ILLINOIS POLLUTION CONTROL BOARD
May 16, 1996

MARATHON OIL COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 94-27
	)	(Variance - Air)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent.	)	

JOSEPH WRIGHT, McBRIDE, BAKER & COLES APPEARED ON BEHALF OF PETITIONER.

JAMES O'DONNELL, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by R.C. Flemal):

This matter comes before the Board upon a petition for variance filed by Marathon Oil Company (Marathon). Marathon seeks variance from the Board's particulate emissions and opacity regulations pertaining to its fluid catalytic cracking unit at its petroleum refinery in Crawford County, Illinois. The term of the requested variance is from January 1, 1993 to November 15, 1995[1].

The Board's responsibility in this matter arises from the Environmental Protection Act (Act) (415 ILCS 5/1 et seq. (1994).) The Board is charged there with the responsibility of granting variance from Board regulations whenever it is found that immediate compliance with the regulations would impose an arbitrary or unreasonable hardship upon the petitioner. (415 ILCS 5/35(a).) The Illinois Environmental Protection Agency (Agency) is required to appear in hearings on variance petitions. (415 ILCS 5/4(f).) The Agency is also charged, among

[1] The inclusive dates, January 1, 1993 to November 15, 1995, are requested in Marathon's Amended Petition (Amd. Pet.), page 3. The Board notes that in Marathon's initial petition (Pet.) at page 3, Marathon requested that variance start on January 14, 1994. The Board further notes that in Marathon's post hearing brief the requested term is identified both as "the period commencing on May 13, 1993 . . . through August 10-11, 1994" (Marathon Br. at 5) and as "from May 12, 1993 through and including August 10, 1994" (*Id.* at 10).

other matters, 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).)

Based on the record presented to it, and upon analysis of the requirements necessary for grant of variance, the Board finds that Marathon has not carried its burden of proof to justify grant of variance. Accordingly, the variance request will be denied.

PROCEDURAL HISTORY

Marathon's initial petition for variance was filed with the Board on January 14, 1994. Along with its petition Marathon filed a motion to have two documents (permit and permit application) declared "not subject to disclosure" pursuant to Section 7 of the Act. (415 ILCS 5/7.) On February 17, 1994 the Board found that Marathon had not physically included those documents which it was requesting "not subject to disclosure". The Board directed Marathon to resubmit its application, including both documents it would be requesting to be protected, along with a motion so stating. Marathon never submitted the specific documents to be protected, nor did it submit an additional request to prevent disclosure.

On March 8, 1994 the Agency filed a motion to dismiss which Marathon answered on March 14, 1994. The Board denied the Agency's motion on March 17, 1994, finding that Marathon had at that time presented sufficient information as required by Section 104.121(e) of the Board's regulations. The Board also construed the additions in Marathon's response as amending the petition. On March 18, 1994 Marathon filed a formal amended petition for variance which the Board accepted on March 31, 1994.

On April 25, 1994 the Agency filed its recommendation to deny Marathon's requested variance relief. Contrary to Marathon's claim that the Agency did not file a recommendation as required by Section 37 of the Act[2], the Board accepted the Agency's recommendation on April 25, 1994. The Agency claims that Marathon was served with the recommendation on April 21, 1994. (Agency Br. at 8.)[3]

A hearing was held on March 2, 1996 at the Crawford County Courthouse, Robinson, Illinois, before hearing officer Deborah Frank, and continued on the record by telephone due to weather conditions to March 21, 1996. Charles Samuels appeared as a witness on behalf of Marathon and John Justice appeared as a witness for the Agency. No members of the public were present at the hearing.

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[2] See Marathon's April 11, 1996 post-hearing brief, page 2.

[3] Marathon's amended petition will be cited as (Amd. Pet. at _.); the Agency's post-hearing brief will be cited as (Agency Br. at _.); Marathon's post-hearing brief will be cited as (Marathon Br. at _.); the Agency's reply brief will be cited as (Agency Reply Br. at _.); and the transcript of the hearing will be cited as (Tr. at _.).

On April 11, 1996 Marathon filed a motion to strike Respondent's Exhibit 8. On April 19, 1996 the Agency filed its response to Marathon's motion to strike Respondent's Exhibit 8. The Board hereby denies Marathon's motion to strike and affirms the hearing officer's ruling to admit Respondent's Exhibit 8.

REGULATIONS AT ISSUE

Pursuant to authority granted it under the Act, the Board has established limits for various types of air emissions. Among these are limits on particulate matter emissions and on the opacity of visual emissions. The particulate emission limits pertinent to the instant matter are found at 35 Ill. Adm. Code 212.381, which in its entirety reads:

> Section 212.381 Catalyst Regenerators of Fluidized Catalytic Converters
>
> Sections 212.321 and 212.322 shall not apply to catalyst regenerators of fluidized catalytic converters. No person shall cause or allow the emission rate from new and existing catalyst regenerators of fluidized catalytic converters to exceed in any one hour period the rate determined using the following equations:
>
> $E = 4.10\ (P)^{0.67}$ for P less than or equal to 30 tons per hour.
> $E = (55.0(P)^{0.11})-40.0$ for P greater than 30 tons per hour.
>
> where:
>
> E = allowable emission rate in pounds per hours, and
> P = catalyst recycle rate, including the amount of fresh catalyst added, in tons per hour.

