

ILLINOIS POLLUTION CONTROL BOARD
December 17, 1987

USI CHEMICALS COMPANY)
(Tuscola Plant TWR Unit),)
)
Petitioner,)
)
v.) PCB 87-199
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

ORDER OF THE BOARD (by B. Forcade):

On December 15, 1987, USI Chemicals Company ("USI") filed a permit appeal. This matter is accepted for hearing. USI has challenged the underlying validity of the regulations upon which this permit is based, presumably under the theory of Celotex Corp. v. IPCB 94 Ill. 2d 107, 445 NE2d 752 (1983). The issue appears settled that a permit denial applicant may challenge a regulation as applied to that applicant. However, the extent and scope of such a hearing is not well settled.

In Village of Carey v. IPCB 403 NE2d 83 (2nd Dist., 1980) the court stated as follows:

When the validity of a regulation has been challenged, as in this case, the Board may properly consider the evidence received ... when it adopted ... the regulation ... and that evidence should be made a part of the record ... for purposes of judicial review.

Accordingly, the Board orders the parties to present arguments concerning the burdens of proof, standards of review and relevant evidence to be considered at such a hearing. The Board gives the parties until January 15, 1988, to submit briefs on these issues.

Hearing must be scheduled within 14 days of the date of this Order and completed within 60 days of the date of this Order. The hearing officer shall inform the Clerk of the Board of the time and location of the hearing as expeditiously as possible but at least 40 days in advance of hearing so that public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, and all actual exhibits to the Board within 5 days of the hearing. Any briefing schedule shall provide for final filings as expeditiously as possible and in no event later than 70 days from the date of this Order.

If after appropriate consultation with the parties, the parties fail to provide an acceptable hearing date or if after an attempt the hearing officer is unable to consult with the parties, the hearing officer shall unilaterally set a hearing date in conformance with the schedule above. This schedule will only provide the Board a very short time period to deliberate and reach a decision before the due date. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible.

Within 10 days of accepting this case, the Hearing Officer shall enter a Hearing Officer Scheduling Order governing completion of the record. That Order shall set a date certain for each aspect of the case including: briefing schedule, hearing date(s), completion of discovery (if necessary) and pre-hearing conference (if necessary). The Hearing Officer Scheduling Order may be modified by entry of a complete new scheduling order conforming with the time requirements below.

The hearing officer may extend this schedule only on a waiver of the decision deadline by the petitioner and only for the equivalent or fewer number of days that the decision deadline is waived. Such waivers must be provided in writing to the Clerk of the Board. Any waiver must be an "open waiver" or a waiver of decision until a date certain.

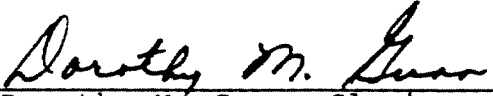
Because of requirements regarding the publication of notice of hearing, no scheduled hearing may be canceled unless the petitioner provides an open waiver or a waiver to a date at least 75 days beyond the date of the motion to cancel hearing. This should allow ample time for the Board to republish notice of hearing and receive transcripts from the hearing before the due date. Any order by the hearing officer granting cancellation of hearing shall include a complete new scheduling order with a new hearing date at least 40 days in the future and at least 30 days prior to the new due date and the Clerk of the Board shall be promptly informed of the new schedule.

Because this proceeding is the type for which the Illinois Environmental Protection Act sets a very short statutory deadline for decisionmaking, absent a waiver, the Board will grant extensions or modifications only in unusual circumstances. Any such motion must set forth an alternative schedule for notice, hearing, and final submissions, as well as the deadline for decision, including response time to such a motion. However, no such motion shall negate the obligation of the hearing officer to establish a scheduling Order pursuant to the sixth paragraph of this Order, and to adhere to that Order until modified.

This Order will not appear in the Board's Opinion Volumes.

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 17th day of December, 1987, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board