

ILLINOIS POLLUTION CONTROL BOARD
December 5, 1985

DEMETER, INC.,)
)
 Petitioner,)
)
 v.) PCB 85-75
)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

LLOYD SMITH and KEV KLEMME APPEARED ON BEHALF OF PETITIONER;

WILLIAM D. INGERSOLL, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by R. C. Flemal):

This matter comes before the Board pursuant to a variance petition filed by Demeter, Inc. ("Demeter") on May 21, 1985. Demeter seeks variance from the provisions of 35 Ill. Adm. Code 212.462(e) for a period of four years. Section 212.462(e) identifies New and Modified Grain-Handling Operations and control equipment requirements applicable to same. The Board finds that Petitioner will suffer arbitrary or unreasonable hardship without variance relief. Thus, variance from §212.462(e) will be granted to Demeter for the period of four years subject to conditions, beginning the date of this Opinion and Order.

Demeter waived hearing in this matter by inclusion in its May 21 petition of a provision so stating. The Illinois Environmental Protection Agency ("Agency"), however, gave notice to the Board on June 5, 1985 of its objection to the variance, and requested that a hearing be authorized. The Agency reasoned that hearing is necessary under the Clean Air Act since §212.462(e) is an approved part of the Illinois State Implementation Plan. Hearing was held on October 21, 1985.

The Agency filed a recommendation in this case on June 24, 1985, advising that Demeter's petition for variance be denied because, in its view, Petitioner offered no plan through which it could come into compliance by the end of the variance period and also failed to adequately show it would suffer an arbitrary or unreasonable hardship if denied variance relief. Demeter waived the 90-day time for decision (as provided for in §38 of the Illinois Environmental Protection Act) in this matter on July 3, 1985, and filed an amended variance petition on August 7, 1985 intended to address the concerns expressed by the Agency in its

recommendation. The Agency amended its recommendation on September 10, 1985, and presently suggests that Demeter be granted variance subject to conditions for the full four-year period as requested by Petitioner.

Demeter operates a grain elevator on 16 acres of land in an industrial area 1½ miles south of South Beloit in Winnebago County, Illinois. The facility receives, dries, stores and ships grain (primarily corn, soybeans, wheat and oats) and employs seven people.

Demeter seeks variance from §212.462(e), which requires new and modified grain-handling operations to file applications for construction and operating permits pursuant to 35 Ill. Adm. Code 201 and to comply with the control equipment requirements of §212.462. Petitioner's facility originally qualified for an exemption from the control requirements of §212.462(b) (which relate to major dump-pit areas, and are relevant to this case) by action of §212.461(c) because the facility is located outside of a major population area and had not lost the exemption due to the existence of other violations. Consequently, up to this time Demeter has not installed dump pit dust controls on its primary receiving pit, as would otherwise be required under §212.462(b).

For grain-handling operations at which no physical alterations or additions take place, Section 212.462(e) provides that a "modification" occurs when the increase in the annual grain through-put ("AGT") for the facility exceeds 30% of the AGT on which the operation's original construction and/or operating permit was granted. The definition of AGT is found at §211.122 of Title 35, and says that AGT for an operation is found by adding its grain receipts and shipments for the three previous fiscal years and dividing the total by 6. For Demeter, this number is derived from the following data which the Agency asserts was provided by Demeter in its AGT report of November 1, 1984:

1981/82	2,510,873 bu. received 1,549,575 bu. shipped
1982/83	4,718,542 bu. received 2,166,976 bu. shipped
1983/84	2,797,732 bu. received <u>3,187,821 bu. shipped</u> 16,931,519 bu. received/shipped

16,931,519 bu. / 6 = 2,821,920 bu. AGT

Petitioner's facility was originally permitted at an AGT of 1,100,000 bushels per year (Agency Recommendation, Appendix p.4). Therefore it is clear that Demeter's AGT has increased more than 30%, and thus that the facility has been "modified" as defined by §212.462(e).

Environmental Impact

The Demeter operation is located in a rural section of Winnebago County, in the extreme northern portion of Illinois. Winnebago County is designated as an attainment area for particulates and the Agency believes that any adverse environmental impact stemming from Petitioner's facility would be minimal (Variance Recommendation Amendment, ¶15-16). Nevertheless, for the record the Agency and Demeter provide differing characterization of the quantity of grain dust discharged from the dump pit operation. Petitioner contends a "minimal" amount of grain dust is discharged (Variance Petition, p.1), whereas the Agency calculates the amount to be approximately 22 tons per year (Variance Recommendation, ¶7). While a modeling study has not been done, it appears that no adverse environmental impact has or will occur due to the continued operation of Demeter's dump pits during the pendency of this variance.

