ILLINOIS POLLUTION CONTROL BOARD
March 24, 1988

USI CHEMICALS COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 87-149
	)	87-199
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	88-9
	)	Consolidated
	)	
Respondent.	)	

ORDER OF THE BOARD (by J.D. Dumelle):

USI Chemicals Company (USI) filed the first of the three above-docketed permit appeals on October 8, 1987. On November 9, 1987 the Illinois Environmental Protection Agency (Agency) filed a motion to dismiss. The Agency argued that the statutory period for declaration of invalidity of the rule in question had passed and that no case law supported the seeking of a declaration of invalidity of a rule in a permit appeal proceeding. In response to the Agency's motion, USI asserted that a regulation may be challenged in a permit appeal action, and to support this assertion, cited Celotex Corp. v. IPCB, 94 Ill. 2d 107, 445 N.E.2d 752 (1983). On November 25, 1987 the Board issued an Order stating that "[t]he issue appears settled that a permit denial applicant may challenge a regulation as applied to that applicant" and requesting briefs on burden of proof, standard of review, and other relevant evidence. Both parties filed briefs on February 23, 1988. Discovery has been postponed pending guidance from the Board concerning the scope of review appropriate for the issues raised in these appeals.

USI asserts that the nature of these permit appeals, i.e., challenging the validity of a rule "as applied", is fundamentally different from an ordinary permit appeal proceeding in that the Agency does not make the initial determination on the issue presented. USI has correctly cited Celotex Corp. v. Illinois Pollution Control Board, 94 Ill. 2d 107, 445 N.E.2d 752 (1983) and Central Illinois Public Service Co. v. Illinois Pollution Control Board, 36 Ill. App. 3d 397, 344 N.E.2d 229 (1976) for the proposition that a permit applicant has the right to challenge the validity of a Board rule in a permit appeal proceeding. However, USI has not persuaded the Board that the Celotex and CIPS cases can be extended by Village of Cary v. Pollution Control Board, 82 Ill. App. 3d 793, 403 N.E.2d 83 (1980), to allow a permit applicant to challenge the validity of a regulation "as applied" to a particular facility in a permit

appeal. The validity "as applied" argument is the result of language in the Cary decision. Cary was an appeal from a Board decision denying a variance request. The ultimate Court holding was that

> "it is manifestly appropriate that a regulation which is asserted to be arbitrary, unreasonable or capricious as applied to a party be first considered by the Pollution Control Board when raised in a variance proceeding (see Monsanto v. Pollution Control Board (1977), 67 Ill. 2d 276, 288-91. 10 Ill. Dec. 231, 367 N.E.2d 684, 689-90), and no section of the Environmental Protection Act provides otherwise. We conclude that the issue of the validity of a Board regulation as applied to a party may be raised in a variance proceeding and that direct review of the order thereafter entered may be sought pursuant to Sections 29 and 41 of the Act." Cary, supra.

The Board believes that the issue of the validity of a regulation as applied to a particular facility is not appropriate for review in a permit appeal proceeding. In support of this belief, the Board notes that one of the principal drafters of the Environmental Protection Act (Act), Professor David P. Currie, has stated:

> "Uncertainty as to the meaning of a regulation can often be clarified by filing a petition for variance; if there is no need for a variance because the regulation is inapplicable, the Board can say so in its opinion. The same considerations-utilizing the experience of the specialized Board, and the awkwardness of conducting a trial at the appellate level-support the decision in Commonwealth Edison Co. v. EPA that the avenue for challenging the validity of a regulation as applied to particular facts is to petition for a variance, not to seek direct review under Sections 29 and 41." David Currie, Rulemaking Under Illinois Pollution Law, 42 U. Chi. L. Rev. 457, at 475.

In Commonwealth Edison Co. v. PCB, 25 Ill. App. 3d 271, 323 N.E.2d 84 (1975), the Appellate Court stated that it did not believe an "as applied" argument could be successfully urged in a Section 29 appeal. Further, the Court stated:

> "Substantive rules of this nature are promulgated for general, not special,

> application. Consequently, investigators for the Board gather facts and solicit expert advice in regard to pollution problems affecting all types of companies in a particular trade. In a case like the present one, the Board would have been charged with investigating facts and operations of all types of generating units-single and multi-unit, commercial, industrial, and public utility -- and from these surveys extrapolate the appropriate principles and propose the necessary regulations. The Board cannot be expected to research, evaluate, and make allowance for every special, unusual, or unique problem involving every producer of electrical energy. Where one fails to challenge the rules generally and instead seeks to relax their enforcement against him exclusively due to arbitrary and unreasonable hardship, the legislature has determined that the appropriate remedy is for the aggrieved party to seek a variance in accordance with Title 9 of the Act. If that is denied, the aggrieved can petition to this court for review based on the record at that proceeding." Commonwealth Edison, 323 N.E.2d 84, at 90.

Although Commonwealth Edison involved a Section 29 appeal, the Board believes that the same considerations apply to the permit appeal proceeding, and that, therefore, the variance petition is the proper method by which to challenge the validity of a regulation as applied to particular facts. The Board notes also that it has no investigators of its own with which to investigate the facts and operations attendant to each regulated facility.

Nor has USI persuaded the Board that Cary provides guidance on the issue of the scope of relevant evidence in a permit appeal proceeding. The scope of relevant evidence depends on the type of action presented, and Cary involved a variance proceeding. Section 35 of the Act establishes variance procedures to provide a mechanism 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." A determination of arbitrary or unreasonable hardship in certain circumstances necessarily includes a consideration of relevant evidence in the rulemaking record.

Here, however, the actions presented are permit appeals -- USI is challenging the imposition of certain Board air pollution regulations as a condition of its permit. Pursuant to Section 40 of the Act, USI may "petition for a hearing before the Board to

contest the decision of the Agency." It is, therefore, the decision of the Agency that is being appealed: USI's claim as to the nature of these proceedings notwithstanding. Consistent with the dictates of Celotex and CIPS, the Board will accept evidence on the validity and applicability of the regulation in question as it relates to the Agency's decision. To demonstrate that a regulation is invalid, a party must show that the regulation, in general and not "as applied" to particular facts, is arbitrary, capricious, unreasonable, or otherwise not in accordance with the law. To demonstrate that a regulation is inapplicable, a party must show that the facility in question does not fall within the purview of the regulation. The Board notes that these constitute two separate and distinct determinations.

Finally, there can be no question but that the burden of proof on these issues lies with USI. Section 40 of the Act states that "the burden of proof shall be on the Petitioner." USI's assertion that "the Agency should have the burden of coming forward with the evidence in the rulemaking proceeding which shows that the rules are valid as applied to the Petitioner and that the rules were validly adopted" (USI Brief on Procedural Issues, filed February 23, 1988, p. 16) is ludicrous. As the Agency correctly notes, rules and regulations promulgated by the Board have the force and effect of law, and like statutes, are presumed valid. Celotex, citing Eastman Kodak Co. v. Fair Employment Practices Com., 86 Ill. 2d 60, 71, 55 Ill. Dec. 552, 426 N.E.2d 877 (1981). The Act and case law are further reinforced in that policy reasons mandate that the Agency not be required to reprove a regulation each time a permit condition is challenged -- the time, energy, and expense involved in rejustifying an already presumptively valid regulation would be too great.

The Hearing Officer is hereby directed to proceed with hearing in a manner consistent with this Order. The Board notes that the standard of review issue will be addressed in the final opinion and order. USI is cautioned that any attempts to exceed the scope of review outlined herein will not be favored.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 24th day of March, 1988 by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board