



DEPARTMENT OF PUBLIC HEALTH
CITY OF CHICAGO

February 1, 2017

Kim R. Walberg
TAFT STETTINIUS & HOLLISTER LLP
111 East Wacker, Suite 2800
Chicago, IL 60601

RE: S. H. Bell Company, 10218 South Avenue O
Request for Variance from 90-day Compliance Requirement for Installation of Monitors
Pursuant to the Regulations for Control of Emissions from Handling and Storage of Bulk
Material Piles

Dear Ms. Walberg,

The Chicago Department of Public Health ("CDPH") is in receipt of S. H. Bell Company's ("S.H. Bell's") December 2, 2016 letter requesting a variance from requirements of CDPH's Rules and Regulations for Control of Emissions from the Handling and Storage of Bulk Material Piles ("Bulk Material Regulations" or "Regulations") and supplemental materials in support of the variance request provided by S.H. Bell dated December 7, 2016. Pursuant to the Bulk Material Regulations, CDPH accepted written comments on the variance request during an extended 32-day comment period.

Under the variance request, S. H. Bell asked for an extension of time to install fugitive dust monitors as required by Section 3.0(4) of the Bulk Material Regulations. Specifically, S.H. Bell requested an additional 43 days beyond the 90-day compliance period set forth in Section 6.0(2) of the Regulations (and as provided in CDPH's October 17, 2016 letter to S.H. Bell), for a total of 133 days to install the monitors.

For the reasons set forth below, CDPH finds that S.H. Bell has failed to meet the requirements set forth in Sections 8.0(2) and 8.0(3)(a) of the Bulk Material Regulations for issuance of a variance, and the variance request is therefore denied. Accordingly, the monitors required by Section 3.0(4) of the Regulations must be installed and operating within two (2) weeks from the date of this letter, i.e. by February 15, 2017.

DETAILED DISCUSSION

I. Requirements for Issuance of a Variance

Under Section 8.0 of the Bulk Material Regulations, the burden of proof is upon the applicant for the variance to demonstrate that issuance of the requested variance will not create a public nuisance or adversely impact the surrounding area, the surrounding environment, or surrounding property uses. In the event that the applicant does not meet this burden, the variance request will be denied. Pursuant to Section 8.0(2), a variance request must be in writing and must set forth, in detail, all of the following (in pertinent part):¹

- a) A statement identifying the regulation or requirement from which the variance is requested;
- b) A description of the process or activity for which the variance is requested, including pertinent data on location, size, and the population and geographic area affected by, or potentially affected by, the process or activity;
- c) The quantity and types of materials used in the process or activity in connection with which the variance is requested, as appropriate;
- d) A demonstration that issuance of the variance will not create a public nuisance or adversely impact the surrounding area, surrounding environment, or surrounding property uses;
- e) A statement explaining:
 - i. Why compliance with the regulations imposes an arbitrary or unreasonable hardship;
 - ii. Why compliance cannot be accomplished during the required timeframe due to events beyond the Facility Owner or Operator's control such as permitting delays or natural disasters; or
 - iii. Why the proposed alternative measure is preferable.

¹ Because the variance requests under review do not involve a request for an extension of time for full enclosure, requirement 8.0(2)(i) is not relevant to this discussion, and is therefore omitted.

- f) A description of the proposed methods to achieve compliance with the regulations and a timetable for achieving that compliance, if applicable;
- g) A discussion of alternate methods of compliance and of the factors influencing the choice of applying for a variance;
- h) A statement regarding the person's current status as related to the subject matter of the variance request[.]

