ILLINOIS POLLUTION CONTROL BOARD
October 20, 1994

BURLINGTON ENVIRONMENTAL INC., Petitioner,	)	
v.	)	PCB 94-177 (Variance)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

STEPHEN F. HEDINGER, MOHAN, ALEWELT, PRILLAMAN, ADAMI APPEARED ON BEHALF OF THE PETITIONER;

JOHN J. KIM APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by E. Dunham):

On June 9, 1994, Burlington Environmental Inc. (Burlington) filed a petition for a variance from 35 Ill. Adm. Code 721.104(f)(3) and (4) to the extent those regulations limit the quantity of media contaminated with acute hazardous wastes that may be treated or stored during treatability studies. On July 7, 1994, Burlington filed an amended petition pursuant to the Board's order of June 23, 1994. Burlington seeks this variance in order to enable it to use a large scale model to conduct treatability studies of an innovative thermal technology for treating contaminated soils. In conjunction with its variance petition, Burlington submitted a request for trade secret protection for Exhibit I of its petition, entitled "System Overview: Burlington Environmental Inc.'s Mercury Recovery Pilot System Revised Preliminary Description" (System Overview). On July 21, 1994, the Board granted trade secret protection to Exhibit I.

A hearing on the petition was held on September 14, 1994, in Columbia, Illinois before hearing officer John Hudspeth. Several members of the public attended the hearing. On September 26, 1994, petitioner filed a closing brief and request for expedited decision.

STATUTORY FRAMEWORK

The Board's responsibility in this matter arises from the Environmental Protection Act (Act) (415 ILCS 5/1 et seq. (1992).) The Board is charged therein with the responsibility to "grant individual variances beyond the limitations prescribed in this Act, whenever it is found upon presentation of adequate proof, that compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship". (415 ILCS 5/35(a) (1992).) The Agency is required to appear in

hearings on variance petitions. (415 ILCS 5/4(f) (1992).) The Agency is also charged, among other things, 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) (1992).)

BACKGROUND

Burlington offers comprehensive waste management services through a nationwide network of recycling and treatment facilities, consulting engineering offices, and waste transportation hubs. (Pet. at 13.) Burlington's Columbia facility, including engineering offices and warehouse facility, was founded nearly 20 years ago. (Pet. at 14.) Burlington employs 125 persons locally and contributes $5,400,000 in payroll wages each year to the local economy. (Pet. at 14.) The facility is located in an industrial area with scattered residences, light industry and agricultural areas within a mile of the facility. (Pet. at 14.)

Burlington plans to test a newly developed thermal technology for recovery of contaminants from media contaminated with acute or non-acute hazardous waste at the Columbia, Illinois facility. (Pet. at 14.) Burlington plans to use a pilot-scale treatment unit for processing 90 to 180 kg (200 to 400 pounds) of mercury contaminated soil per hour. (Pet. at 3.) Batch tests will vary in duration, from a few hours to several hours at a time. (Pet. at 16.) Burlington intends to run the tests for a two to four week period. (Pet. at 16.) Batch runs may not always run on consecutive days within the two to four week test period. (Pet. at 16.)

Burlington plans to use mercury contaminated soil as received from an off-site location. (Pet. at 3.) Burlington does not plan to add non-hazardous soil to the mercury contaminated soil after it has been received at the facility. (Pet. at 3.) The mercury content of the soil (which will be extracted for recycling using Burlington's thermal process is 1.2% to 5%. (Pet. at 7.) Mercury contaminated soil is listed as a D009 hazardous waste, which is considered a non-acute hazardous waste. (Pet. at 7.)

Burlington contends that all processed materials will be containerized and transported off-site for proper disposal or recycling. (Pet. at 17.) Burlington asserts that the pilot system was designed with regulatory compliance and better resource management in mind. (Pet. at 20.) The system also includes pollution control and monitoring systems. (Pet. at 24.)

REQUESTED RELIEF

The Board's regulations provide special requirements for

samples undergoing treatability studies at laboratories or testing facilities. No more than 250 kg (552.5 lbs) of as received hazardous waste may be subjected to treatability studies in one day. (35 Ill. Adm. Code 721.104(f)(3).) As received hazardous waste stored at the facility for treatability studies can not exceed 1000 kg (2210 lbs). (35 Ill. Adm. Code 721.104(f)(4).)