Hardship

Throughout this case Petitioner has contended that, for two reasons, it would suffer arbitrary or unreasonable hardship if forced to install dump pit controls at the South Beloit facility. First, Demeter believes that the 30% increase it experienced over its base period volume (triggering the applicability of §212.462(e)) was attributable to Demeter's participation in one-time programs such as the federal PIK (Payment-In-Kind) program during the 1983/84 period. Second, Petitioner alleges that it would be financially unable to install grain dust control systems, if such were required, due to the poor economic condition of the agri-business industry and Demeter's low profitability over the past several years. Demeter asserts that for the years 1981 through 1984 the total four-year profit of the firm was under \$30,000 (Amended Variance Petition, p. 1). The Agency does not contest this assertion.

The Agency concurs with Demeter's assertion that arbitrary or unreasonable hardship is present, but only for the latter reason given by Petitioner. The Agency agrees that Demeter is not in a position to finance the purchase and installation of control equipment, the cost of which could range from \$60,000 to \$93,500 (Variance Recommendation Amendment, ¶13). The Agency disputes, however, the relevance of Demeter's position that its AGT increase of greater than 30% was attributable to one-time government programs. The Agency argues that this is an incorrect interpretation of §212.462(e); that the section provides that when AGT increases by more than 30% over the AGT on which the facility's original permit was granted, the facility is then "modified" and cannot return to its original status.

Balancing the minimal environmental impact from Demeter's activities against the economic hardship Petitioner would endure if required to immediately install dump pit controls the Board finds that denial of variance relief would constitute arbitrary or unreasonable hardship. The Board notes that it is not at this

time addressing the question of whether §212.462(e) can be interpreted to allow a reversion in the status of a facility after such facility has been "modified", as defined by that section.

The Board generally accepts and imposes on Demeter the variance conditions as proposed by the Agency, with the exception of that one requiring Demeter to post a performance bond to assure the performance of the work necessary to bring Petitioner's facility into compliance. The Agency itself notes that Demeter's history of compliance is generally good (Agency Recommendation, ¶9). In light of that assertion, as well as Demeter's stated intention to come into compliance, the Board finds that the posting of a performance bond is not necessary in this instance.

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

ORDER

The South Beloit, Illinois facility of Demeter, Inc. is hereby granted variance from the provisions of 35 Ill. Adm. Code 212.462(e) regarding Modified Grain-Handling Operations, subject to the following conditions:

1. This variance begins the date of this Order and extends through December 4, 1989.
2. Demeter shall annually provide grain through-put data pertaining to its South Beloit facility to the Agency.
3. On or before March 1, 1989, Demeter shall make application to the Agency for a construction permit for a dust control system to achieve compliance with regulations in effect at that time, and such system shall be in operation prior to the end of the variance term.
4. Demeter shall perform yearly studies of the cost and availability of dust control systems applicable to their operation, and shall submit such studies prior to each anniversary date of the grant of this variance, to:

Illinois Environmental Protection Agency
Division of Air Pollution Control
Field Operations Section
5415 North University
Peoria, Illinois 61614

5. If the average of grain receipts and shipments at the South Beloit facility for any one year period, as reported to the Agency, exceeds 2,500,000 bushels, Demeter shall apply for a construction permit for a dust control system, and shall complete installation of such system within six months of the date such permit is issued.

6. Within forty-five days of the date of this Order, the Petitioner shall execute and send to:

William D. Ingersoll
Enforcement Programs
Illinois Environmental Protection Agency
2200 Churchill Road
Springfield, Illinois 62706

a certification of acceptance of this variance by which it agrees to be bound by its terms and conditions.

This forty-five day period shall be held in abeyance for any period during which this matter is being appealed. The form of the certification shall be as follows:

CERTIFICATION

Demeter, Incorporated hereby accepts and agrees to be bound by all terms and conditions of the Order of the Illinois Pollution Control Board in PCB 85-75, dated December 5, 1985.

By: Demeter, Incorporated

As Authorized Agent

Title

Date

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 5th day of December, 1985, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control