ILLINOIS POLLUTION CONTROL BOARD
November 3, 1988

VILLAGE OF SAUGET,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 88-18
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by J. Marlin):

On October 11, 1988 the Village of Sauget (Sauget) filed a Motion for Reconsideration of the Board's September 8, 1988 decision. The Illinois Environmental Protection Agency filed a Motion to Strike, Agency Objection to Reconsideration, and Request for Clarification on October 19, 1988. Sauget filed a Response to the Agency's Motion to Strike on October 28, 1988.

The general contention of Sauget's October 11th motion is that the Board improperly limited the arbitrary or unreasonable hardship evaluation to the hardship resulting from the PACT/WAR accident which occurred on December 2, 1987. Sauget asserts:

> While Sauget's original variance was premised upon the explosion and/or fire which disabled one of the WAR units, Sauget made it clear at hearing, as the Board recognized, that the question of how to achieve overall compliance as well as Sauget's basis for demonstrating arbitrary and unreasonable hardship goes well beyond the PACT/WAR process.
>
> (Sauget Motion, p.3)

Then, Sauget seems to link, for the first time, its changing relief request with the basis for the variance.

> [T]he Agency had no objection to Sauget's revisions to the scope of its relief. This up-dated information demonstrated that the problems and the compliance alternatives go beyond the PACT/WAR process, and the basis for the variance changed along with the changing facts which came to light.
>
> The Board, on the other hand, appears to be limiting Sauget to the basis stated in Sauget's petition, e.g. the explosion and/or

> fire which rendered the PACT/WAR system inoperable.
>
> (Sauget Motion, p.6)

Sauget suggests that the Board based its evaluation of Sauget's only on the information asserted in Sauget's January 19, 1988 Petition. Evidently, Sauget chooses to ignore pages 11 and 12 of the Board's September 8, 1988 Opinion. On those pages the Board quoted passages from Sauget's post-hearing briefs that clearly support the Board's conclusion that Sauget has attempted to use the unfortunate and unexpected accident of December 2, 1987 as the basis of its variance request. The Board concluded in its September 8th Opinion that this was an inadequate basis for a variance. That is, Sauget would not incur an arbitrary or unreasonable hardship, stemming from the December 2, 1987 accident, if denied a variance.

In its motion Sauget further contends:

> The Board appears to have seriously misunderstood the present intent of Sauget's variance request. Sauget is attempting to achieve and maintain consistent compliance with all applicable standards. Due to unforeseeable changes in the influent, possible design deficiencies and the fire and/or explosion of one of the WAR units, Sauget is faced with a complex problem of doing so.
>
> (Sauget Motion, p. 8-9)

Therefore, Sauget now claims that design deficiencies due to changes in its influent are the heart of its variance request. However, Sauget still maintains in its motion that "effluent data from the AB plant since the explosion demonstrates substantial compliance with the effluent standards". (Sauget Motion, p.9). The motion also states, "Mr. George Schillinger [a Sauget witness] presented unrebutted testimony that 'all portions of the plant, other than the PACT/WAR system are functioning and functioning well.'" (Sauget Motion, p.5).

Notwithstanding such inconsistencies the Board addressed the issue of design deficiencies in its September 8th Opinion concluding:

> Changes in ABRTF's [American Bottoms Regional Treatment Facility] influent could have been reasonably anticipated and dealt with by pretreatment or other means. General design deficiencies in the treatment processes employed by ABRTF due to such changes, while perhaps unfortunate, are not a sufficient

> basis for an "arbitrary or unreasonable" hardship determination.
> (PCB 88-18, slip op. at 20, September 8, 1988)

Sauget counters that such a finding is not supported by the record. The Board disagrees.

While the Board believes that ABRTF's performance is such that a variance is not necessary for most parameters at issue, any hardship which would result from a variance denial might be classified as self-imposed. Sauget chose and implemented the design for ABRTF. It is true that the quantity and quality of flow, now tributary to ABRTF, have changed over years. This change was due to the fact several major industries no longer contribute to the flow and other changes to contributors. In fact the current flow amounts to 1/2 to 2/3 the designed flow. (R. 126) It is reasonable, though, to believe that Sauget could have initially planned for the possibility of such changes. In the least, Sauget should have attempted to modify its treatment system and pretreatment program to accommodate variations in flow when first observed. A pretreatment program could have been one route. These conclusions seem even more reasonable when one considers that at least one-half of ABRTF influent consists of wastewaters originating from chemical and other various manufacturing plants. (R. 125)

The Board must emphasize that under the Act variances are not granted merely because the petitioner has shown that it cannot comply with regulations despite its efforts to achieve compliance. Rather, a shield from an enforcement action is only given to a petitioner who would suffer an arbitrary or unreasonable hardship. See Monsanto Company v. Pollution Control Board, 67 Ill. 2d 276, 367 N.E. 2d 684 (1977) (Inability to comply with a State standard does not make mandatory the granting of a variance.). Certainly, most persons would view any defense to an enforcement action as a hardship. But it does not automatically follow that such a defense is an arbitrary or unreasonable hardship. Quaker Oats Company v. Illinois Pollution Control Board, PCB 83-107, 59 PCB 25 (July 19, 1984) (Enforcement efforts and decisions have nothing to do with the question of arbitrary or unreasonable hardship.). It is only through enforcement that the environmental laws are given their teeth. Without the potential for such actions, the environmental quality of this State would never improve. Therefore, variances are not to be granted lightly. Additionally, Sauget's past efforts in the design and construction of ABRTF, although not determinative in this variance proceeding, would have relevance and weight in an enforcement action.