Burlington interprets the exclusion limits of Section 721.104(f)(3) and (4) to apply to treatability testing of non-acute hazardous waste in its pure form, exclusive of the media contaminated with the waste. (Pet. at 6.) Therefore, Burlington contends that its proposed operation is below the exclusion limits because the amount of actual mercury to be subjected to the testing is well under the current regulatory limits. (Pet. at 6.) The Agency has indicated its disagreement with this interpretation to Burlington. (Pet. at 6.) Burlington requests the Board to find that the exclusion limits of Section 721.104(f)(3) and (4) apply to treatability testing and storage of non-acute hazardous waste exclusive of the media contaminated by those wastes. (Pet. at 10.)

In the event that the Board finds that Burlington's interpretation of the exclusion limits is incorrect, Burlington requests a variance from the restrictions on the quantities of non-acute and acute hazardous waste which may be treated or stored during treatability studies. (Pet. at 11.) Burlington requests that the less stringent standards established by the federal treatability studies sample exclusion rules, 40 CFR §261.4(f)(3) and (4)[1], be applicable to the treatability studies conducted at its Columbia facility. (Pet. at 12.) Burlington requests that relief be granted retroactively to June 27, 1994. (Pet. at 13.) Burlington is requesting that the term of the variance be until such time as the Board adopts regulations consistent with the U.S. EPA or until a site-specific rule or adjusted standard is granted or until 18 months after the denial of a site-specific rule change or adjusted standard. (Pet. at 13.)

The Board finds that the exclusion limits of Section 721.104(f)(3) and (f)(4) apply to the contaminated media and not solely to the amount of hazardous waste. The Board finds this interpretation to be consistent with the federal regulations upon which the Board's regulations are based. Therefore, the Board finds the pilot testing proposed by Burlington would be in

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[1] On February 18, 1994, the United States Environmental Protection Agency (U.S. EPA) revised its rules on treatability studies sample size. The final rule was published at 59 FR 8362. The Board today adopts amendments to Sections 721.104(f)(3) and (4) in an identical-in-substance rulemaking in R94-17.

violation of the Board's regulation and that the petition for a variance is appropriate. Therefore, the Board proceeds to review the petition for variance.

AGENCY RECOMMENDATION

The Agency filed its recommendation on August 8, 1994. The Agency reports that it has investigated the variance petition. (Ag. Rec. at 1.) The Agency has also provided public notice of the petition and has received at least one telephone inquiry, a letter from a citizen of Columbia and a petition in opposition to the variance signed by 367 citizens of Columbia. (Ag. Rec. at 1.)

The Agency recommends that the Board grant the variance until the formal adoption of the identical-in-substance rulemaking. (Ag. Rec. at 5.) The Agency recommends that the variance be granted retroactively. (Ag. Rec. at 5.) The Agency also recommended a reporting condition be added to the variance (Ag. Rec. at 5) but at hearing the Agency withdrew the request that the condition be made part of the variance because reporting would be required under other regulations. (Tr. at 47.)

PUBLIC COMMENTS

At the hearing, 10 members of the public presented testimony on their concerns on the testing to be done by Burlington. The Board also received several written comments from members of the public. A petition in opposition to the variance with 511 signatures[2] was presented at the hearing. (Exh. 1.)

The public comments express concerns on the effects of mercury on humans. (Tr. at 53, 66, 97, 106, 108 and 124.) The comments also express a concern of the production of dioxin from the operation. (Tr. at 55.) The commenters are especially concerned about the proximity of the facility to residential areas and the possibility of pollutants being transmitted by air and water to the residents. (Tr. at 59.) The commenters believe that a site away from a residential population would be more appropriate. (Tr. at 59 and 108.) There is a concern on the effect on the resale value of homes in the area. (Tr. at 69 and 106.) Comments were also presented questioning the suitability of the operation for an area zoned for light industry. (Tr. at 105 and 111.)