In addition, Section 8.0(3) of the Bulk Material Regulations sets forth the criteria for reviewing applications:

- a) In determining whether to grant a variance, the Commissioner [of CDPH] will consider public comments received pursuant to 8.0(4) and will evaluate the information provided in the application to meet the requirements of 8.0(2). Particular consideration will be given to the following information:
 - i. Inclusion of a definite compliance program;
 - ii. Evaluation of all reasonable alternatives for compliance;
 - iii. Demonstration that any adverse impacts will be minimal.
- b) The Commissioner may deny the variance if the application for the variance is incomplete or if the application is outside the scope of relief provided by variances.
- c) The Commissioner may grant a variance in whole or in part, and may attach reasonable conditions to the variance to ensure minimization of any adverse impacts.
- d) Issuance of a variance is at the sole discretion of the Commissioner. A variance may be revoked at any time if the Commissioner finds that operation of the Facility is creating a public nuisance or otherwise adversely impacting the surrounding area, surrounding environment, or surrounding property uses.

II. Variance Process and Public Comments

In addition to the requirement that the Commissioner of CDPH (“Commissioner”) consider public comments, as set forth in Section 8.0(3)(a) of the Bulk Material Regulations, Section 8.0(5) also provides that the Commissioner will not grant any variance until members of the public have had an opportunity to submit written comments on the variance application. This

section further provides that public notice will be provided by publication in a newspaper of general circulation published within the City and by publication on the City's website, and that the Commissioner will accept written comments for a period of not less than thirty (30) days from the date of the notice.

On December 9, 2016, public notice of S.H. Bell's variance request was provided by publication in the Chicago Sun-Times and on the City's website at www.cityofchicago.org/environmentalrules. This notice stated that, to be considered, written comments must be received by CDPH on or before January 9, 2017. On December 28, 2016, a subsequent public notice was published in the same manner, notifying the public that the comment period had been extended by two days upon request of members of the public. The new deadline for public comments was January 11, 2017. During the public comment period, CDPH received one written submission from the public, which is posted on the website referenced above.

The public comment letter, dated January 11, 2017, was submitted jointly by the Natural Resources Defense Council ("NRDC"), the Southeast Environmental Task Force ("SETF"), the Southeast Side Coalition to Ban Petcoke ("SSCBP"); and National Nurses United-Illinois (hereafter collectively referred to as "NRDC *et al*"). In the comment letter, NRDC *et al* urged CDPH to deny the variance request and further added that the City should enact a zoning ordinance to ban the handling and storage of manganese. The letter and supporting documentation highlighted negative health impacts associated with manganese, specifically negative neurological impacts caused from the inhalation of manganese dust. The letter described past and ongoing dust issues at S.H. Bell's facilities in Ohio and pointed to dust violations at the company's Chicago facility. The letter further pointed out inconsistencies within the company's Fugitive Dust Plan and cited monitoring data that showed high levels of manganese near the S.H. Bell facility. Finally, the letter argued that S.H. Bell should not need additional time to install monitors because 1) the company has been on notice of the monitoring requirement since issuance of the City's dust regulations in March 2014 and 2) use of the monitors does not need to wait for S.H. Bell's installation of new baghouses.

III. Variance Request and Determination Detailed Analysis

A. Detailed Summary of Variance Request: S.H. Bell requested a variance from Section 6.0(2) of the Bulk Material Regulations, which provides 90 days for compliance with Section 3.0(4) of the Regulations. Section 3.0(4) requires the installation and operation of at least four permanent, continuous Federal Equivalent Method (FEM) real-time PM₁₀ monitors around the perimeter of all bulk material facilities. Specifically, S.H. Bell requested an additional 43 days, i.e. until March 1, 2017, to comply with the monitoring requirement. S.H. Bell offered three reasons for the request.

i) USEPA Settlement Agreement. On December 5, 2016, S.H. Bell and the United States Environmental Protection Agency (“USEPA”) entered into a Stipulated Settlement and Final Consent Order (“Final Order”) to resolve the case of *United States of America v. S.H. Bell Company*, Case No. 16-7955. Under the Final Order, S.H. Bell is required to install, operate, and maintain four continuous FEM PM₁₀ monitors and one Federal Reference Method (“FRM”) PM₁₀ filter-based monitor at its facility and to commence operation of the monitors “by the date required by the City of Chicago, except that, regardless of the date required by the City of Chicago, SHB shall commence operation of the Monitors by no later than March 1, 2017.” In its variance request, S.H. Bell stated that the full amount of time provided by the USEPA is required because of the fifth monitor (the FRM PM₁₀ filter-based monitor).