When data for the facility at issue are entered into the pertinent equation of Section 212.381, the emission limit calculates to approximately 84 pounds per hour (lb/hr). (Tr. at 14.) This value is not at dispute.

Opacity limits are found in the Board's regulations at 35 Ill. Adm. Code 212.123. Section 212.123 reads in its entirety:

> Section 212.123 Limitations for All Other Sources
>
> a) No person shall cause or allow the emission of smoke or other particulate matter, with an opacity greater than 30 percent, into the atmosphere from any emission source other than those sources subject to Section 212.122.

b) Exception: The emission of smoke or other particulate matter from any such emission source may have an opacity greater than 30 percent but not greater than 60 percent for a period or periods aggregating 8 minutes in any 60 minute period provided that such more opaque emissions permitted during any 60 minute period shall occur from only one such emission source located within a 305 m (1000 ft) radius from the center point of any other such emission source owned or operated by such person, and provided further that such more opaque emissions permitted from each such emission source shall be limited to 3 times in any 24 hour period.

The pertinent part of Section 212.123 is subsection (a), which establishes that opacity may not exceed 30%. It is undisputed that this limit is applicable in this instant circumstance.

The Board is authorized under the Act to grant variances, which are temporary exemptions from compliance with specific Board regulations, at 415 ILCS 5/35(a):

> The Board may 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.

BACKGROUND

Marathon seeks variance with respect to emissions from its petroleum refinery located near the City of Robinson, Crawford County, Illinois. The refinery has a capacity of 175,000 barrels of crude oil per day. It is located on a 900-acre tract that contains 25 process units and 7 support units; the refinery has a storage tank capacity of 6.1 million barrels. (Marathon Br. at 2.) Marathon employs 570 persons with an annual payroll of $40 million.

One of the units that Marathon operates is a fluid bed catalytic cracking unit (FCCU) that is used to crack heavy gas oil material into lighter, more valuable fractions. (Tr. at 9-10.) The unit starts with olefins, consisting of "cat gasoline, light cycle oil, and slurry". (*Id.* at 10.) Most of the olefins are used in this refinery to produce alkylite gasoline, in the amount of 12,000 barrels a day. (*Id.*) The remainder of the olefins are used to make oxygenates for reformulating gasoline. (*Id.*)

The two main process vessels in the FCCU are the reactor and the regenerator. A very fine aluminous silica catalyst is circulated from the regenerator to the reactor through a riser. Cracking takes place in the reactor and riser. (Tr. at 11.)

According to Marathon, the air emissions from the FCCU are controlled by air pollution control devices, specifically cyclones for controlling the particulate matter and a "CO Boiler" for controlling carbon monoxide. (Amd. Pet. at 1.) However, the Agency disagrees

with this characterization, and argues that these devices only partially control air emissions. (Rec. at 1.)

Marathon installed a new catalyst in the FCCU in about January 1993. A stack test to determine whether the FCCU complied with particulate emission limits was performed by Marathon on May 12, 1993. The test measured a particulate emissions rate of 100.7 lb/hr (Amd. Pet. at Attachment A.), which exceeds the 84 lb/hr limitation established pursuant to 35 Ill. Adm. Code 212.381.

On June 2, 1993 the Agency sent a compliance inquiry letter (CIL) to Marathon citing apparent violations of the air emission regulations. (Tr. at 43; Agency Exh. 1.) The Agency's letter also asked the reasons for the excess opacity emissions reported by Marathon on April 20, 1993. (Agency Br. at 2.)

Marathon and the Agency agreed that the stack would be retested. The tests were conducted on August 4 and 5, 1993. These tests produced particulate emissions rates of 100.4 and 129.6 lb/hr. (Amd. Pet. at Attachment A.) Marathon admits that these measurements constituted violations of the particulate emissions standard. (*Id.*) In addition, fifteen opacity (visible emissions) tests were conducted that exceeded the 30% allowable opacity[4]. Marathon admits that these measurements constituted violations of the opacity standard. (Amd. Pet. at Attachment A.)

Marathon hypothesized that the high emissions were caused either by mechanical damage to the two stage cyclonic control device or by the catalyst itself (possibly soft catalyst or low attrition resistant catalyst). (Tr. at 16; Marathon Br. at 3.) Marathon began collecting its own data and instituted investigations by General Electric Cyclone, who manufactured the cyclones, and Universal Oil Products. The outside tests revealed that the mechanical devices were operating properly. (Marathon Br. at 3.)

On October 29, 1993[5] Marathon submitted a compliance program to the Agency and notified the Agency that it would be changing-out the catalyst and, because the change-out would require significant time, would also be investigating mechanical changes to the FCCU. (Tr. at 18; Marathon Exh. 4.) Marathon commenced the catalyst change-out in December 1993; completion did not occur until September 1994. (Tr. at 21-22.)

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[4] Six-minute average opacity measurements ranged from a low of 31.3% to a maximum of 46.9%. (Amd. Pet. at Attachment A.)

[5] The Board notes an apparent error in Marathon's brief, in which the date that Marathon submitted the compliance program to the Agency is given as October 29, 1995. In consideration of the rest of the record, the Board concludes that 1993 is likely to be the correct year (see, e.g., Marathon's Exhibit #4).