The Mayor of Columbia also testified at the hearing in support of Burlington and the granting of the variance. (Tr. at

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[2] This is the same petition that was submitted with the Agency recommendation but additional signatures were obtained since the submission of the petition to the Agency.

101.) The Board also received a copy of a letter from the Mayor to the Agency stating the building inspector/zoning administrator will investigate and conduct on-site inspections of the facility to insure that there is no violation of the city's zoning ordinances.

HARDSHIP

Burlington contends that it must run the system at full strength (two to four hundred pounds of contaminated soil per hour) to obtain the necessary information from the pilot test. (Pet. at 7.) Burlington maintains that without the variance, Burlington will be unable to conduct meaningful pilot test. (Pet. at 26.) Burlington contends that failure to begin the pilot test in June will result in the loss of the only potential client with an immediate need for the technology. (Pet. at 16.) Burlington maintains that failure to meet the planned schedule for testing may result in a lost economic opportunity to develop this technology for years, and potentially permanently. (Pet. at 16.)

The Board finds that Burlington has presented adequate proof that immediate compliance with the treatability exclusion limitations would impose an unreasonable or arbitrary hardship on Burlington. The hardship faced by Burlington is the inability to conduct meaningful pilot tests at the lower limits. Burlington is also subject to a hardship in that the current limitations prohibit the timely development of the treatment system to meet potential customers' current needs.

ENVIRONMENTAL IMPACT

The mere showing that compliance with a Board regulation would impose a hardship upon a petitioner is not sufficient for a variance to be granted. The petitioner must also demonstrate to the Board's satisfaction that the hardship outweighs any injury that would result from grant of the variance. This weighing of the consequences of a variance was recently capsulized by the appellate court in Marathon Oil Company v. IEPA and PCB (5th Dist. 1993) 610 N.E.2d 789,793, 182 Ill. Dec. 920, 924:

> The petitioner must *** show that the hardship it will encounter from the denial of the variance will outweigh any injury to the public or environment from the grant of the variance. Only if the hardship outweighs the injury does the evidence rise to the level of an arbitrary or unreasonable hardship.

Commenters have raised several issues relating to the effects of mercury on humans. In addition, residents surrounding the facility have expressed their concerns on the possibility of air pollution and contamination of groundwater due to releases of mercury from the facility. However, Burlington maintains that

the proposed system is a closed system and that all material will be containerized and properly disposed or recycled.

While the Board recognizes the concerns presented by the citizens, the record does not support a finding that the granting of the variance will result in an adverse effect on the environment. The operations at the Burlington facility are required to comply with all provisions of the Act and the Board's regulations. Compliance with these regulations will assure that any emissions from the facility do not exceed the specified levels so as to adversely effect the environment and cause injury to the public. In addition, the exclusion levels requested by Burlington are the levels allowed by federal regulations which have been determined by the federal government to represent a level which does not create a threat to the human health or the environment.

CONSISTENCY WITH FEDERAL LAW

Burlington maintains that the proposed variance is consistent with federal law. (Pet. at 29.) U.S. EPA expanded an existing exclusion from the definition of solid waste for varying amounts of hazardous waste used for treatability study. The amendments to 40 CFR 261.4(e)(2), (e)(3), and (f)(3) through (f)(5) (corresponding with 35 Ill. Adm. Code 721.104(e)(2), (e)(3), and (f)(3) through (f)(5)) occurred at 59 Fed. Reg. 8362, on February 18, 1994.

The amendments essentially changed the usage "soils, water or debris contaminated with hazardous waste" and expanded the amounts of these materials that are exempted. Unaffected was the amount of hazardous waste itself that is exempted from regulation as hazardous waste. Thus, exempted for study are up to 10,000 kg (formerly 1,000 kg) of media contaminated with hazardous waste or up to 2,500 kg (formerly 250 kg) of media contaminated with acute hazardous waste. The exemption remains for up to 1,000 kg of hazardous waste or up to 1 kg of acute hazardous waste. Also, the generator or accumulator may ship in a single shipment up to 10,000 kg (formerly 1,000 kg) of media contaminated with hazardous waste or 2,500 kg (formerly 1 kg) of media contaminated with acute hazardous waste. Unaffected was the shipment of 1,000 kg of hazardous waste or 1 kg of acute hazardous waste.