Specifically, S.H. Bell stated that it “requires additional time to identify an FRM PM₁₀ monitor available for purchase or lease, allocate the necessary funds and resources for its acquisition and installation and locate an appropriate place for its and the other monitors’ operation such that it does not interfere with S.H. Bell’s business activities.” (December 2, 2016 S.H. Bell Variance Request, p. 3.)

ii) Installation of two new baghouses. S.H. Bell noted that the company plans to install two new stationary dust collectors or “baghouses” at two truck loadout sheds at the facility. Installation of the baghouses is pending issuance of a City of Chicago building permit, which S.H. Bell hopes will be issued imminently. S.H. Bell stated that operation of the monitors should not begin until the baghouses are installed so that CDPH and USEPA may “receive the most accurate monitoring data.” *Id.* S.H. Bell further stated that if additional time is not afforded

“to secure the permitting and install the baghouses prior to commencing operation of the monitors, S.H. Bell will be highly prejudiced because monitoring and data reporting will begin before S.H. Bell has fully implemented its enhanced control measures in accordance with its revised Fugitive Dust Plan.” (December 2, 2016 S.H. Bell Variance Request, p. 4.)

Nevertheless, S.H. Bell noted that it would begin operating the monitors by no later than March 1, 2017, even if the baghouses are still not installed by that time.

iii) Existing dust control measures. Finally, S.H. Bell stated that an extension of time to install and operate the monitors “is warranted because of the extensive dust control measures already in place at the Facility.” *Id.* S.H. Bell listed a number of dust control measures, including use of wet suppression systems and a wet sweeper truck, purchase of a mobile baghouse, and the hiring of an environmental manager to conduct daily dust observations.

B. Analysis of Variance Request:

i. Minimization of Adverse Impacts. Section 8.0(2)(d) of the Bulk Material Regulations requires a demonstration that issuance of a variance will not create a public nuisance or adversely impact the surrounding area, environment, or property uses. In this case, as pointed out by NRDC *et al*, nearly 20,000 residents live within a one-mile radius of S.H. Bell’s facility. Furthermore, publicly available online maps show that the nearest residential property is within 100 feet of the facility’s boundary. Therefore, S.H. Bell is required to show how delaying installation of required monitors will not adversely impact these nearby residents.

Although S.H. Bell noted the use of dust control measures in place at the facility, S.H. Bell has not demonstrated the effectiveness of the measures. Moreover, S.H. Bell did not provide any information to establish that anything has changed on the site since CDPH’s denial of S.H. Bell’s prior variance request in October of 2016.

In CDPH’s October 17, 2016 letter to S.H. Bell, in which CDPH denied S.H. Bell’s request for a variance from the requirement to install fugitive dust monitors, CDPH found that S.H. Bell did not demonstrate that issuance of the variance will not create a public nuisance or adversely impact the surrounding area. As stated in the October 17, 2016 letter (a copy of which is available on the City’s website at www.cityofchicago.org/environmentalrules):

Importantly, CDPH found that S.H. Bell's implementation of its current Fugitive Dust Plan has not ensured the suppression of fugitive dust as evidenced by recent City inspections, as well as findings by the United States Environmental Protection Agency (USEPA). This information, combined with deficiencies identified in S.H. Bell's supporting materials, leads CDPH to conclude that S.H. Bell has not established that the facility's operations do not result in off-site fugitive dust emissions. Accordingly, the monitors required by Section 3.0(4) of the Regulations must be installed within ninety (90) days from the date of this variance determination letter, consistent with the 90-day timeframe set forth in Section 6.0(2) of the Bulk Material Regulations.