Marathon accordingly now attributes the increased emissions to the use of its new catalyst, the AKZO catalyst. (Amd. Pet. at 2.) As compared to the prior GXO catalyst, the AKZO catalyst is softer and finer-grained, and thereby more prone to particulate loss. (Tr. at 17; Marathon Br. at 3.)

On December 16, 1993 Marathon notified the Agency that its particulate emissions during November 1993 averaged 156.7 lb/hr, where 85.4 lb/hr is allowable. (Agency Br. at 3.) On January 13, 1994 Marathon notified the Agency its particulate emissions during December 1993 averaged 169.1 lb/hr. (*Id.*)

On December 16, 1993 the Agency denied Marathon's application for an operating permit based upon particulate emissions from the FCCU. (Tr. at 21-22; Marathon Exh. 5.)

On March 2, 1994 Marathon received a "Notice of Violation" from the United States Environmental Protection Agency (USEPA) concerning particulate emissions and opacity emissions from the FCCU. The USEPA filed a lawsuit on March 29, 1996 in the United States District Court for the Southern District of Illinois. (Marathon Br. at 5.)[6]

Marathon performed three more emissions tests in March 1994. During two of these, particulate emissions were within standard measurements (63.5 and 72.6 lb/hr). (Tr. at 22.) However, in the third, which was conducted with the soot blower in operation, the measured emissions (91.3 lb/hr) were over standard measurements. (*Id.)*

In approximately May 1994 (Tr. at 23-25) or July 1994 (Marathon Br. at 4) Marathon installed sonic soot blowers to replace the prior steam soot blowers.

Marathon conducted the final stack tests for mass omissions and opacity on August 9 and 10, 1994. Marathon asserts that these tests demonstrated compliance and moreover, that Marathon has been in compliance since that time. (Tr. at 27; Marathon Br. at 4.)

Marathon was issued a general operating permit for the FCCU by the Agency on September 22, 1994. (Tr. at 27; Marathon Exh. 7.)

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[6] Marathon requests the Board take "judicial notice that Counts I and II of the complaint allege violations of the mass emission limitations during the May and August 1993 tests and opacity limitations during the August 1993 tests", however, Marathon does not include a copy of the USEPA complaint. The Board will, however, take appropriate judicial notice of the USEPA Notice of Violation, Exhibit #B of Marathon's Amended Petition, which indicates the notice is based upon tests conducted on May 12, August 4 and 5, 1993.

HARDSHIP

Marathon essentially claims two hardships that it will, or has, experienced if it is not granted variance relief. First, Marathon argues that even though it does not know when the period of noncompliance commenced, once it was discovered Marathon's only choice was to begin the process of getting a new catalyst and beginning the change-out process. (Amd. Pet. at 3.) According to Marathon, the other choice was to "shut down the unit and in all probability, the refinery itself", as the FCCU is "essential to the operation of a petroleum refinery that produces gasoline". (*Id.*) Marathon claims that a modern petroleum refinery would not be economically feasible without a functioning FCCU (Tr. at 13; Marathon Br. at 2) and shutting down the FCCU "would have resulted in an economic disaster for Marathon and the community" (Marathon Br. at 6). At hearing Mr. Samuels, of Marathon, testified that if the FCCU is down for any length of time without pre-planning, "it almost certainly means a crude unit shutdown". (Tr. at 13.) Part of the reason is that if the FCCU is down there will be a shortage of intermediate storage capacity for all of the gas oils, where approximately 45,000 barrels of total gas oil feed per day are used in the FCCU.

Instead of shutting down the FCCU, Marathon asserts it worked diligently toward its compliance plan as submitted to the Agency and even surpassed the projected compliance dates. (See Marathon's compliance plan in Marathon Exh. #4.) Therefore, Marathon's first claimed hardship is that it would have had to shut down the FCCU and in all probability the refinery if it was forced to immediately comply with the regulations at issue when it discovered it was out of compliance in 1993.

The Agency argues that the major particulate loss was attributable to the softer catalyst in the FCCU and that Marathon both knew of the soft nature of this catalyst and had the ability to use other catalysts. (Agency Br. at 5.) The Agency states that Marathon should have initiated an "immediate program" to correct the situation when it received the May 1993 test results which showed noncompliance. (*Id.* at 6.) But instead, Marathon "waited several more months and retested the FCCU in August 1993". (*Id.*) According to the Agency, "Marathon did not act to remedy the softer catalyst until December of 1993, eight months after it knew of the softer catalyst, and reported the excess opacities and seven months after it failed the first particulate matter emissions test". (*Id.*) The Agency interprets Marathon's noncompliance as a self-imposed hardship, not rising to the level of an arbitrary or unreasonable hardship. (*Id.*)

Marathon's second claim of hardship arises out of an enforcement action by the USEPA. Marathon clearly states that "[t]here should be no mistake as to why Marathon seeks a variance. It is because the U.S. EPA has chosen to enforce the Board's regulations, despite the fact that IEPA has declined to do so." (Marathon Br. at 6.) However, Marathon does acknowledge that the "IEPA has not offered a release and could, if it chose, file an enforcement action tomorrow". (Marathon Br. at 8.)

The Agency believes "Marathon has failed to met (*sic*) its burden of demonstrating that denial of variance would impose an arbitrary or unreasonable hardship". (Agency Br. at 4.)