The Board finds that the variance is consistent with federal law. Burlington is seeking a variance to impose the less stringent limitations recently adopted by the U.S. EPA. The Board is proceeding with the adoption of the U.S. EPA amendments to the treatability exclusions in the identical-in-substance rulemaking R94-17, In the Matter of RCRA Subtitle C Update, USEPA. The Board today has adopted a separate opinion and order in R94-17 adopting the proposed amendments, however, the Board will delay filing of the adopted amendments for 30 days

specifically to allow U.S. EPA to comment on the adopted amendments.

COMPLIANCE

Burlington contends that at the time of the filing of the petition it was in compliance with the Act and the Board's regulations. (Pet. at 17.) Burlington seeks to maintain compliance through this variance. (Pet. at 17.) Burlington also intends to pursue a site-specific rule change or an adjusted standard to maintain long-term compliance.[3] (Pet. at 19.) Burlington will also be in compliance when the Board adopts the limitations adopted in the federal regulations. Burlington also contends that if the variance is denied, the pilot test may be moved to another state or Canada to avoid noncompliance. (Pet. at 23.)

RETROACTIVE APPLICATION

As a general rule, in the absence of unusual or extraordinary circumstances, the Board renders variances as effective on the date of the Board order in which they issue. (LCN Closers, Inc. v. EPA (July 27, 1989), PCB 89-27, 101 PCB 283, 286; Borden Chemical Co. v. EPA (Dec. 5, 1985), PCB 82-82, 67 PCB 3,6; City of Farmington v. EPA (Feb. 20, 1985), PCB 84-166, 63 PCB 97, 98; Hansen-Sterling Drum Co. v. EPA (Jan. 24, 1985), PCB 83-240, 62 PCB 387, 389; Village of Sauget v. EPA (Dec. 15, 1983), PCB 83-146, 55 PCB 255, 258; Olin Corp. v. EPA (Aug 30, 1983), PCB 83-102, 53 PCB 289, 291.)

> A variance is not retroactive as a matter of law, and the Board does not grant variance retroactivity unless retroactive relief is specially justified.
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> Deere & Co. v. EPA, (Sept. 8, 1988) PCB 88-22, 92 PCB 91, 94 (citations omitted).

Absent a waiver of the statutory due date, Section 38(a) of the Environmental Protection Act requires the Board to render a decision on a variance within 120 days of the filing of a petition. (415 ILCS 5/38.5) (1992).) For this reason, a petitioner that wishes a variance to commence by a certain date must file its petition at least 120 days prior to the desired inception date. (EPA v. Citizens Utilities Co. of Illinois (Jan. 12, 1984), PCB 79-142, 56 PCB 1, 4.) Burlington should have filed its petition by February 25, 1994 in order to file 120 days

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[3] Burlington has not filed a petition for a site-specific rule or an adjusted standard with the Board. However, Burlington has filed a rulemaking petition in R94-18, requesting amendments to 35 Ill. Adm. Code 721.104(f)(3) and (f)(4).

prior to the desired inception date of June 27, 1994. Although retroactive relief may be justified where a petitioner has filed a timely variance petition, retroactive relief is not granted where the delay was through some fault of the petitioner. (DMI v. IEPA (December 19, 1991), PCB 90-227, 128 PCB 241, 246.)

Burlington contends that it learned that a variance may be necessary to conduct the pilot test in early 1994. (Pet. at 5.) Burlington discovered that the Agency interpreted the treatability exclusion limitations to apply to the amount of contaminated media and not to the amount of hazardous material in its pure form, exclusive of the media. (Pet. at 6.) On April 27, 1994, Burlington requested a provisional variance from the Agency. (Pet. at 5.) On May 26, 1994, the Agency denied the request for a provisional variance. (Pet. at 6.) The petition for a variance was filed on June 9, 1994. Burlington contends that the petition for variance was compiled as expeditiously as possible following the Agency's denial of a provisional variance. (Pet. at 12.)