Thus, as with the prior variance request, CDPH finds that the information submitted in support of the current variance request does not include evidence to establish that the issuance of the variance will not result in adverse impacts.

ii. Explanation of Need for Variance. Section 8.0(2)(e) of the Bulk Material Regulations requires applicants to provide a statement explaining: 1) Why compliance with the regulations imposes an arbitrary or unreasonable hardship; 2) Why compliance cannot be accomplished during the required timeframe due to events beyond the Facility Owner or Operator's control such as permitting delays or natural disasters; or 3) Why the proposed alternative measure is preferable. In this case, S.H. Bell pointed to two main reasons for the request: the settlement agreement with USEPA and S.H. Bell's plan to install two new baghouses pending issuance of a building permit.

With respect to the settlement agreement with USEPA, it is notable that USEPA defers to the City of Chicago's deadline for installation of the required monitors so long as the monitors are installed by March 1, 2017. In the Final Order, there is no reason stated why the monitors may not be installed prior to March 1, 2017. In addition, while S.H. Bell noted that the Final Order requires installation of a fifth monitor, above and beyond the City's requirement to install four monitors in accordance with the Bulk Material Regulations, S.H. Bell does not provide any reason why the four FEM PM₁₀ monitors cannot be installed in the time allotted. Indeed, S.H. Bell does not say whether or not it already possesses these four monitors, nor does the company provide any information about the time it takes to site and install the monitors.

With respect to the planned baghouses, the variance request does not sufficiently explain why installation of dust monitors should be delayed based on delays in the installation of the new baghouses. In fact, the variance request acknowledges that the baghouses may not be installed by March 1, 2017. In any event, the monitoring requirement outlined in the Bulk Material Regulations is not dependent on a facility's installation of measures designed to reduce and control its fugitive dust. CDPH believes that monitoring data from the site will be useful and should be collected as soon as possible.

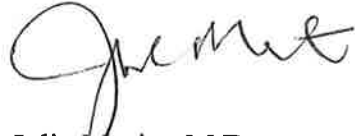
C. CDPH Determination: For the reasons set forth above, with respect to S.H. Bell's request for a 43-day extension of time to install continuous FEM PM₁₀ dust monitors, CDPH finds that S.H. Bell has failed to meet the requirements set forth in Sections 8.0(2)(d) and 8.0(2)(e) of the Bulk Material Regulations for issuance of a variance, and the variance request is therefore denied. Given that the original 90-day deadline has already passed, and since S.H. Bell did not provide any information explaining how long it actually takes to install four FEM PM₁₀ monitors, CDPH requests that the monitors required by Section 3.0(4) of the Regulations be installed and operating within two (2) weeks from the date of this letter, i.e. by February 15, 2017. (Since the Bulk Material Regulations do not require the fifth, filter-based monitor, S.H. Bell may delay installation of that monitor until March 1, 2017 as required by USEPA.)

CONCLUSION

CDPH's determinations regarding S.H. Bell's variance requests will be effective as of the date of this letter, and will be posted, along with appendices and supporting materials, on CDPH's website at www.cityofchicago.org/environmentalrules. Please be advised that if S.H. Bell fails to comply with the Bulk Material Regulations within the timeframes provided above, S.H. Bell will be subject to enforcement action including daily fines in the amount of \$1,000 to \$5,000 per violation as provided by Section 11-4-810(a)(7) of the Chicago Municipal Code. Furthermore, CDPH may issue a summary abatement order pursuant to Section 11-4-025(c) of the Chicago Municipal Code, requiring S.H. Bell to correct any violations within a timeframe prescribed by the Commissioner.

Please contact Assistant Commissioner Dave Graham at (312) 745-4034 if you have any questions regarding the above.

Sincerely,

A handwritten signature in black ink, appearing to read "Julie Morita". The signature is fluid and cursive, with the first letter of each name being capitalized and prominent.

Julie Morita, M.D.
Commissioner

cc: Mort Ames, DOL