The Agency stated that it "ardently maintains that Petitioner has not satisfactorily presented evidence, in the Petition, Amended Petition or at hearing, supporting its position that Marathon would suffer an arbitrary or unnecessary hardship". (Ag. Br. at 10-11.)

ENVIRONMENTAL IMPACT

Marathon claims it conducted Air Quality Modeling to determine whether the air quality in the surrounding area was adversely affected during the periods in question. Marathon puts forth Petitioner's Exhibit #3 to show results which "confirmed that there was no adverse affect on air quality". (Marathon Br. at 5.) Marathon argues to require it to shut down the FCCU in the "absence of adverse environmental consequences would certainly have caused Marathon (and probably the community as well) an arbitrary and unreasonable hardship". (Marathon Br. at 6-7.)

Petitioner's Exhibit #3 is entitled, "Atmospheric Dispersion Modeling of Particulate Emissions from the CO Boiler at the Robinson, Illinois Refinery". According to the authors, Certified Consulting Meteorologist, "[t]his report details modeling analyses that were performed to determine ambient concentrations of both PM-10 and total particulate due to emissions from the CO boiler". (Marathon Exh. #3 at 2.)

The Agency challenges Marathon's contention that Exhibit #3 constitutes proof of no adverse affect on air quality. The Agency contends that the Exhibit #3 is a flawed study involving unwarranted premises and procedures. (Agency Br. at 6-7; Agency Reply Br. at 2-3.) The Agency concludes that Marathon has "not addressed the injury to the public or to the environment and therefore has not proven any arbitrary or unreasonable hardship exists". (Agency Reply Br. at 3.)

DISCUSSION

The purpose of a variance has been stated many times by the Board and the courts. In Monsanto Company v. Pollution Control Board (June 1, 1977), 67 Ill.2d 276, 10 Ill.Dec. 231, 367 N.E.2d 684, 688, the Supreme Court, in determining whether variances can be permanent, stated that the Act's ultimate goal is for all polluters to be in compliance and that, "[t]he variance provisions afford some flexibility in regulating speed of compliance, but a total exemption from the statute would free a polluter from the task of developing more effective pollution-prevention technology...". The Appellate Court citing to Monsanto in City of Mendota v. Pollution Control Board (3rd Dist. 1987), 112 Ill. Dec. 752, 757, 514 N.E.2d 218, stated "[t]he variance provisions of the Act are intended to afford some flexibility in regulating the speed for compliance." Finally the Appellate Court in Celotex Corporation v. Illinois Pollution Control Board (4th Dist 1978), 65 Ill. App. 3rd 776, 22 Ill. Dec. 474, 382 N.E.2d 864, 866, phrased the purpose as "[t]he issues in a variance proceeding focus upon whether compliance should be excused for a period of time."

> The Board in following Monsanto and the other cases stated "[a] further feature of a variance is that it is, by its nature, a temporary reprieve from compliance with the Board's regulations, and compliance is to be sought regardless of the hardship which the task of eventual compliance presents an individual polluter." (American River Transportation v. Illinois Environmental Protection Agency (August 24, 1995), PCB 95-147.)

Thus, as the courts and the Board have found, the purpose of a variance is to provide for a period of time to allow individuals to come into compliance with otherwise applicable rules and regulations when immediate compliance would cause an arbitrary or unreasonable hardship. The purpose, therefore, is not to avoid compliance, but rather only to allow for time for compliance to be achieved.

The Board and the courts have given interpretation to what justification is necessary in deciding when immediate compliance with the applicable rules and regulations would cause an arbitrary or unreasonable hardship. In Marathon, the 5th District Appellate Court, in reversing the Board, observed:

> When deciding whether to grant or deny a variance request, the Board is required to balance the hardship of continued compliance on the business against the adverse impact the variance will have on the environment. * * * The party requesting the variance has the burden of establishing that the hardship resulting from denial of a variance outweighs any injury to the public or the environment from a grant of the variance. * * * Specifically if the one requesting the variance demonstrates only that compliance will be difficult, that proof alone is insufficient basis upon which to grant the variance. The petitioner must go further and 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.
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> (Marathon Oil Company v. IEPA 242 Ill.App.3d 200, 610 N.E.2d 789, 793 (5th Dist).)

The Board itself has further observed:

> The Board must emphasize that under the Act variances are not to be granted merely because the petitioner has shown that it cannot comply with regulations despite its efforts to achieve compliance. Rather, a shield from an enforcement action is only given to a petitioner who would suffer an arbitrary or unreasonable hardship. * * * Certainly, most persons would view any defense to an enforcement action as a hardship. But it does not automatically follow that such a defense is an arbitrary or unreasonable hardship. (Village of Sauget v. IEPA (November 3, 1988), PCB 88-18, 93 PCB 281.)

Hardship

Replacing the FCCU. Marathon argues that maintaining or achieving compliance with the current standards would have created a hardship which outweighed the adverse impact on the environment, because it would have had to close down the FCCU, and essentially its operations, to come into compliance.

The Board has previously found that the time required to construct facilities and achieve compliance does not in itself create an arbitrary or unreasonable hardship associated with immediate compliance. (Olin Corporation v. IEPA (February 7, 1991), PCB 89-72, 118 PCB 221 .) The mere existence of violations, which cannot be cured immediately, does not prove the hardship of immediate compliance for which a variance should be granted. (Id.; Decatur Sanitary District v. IEPA (March 22, 1971), PCB 71-37, 1 PCB 359, 360.)

