ILLINOIS POLLUTION CONTROL BOARD
November 16, 1995

COMMUNITY LANDFILL CORPORATION,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 95-137
	)	(Variance-Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

DISSENTING OPINION (by J. Theodore Meyer):

I respectfully dissent from the majority opinion. I believe the Board, in today's order, misapplied relevant case law, overlooked pertinent facts in this matter and ignored new facts presented in CLC's Motion for Reconsideration, facts which bear a connection to due diligence and good faith efforts at compliance, a key argument upon which the majority relied in its denial of CLC's request for variance. Therefore, CLC's Motion for Reconsideration should have been granted. I also reiterate my position that the September 18, 1995 Board order in this matter failed to properly weigh the negligible enviromental harm against the hardships suffered by Community Landfill Corporation (CLC), the City of Morris and the citizens of Morris. Therefore, CLC should be granted a prospective variance.

Factual Examination and Application to Relevant Law

In its September 18, 1995 order the Board denied CLC its request for variance from the deadline for submission of its significant modification application. The Board reasoned that CLC failed to prove due diligence in requesting the variance because it had a deadline for parcel B, missed the deadline, never asked for an extension of the deadline and then submitted its request for variance 22 months late. I believe the Board overlooked similar scenarios present in prior Board cases and ignored the relevant facts of those cases presented to the Board in CLC's Motion for Reconsideration. Based upon this new information, I believe CLC should have received a variance as the petitioners in prior cases have.

In its Motion for Reconsideration, CLC stated that it discovered new information regarding the series of events that occurred in Atkinson Landfill Company, Inc. v. IEPA, PCB 94-259 (January 11, 1995). Specifically, Atkinson missed a September 15, 1993 deadline for submitting its significant modification application, requested and received an extension until February 15, 1994, missed that deadline, and without any explanation, submitted a request for variance from that deadline over seven months late. (Mot. for Recon. at 34.) The Board, in its order

granting a retroactive variance, did not seem overly concerned with the tardy submission of Atkinson's petition for variance. (Atkinson, PCB 94-259 at 6.).

In the instant matter, the Board relied on information that Atkinson was subject to the general significant modification application deadline of September 18, 1994, and therefore was only two days late in submitting its petition for variance. (PCB 95-137 at p.9.) The Board pointed to this information to support its argument that Atkinson was diligent and made a good faith effort in timely requesting a variance, whereas CLC was late in its request. (Id.) However, the new information CLC set forth in its Motion for Reconsideration clearly shows a different timeline of events in Atkinson. Since this information is directly relevant to the issues in this matter, I would have granted the Motion for Reconsideration.

In addition to filing their petitions for variance well after their respective deadlines, both Atkinson and CLC cited to ongoing negotiations and the desire to avoid the cost of submitting duplicative applications as the reason for the tardy filings. (Atkinson, PCB 94-259 at 6, CLC Pet. at 11-12.) The same rationale was used in another case where the petitioner submitted its petition for variance three months late. (Envirite Co. v. IEPA, PCB 94-259 (January 11, 1995.) Arguably, CLC was almost two years late in submitting its petition for variance, a substantially more tardy submission than in Atkinson or Envirite. However, the lateness of CLC's filing is a mitigating factor relevant to the question of granting a retroactive variance, not to the question of whether or not a variance should be granted at all. One could also argue that the Agency recommended a grant of the variance in Atkinson and Envirite but requested a denial for CLC. Yet, it was the Agency that recommended CLC seek a variance in order to achieve compliance. (Tr. at 233-38.) The Agency cannot now be heard to recommend a denial of the very relief it encouraged CLC to seek. In sum, the similarities between these cases outweigh their differences; therefore, for the sake of consistency and fairness, CLC should have been granted a variance.

Environmental Impact versus Hardship

The rule of law regarding the burden of proof in petitions for variance is very clear. The petitioner must prove that immediate compliance with the regulations at issue would impose an arbitrary or unreasonable hardship. (415 ILCS 5/35(a).) A hardship is arbitrary or unreasonable if the petitioner can prove that it outweighs the public interest in attaining compliance with regulations designed to protect the public. (We Shred It, Inc. v. IEPA, PCB 92-180 at 3 (November 18, 1993).)

The question in this case is whether the hardships resulting

from a denial of variance outweigh the public interest in protecting the environment and timely submissions of significant modification applications. CLC outlined the ramifications if it is denied a variance: CLC will likely close operations at Morris Community Landfill; the City of Morris will lose substantial tax and royalty revenues; and the citizens of Morris will lose the benefit of free garbage pickup and road services. (Mot. for Recon. at 12.) On the other hand, little environmental impact is anticipated since parcel A, the part of Morris Community Landfill at issue, has been inactive since 1980. (Id.) It is evident, then, that the hardships in this case outweigh the negligible environmental harm; therefore, CLC's petition for variance should have been granted.

As I stated in my previous dissent, the variance granted in this case should be prospective only. As operator of Parcel B, CLC was well aware that it had to submit a significant modification application by June 15, 1993. If lease negotiations prevented it from submitting an application by that date, CLC should have asked for an extension. This lack of diligence on CLC's part precludes the Board from justifying a retroactive variance. However, a prospective variance is an appropriate remedy. After all, the ultimate goal for the petitioner is to achieve compliance as soon as possible. CLC was ready to comply within 45 days of the Board's September 18, 1995 order. Rather than delay compliance further, I would grant a 45-day prospective variance for CLC to submit its significant modification application to the Agency.

For these reasons, I respectfully dissent

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J. Theodore Meyer
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, do hereby certify that the above dissenting opinion was filed on the _____ day of _____, 1995.

_____
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board