

ILLINOIS POLLUTION CONTROL BOARD
November 18, 1993

WE SHRED IT, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 92-180
)	(Variance)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent,)	
)	
COUNTY OF CHRISTIAN,)	
)	
Intervenor.)	

JAMES L. PROFFITT OF PROFFITT & LACY APPEARED ON BEHALF OF PETITIONER;

DANIEL P. MERRIMAN APPEARED ON BEHALF OF RESPONDENT; and

DAVID H. MARTIN APPEARED ON BEHALF OF INTERVENOR THE COUNTY OF CHRISTIAN.

OPINION AND ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on petitioner We Shred It, Inc.'s (WSI) third amended petition for variance.¹ WSI originally initiated this proceeding with a petition for variance filed on November 17, 1992. WSI filed its third amended petition on March 15, 1993. WSI seeks a variance from the financial assurance requirements of the Board's used and waste tire regulations, codified at 35 Ill. Adm. Code 848.400 through 848.415.² WSI originally requested a variance for three years, but has subsequently agreed to seek a shorter variance. (Tr. at 18-20.) On March 25, 1993, the Board granted the County of Christian's motion to intervene.

On November 4, 1993, the Illinois Environmental Protection

¹ The third amended petition will simply be cited as "Pet. at ____."

² WSI also originally sought a variance from "certain management standards" in 35 Ill. Adm. Code 848.202(d). (Pet. at 1.) However, WSI withdrew that request at hearing (Tr. at 22, 24), and the recommendation filed by the Illinois Environmental Protection Agency discusses only the request for variance from the financial assurance regulations.

Agency (Agency) filed a motion for leave to file its recommendation instanter. The Agency states that it was unable to file its recommendation earlier due to the press of business, and notes that the recommendation reflects an agreement between the parties. The motion for leave to file instanter is granted.

The Agency's recommendation is the result of negotiations between it and WSI, and has the approval of intervenor the County of Christian. The agreement was discussed at the July 15, 1993 public hearing in this matter, held in Pana, Illinois. The Agency recommends that the variance be granted until January 15, 1995 (eighteen months after the date of agreement of the parties), subject to certain conditions.

For the following reasons, the Board finds that WSI has presented adequate proof that immediate compliance with the financial assurance requirements of 35 Ill. Adm. Code 848.Subpart D would result in the imposition of an arbitrary or unreasonable hardship. Accordingly, the variance is granted, subject to conditions set forth in the attached order.

BACKGROUND

WSI recycles, processes, and disposes of used and waste tires. WSI accepts whole and quartered car and truck tires at its facility in Pana, Christian County, Illinois. Tires are sorted at the facility, and a small fraction are resold for recapping or as used tires. Most of the tires, however, are shredded. (Pet. at 2.) The shredded tires are marketed as tire-derived fuel (TDF), artificial playground turf, landscape material and landfill roadbed material. (Pet. at 3.)

As of July 15, 1993, there were three categories of tires at WSI's facility. First, there were approximately 1500 to 1600 whole tires, which represents about four to five days of tire collection. (Tr. at 8-9.) The second stockpile consisted of chopped or "primary-shred" tires. (Tr. at 9; Rec. at 2.) A "primary-shred" tire is a tire that has been cut into either four or eight pieces, so that it does not accumulate water. (Tr. at 10.) Thomas J. Funk, a shareholder in WSI, testified at hearing that there are approximately 200 tons of material in that stockpile of primary-shred tires. (Tr. at 10.) By comparison, when WSI filed its March 15, 1993 third amended petition, WSI had approximately 2800 tons of primary-shred tires. (Pet. at 2.)

The third stockpile at WSI's facility consists of approximately 2700 tons of tires shredded into "two-inch nominal" tire chips. (Tr. at 9.) "Two-inch nominal" tire chips are approximately two inches on at least two of its dimensions, but is longer than two inches on the third dimension. (Tr. at 23.) WSI's tire shredding equipment, purchased in January 1991, produces these "two-inch nominal" tire chips, but apparently will

not produce "two-inch minus" tire chips. (Pet. at 10; Tr. at 10-11.) "Two-inch minus" tire chips have individual dimensions of height, length, and width of two inches or less. (35 Ill. Adm. Code 848.101(a).) Despite WSI's efforts to market its "two-inch nominal" tire chips, there is an insufficient market for this size to allow WSI to reduce its current stockpile. A market does exist for "two-inch minus" tire chips. (Tr. at 12.) WSI is planning to purchase additional machinery which will produce "two-inch minus" tire chips. (Tr. at 12-13.)

