

ILLINOIS POLLUTION CONTROL BOARD
February 6, 1992

D & B REFUSE SERVICE, INC.)
)
 Petitioner,)
)
 v.) PCB 92-12
) (Variance)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by M. Nardulli):

This matter is before the Board on the Illinois Environmental Protection Agency's (Agency) January 27, 1992 motion to dismiss petitioner's variance petition. On January 21, 1991, petitioner D & B Refuse Service, Inc. (D & B) filed a petition for variance from 35 Ill. Adm. Code 814.501(b) and 814.104(a) seeking to operate its landfill for 16 months beyond the two-year deadline set forth in the regulations. The Agency asks that the variance petition be dismissed because the relief sought is not the proper subject of a variance.

A review of the Board's landfill regulations is necessary to understand the instant case. Part 814 addresses what are often referred to as the transition provisions between the Board's old and new landfill regulations. The regulations from which Land and Lakes seeks variance provide that an existing landfill must close by September 18, 1992 (i.e. two years after the effective date of the Board's new landfill regulations adopted in R88-7) unless it can demonstrate compliance with the stricter operating, closure and post-closure care standards of Subpart B, applicable either to landfills remaining open for more than seven years¹, or Subpart D, applicable to landfills remaining open between two and seven years. The standards set forth in Subpart D, applicable to Land and Lakes because it seeks to remain open three years, in large part reference Part 811, which sets forth the standards applicable to new landfills. (35 Ill. Adm. Code 814.402.) Only if a landfill closes within the two-year period may it continue to operate under its present permit and close under the closure and post-closure care provisions of Part 807 of the old landfill regulations. (35 Ill. Adm. Code 814.104(a) and 814.502(a) and (b).)

The relief sought in the instant variance petition is

¹ Those landfills seeking to stay open beyond seven years must demonstrate compliance with the strictest standards in Part 814. (See e.g., 35 Ill. Adm. Code 814.301 and 814.302.)

virtually identical to the relief sought by the petitioner in Land and Lakes Co. v. IEPA, PCB 91-215 (January 23, 1992). By its variance petition, D & B seeks to continue to operate its landfill located in rural Moultrie County for 16 months beyond the two year closure provisions in Part 814 of the Board's new landfill regulations and to be allowed to remain under Part 807 of the Board's old landfill regulations. D & B contends that it has 75,000 cubic yards of air space remaining and that it would impose an arbitrary and unreasonable hardship on it to close by September 18, 1992 because it needs the remaining capacity to finance Part 807 closure and post-closure. D & B asserts that closure under the new regulations, which it contends that it cannot comply with, would also impose an arbitrary and unreasonable hardship because closure/post-closure costs would exceed \$3 million. Additionally, D & B contends that premature closing of its landfill would require that waste be transported to other landfills in central Illinois resulting in increased transportation costs that would impose a hardship on both petitioner and its customers. Therefore, D & B seeks an additional 16 months of operation so that it may fill its landfill to capacity without having to comply with the new landfill regulations.

D & B's proposed compliance plan is to achieve compliance with the Part 807 regulations by January of 1994.

The Agency contends that the variance petition should be dismissed because D & B has failed to present a plan or timetable by which it will ultimately achieve compliance with the applicable Part 811 regulations if it remains in operation until January of 1994. Therefore, the Agency asserts that the relief sought by D & B is not the relief envisioned by the variance concept. City of Mendota v. Pollution Control Board, 161 Ill. App. 3d 203, 514 N.E.2d 218 (3d Dist. 1987), the Agency states that D & B seeks permanent exemption from these regulations, which is not the proper subject of a variance petition.

D & B asserts that it is not seeking permanent exemption from Part 811; rather, it seeks an extension of time to close its facility under part 807. D & B contends that the Agency is mistaken when it claims that it is seeking a permanent exemption.

DISCUSSION

Section 104.121(f) requires a petition for variance to include:

A detailed description of the existing and proposed method of control to be undertaken to achieve full compliance with the Act and regulations, including a time schedule for the implementation of all phases of the control program from initiation of design to program completion and the estimated costs involved for each

phase and the total cost to achieve compliance

The requirement that a variance petition include a compliance plan is consistent with the purpose of a variance which is to provide temporary relief while encouraging future compliance. (Monsanto Co. v. PCB, 67 Ill. 2d 276, 367 N.E.2d 684 (1977).) "[T]he variance procedure is not intended as a mechanism for seeking a permanent exemption from the Act." (City of Mendota v. PCB, 161 Ill. App. 3d 203, 514 N.E.2d 752 (3d Dist. 1987).)

Here, the only regulations from which D & B seeks variance are those that require a landfill to either: (1) demonstrate compliance with the new landfill regulations such that the landfill may stay open between two and seven years or; (2) close within two years and remain under the old regulations. The 16-month extension of time sought by D & B precludes compliance with the regulations which are the subject of this variance. It is impossible for D & B to receive the requested relief of operating under the old regulations for three years and four months from the effective date of the Board's new landfill regulations and achieve future compliance with regulations which require that operations cease within two years. D & B mistakenly equates a request for an extension of a regulatory deadline with a variance petition. As noted above, while a variance allows one time to achieve compliance, it also contemplates ultimate compliance. Such compliance cannot be achieved by variance in the instant case.

Rather than seeking temporary relief from the two-year deadline, D & B actually seeks permanent relief from ever having to demonstrate compliance with the stricter new regulations seeking, instead, to simply substitute the regulations in Part 807. Given that D & B is requesting to initiate closure between two and seven years, the following "between two and seven year" provisions of Part 814 automatically apply (35 Ill. Adm. Code 814.401(a)):

- (a) The standards in this Subpart are applicable to all existing units of landfills, including those exempt from permit requirements in accordance with Section 21(d) of the Act, that have accepted or accept chemical and putrescible wastes. Based upon an evaluation of the information submitted pursuant to Subpart A and any Agency site inspection, units that meet the requirements of this Subpart shall initiate closure between two and seven years after the effective date of this Part.
- (b) Based upon an evaluation of the information submitted pursuant to Subpart A and any Agency site inspection, units which are unable to comply with the requirements of this Section are subject to the requirements of Subpart E [the two-year closure requirement].

Consequently, if a landfill seeks to continue accepting waste beyond the two-year deadline but will initiate closure within seven years, it must demonstrate compliance with the applicable standards set forth in Part 814 which refer to Part 811. Landfills which cannot demonstrate compliance with the stricter standards must close within two years in accordance with the old regulations. D & B cannot amend these regulatory provisions by way of a variance.

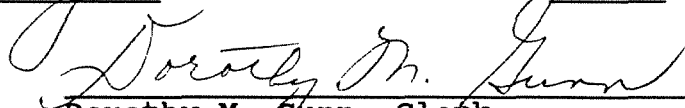
In conclusion, D & B seeks to exercise the option of staying open beyond two years, but wants to avoid ever complying with the stricter standards. D & B has not requested relief from immediate compliance with the "between two and seven year" provisions of Part 814, nor has it presented a compliance plan or time schedule for achieving ultimate compliance with the standards applicable to landfills seeking to operate beyond the two-year deadline. Consequently, D & B is seeking permanent relief from Part 814 and Part 811 by attempting to "extend" the two-year deadline allowing a landfill to close under the old landfill regulations. D & B's petition is, in essence, an attempt to amend the Board's new landfill regulations by way of variance and improperly seeks permanent relief.

For the foregoing reasons, the Board grants the Agency's motion to dismiss D & B's petition for variance.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1041) provides for the appeal of final Board orders. 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 Order was adopted on the 6th day of February, 1992 by a vote of 6-0.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board