



ENVIRONMENTAL LAW & POLICY CENTER

Protecting the Midwest's Environment and Natural Heritage

March 18, 2015

Julie Morita, M.D.
Acting Commissioner of Health
Chicago Department of Public Health
Attn: Environmental Permitting and Inspections
333 South State Street, Room 200
Chicago, IL 60604

RE: Comments on Variance Application from Carmeuse Lime, Inc.

Via email to EnvComments@cityofchicago.org

Dear Ms. Morita,

Thank you for the opportunity to comment on Carmeuse Lime, Inc.'s ("Carmeuse") request for a variance from the City of Chicago Rules and Regulations Pertaining to the Handling and Storage of Bulk Material Piles. The Environmental Law & Policy Center ("ELPC") submits these comments on behalf of itself, the Illinois Environmental Council, and the Respiratory Health Association. Carmeuse has not met the requirements for a variance. The application does not demonstrate that the granting of the variance would not create a public nuisance or adversely impact the surrounding environment. In addition, Carmeuse has not shown that the regulations create an arbitrary or unreasonable burden, that compliance cannot be achieved, or that an alternative measure is preferable. We urge you to deny the variance request in its entirety.

In a general statement at the beginning of its request, Carmeuse claims that the variances it seeks will not create a public nuisance or adversely impact the surrounding area because the company uses "best management practices" and is "in compliance with the federal, state and city regulations." Variance request, p.4. First, it is odd for Carmeuse to claim that it is operating in compliance with all applicable regulations as a justification in asking to be excused from complying with applicable city regulations. Certainly alleged, or even actual, compliance with older existing regulations does not mean that the company should be excused from new rules.

Second, Carmeuse has a history of creating fugitive dust problems that negatively affect the surrounding area. In 2012, the U.S. Environmental Protection Agency ("U.S. EPA") brought a lawsuit against Carmeuse for "alleged violations of the emissions limits and reporting requirements for opacity and fugitive dust."¹ A U.S. EPA fact sheet explained that the facility

¹ Consent Decree, *United States v. Carmeuse Lime, Inc.* (No. 12-C-5689, N.D. Ill., Oct. 23, 2012), available at <http://www.epa.gov/region5/air/enforce/pdfs/20121023-carmeuse-consent-decree.pdf>.

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had “released excessive amounts of dust into surrounding neighborhoods.”² Before that, U.S. EPA had entered into an administrative consent order in 2005 to address fugitive dust issues at Carmeuse.³ The company’s unsupported claims that it will not negatively impact the surrounding area do not justify a variance, especially in light of Carmeuse’s long history of violating emission standards and polluting its neighbors’ air.

I. Opacity Reading

Carmeuse’s request with regard to opacity testing is, well, opaque. Carmeuse cites two provisions of the regulations, one of which called for opacity testing to be performed using one method (that set out at 35 Ill. Admin. Code 212.109), and another which called for opacity testing to be performed using a different method set out at 35 Ill. Admin. Code 212.107. Carmeuse never states, however, precisely what it is asking for with regard to those two provisions. To the extent that these requirements may be inconsistent, we recommend that the Department of Public Health (“Department”) clarify the requirements. Since Carmeuse’s variance request does not make any clear request, no variance should be granted with regard to opacity readings and Carmeuse should be required to comply with the bulk material handling rules.

II. PM10 Monitoring

Carmeuse asks for a variance from the requirement that it install and operate real-time monitors for particulate matter 10 microns in diameter or less (“PM10”) around the perimeter of its facility, but utterly fails to comply with the requirements for a variance from that provision. First, Carmeuse was required, but failed, to prove that issuance of the variance “will not create a public nuisance or adversely impact the surrounding area, surrounding environment, or surrounding property uses.” See § 8.0(2)(d). Instead, Carmeuse simply states that it “does not anticipate off-site emissions of fugitive particular matter,” that it “has historically . . . adhered to best management practices,” and that the company believes that adhering to its dust monitoring plan “will document that there is no public nuisance or adverse impact to the surrounding area.” Variance request, p.5. Carmeuse apparently misunderstands the requirements of a variance request. A company does not get to “wait and see” whether a variance will negatively affect the surrounding area; rather, proof that the variance would not do so must be included in its application for the variance. See § 8.0(2)(d).