Finally, Sauget seems to argue that the Board must grant a variance imposing a compliance plan before Sauget will be able to achieve compliance. Sauget asserts:

> The Board's failure to recognize the need for such an overall compliance strategy, which includes investigation of pretreatment alternatives, is improper.

Sauget concludes its motion by stating:

> Even if variance from some of the standards should be denied, the compliance plan required must consider each of the constituents at issue and not focus upon some small part of the overall problems in order to be both technically and economically effective.

Even though the Board denied Sauget a variance with respect to all the parameters except color, Sauget is not precluded from taking action to ensure that it will continue to comply with all other parameters. In other words, Sauget is free to implement its proposed compliance plan even though it does not have the variance which it requested.

The Board notes, though, that Sauget agrees with the Board that its proposed compliance plan is speculative. However, on this point, Sauget again relies on the December 2, 1987 accident to justify its proposal.

> Sauget has fully admitted that the relief sought is speculative. Sauget did not foresee that the PACT/WAR system would fail.
>
> (Sauget Motion, p.5)

Throughout this proceeding Sauget has used the December 2, 1987 accident as the keystone to its variance request. The Board concluded that the situation created by the accident would not impose an arbitrary or unreasonable hardship if Sauget were denied a variance. In addition, the Board concluded that the general design deficiencies of ABRTF would similarly not create an arbitrary or unreasonable hardship if the variance were denied.

Now Sauget claims that it needs the variance due to general design deficiencies beyond the December 2, 1987 accident. Sauget also asserts that if it had known that the Board would have ruled unfavorably regarding the issue of design deficiencies it would have sought to enter into this proceeding information which Sauget believes would counter the Board's conclusion. To this end, Sauget attaches to its motion copies of portions of a 1980 report. Also, in its Response, Sauget states that it "has file drawers filled with information regarding the design and construction of the AB plant which it could have entered as exhibits."

A petitioner in a variance proceeding carries the burden of proof; a petitioner must prove arbitrary or unreasonable hardship. Sauget presented evidence and argued its case before the Board. If the case is insufficient to prove arbitrary or unreasonable hardship, to the full extent of the variance request, then a decision unfavorable to Sauget is warranted. Sauget seems to be requesting a second bite of the apple. While new information is not necessarily inappropriate when presented in conjunction with a motion for reconsideration, such information should indeed be "new". In its Response Sauget admits that "the information presented is not 'newly discovered' in the sense that Sauget was unaware of its existence prior to hearing in this matter." (Sauget Response, p.2) Consequently, Sauget voluntarily decided not to introduce information concerning ABRTF's design history even though it is now seeking to justify a variance on that issue. Sauget is free to file a new variance petition under a new docket to introduce into that proceeding any information which it wishes the Board to consider.

Sauget also suggests that the variance from the color standard granted by the Board is improper, because "neither Sauget nor the Agency presented evidence that compliance can be achieved in one year". (Sauget Motion, p.7) In its variance, the Board imposed conditions which require Sauget to investigate the color problem and implement a solution within one year. The Board believes that such conditions are appropriate. In Monsanto Company, 367 N.E. 2d at 238, the Supreme Court spoke of the Board's authority to impose "technology forcing" standards. The Court held

> [T]o hasten ultimate compliance with a statewide standard, the Board may establish an interim standard which, though not impossible to satisfy, is beyond the polluter's present technical capability. In short, it is not necessarily arbitrary and capricious conduct for the Board to set a standard which a petitioner cannot adhere to at the present time....

It is not conclusive from the record that compliance with the color standard is even beyond Sauget's present capabilities. The issue of pretreatment requirements to remedy the color problem was not addressed in the record. The only compliance option discussed for color was the addition of carbon to the whole flow at ABRTF, as the Agency points out in its Objection. The Board believes that other compliance options should be investigated.

Sauget's October 11th motion referred to an attachment which was inadvertently left off the motion. Sauget filed copies of the attachment on November 2, 1988. However, the Board has not substantively considered the attachment. Sauget's motion for reconsideration is denied, and the Agency's motion to strike is denied.

Finally, the Agency requests clarification of the Board's Order of September 8, 1988. The Board believes that the Order accurately reflects the Board's intention concerning the variance. That is, the Board did not intend to incorporate any interim deadlines or any reporting requirements in this variance. However, this does not preclude the Agency from imposing permit conditions which the Agency deems necessary for compliance.

IT IS SO ORDERED.

B. Forcade dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 3rd day of November, 1988, by a vote of 5-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board