REGULATORY FRAMEWORK

WSI seeks a variance from the financial assurance requirements of the Board's used and waste tire regulations. Those financial assurance rules, set forth at 35 Ill. Adm. Code 848. Subpart D, require owners or operators of tire storage sites and tire disposal sites to provide financial assurance equal to or greater than the current estimate of removing all used and waste tires from the site. The rules establish provisions for the form of financial assurance, upgrading of that assurance, release of financial institution, and application of proceeds and appeal. (35 Ill. Adm. Code 848.400-848.415.) However, the rules do not apply to altered tires which have been chopped, shredded, or processed to a "two-inch minus" standard. (35 Ill. Adm. Code 848.101.)

In determining whether any variance is to be granted, the Environmental Protection 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) (1992).) 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 (1st Dist. 1977), 135 Ill. App. 3d 343, 481 N.E.2d 1032). Only with such 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 (Monsanto Co. v. Pollution Control Board (1977), 67 Ill. 2d 276, 367 N.E.2d 684), and compliance is to be sought regardless of the hardship which the task of eventual compliance presents an individual polluter (Id.). 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

WSI seeks a variance from the financial assurance regulations so that it can use the funds which would be dedicated to fulfilling the financial assurance provisions in order to purchase equipment to reduce its stockpiles of "primary-shred" and "two-inch nominal" altered tires to "two-inch minus" tire chips. That equipment will cost \$120,875. (Tr. at 12-13.) When WSI's stockpiles are reduced to "two-inch minus" tire chips, the financial assurance provisions of Part 848 will no longer apply to WSI's operation, because tires which are altered to a "two-inch minus" standard are exempt from regulation by Part 848. (35 Ill. Adm. Code 848.101.) Mr. Funk testified that there are indications of markets for the "two-inch minus" tire chips for TDF, landscape material (called RubbeRock), and playground material (called SoftTurf). (Tr. at 12-15, see also Pet. at 7-8.) WSI is also exploring the use of its product in water purification at water treatment plants and for leachate collection systems filters at landfills. (Pet. at 7.)

At the July 15, 1993 hearing in this matter, WSI discussed the terms of the agreement reached between it and the Agency. Those terms are included in the Agency's recommendation. (Rec. at 5-7.) During the term of the variance, WSI will properly dispose of the "primary-shred" tires, either by landfilling, hauling to another place for disposal, or reducing the "primary-shred" to a complying or marketable product. (Tr. at 16-17.) WSI will also properly dispose of the "two-inch nominal" tire chips, either by reprocessing the material to "two-inch minus" size or through removal to a disposal site. (Tr. at 18-19.) If WSI fails to comply with these provisions by the expiration of the variance, WSI will comply with the financial assurance provisions. (Tr. at 18, 19.)

HARDSHIP

WSI contends that failure to grant the requested variance would result in an arbitrary or unreasonable hardship. WSI states that it is in a business which is newly formed and rapidly evolving, and that technologies are novel and shift with the market for products. WSI notes that it purchased its existing shredder (which reduces tires to the "two-inch nominal" size) prior to the Board's adoption, in docket R90-9, of the used and waste tire rules in April 1991 and February 1992. In sum, the regulations exempting "two-inch minus" tire chips had not been adopted when WSI purchased the shredder which produces "two-inch nominal" tire chips. (Pet. at 14-15.) WSI maintains that if required to comply with the financial assurance rules, it would be required to place one-fifth of its total assurance costs (estimated at \$98,000 to \$136,000) in a trust fund. One-fifth of the lower of the figures is approximately \$20,000, or about 70%

of WSI's anticipated profit for 1992. (Pet. at 16-17.) WSI contends that compliance with the regulations would leave it in an extremely precarious financial position. WSI further argues that grant of variance would assist in the development of TDF and TDF-related products and markets. (Pet. at 17.)

The Agency does not directly disagree with WSI's arguments. However, the Agency's estimates for total closure costs are lower than WSI's, with the Agency estimating that total closure costs would range between \$43,500 and \$75,000. The Agency states that if WSI chose to utilize the trust fund method of assurance, the costs of compliance would range from \$8,700 to \$15,000 per year, or from \$17,400 to \$30,000 (two annual pay-in periods) to be in complete compliance. (Rec. at 3-4.)

ENVIRONMENTAL IMPACT

WSI argues that the grant of the requested variance would have a minimal or nonexistent impact on human, plant, and animal life in the affected area. (Pet. at 8-9.) The Agency agrees, stating that because of the nature of the variance request, the issue of possible contamination is less serious than the potential financial loss to Illinois if WSI became insolvent or otherwise go out of business. The Agency estimates that the potential harm to the public from grant of variance is the potential closure cost of \$43,500 to \$75,000. However, assuming that WSI complies with the conditions agreed upon by the parties and contained in the Agency recommendation, the Agency does not believe that there are significant risks to the public or the environment from a grant of the requested variance. (Rec. at 4.)