Second, Carmeuse was required, but failed, to “establish[] that the Facility’s operations do not result in off-site fugitive dust emissions.” See § 3.0(4). Carmeuse’s statement that its dust monitoring plan “will document” no adverse impacts is wholly insufficient to establish that Carmeuse’s operations create no off-site dust emissions. To begin with, whatever the plan “will document” in the future, the requirement is ongoing: that is, there must be current documentation submitted with the variance request that Carmeuse is not creating off-site emissions now. Carmeuse does not produce any such documentation in its request. Moreover, even if Carmeuse could rely on not-yet-collected data to justify a variance request, the data collected pursuant to its

² U.S. EPA, Legal Settlement Aimed at Helping Dust Problem 1 (Jan. 2013), available at <http://www.epa.gov/region5/air/enforce/pdfs/20130118-carmeuse-fact-sheet.pdf>.

³ Id. at 2.

dust monitoring plan would be nowhere near sufficient to prove that the facility is not creating an adverse impact. As described in its variance application, the dust monitoring plan includes visual opacity testing “on at least a quarterly basis,” which is conducted by plant personnel. Variance request, p.4. Visual opacity testing that occurs only once every 3 months could easily fail to document a serious fugitive dust problem, especially when conducted by company employees who may have an incentive to test on days when conditions make fugitive dust less likely (e.g. low winds, low activity level at the facility).

Third, Carmeuse’s statement that it has “historically” followed best management practices is belied by the evidence. Rather, as mentioned above, Carmeuse has a history of substantial and problematic fugitive emissions that led to an administrative consent decree in 2005 and a lawsuit filed by U.S. EPA in 2012. In its investigation in connection with the 2012 case, EPA determined that “poor maintenance at the facility allowed dust to be released to the surrounding neighborhood.”⁴ Given the company’s past, its claims that monitoring is unnecessary ring hollow.

In the section attempting to explain why (a) the regulations impose an arbitrary or unreasonable hardship, (b) compliance cannot be accomplished during the required time period, or (c) the proposed alternative is better, Carmeuse states that “because the lime handling operations are conducted within enclosures the risk of off-site fugitive PM is anticipated to be low.” Variance request, p.6. It is unclear whether Carmeuse is alleging that the regulations therefore create an impermissible burden, or whether it is claiming that its current practices are a better alternative. If it is attempting to show that its current practices are better than what the regulations require, that attempt fails. Carmeuse does not describe the enclosures, so there is no basis for the Department to determine the effectiveness of the enclosures in preventing fugitive dust. In addition, it should be noted that the bulk material regulations require PM10 monitoring for all bulk material facilities, including coal and coke transloading facilities, for which complete enclosure is also required. Obviously, then, the Department determined that PM10 monitoring was important, even when enclosures were used.

Carmeuse also claims that it would be “economically infeasible to install and maintain the PM10 monitors.” Variance request, p.6. The Department was aware of the costs of PM10 monitoring when it created the regulations. Carmeuse does not claim that it is situated differently from other bulk material facilities such that the cost would be beyond that anticipated by the Department. Accordingly, Carmeuse has not shown that the requirement is arbitrary or unreasonably burdensome.

Finally, Carmeuse asserts that “it is ineffective to rely on PM10 monitors which cannot distinguish background concentrations or the source of the monitored PM10 levels.” Variance request, p.6. This amounts to no more than a statement that Carmeuse does not agree with the regulations. In requiring the use of PM10 monitors, the Department presumably determined that the value of data collected from PM10 monitors justified requiring those monitors to be put in place.

⁴ U.S. EPA, EPA Reaches Agreement with Carmeuse Lime to Control Dust from its Chicago Plant (Aug. 2012), available at <http://yosemite.epa.gov/opa/admpress.nsf/6427a6b7538955c585257359003f0230/50523e7dadc20ef885257aac007b4ce8!OpenDocument>.

In sum, Carmeuse has failed to meet any of the standards for the granting of a variance with respect to PM10 monitoring. Accordingly, its variance request should be denied.

