

ILLINOIS POLLUTION CONTROL BOARD
September 21, 1995

J.M. SWEENEY CO.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 94-297
	)	(Variance-Air)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

MR. DIRK C. MCELRAVEY OF BRYDGES, RISEBOROUGH, MORRIS, FRANKE & MILLER APPEARED ON BEHALF OF PETITIONER;

MS. BONNIE SAWYER OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY APPEARED ON BEHALF OF RESPONDENT.

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

On October 19, 1994, J.M. Sweeney (Sweeney) filed a request for a variance from the Board's regulations which require installation of Stage II Vapor Recovery Systems at retail gasoline dispensing facilities. (35 Ill. Adm. Code 218.586.) Sweeney seeks a variance to allow it to delay installing a Stage II System until March 31, 1996.

On November 29, 1994, the Illinois Environmental Protection Agency (Agency) filed its recommendation supporting the grant of the variance with certain conditions. Hearing was held before Board hearing officer David Krause on June 1, 1995, in Chicago, Illinois. No members of the public were present to testify on the record.

The Board's responsibility in this matter arises from the Environmental Protection Act (Act) (415 ILCS 5/1 et seq. (1994).) The Board is charged in the Act with the responsibility of granting variance from the 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).)

BACKGROUND

Petitioner operates a gasoline dispensing facility at 24545

West Miller Road, Lake Zurich, Illinois. (Pet. at 2.)¹ Petitioner has operated the facility since prior to November 1, 1990, and employs ten people. (Pet. at 2; Ag. Rec. at 3.) In January of 1994 petitioner performed tank tightness tests on the underground storage tanks at the facility. (Pet. at 2.) The tanks failed the tightness test and Professional Tank Services, LTD (PTS) were retained to determine if a petroleum release had occurred. (Pet. at 2.) PTS determined that a leak had occurred and petitioner notified the Illinois Emergency Management Agency of a release on January 20, 1994. (Id.)

PTS performed a limited soil investigation on April 19 and 20, 1994. (Pet. at 2.) Petitioner and PTS have concluded that corrective action may be necessary to remediate petroleum contamination at the Sweeney facility. (Pet. at 3.) On September 1, 1994, petitioner submitted a site characterization work plan to the Agency. (Pet. at 3.)

At hearing on June 20, 1995, petitioner updated the status of the investigation and remedial work at the site. The September work plan was approved by the Agency and implemented to classify the site. Subsequently on February 17, 1995, a site classification completion report was submitted by petitioner, as well as a request for cost reimbursement for early action activities. Per the Agency's request, additional information amending the 45 day report was also submitted early in 1995. Petitioner has since been advised by the Agency that the site classification report has been selected for full review. Therefore the Agency is to advise petitioner no later than June 17, 1995 if more information is required. (Tr. at 10-11, 13.) At hearing the Agency reported that the classification report indicated that site's classification is most likely to be high, meaning remediation will be necessary. (Tr. at 14.)

REGULATORY FRAMEWORK

Sweeney is seeking a variance's from the Board's air regulations as these regulations relate to installation of Stage II vapor recovery equipment. The regulations that Sweeney is seeking a variance from are found at 35 Ill. Adm. Code 218.586. Section 218.586 is entitled Gasoline Dispensing Operations - Motor Vehicle Fueling Operations, which provides in pertinent part that:

- b) The provisions of subsection (c) below shall apply to any gasoline dispensing operation which dispenses an

¹The petition for variance will be cited as "Pet. at ____"; the Agency recommendation will be cited as "Ag. Rec. at ____"; the transcript from the June 1 hearing will be cited as "Tr. at ____".

average monthly volume of more than 10,000 gallons of motor vehicle fuel per month. Compliance shall be demonstrated in accordance with the schedule provided in subsection (d) below.

- d) In conjunction with the compliance provisions of Section 218.105 of this Part, operations subject to the requirements of subsection (c) above shall demonstrate compliance according to the following:

- 3) 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.

In determining whether a 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 or unreasonable hardship. (415 ILCS 5/35(a) (1994).) Furthermore, the burden is upon 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. Pollution Control Board, (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.

A further feature of a variance is that it is, by its nature, a temporary reprieve from compliance with the Board's regulations, and compliance is to be sought regardless of the hardship which the task of eventual compliance presents an individual polluter. (Monsanto Co. v. IPCB, (1977), 67 Ill.2d 276, 367 N.E.2d 684.) Accordingly, except in certain special circumstances, a variance petitioner is required, as a condition to grant of variance, to commit to a plan which is reasonably calculated to achieve compliance within the term of the variance.

COMPLIANCE PLAN AND HARDSHIP

Sweeney asserts that it has evaluated alternative methods for compliance with the Stage II requirements and that "no interim measures can be implemented to achieve whole or partial compliance with these requirements". (Pet. at 3.) Sweeney estimates that it will cost \$80,000 to comply with the Board's regulations. (Pet. at 3.) However, Sweeney also believes that if it were to timely install Stage II vapor recovery equipment,

Sweeney would be required to dismantle the system in order to perform corrective action to remediate the petroleum release at the site. (Pet. at 3.) Sweeney estimates that the salvage value of the components of a dismantled system would be between \$20,000 and \$30,000. (Pet. at 3.) Sweeney asserts that it estimates it would lose between \$50,000 and \$60,000 if Sweeney were required to install Stage II by November 1, 1994 and later dismantle the system. (*Id.*)

The Agency agrees that it would be a hardship for Sweeney to comply with the Stage II requirements at this time considering that the Stage II equipment may need to be dismantled if corrective action is required. (Ag. Rec. at 6.) The Agency states that "Sweeney will suffer an arbitrary and unreasonable hardship should the Board not grant relief from the Stage II requirements in Section 218.586". (Ag. Rec. at 7.) However, the Agency states that it "does not believe that the extent of relief requested in Sweeney's petition for variance is necessarily needed". (Ag. Rec. at 7.) The Agency suggests that conditions limiting the length of the variance, if corrective action is not necessary, should be attached to the granting of the variance.

