

ILLINOIS POLLUTION CONTROL BOARD  
October 29, 1992

MARSCO MFG. CO.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 91-235
	)	(Variance)
	)	
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by J. Anderson):

On October 20, 1992, Marsco Manufacturing Company (Marsco) filed a motion requesting the Board to dismiss Marsco's variance petition and grant it leave to reinstate the petition in accordance with 35 Ill. Adm. Code 103.140(e) and Section 2-1009 of the Illinois Code of Civil Procedure.

In support of its motion, Marsco states that it has been negotiating a "settlement of this matter" with the Attorney General's Office (AG) since February 13, 1992.<sup>1</sup> More specifically, Marsco states that the parties met on February 13, 1992, May 20, 1992, September 9, 1992, and September 25, 1992, to discuss Marsco's plan for "achieving compliance with the applicable regulation as well as the procedural manner in which [the] proceeding would be handled", and that, on October 19, 1992, the parties reached a settlement in principle. On October 20, 1992, hearing was held in this matter. Marsco states that, although no testimony on the merits of Marsco's variance request was presented at hearing, the parties read their settlement into the record. As part of the settlement agreement, Marsco agreed to dismiss its variance petition.<sup>2</sup> Finally, Marsco states that although settlement agreement remains unsigned, the parties expect to reach a finalized settlement within the next two months. Marsco adds that it would be prejudiced if the Board

<sup>1</sup>At hearing, the parties discussed a settlement agreement that provided, in part, for Marsco's payment of a penalty. Neither party, however, identified where an enforcement action was pending.

<sup>2</sup>On October 26, 1992, the hearing officer filed a report of the hearing. The hearing officer stated that the parties read a proposed settlement agreement into the record and agreed that Marsco would submit a motion to dismiss. The hearing officer added, however, that it was his understanding that the agreement provided for dismissal without any stated conditions.

were to deny its request and if the parties did not reach a final settlement.

The Board will recap the history of this matter. Marsco filed its variance petition on November 27, 1991. In response to a December 6, 1991 Board order for more information, Marsco filed an amended petition on January 6, 1992. On October 14, 1992, Marsco filed a second amended petition changing the time frame of the requested relief as well as a request to the Board to cancel the October 20, 1992 hearing in the case. In support of its request, Marsco argued, in part, that the Illinois Environmental Protection Agency (Agency) had not yet reviewed the second amended petition, nor had it filed a recommendation on the first amended petition. On October 16, 1992, the Board issued an order directing the parties to go to hearing on October 20, 1992.

The Board is disturbed by the fact that the Agency never filed a recommendation in response to Marsco's first amended petition, filed some nine months ago. The Agency is required by statute to file a recommendation in variance cases and, by Board rule, to do so in 30 days. Ill. Rev. Stat. 1991, ch. 111 $\frac{1}{2}$ , par. 1037(a); 35 Ill. Adm. Code 104.180. Although the Board recognizes that the Agency may be concerned with the time and resources needed to prepare documentation for a case that might be dismissed because of possible settlement in an unidentified but presumable related enforcement case, the acceptable procedure would have been for the Agency to inform the Board that it wished to delay its recommendation by filing either a motion requesting an extension of time to file its recommendation or a temporary stay of the filing of its recommendation.

As for Marsco's motion to dismiss, the Board hereby grants the motion. However, the Board notes that it need not specifically consider whether to grant leave to reinstate a petition for variance. The Board notes that the right to file a variance petition is a right provided for by statute. Environmental Protection Act, Ill. Rev. Stat. 1991, ch. 111  $\frac{1}{2}$ , pars. 1035, 1037 (see also 35 Ill. Adm. Code 104.120). As a result, the decision to file a variance rests with an individual rather than the Board. Accordingly, for the foregoing reasons, the Board grants the motion to dismiss and closes the docket, but will not grant Marsco leave to reinstate its variance in that such action is unnecessary.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 29th day of October, 1992, by a vote of 7-0.

Dorothy M. Gunn  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board