

ILLINOIS POLLUTION CONTROL BOARD
October 29, 1992

LONE STAR INDUSTRIES, INC.,)
)
Petitioner,)
)
v.) PCB 92-134
) (Variance)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

ORDER OF THE BOARD (by B. Forcade):

On October 14, 1992, The Environmental Protection Agency (Agency) filed a "Motion to Dismiss and Motion To Stay Filing of Agency Recommendation". The Board denied the Agency's motion to stay on October 16, 1992. Lone Star filed its response to the Agency's motion to dismiss on October 19, 1992.

Lone Star filed a petition for variance on September 17, 1992. Lone Star operates a portland cement manufacturing plant and associated quarry in Oglesby, Illinois. Lone Star is seeking a variance from various provisions of the Board's regulations on landfills. In particular, the petition requests variance from the following provisions:

1. Minimum of one foot of cover within 60 days of waste placement - [Sections 814.302(a) and 811.313] - extend to December 31, 1992.
2. Installation of leachate management system - [Section 814.302(b)(1)] - extend to December 31, 1992.
3. Diversion of runoff from undisturbed areas - [Section 811.103(b)] - extend to December 31, 1992.
4. Installation of a final cover system which meets all stated design standards - [Section 811.314] - extend to one year after final Board action on an adjusted standard petition or rule change, or determination by the Board that the proposed final cover system meets the requirements of the existing rule.
5. Requirement for setting background concentration for groundwater - [Section 811.320(d)] - extend to 120 days after final Board action on an adjusted standard petition or rule change, or determination by Board that the requirement is non-applicable.
6. Completion of groundwater impact assessment and submittal as part of Initial Facility Report -

0137-0077

[Sections 811.317, 815.202(a), 815.203(b), and 812.316]
- extend to December 31, 1994.

7. Completion and submittal of a written Closure Plan as part of an initial Facility Report - [Sections 815.202(a), 815.203(b), and 811.110(d)] - extend to 120 days after final Board action on an adjusted standard petition or rule change modifying the applicable requirements for the final cover system.

Pet. at 4

The Agency argues that Lone Star's petition should be dismissed because it does not seek relief which is the proper subject of a variance petition. The Agency argues that the petition does not envision compliance with the Board's regulations because Lone Star is only seeking relief for the period before the Board can act on an adjusted standard petition or a rule change. The Agency specifically references requests 4, 5, and 7 of Lone Star's petition. The Board notes that Lone Star has not filed a petition for adjusted standard or rule change.

Lone Star contends that it is not seeking to avoid ultimate compliance with the regulations either in their present form or as modified by Board action. Lone Star contends that it is merely seeking affirmation that the proposed actions will result in compliance with the regulations as they are interpreted by the Board, or in the alternative, time to comply with site-specific rules. Lone Star holds that proposed dates of compliance are set forth in its petition. Lone Star notes that it has fully complied with the requirements for a variance petition in 35 Ill. Adm. Code 104.121. Lone Star notes that the alleged deficiencies only relate to some of the provisions for which relief is sought. Lone Star argues that those provisions that are not challenged by the Agency should not be subject to dismissal.

The Board will not grant a variance for an indefinite period because the length of a variance is limited to five years. (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1036(b).) Lone Star is requesting that variance be granted for an indefinite period in requests 4, 5 and 7. The duration of the variance requested by Lone Star in 4, 5 and 7 is subject to some action on the part of the Board (i.e. adjusted standard, rule change or Board determination). Lone Star seeks a determination from the Board on final cover composition and conditions and the requirement for installation of monitoring wells.

The Board may dismiss a petition for some legal defect. In considering a motion to dismiss, the Board may accept all well plead facts as true and draw all inferences in favor of the non-moving party. (Erich J. Mandel v. Thaddeus G. Kulpaka (July 30, 1992) PCB 92-33.) Lone Star's failure to request the variance

0137-0078

for a specific period, regarding certain numbered requests could be construed to create a legal defect. However, due to the nature of the variance and the method of compliance that Lone Star plans to follow, the Board can infer that compliance may be possible by means other than an adjusted standard or rule change within the maximum five year term of a variance. For example, in request #4, Lone Star seeks in part a determination that the proposed final cover meets the requirements of the existing rule. Therefore, this request is more in the nature of a declaratory judgment action. The alleged legal defects in the petition can be corrected through inference and dismissal would be inappropriate in this matter.

A variance by its nature is a temporary reprieve from compliance with the Board's regulations. (Monsanto Co. v. IPCB (1977), 67 Ill.2d 276, 367 N.E.2d 684.) A variance petitioner accordingly is required, as a condition to grant of variance, to commit to a plan that is reasonably calculated to achieve compliance within the term of the variance. (City of Mendota v. IPCB (3d Dist. 1987), 161 Ill. App. 3d 203, 514 N.E.2d 218.) However, the Board has found that in some exceptional circumstances variance may be granted even though petitioner does not have a final compliance plan. See Mobil Oil v. IEPA (Sept. 20, 1984, 60 PCB 99; IPC, Clinton Plant v. IEPA (May 22, 1989), PCB 88-97, 100 PCB 181); Amerock v. IEPA (Nov. 11, 1985), PCB 84-62, 66 PCB 411; Zeigler Coal v. IEPA (Aug. 22, 1991), PCB 91-12, 125 PCB 331.) In each of these exceptional circumstances the Board has required assurance, commonly through conditions attached to the grant of variance, that negative environmental impact during the term of the variance be minimal and temporary.

The filing of a proposal for site-specific relief is not a compliance plan, since it is a matter of speculation whether such regulatory relief may be granted. (Citizens Utilities Company of Illinois v. IPCB et al. (3rd Dist. 1985), 134 Ill. App. 3d 111, 479 N.E.2d 1213.) The pendency of a rulemaking does not stand by itself as grounds for grant of a variance. (Section 35(a) of the Act; Citizens Utilities Company of Illinois v. IPCB, supra; City of Lockport v. IEPA (September 11, 1986), PCB 85-50, 72 PCB 256, 260; General Motors Corporation, Electro-Motive Division v. IEPA (February 19, 1987), PCB 86-195, 76 PCB 54, 58; Alton Packaging Corp. v. IEPA (February 25, 1988), PCB 83-49, 86 PCB 289, 299, Borden Chemicals v. IEPA (October 25, 1990) PCB 90-130, 115 PCB 453.)

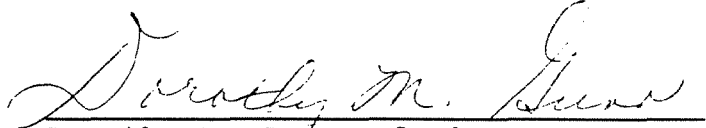
Lone Star's petition does present alternate forms of compliance with Board regulations other than site-specific rulemaking or a rule change. The Board finds that the information contained in petition is sufficient and that dismissal of the petition at this point in the proceeding is unwarranted. The Board does not reach a determination on whether Lone Star's petition presents an adequate plan for compliance or

if a variance is necessary.

Therefore, the motion to dismiss is denied.

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, Clerk
Illinois Pollution Control Board