Additionally, the Board has articulated that a petitioner's hardship must not be self-imposed by the petitioner's inactivity or own decision-making. EPA v. Lindgren Foundry Co. (September 25, 1970), PCB 701-1, 1 PCB 11; Ekco Glaco Corporation v. IEPA and IPCB 542 N.E. 2d 147 (1st Dist. 1989); Willowbrook Motel, 481 N.E.2d at 1036. For example, in denying the request for variance relief in Community Landfill Corporation v. IEPA, the Board found that the twenty two month lapse of time between the deadline for filing petitioner's significant modification permit application and petitioner's filing for variance relief, was a self-imposed hardship. ((September 21, 1995), PCB 95-137.) In PCB 87-41, Ekco Glaco v. IEPA, the Board found that "Ekco Glaco's problems arise from the delay caused by decisions it has made in attempting to secure compliance and its failure to commit to a particular compliance option. The Board cannot find that those problems constitute an arbitrary or unreasonable hardship." Ekco Glaco, PCB 87-41 at 4, aff'd in Ekco Glaco Corp. v. IEPA and IPCB 542 N.E. 2d 147 (1st Dist. 1989). The Appellate Court affirmed the Board's denial of an extension of variance in Ekco notwithstanding Ekco's argument that the denial would lead to a shut-down of its new pan and used pan facilities, which would adversely impact Ekco and its local customers.

Marathon did not petition for a variance in May 1993 when it first discovered that its FCCU was out of compliance, nor did it petition for a variance when that noncompliance was confirmed by further testing in August 1993. Marathon did not petition the Board for variance relief until January 1994, eight months after it discovered the FCCU was out of compliance. According to Marathon, it "acted with due haste and (*sic*) to correct excess emissions while performing Air Quality Modeling to assure that no harm befell the community and that Air Quality Criteria were not exceeded, all the while communicating its actions to the IEPA". (Marathon Br. at 6.)

Albeit Marathon's claims, the Board does not believe that the record demonstrates that Marathon diligently sought timely relief nor made sufficient efforts to quickly comply. Marathon could have reasonably anticipated it would continue to be out of compliance and a variance would be needed after retesting in August 1993. The Board cannot allow Marathon

eight months of noncompliance while it attempts to construct a new FCCU, without at the same time attempting to secure regulatory protection. Marathon should have petitioned the Board for a variance during the time period it was attempting to achieve compliance.

Marathon's indecision for eight months as to how to correct the noncompliance through either changing or fixing the catalyst was a hardship Marathon brought on itself. Marathon's failure to timely file for variance relief was a self-imposed hardship which does not constitute an arbitrary or unreasonable hardship warranting variance relief.

USEPA Enforcement. Marathon seeks a variance because the USEPA has chosen to enforce the Board's regulations. (Marathon Br. at 6.) Although Marathon does not explicitly so state, it certainly implies that this threat of enforcement is an arbitrary or unreasonable hardship justifying variance relief. While the threat of future enforcement may be a hardship envisioned by the Act and this Board, the hardship of an ongoing enforcement resulting from a past violation is not in itself a hardship upon which variance relief may be granted.

The purpose of variance relief is to afford some flexibility in regulating the speed in which one must come into compliance with the rules and regulations. Marathon argues that "the need for a variance is really the need for the ability to operate without being prosecuted". (Marathon Br. at 7.) However, it is not the purpose of a variance to provide an after the fact enforcement shield for past non-compliance. Since the Board's inception it has held that "one cannot qualify for a variance simply by ignoring a compliance date and thereafter applying for a variance" because this behavior "would lead to the preposterous proposition that the very existence of violation is a ground for excusing it". (Decatur SD, PCB 71-037, 1 PCB 360 (March 22, 1971).) This aspect of variance relief is evident in the Board's reluctance in granting retroactive variances.

First, the Board recognizes that the threat of future enforcement action is a hardship for which any alleged violator would seek protection. However, the threat of enforcement alone cannot constitute an *arbitrary or unreasonable hardship*, otherwise any threat of future enforcement would justify a variance. It is clearly absurd for the Board to find that the threat of an enforcement action is itself sufficient grounds to protect against the bringing of that enforcement action. Such finding would eviscerate the entire concept of enforcing the Act.

Indeed, the Board has clearly found that it is not the purpose of a variance to legitimize past failure to comply with rules and regulations. (Modine Manufacturing Company v. IEPA (December 22, 1987), PCB 85-154, 84 PCB 735.) As has been clearly stated, "(t)he Board does not believe that a pending enforcement action, before this Board or before a court, is sufficient reason to grant a variance". (The Village of Sauget v. IEPA, (February 6, 1992) PCB 91-252; The Village of Sauget v. IEPA, (January 24, 1991), PCB 90-181.) A retroactive variance to protect against enforcement is contrary to the nature of a variance. The purpose of a variance is to provide a temporary reprieve, during which compliance is pursued. All regulated entities must operate in compliance, the mere fact that compliance is difficult or costly does not in itself rise to the level of arbitrary or unreasonable hardship.

