

ILLINOIS POLLUTION CONTROL BOARD
January 23, 1992

LAND and LAKES COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 91-217
)	(Variance)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by M. Nardulli):

This matter is before the Board on the Illinois Environmental Protection Agency's (Agency) January 6, 1992 motion to dismiss petitioner's amended variance petition. On December 24, 1991, petitioner Land and Lakes Company (Land and Lakes) filed an amended petition for variance from 35 Ill. Adm. Code 814.501(b) and 814.104 seeking to operate its landfill for one year beyond the two-year deadline set forth in the regulations. The Agency asks that the variance petition be dismissed because the relief sought is not the proper subject of a variance.

A review of the Board's landfill regulations is necessary to understand the instant case. Part 814 addresses what are often referred to as the transition provisions between the Board's old and new landfill regulations. The regulations from which Land and Lakes seeks variance provide that an existing landfill must close by September 18, 1992 (i.e. two years after the effective date of the Board's new landfill regulations adopted in R88-7) unless it can demonstrate compliance with the stricter operating, closure and post-closure care standards of Subpart B, applicable either to landfills remaining open for more than seven years¹, or Subpart D, applicable to landfills remaining open between two and seven years. The standards set forth in Subpart D, applicable to Land and Lakes because it seeks to remain open three years, in large part reference Part 811, which sets forth the standards applicable to new landfills. (35 Ill. Adm. Code 814.402.) Only if a landfill closes within the two-year period may it continue to operate under its present permit and close under the closure and post-closure care provisions of Part 807 of the old landfill regulations. (35 Ill. Adm. Code 814.104(a) and 814.502(a) and (b).)

¹ Those landfills seeking to stay open beyond seven years must demonstrate compliance with the strictest standards in Part 814. (See e.g., 35 Ill. Adm. Code 814.301 and 814.302.)

By its variance petition, Land and Lakes seeks to continue to operate its landfill for one year beyond the two year closure provisions in Part 814 of the Board's new landfill regulations and to be allowed to remain subject to its existing permits, issued prior to the new regulations, under Part 807 of the Board's old landfill regulations. Land and Lakes contends that it has limited disposal capacity remaining at its landfill but that it "does not make economic sense" to comply with the requirements applicable to new landfills (Part 811). Land and Lakes estimates that compliance with Part 811 would be in excess of \$2.1 million for one additional year of operation. Land and Lakes seeks an additional year of operation so that it may fill its landfill to capacity without having to comply with the new landfill regulations.

Land and Lakes proposed compliance plan is as follows: "The proposed method to achieve compliance with the act [sic] and regulations would be to operate, close and provide post-closure care for the facility in accordance with all existing state and local permits issued pursuant to Section [sic] 807, as well as applicable federal, State and local regulations."

The Agency contends that the variance petition should be dismissed because "Land and lakes does not present a plan or timetable by which it will ultimately achieve compliance with the applicable regulations, namely the Section [sic] 811 regulations if it remains in operation until September 18, 1993 ... [Therefore,] the relief sought here by Land and Lakes is not the relief envisioned by the variance concept." Citing City of Mendota v. Pollution Control Board, 161 Ill. App. 3d 203, 514 N.E.2d 218 (3d Dist. 1987), the Agency states that "Land and Lakes seeks permanent exemption from these regulations, which is not the proper subject of a variance petition."

Land and Lakes asserts that it is not seeking permanent exemption from Part 811; rather, it seeks an extension of time to close its facility under part 807. According to Land and Lakes, it "will comply with the Part 807 regulations and will close in accordance with the existing permits in full compliance with those regulations. All it seeks is additional time to do so." Land and Lakes contends that the Agency is mistaken when it claims that Land and Lakes is seeking a permanent exemption.