The Board finds that retroactive relief is appropriate because the circumstances surrounding the filing of this petition present an unusual situation. The corresponding U.S.EPA amendments which contain the relief Burlington seeks were final on February 18, 1994. The Board is required to adopt the same regulations through the identical-in-substance rulemaking procedure. (415 ILCS 5/7.2 (1992).) The lag of time between the effective date of the federal rule and the Board's adoption of the rules is due to unavoidable rulemaking and procedural hurdles. But for those inherent delays, Burlington would have not needed to request a this variance or the provisional variance which was earlier denied by the Agency. In addition, the Board will not fault Burlington for the delay in filing the petition for variance when it was involved in communications with the Agency and in the process of obtaining similar relief through different means.

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

CONCLUSION

The Board grants Burlington a variance from 35 Ill. Adm. 721.104(f)(3) and (f)(4). The Board finds that Burlington has presented adequate proof that immediate compliance with 35 Ill. Adm. Code 721.104(f)(3) and (f)(4) will impose an unreasonable or arbitrary hardship on Burlington. The Board finds that the granting of the variance will not result in an adverse impact on the environment.

Finally, the Board notes that the conclusions it reaches based upon the record of this variance proceeding do not

necessarily reflect on the merits of Burlington's rulemaking proposal, currently pending before the Board in R94-18. The burdens of proof and the standards of review in a rulemaking (a quasi-legislative action) and a variance proceeding (a quasi-judicial action) are distinctly different. (Cf. Titles VII and IX of the Act; see also Willowbrook Development v. Pollution Control Board (2d Dist. 1981), 92 Ill. App. 3d 1074, 416 N.E.2d 385.) The Board cannot lawfully prejudge the outcome of a pending regulatory proposal in considering a petition for variance. (City of Casey v. IEPA (May 14, 1981), PCB 81-16, 41 PCB 427, 428.)

ORDER

Petitioner, Burlington Environmental Inc., is granted a variance from 35 Ill. Adm. Code 721.104(f)(3) and 721.104(f)(4) with respect to its facility located in Columbia, Illinois subject to the following conditions:

1. This variance begins on June 27, 1994 and terminates on the effective date of the adopted amendments in R94-17, currently pending before the Board or December 31, 1995, whichever shall occur first.

2. During the period of the variance the following limitations are applicable:

   a) No more than a total of 10,000 kg of "as received" media contaminated with non-acute hazardous waste, 2500 kg of media contaminated with acute hazardous waste or 250 kg of other "as received" hazardous waste is subject to initiation of treatment in all treatability studies in any single day. "As received" waste refers to the waste as received in the shipment form the generator or sample collector.

   b) The quantity of "as received" hazardous waste as stored at the facility for the purpose of evaluation in treatability studies does not exceed 10,000 kg, the total of which can include 10,000 kg of media contaminated with non-acute hazardous waste, 2500 kg of media contaminated with acute hazardous waste, 1000 kg of non-acute hazardous wastes other than contaminated media and 1 kg of acute hazardous waste. This quantity limitation does not include treatment materials (including nonhazardous waste) added to "as received" hazardous waste.

Within forty-five days of the date of this order, petitioner shall execute and forward to:

Illinois Environmental Protection Agency
Division of Legal Counsel
2200 Churchill Road, P.O. Box 19276
Springfield, Illinois 62794-9276
Attn: Mr. John Kim

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 and of no force and effect as a shield against enforcement of rules from which this variance is granted. The form of the 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 94-177, October 20, 1994.

____
Petitioner

____
Authorized Agent

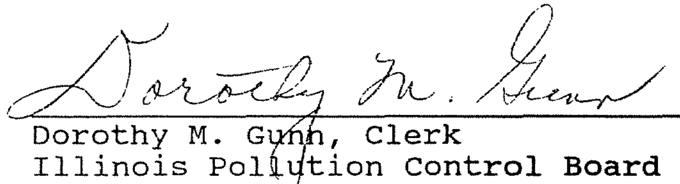
____
Title

____
Date

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act, (415 ILCS 5/41 (1992)), provides for appeal of final orders of the Board within 35 days of the date of service of this order. The Rules of (See also 35 Ill. Adm. Code 101.246, Motion for Reconsideration) the Supreme Court of Illinois establish filing requirements.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 20th day of October, 1994, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board