Marathon's hardship as a result of the ongoing USEPA enforcement action is not the type of hardship envisioned by the Act that would warrant variance relief. The variance provisions are not to be utilized as an after the fact defensive mechanism for alleged past violations and are to be utilized only when immediate compliance with rules and regulations would create an arbitrary or unreasonable hardship.

Retroactive Variances

Marathon's amended petition for variance was filed on March 18, 1994. Marathon is requesting a retroactive variance from January 1, 1993 through November 15, 1995. (see footnote 1.) Marathon argues that, "(i)f circumstances that justify a shield from prosecution exist, there is no logical reason why past circumstances are any less compelling than future circumstances". (Marathon Br. at 7.)

The Board has stated:

> "[m]oreover the Board is displeased with a request for a variance which has a term, but for a few days, which is after the fact. While the Board allows that there may be circumstances where the latter condition might validly arise, it also believes that after-the-fact grants of variance are generally inconsistent with the intent of variance relief as enunciated by the Environmental Protection Act. At the minimum, it is not the intent of a variance to legitimatize past failure to comply with rules and regulations."

(Modine Company v. IEPA (December 22, 1987), PCB 85-154, 84 PCB 735.)

The Board has determined that 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. IEPA (July 27, 1989), PCB 89-27, 101 PCB 283, 286; Borden Chemical Co. v. IEPA (December 5, 1985), PCB 82-82, 67 PCB 3, 6; City of Farmington v. IEPA (February 20, 1985), PCB 84-166, 63 PCB 97, 98; Hansen-Sterling Drum Co. v. IEPA (January 24, 1985), PCB 83-240, 62 PCB 387, 389; Village of Sauget v. IEPA (December 15, 1983), PCB 83-146, 55 PCB 255, 258; Olin Corp. v. IEPA (August 30, 1983), PCB 83-102, 53 PCB 289, 291. Although the Board does not generally grant variances retroactively, retroactive variances have been granted upon specific justification. Deere & Company John Deere Harvester East Moline Works v. IEPA (September 8, 1988), PCB 88-22, 92 PCB 91 (citations omitted). The Board stated that the reasoning behind the general rule is to discourage untimely filed petitions for variance, i.e., variances filed after the start of the claimed arbitrary or unreasonable hardship creating the desire for a retroactive start; and because the failure to request relief in a timely manner is a self-imposed hardship. (Fedders-USA v. IEPA (April 6, 1989), PCB 86-47, 98 PCB 15, 19, DMI, Inc. v. IEPA (February 23,

1987) PCB 88-132, 96 PCB 185, 187 and American National Can Company v. IEPA (August 31, 1989), PCB 88-203, 102 PCB 215, 218.)

As the appellate court discussed in Monsanto, "[t]he Board can provide relief from the hardship of immediate compliance and yet retain control over a polluter's future conduct by granting a temporary variance". (Monsanto Co. v. Pollution Control Board 67 Ill.2d 276, 288 (1977) (emphasis added).) The very concept of a retroactive variance would eliminate the Board's ability to retain any control over the polluter's activity during the term of the variance.

The Monsanto court further examined the Board's authority to grant a variance and any conditions attached thereto. The court found that the Board's authority to decide whether a regulation imposes an arbitrary or unreasonable hardship on an individual polluter which would justify variance, is essentially a quasi-judicial decision. (67 Ill.2d 276, 289 (1977).) However, the Board's authority to impose conditions upon that variance is not quasi-judicial, but "in a word, rule-making power, in the sense that its focus is on future conduct and its efficacy depends upon agency expertise". (*Id.* at 290.) The Board's power in this regard is "tantamount to the quasi-legislative power to make prospective regulations and orders". (*Id.*) In the instant matter Marathon is requesting an entirely retroactive variance which would preclude the Board from attaching any conditions which may be necessary to effectuate the policies of the Act. Not only is the very essence of a variance one to provide prospective relief, but that same legislative intent of future policy making is also present in the conditions attached to any variance.

However, the Board has granted variances with "retroactive" inception dates under certain circumstances. The Board has made a variance retroactive to the date on which the Board would have rendered a decision where there was a procedural delay of the proceeding through no fault of the petitioner, or as the result of confusion over interpretation of federal regulations. (See Allied Signal, Inc. v. IEPA (November 2, 1989), PCB 88-172, 105 PCB 7, 12; Morton Thiokol Inc., Morton Chemical Division v. IEPA (February 23, 1989), PCB 88-102, 96 PCB 169, 181 and Union Oil Company of California v. IEPA (February 20, 1985), PCB 84-66, 63 PCB 75, 79.) The Board has also applied a shorter period than the statutory time for decision to back-date a variance where we have otherwise viewed the petition as timely filed prior to the date on which the petitioner required the relief. (Monsanto Company v. IEPA (April 27, 1989), PCB 88-206(B), 98 PCB 267, 273.) These types of retroactive variances are entirely consistent with the Board's general principle of not granting retroactive variances. In these cases, the Board did little more than confer the starting date of the latest date on which the Act would have required a Board decision, i.e., the 120-day decision deadline, were it not for a waiver of that deadline.