DISCUSSION

Section 104.121(f) requires a petition for variance to include:

A detailed description of the existing and proposed method of control to be undertaken to achieve full compliance with the Act and regulations, including a time schedule for the implementation of all phases of the control program from initiation of design to program

completion and the estimated costs involved for each phase and the total cost to achieve compliance

The requirement that a variance petition include a compliance plan is consistent with the purpose of a variance which is to provide temporary relief while encouraging future compliance. (Monsanto Co. v. PCB, 67 Ill. 2d 276, 367 N.E.2d 684 (1977).) "[T]he variance procedure is not intended as a mechanism for seeking a permanent exemption from the Act." (City of Mendota v. PCB, 161 Ill. App. 3d 203, 514 N.E.2d 752 (3d Dist. 1987).)

Here, the only regulations from which Land and Lakes seeks variance are those that require a landfill to either: (1) demonstrate compliance with the new landfill regulations such that the landfill may stay open between two and seven years or; (2) close within two years and remain under the old regulations. The one year extension of time sought by Land and Lakes precludes compliance with the regulations which are the subject of this variance. It is impossible for Land and Lakes to receive the requested relief of operating under the old regulations for three years from the effective date of the Board's new landfill regulations and achieve future compliance with regulations which require that operations cease within two years. Land and Lakes mistakenly equates a request for an extension of a regulatory deadline with a variance petition. As noted above, while a variance allows one time to achieve compliance, it also contemplates ultimate compliance. Such compliance cannot be achieved by variance in the instant case.

Rather than seeking temporary relief from the two-year deadline, Land and Lakes actually seeks permanent relief from ever having to demonstrate compliance with the stricter new regulations seeking, instead, to simply substitute the regulations in Part 807. Given that Land and Lakes is requesting to initiate closure between two and seven years, the following "between two and seven year" provisions of Part 814 automatically apply (35 Ill. Adm. Code 814.401(a)):

- (a) The standards in this Subpart are applicable to all existing units of landfills, including those exempt from permit requirements in accordance with Section 21(d) of the Act, that have accepted or accept chemical and putrescible wastes. Based upon an evaluation of the information submitted pursuant to Subpart A and any Agency site inspection, units that meet the requirements of this Subpart shall initiate closure between two and seven years after the effective date of this Part.
- (b) Based upon an evaluation of the information submitted pursuant to Subpart A and any Agency site

inspection, units which are unable to comply with the requirements of this Section are subject to the requirements of Subpart E [the two-year closure requirement].

Consequently, if a landfill seeks to continue accepting waste beyond the two-year deadline but will initiate closure within seven years, it must demonstrate compliance with the applicable standards set forth in Part 814 which refer to Part 811. Landfills which cannot demonstrate compliance with the stricter standards must close within two years in accordance with the old regulations. Land and Lakes cannot amend these regulatory provisions by way of a variance. The Board's transition provisions anticipated the very situation in which Land and Lakes finds itself. Relief is provided for in the regulations: Land and Lakes may continue to operate beyond the two-year deadline but there is a price to pay in that the new regulations must be met.

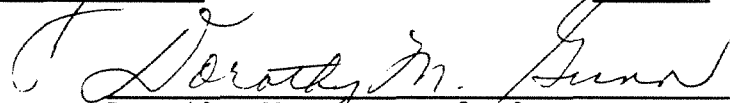
In conclusion, Land and Lakes seeks to exercise the option of staying open beyond two years, but wants to avoid ever complying with the stricter standards. Land and Lakes has not requested relief from immediate compliance with the "between two and seven year" provisions of Part 814, nor has it presented a compliance plan or time schedule for achieving ultimate compliance with the standards applicable to landfills seeking to operate beyond the two-year deadline. Consequently, Land and Lakes is seeking permanent relief from Part 814 and Part 811 by attempting to "extend" the two-year deadline allowing a landfill to close under the old landfill regulations. Land and Lakes petition is, in essence, an attempt to amend the Board's new landfill regulations by way of variance and improperly seeks permanent relief.

For the foregoing reasons, the Board grants the Agency's motion to dismiss Land and Lakes' amended petition for variance.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1041) provides for the appeal of final Board orders. The Rules of the Supreme Court of Illinois establish filing requirements.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 23rd day of January, 1992 by a vote of 5-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board