ENVIRONMENTAL IMPACT

Sweeney estimates the uncontrolled emissions from its facility are "approximately 1076.4 pounds of VOC per month". (Pet. at 4.) Sweeney refers to the Agency's 1990 Chicago Ozone SIP Inventory Summary which indicates that the total VOM emissions on a weekday during the ozone season is 1453.69 tons. (*Id.*) Sweeney states that its uncontrolled VOM emissions "would total approximately .5 tons per day or approximately .0034 percent of the total VOM emissions per day in the Chicago area". (*Id.*)

The Agency disagrees with Sweeney's calculations of Sweeney's VOM emissions and instead calculates daily emissions at "about .02 tons per day" which would compromise approximately .001 percent of the total VOM emissions per day in the Chicago area. (Ag. Rec. at 5.) The Agency concedes that the VOM emissions from this station "are not that significant when compared to the total Chicago area VOM emissions". (Ag. Rec. at 5.) However, the Agency also notes that the ozone problem in Chicago is "largely attributable to numerous smaller sources that, when aggregated, add up to significant emissions". (*Id.*)

The Agency does recommend granting this variance however as Sweeney is seeking relief from the Stage II requirements to mitigate potential damage to another "environmental medium". (Ag. Rec. at 5.) The Agency therefore believes that the hardship "Sweeney would incur if required to install the Stage II equipment by the November 1, 1994 deadline only to dismantle and reinstall if remediation proves necessary, outweighs the

environmental impact from allowing this facility to emit uncontrolled VOMs for the variance period." (Ag. Rec. at 5.)

CONCLUSION

Based on the record the Board finds that Sweeney has established that compliance with 35 Ill. Adm. Code 218.586 constitutes an arbitrary or unreasonable hardship. Further, the Board finds that the environmental impact of this variance does not pose a significant risk to environmental health due to the temporary relief which is being granted. The Board will grant the variance with the conditions recommended by the Agency. If Sweeney is not required to perform corrective action which would require the dismantling of the tank system, then Sweeney should be able to comply with the Stage II vapor recovery system requirements within a reasonable timeframe. Therefore, the time conditions suggested by the Agency will be adopted in the Board's order.

Sweeney has requested that the variance commence on November 1, 1994 and end on March 31, 1996. 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, the Board will grant the variance from November 1, 1994.

This opinion constitutes the Board findings of fact and conclusions of law in this matter.

ORDER

The Board hereby grants this variance, commencing retroactively from November 1, 1994, to J.M. Sweeney, Co. for the facility at 24545 West Miller Road, Lake Zurich, Illinois, subject to the following conditions:

1. If the site classification concludes that no further remediation is necessary, Sweeney will complete installation of Stage II equipment within 45 days of the Agency's concurrence with this conclusion.
2. If the site is classified as low priority, Sweeney will complete installation of Stage II equipment within 45 days of the Agency's concurrence with this classification.
3. If remediation is required but the method selected will not interfere with Stage II equipment, Sweeney will install Stage II equipment within 45 days of approval of this method.

4. If the site is classified, and requires further remediation, Sweeney will install Stage II equipment within 45 days of completion of remediation, but in no case later than March 31, 1996.
5. Sweeney shall notify Terry Sweitzer of the Agency as to classification of this site within 14 days of receipt of site classification approval. Such notice shall be sent to:

Mr. Terry Sweitzer
Illinois Environmental Protection Agency
Bureau of Air
P.O. Box 19276
Springfield, IL 62794-9276

6. Sweeney shall notify the Agency of the installation of any Stage II equipment within 14 days after its installation. Notification shall include the address of the facility and shall be sent to Terry Sweitzer at the address provided in "E" above.

IT IS SO ORDERED.

Within 45 days of any Final Board Order granting the variance, Sweeney shall certify in writing that it accepts and agrees to be bound to all terms and conditions of the granted variance, and such certification shall be in the form as follows:

CERTIFICATION

Sweeney, hereby accepts and agrees to be bound by all terms and conditions of Order of the Pollution Control Board in PCB 94-297, including the following conditions:

- 1) Sweeney will close this station by April 1, 1995, and it will not be reopened to dispense gasoline until Stage II vapor recovery systems are operational.
- 2) In the event that Sweeney is unable to pursue the reconstruction plans outlined in its Petition, Stage II vapor recovery equipment shall be installed within 30 days of the abandonment of reconstruction plans.
- 3) Sweeney shall notify the Agency of the installation of any Stage II equipment within 14 days after its installation. Notification shall include the address of the facility. Such notice to the Agency shall be sent to:

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Mr. Terry Sweitzer
Illinois Environmental Protection Agency
Bureau of Air
P.O. Box 19276
Springfield, IL 62794-9276

J.M. Sweeney Company

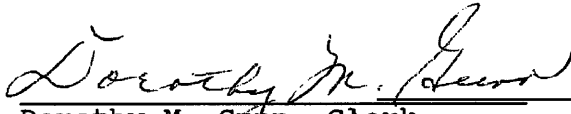
By: _____

Date: _____

The Certification of Acceptance shall be forwarded to Bonnie R. Sawyer, Division of Legal Counsel, Illinois Environmental Protection Agency, P.O. Box 19276, 2200 Churchill Road, Springfield, Illinois 62794-9276. 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 and of no force and effect as shield against enforcement of the rules from which this variance is granted.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rule of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 21st day of September, 1995, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board