The Board has also granted retroactive variance where there are unavoidable, special, or extraordinary circumstances. American National Can Company v. IEPA (August 31, 1989), PCB 88-203, 102 PCB 215 (variance effective 11 days after filing, where petitioner diligently sought compliance and there was no reason to anticipate the need for a variance until

it was too late to timely file); Minnesota Mining and Manufacturing Company v. IEPA (August 31, 1989), PCB 89-58, 102 PCB 223, 226 (variance effective day after filing, where petitioner learned of error that resulted in non-compliance only shortly before filing); Fedders-USA v. IEPA (April 6, 1989), PCB 86-47, 98 PCB 19 (variance effective date of filing, where extended proceeding for prior variance ended only a short time before filing); Pines Trailer Corporation v. IEPA (June 30, 1988), PCB 88-10, 90 PCB 485, 488; Bloomington/Normal Sanitary District v. IEPA (March 10, 1988), PCB 87-207, 87 PCB 21, 22 (variance effective nine days after filing, where there were unexpected construction delays and the petitioner made a good faith effort at compliance); Classic Finishing Company, Inc. v. IEPA (June 20, 1986), PCB 84-174(B), 70 PCB 229, 233 (variance effective date of filing first amended petition, where there was a change in company ownership, an ongoing compliance effort that resulted in updatings of the petition and eventual compliance before the date of the Board decision, and due to nature of the materials involved and the technology-forcing nature of the underlying regulation); Chicago Rotoprint Company v. IEPA (February 20, 1985), PCB 84-151, 63 PCB 91 (variance effective 35 days after filing, where need for variance was not known earlier). The Board has also occasionally applied an effective date that antedates the filing of the petition under extreme such circumstances. Deere & Company, John Deere Harvester East Moline Works v. IEPA (September 8, 1988), PCB 88-22, 92 PCB 94 (variance effective 20 days prior to filing, where petitioner diligently sought relief and good faith efforts appeared to have resulted in compliance prior to the Board decision); Midwest Solvents Company of Illinois v. IEPA (April 5, 1991), PCB 84-5, 57 PCB 369, 371 (variance effective nine days before filing, where the petitioner was diligent in seeking relief and the delay in filing arose through procedural confusion over the extension of a prior provisional variance). Other cases underscore the fact that the timelines of filing is a primary factor in consideration of the "special circumstances."

Timliness of filing is a primary factor in considering "special circumstances". First, in considering "special circumstances" the Board has routinely refused to apply a retroactive variance where either the petitioner filed late without explanation or where the delay resulted through some fault of the petitioner. LCN Closers, Inc. v. IEPA (July 27, 1989), PCB 89-27, 101 PCB 283; DMI, Inc. v. IEPA (February 23, 1989), PCB 88-132, 96 PCB 185; Borden Chemical Company v. IEPA (December 5, 1985), PCB 82-82, 67 PCB 3; City of Farmington v. IEPA (February 20, 1985), PCB 84-166, 63 PCB 97; Hansen-Sterling Drug Co. v. IEPA (January 24, 1985), PCB 83-240, 62 PCB 387; Village of Sauget v. IEPA (December 15, 1983), PCB 83-146, 55 PCB 255; Olin Corp. v. IEPA (August 30, 1983), PCB 83-102, 53 PCB 83. Second, a "principal consideration in the granting of retroactive relief is a showing that the petitioner has diligently sought relief and has made good faith efforts at achieving compliance". Deere & Company John Deere Harvester East Moline Works v. IEPA (September 8, 1988), PCB 88-22, 92 PCB 91. The Board is not inclined to grant retroactive relief, absent a showing of unavoidable circumstances, because the failure to request relief in a timely manner is a self-imposed hardship. (American Can Co. v. IEPA (August 31, 1989), PCB 88-203, 102 PCB 215.

Marathon must provide proof of "special circumstances" beyond the minimal arbitrary or unreasonable hardship to be granted a retroactive variance. An arbitrary or unreasonable hardship cannot also constitute a "special circumstance" that would justify retroactive relief. If that were acceptable, all variances would simply apply retroactively upon request. (Modine Manufacturing Corp. v. IEPA (July 25, 1991), PCB 88-25, 124 PCB 157.) The Board finds that Marathon has made no showing of special circumstances to warrant a retroactive grant of variance. As stated earlier, the Board finds that Marathon's delay in filing and subsequent request for retroactive variance relief, are self-imposed hardships.

The Board will not consider the time period from June 29, 1994 (120 days after filing amended petition on March 18, 1994) through November 15, 1995, as a request for prospective variance relief. Marathon made no argument in the record to indicate that it was not at fault, or that the Agency was entirely the cause of the Board rendering its decision in accordance with decision waivers after 120 days. To the contrary, in Marathon's post-hearing brief it referenced three of its motions to continue to explain the various reasons why the "action languished". (Marathon Br. at 1.) None of these motions explain or argue that this matter was delayed through no fault of petitioner. For instance, Marathon's March 21, 1994 motion to continue states, "(i)f Marathon is forced to proceed on May 16, 1994 as scheduled, it will be forced to assume the catalyst change will fall (*sic*) to achieve compliance and assume that physical change to the unit will be needed". Marathon does not provide any additional arguments in its brief to explain the delay in this matter. The Board notes the Agency filed various motions to extend the time in which to file the Agency recommendation. However, Marathon never filed any responses in opposition to these motions, but rather voluntarily waived the Board's decision deadline.