CONSISTENCY WITH FEDERAL LAW

The Agency states that it is not aware of any federal law which would conflict with the Board's authority to grant WSI's variance request. (Rec. at 4.)

CONCLUSION

Based upon the record, the Board finds that immediate compliance with the financial assurance provisions of our used and waste tire regulations would impose an arbitrary or unreasonable hardship on WSI. WSI is involved in an evolving field, and was caught in that evolution when purchasing its "two-inch nominal" tire shredder before the Board's rules exempting "two-inch minus" tire chips from Part 848 were adopted. The Board finds that granting a short variance from the financial assurance rules will not cause direct environmental harm, and that the potential economic risk to the State of Illinois, should WSI go out of business, is small. That small risk is outweighed by the public interest in furthering methods of tire disposal other than landfilling. The Board will grant WSI a variance from

35 Ill. Adm. Code 848.Subpart D, subject to the conditions set forth in the Agency recommendation and incorporated below. The variance will expire on January 15, 1995. That date is eighteen months after the date of agreement of the parties.

This opinion constitutes that Board's findings of fact and conclusions of law in this matter.

ORDER

We Shred It, Inc. (WSI) is hereby granted a variance from 35 Ill. Adm. Code 848.Subpart D (Sections 848.400 through 848.415), subject to the following conditions:

1. This variance terminates on January 15, 1995.
2. As to WSI's "primary-shred" altered tire stockpile, by May 15, 1994, WSI shall either:
 - a. completely eliminate its currently existing stored stockpile of "primary-shred" altered tires by:
 1. removal and proper off-site disposal; or
 2. complete reduction by processing into exempt tire-derived fuel (TDF) product which has been chopped, shredded or processed such that the individual dimensions of height, length and width of the tire product are two inches or less (an industry standard known as "two-inch minus"), pursuant to 35 Ill. Adm. Code 848.101; or, alternatively,
 - b. with respect to any remaining "primary-shred" altered tires stored at the site on or after May 15, 1994, WSI shall, as of that date, fully comply with the financial assurance requirements of 35 Ill. Adm. Code 848.400-848.415, as now existing or hereafter amended.
3. As to its "two-inch nominal" tire chip pile, by January 15, 1995, WSI shall:
 - a. completely eliminate its currently existing stored stockpile of altered tires previously processed by chopping into "two-inch nominal" size pieces by:
 1. removal and proper off-site disposal; or
 2. removal off-site by sale as a "product" for use as TDF, landscaping materials, or any other lawful use; or
 3. complete reduction by reprocessing into exempt

material which has been chopped, shredded or processed such that the individual dimensions of height, length and width of the tire product are two inches or less (an industry standard known as "two-inch minus"), pursuant to 35 Ill. Adm. Code 848.101.

- b. No later than July 15, 1994, WSI shall reduce the existing stockpile of its "two-inch nominal" altered tires by approximately one-half, and shall eliminate the remaining amount by January 15, 1995.
 - c. With respect to any remaining "two-inch nominal" sized shredded tire pieces stored at the site on or after January 15, 1995, WSI shall, as of that date, fully comply with the financial assurance requirements of 35 Ill. Adm. Code 848.400-848.415, as now existing or hereafter amended.
4. With respect to any used, waste, or altered tires received or generated at the site on or after July 15, 1993, WSI shall fully comply with all applicable provisions of 35 Ill. Adm Code Part 848.
 5. Within forty-five days of the date of this order, WSI shall execute and forward to:

Daniel P. Merriman
Division of Legal Counsel
Illinois Environmental Protection Agency
P.O. Box 19276
2200 Churchill Road
Springfield, Illinois 62794-9276

a certificate of acceptance and agreement to be bound to all terms and conditions of the granted variance. 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. The form of certificate is as follows.

I (We), _____,
hereby accept and agree to be bound by all terms and conditions of the order of the Pollution Control Board in PCB 92-180, dated November 18, 1993.

Petitioner

Authorized Agent

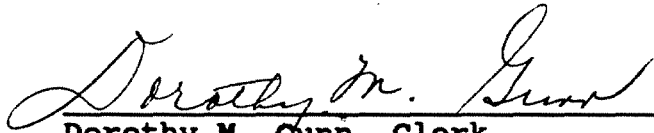
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Date

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for the appeal of final Board orders. The Rules 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 18th day of November, 1993, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board