for at the beginning of August 1994. (Tr. at 22.) Southland has not yet received a permit for the work from the local municipality of Palatine. (Tr. at 12.) The city of Palatine has required installation of a new sidewalk by Southland on the boundaries of the Palatine facility which is on a corner lot. (Pet. at 5.) The new sidewalk must be installed before the local permit for the underground pollution control work will be issued. (Pet. at 5; Tr. at 12, 13.) After discussions with the city of Palatine, Southland has contracted to construct the sidewalk. (Tr. at 13-15.) The contracts for the State II work have already been executed and the equipment for the project has been paid for and delivered. (Pet. at 6.) However, the uncertainties of winter weather and frozen ground conditions may delay the installation. (Pet. at 6; Tr. at 15.)

The Agency agrees that immediate compliance with Section 218.586 for the Palatine facility imposes an arbitrary or unreasonable hardship on Southland. (Rec. at 3-4.) The Agency agrees that the arbitrary and unreasonable hardship exists "until such time as weather conditions improve to the point to allow the installations to commence". (Rec. at 4.) However, the Agency is only willing to recommend that this variance be granted with the condition that the relief granted by this variance will not extend into the 1995 ozone season. (Rec. at 3; Tr. at 8.) At hearing, Southland agreed to the Agency's condition that Stage II equipment be installed at the Palatine facility by March 31, 1995, or else fuel sales would cease at the Palatine facility until installation is complete. (Tr. at 21.)

#### Wilmette Facility

Southland's Wilmette facility dispenses an average of 89,383 gallons of fuel per month and is subject to the November 1, 1994, deadline for installing Stage II equipment (Pet. at 5) found in Board regulations (35 Ill. Adm. Code 218.586(b)). Southland estimates that uncontrolled emission from the facility would be approximately 1,046 pounds of VOM per month (Pet. at 5), which

represents .0012 percent of total VOM emissions per day for the Chicago area. (Rec. at 3.) The Wilmette facility is operated by twelve full and part time employees in a residential area. (Pet. at 4.) Southland originally requested a variance until May 1, 1995, for the Wilmette facility from the Board's Stage II vapor recovery regulations. (Pet. at 8; Rec. at 2.)

Southland maintains that a substantial effort was made to meet the November 1, 1994, deadline for installing Stage II equipment at the Wilmette facility. (Pet. at 5.) Southland has applied for state and local construction permits to install the Stage II equipment at the Wilmette facility, and only the state permit has been received. (Pet. at 5; Tr. at 16.) Southland applied to the city of Wilmette for the construction permit to install Stage II equipment on September 1, 1994. (Tr. at 26.) Over the objection of Southland, the city of Wilmette continued the hearing on Southland's request for a construction permit until the January 1995 Wilmette Village Board meeting. (Pet. at 5; Tr. at 16-18.) The contracts for installing Stage II equipment at the Wilmette facility have already been executed and the equipment for the project has been paid for and delivered. (Pet. at 6.) However, the uncertainties of winter weather and frozen ground conditions may delay the installation. (Pet. at 6; Tr. at 15.)

The Agency agrees that immediate compliance with Section 218.586 for the Wilmette facility imposes an arbitrary or unreasonable hardship on Southland. (Rec. at 4.) The Agency agrees that the arbitrary and unreasonable hardship exists "until such time as weather conditions improve to the point to allow the installation to commence". (Rec. at 4.) However, the Agency is only willing to recommend that this variance be granted with the conditions that the relief granted by this variance will not extend into the 1995 ozone season. (Rec. at 3; Tr. at 8.) At hearing, Southland agreed to the Agency's condition that Stage II equipment be installed at the Wilmette facility by March 31, 1995, or else fuel sales would cease at the Wilmette facility until installation is complete. (Tr. at 21.)

#### ENVIRONMENTAL IMPACT

Southland and the Agency have estimated that emissions from the Palatine and Wilmette facilities would represent approximately .0019 percent and .0012 percent, respectively, of total daily VOM emissions in the Chicago area. (Pet. at 7; Rec. at 3.) Southland states that the increased VOM emission resulting from the proposed variances would have a negligible impact on the Chicago areas ozone nonattainment status. (Pet. at 7.) The Agency states that while emissions from these two facilities 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 3.) Therefore, the Agency is recommending that the variance be granted with the condition that the variance not extend into to the 1995 ozone season. (Rec. at 3.) At hearing, Southland agreed with the Agency's condition that Stage II work at the Palatine and Wilmette facilities be completed by March 31, 1995. (Tr. at 21.) If Stage II vapor recovery equipment is not installed and operational by March 31, 1995, the facility will cease gasoline dispensing operations until such time as Stage II equipment is installed and operational. (Rec. at 5; Tr. at 21.)

#### CONSISTENCY WITH FEDERAL LAW

Petitioner states that the requested relief is consistent with the Clean Air Act. (Pet. at 7.) 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 4.)

#### 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 Southland would encounter, and the environmental impact that would result from grant of variance, the Board finds that Southland has presented adequate proof that immediate compliance with the regulations at issue would result in an arbitrary and unreasonable hardship for each of the two facilities (Palatine and Wilmette).

The term of the variance will differ slightly for the two facilities. The Board will grant the variance for the Palatine facility to commence on December 16, 1994. The Board granted Southland a 45-day provisional variance for the Palatine facility in Southland Corporation v. IEPA, PCB 94-337 (PCB 94-337, December 1, 1994) which commenced November 1, 1994, and expired December 15, 1994. The Board will grant the variance for the Wilmette facility to commence on November 1, 1994. 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 Agency's knowledge that the respective local governments have been slow in issuing the required construction permits (Tr. at 32), and the Agency's recommendation of no significant environmental impact, the Board finds that the instant circumstances warrant the short retroactive start of the two variances. 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 Southland indicated at hearing that it agreed to the Agency's recommendation that the variance be granted only until March 31, 1995. (Tr. at 21.)

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, The Southland Corporation, variances from 35 Ill. Adm. Code 218.586, Gasoline Dispensing Operating-Motor Vehicle Fueling Operations, for the Palatine and Wilmette facilities, subject to the following conditions:

1. The variance for the Palatine facility is for a period of three-and-a-half months commencing December 16, 1994, and expiring March 31, 1995;
2. The variance for the Wilmette facility is for a period of five months commencing November 1, 1994, and expiring March 31, 1995;
3. 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;
4. 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 94-380, March 16, 1995.

Petitioner \_\_\_\_\_

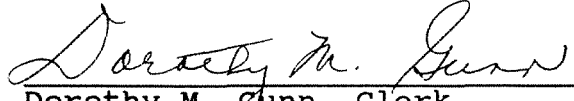
Authorized Agent \_\_\_\_\_

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 March, 1995, by a vote of 7-0.

  
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Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board