III. Vehicle Leaking

Next, Carmeuse asks for a variance from the requirement that material that has leaked onto an internal road be cleaned up with a street sweeper or water within 1 hour. Carmeuse claims that vehicle loading takes place within an enclosure and that material spills are “promptly cleaned up.” Variance request, p.5. Carmeuse doesn’t, however, describe the enclosure or provide any assurances that dust couldn’t blow out of the enclosure or get tracked out by vehicles, equipment, or workers. Carmeuse also does not explain what is meant by “prompt,” although presumably the material is generally left for more than an hour, since Carmeuse is asking for a variance from the hour time limit.

Carmeuse alleges that “[i]t would potentially put undue burden on the plant personnel to clean up spills on Internal Roads within one (1) hour when leaks are likely to be identified while trucks are loaded within an enclosure.” Variance request, p.7. Carmeuse does not elaborate on why exactly this would create a burden, let alone an arbitrary or unreasonable one. If the allegation is that it would be impossible to clean up a spill while a truck is being loaded, the variance request should have explicitly stated this and explained why that would be the case. The variance request would also have to allege that loading takes more than an hour and explain why loading could not be temporarily halted to allow clean-up. Carmeuse’s variance request, however, fails to explain the problem or explore alternatives other than its current practice. In addition, Carmeuse is asking for a variance for the hour limit on all internal roads—not just in the loading enclosures—but provides no justification for the breadth of its request.

Carmeuse also states that it “believes that the current practice of material spills cleanup is sufficient to ensure compliance with the emission standards.” Variance request, p.7. Regardless of Carmeuse’s “belief,” the fact is that CDPH adopted these regulations because rules that simply required compliance with emission limits were proven to be ineffective. The bulk material handling and storage regulations were designed to include specific, detailed, mandatory requirements to ensure the protection of the surrounding area, and—as discussed above—Carmeuse has not provided adequate justification why it should be excused from those rules. Moreover, the vehicle leaking provisions are not just about fugitive dust, but are also about protecting water resources. Even if vehicle leaks did not cause excessive fugitive dust, they could allow bulk materials to contaminate groundwater or run off into surface water. Carmeuse entirely fails to address how ground- and surface-water would be protected if the variance were granted. For these reasons, the variance request should be denied.

IV. Roadway Cleaning

Lastly, Carmeuse asks for a variance from the requirement that the company use a street sweeper to clean all interior roads and exterior roads within one quarter mile of the facility that are used to transport material at least every 4 hours or after 100 truck trips, but not less than one time daily. Carmeuse claims that it currently uses a wet street sweeper on “[a]ll routinely accessed

paved surfaces” unless the temperature is below freezing “or during precipitation events,” and that this frequency was approved by U.S. EPA. Variance request, p.7. “Carmeuse believes that the previously prescribed street sweeping frequency is sufficient to ensure compliance with the emission standards.” Variance request, p.7. Carmeuse does not acknowledge that its current practices not only diverge from the regulations in the frequency of cleaning, but also in that (a) Carmeuse cleans only “routinely accessed” roads, rather than all roads used to transport material, and (b) Carmeuse does not clean the road during precipitation, which is not an exemption provided in the regulations.

And once again, Carmeuse has given no evidence that the variance would not adversely impact the surrounding area, other than its own opinion. The variance request applies to City of Chicago regulations; the terms of a 2012 consent decree with U.S. EPA are in no way determinative of the appropriateness of a variance.

Carmeuse states that it believes dust monitoring “will document” that its facility does not cause a public nuisance or adverse impact to the surrounding area, but once again, it misunderstands the standard for a variance. Carmeuse must demonstrate that the variance will not cause problems before a variance can be granted. Furthermore, Carmeuse seeks to rely on visual opacity tests that only occur four times per year to prove compliance with emission standards. This information would fall far short of proving that the facility created no adverse effects.

In addition, Carmeuse fails entirely to explain why a variance from the street sweeping provisions is necessary. The company does not allege that compliance would create an arbitrary or unreasonable hardship, that compliance is not achievable, or that its current practices are preferable. Carmeuse simply does not wish to comply with the regulations and asserts that its current practices are acceptable. This is not sufficient for a variance.

* * *

For each of the request variances, Carmeuse has failed to demonstrate that, if granted, the facility would not create a public nuisance or adversely affect the surrounding area. Carmeuse also fails to show that compliance with the applicable provisions would create an arbitrary or unreasonable hardship, or to prove that any other permissible reason exists for a variance to be granted. Accordingly, the Department of Health should deny the variance request in its entirety.

Sincerely,



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