Therefore, the Board finds it unnecessary to make any findings as to whether "special circumstances" exist which would allow a retroactive inception date. Accordingly, the Board will not make exception to its normal practice whereby if the requested variance is granted, it will be effective on the date of the Board order in which the grant is made.

Environmental Impact

Throughout the record Marathon concludes, without sufficient supporting documentation, that there was no adverse affect on air quality. (Pet. Br. at 5.) Marathon does not present any data in addition to Exhibit #3 for the Board to determine the environmental impact during the time its FCCU was out of compliance. In this regard, the Board notes that the emissions data used in the dispersion modeling is not representative of the monitored emission levels during the noncompliance period. The stack monitoring information in the record indicates that from May 1993 to March 1994 the total particulate emissions rate ranged from 63.5 lb/hr to 169.1 lb/hr. Instead of using the highest monitored emissions rate to determine the environmental impact, Marathon used a total particulate emissions rate of 70.96 lb/hr, which was measured on March 9 and 10, 1994. Actually, the total particulate emissions rate used in the modeling is less than the 84 lb/hr limitation established by the Agency pursuant to 35 Ill. Adm. Code 212.381.

Also, the Board notes that Marathon has not justified some of the other assumptions made in the modeling exercise. Specifically, Marathon has not justified the emission factors used to calculate the PM_{10} emissions rate used in the modeling and excluding sulfate particulates from the total PM_{10} used in the modeling.

In addition, Marathon only asserted compliance (Marathon Br. at 4) and did not put forth any environmental data showing that the FCCU is currently in compliance with the applicable environmental regulations, and if it is, data as to when compliance was achieved. Therefore, the Board is left without perspective regarding not only the magnitude of the noncompliance, but also its duration.

Another issue which casts doubt upon Marathon's impact on the environment is its own compliance assertions. Marathon is requesting a variance from January 1, 1993 through November 15, 1995. (Amd. Pet. at 3.) However, Marathon's original stack tests showing noncompliance were done on May 13, 1993, and the remediation plan was completed on August 10-11, 1994. Marathon claims that "[t]here is no reason to doubt that the FCCU remains in compliance with the appropriate particulate limits from and after the August 1994 tests". (Marathon Br. at 5.) The Board is therefore left to question why Marathon would seek relief for a time period it claims to be in compliance. Marathon claims it was in compliance in August 1994, but is requesting a variance for another five months. In the alternative, if Marathon does in fact believe the FCCU could have been in noncompliance during this five month period, Marathon has not demonstrated that affect on the environment.

After careful review of Marathon's Exhibit #3 study, and the lack of other evidence demonstrating the impact on the environment during the time period in question, the Board finds that Marathon has failed to show what impact immediate compliance would have had on the environment. (see City of Mendota v. Pollution Control Board and Illinois Environmental Protection Agency 161 Ill.App.3d 203, 514 N.E.2d 218 (3d Dist. 1987) where appellate court held that petitioner failed to meet its burden of showing an arbitrary or unreasonable hardship where petitioner submitted evidence to the Board regarding its hardship resulting from the no-bypass rule; however it failed to submit evidence regarding the impact granting the variance would have on the environment. The appellate court found without this environmental evidence the Board could not find that the regulation worked an arbitrary or unreasonable hardship on the petitioner.)

Given Marathon's failure to make at least a *prima facie* case that it would suffer an arbitrary or unreasonable hardship by complying with the Board's regulations, coupled with Marathon's lack of reliable data evaluating its effect on the environment, the Board is not required (see Marathon Oil Company v. Environmental Protection Agency 242 Ill.App.3d 200, 610 N.E.2d 789 (5th Dist. 1993)), nor able, to examine the adverse impact the variance would have on the environment.

CONSISTENCY WITH FEDERAL LAW

The Agency states that granting the variance would be consistent with federal law only if the USEPA approves the variance as a SIP revision. However, the Agency assumes that the USEPA will not grant a revision to the Illinois SIP when the subject matter of that revision is the subject matter of an enforcement action which was referred to the Department of Justice. (Agency Br. at 8.)

Pursuant to Section 104.122(a) of the Board's regulations, Marathon was required to indicate whether the Board may grant the requested relief consistent with the Clean Air Act (42 U.S.C. 7401 et. seq.) and the Federal regulations adopted pursuant thereto. (35 Ill. Adm. Code 104.122(a).) Marathon argues that Section 35 of the Act requires that a variance be "consistent" with federal statutes, "not that it must please USEPA". (Marathon Br. at 9.) Marathon disagrees with the Agency's speculation that the USEPA will disapprove the variance because the emissions "did not cause or contribute to a violation of ambient air quality standards". (Marathon Br. at 8-9.)

CONCLUSION

The Board finds that Marathon has failed to meet its burden of showing that immediate compliance with the Board regulations at issue would pose a hardship that rises to the level of an arbitrary or unreasonable hardship. Accordingly, there is no justification for grant of variance.

Moreover, even if Marathon's hardship could be found to be arbitrary or unreasonable, Marathon has failed to show any unusual or extraordinary circumstances that would justify granting this variance retroactively.

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

ORDER

The request for variance filed by Marathon Oil Company in this matter is hereby denied.

IT IS SO ORDERED.

Board Member J. Theodore Meyer dissented.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for the appeal of final Board orders within 35 days of the date of service of this order. 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 16th day of May, 1996 by a vote of 6-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board