ILLINOIS POLLUTION CONTROL BOARD
June 16, 1988

JEFFERSON SMURFIT CORPORATION,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 87-185
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

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

Jefferson Smurfit Corporation ("JSC") filed a petition for variance from 35 Ill. Adm. Code 215, Subpart P and 35 Ill. Adm. Code 215.245 on November 30, 1987. In its petition, JSC further requested the Board find that 35 Ill. Adm. Code 215.245 and Subpart P are "invalid as applied to its Bedford Park Plant" (Pet. at 2). On December 3, 1987, the Board noted the validity challenge and ordered the parties "to present arguments concerning the burdens of proof, standards of review and relevant evidence to be considered at ... hearing." JSC and the Illinois Environmental Protection Agency ("Agency") subsequently filed their briefs on February 22 and 23, 1988. Discovery has been postponed pending guidance from the Board concerning the scope of review appropriate for the issues raised in this variance proceeding.[1]

The initial question to be addressed is: What challenge to the validity of regulations is allowable in variance proceedings? That some right of challenge does exist is manifest in the holding of the Second District:

> In our view 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-

[1] The Board notes that JSC participated in R85-21B, the rulemaking proceeding involving these regulations, and that the regulations are currently on appeal before the Second District (Illinois State Chamber of Commerce v. PCB, Second Dist. Appellate Court No. 2-87-1143).

> 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. (Village of Cary v. PCB, 82 Ill. App. 3d 793, 403 N.E.2d 83 (1980).

In reaching this holding, the Second District relied upon D. Currie, Rulemaking Under Illinois Pollution Control Law, 42 U.Chi.Ill.Rev. 457, 475 (1975). Professor Currie is the author of the legislation which ultimately became the Illinois Environmental Protection Act ("Act"). Professor Currie noted that in the original bill which created the Act there had been included a remedy for petition to the Board to determine the scope of validity of its own regulations. This provision was later dropped and as Currie comments:

> [E]limination of the Board remedy for determining the applicability of a regulation seems to have created a gap in the statute. For section 41 speaks only of "judicial review" of what the Board has done, and "review" implies a determination of the correctness, not of the meaning, of Board action ... 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,[25 Ill.App. 3d 271,281, 323 N.E.2d 84, 90 (1st Dist. 1974).] that the avenue for challenging the validity of a regulation as applied to particular facts is to petition for variance, not to seek direct review under sections 29 and 41. (Id.; emphasis added)

It is clear from the Currie text that it is the uncertainty as to the meaning of a regulation which is proper for review in a variance proceeding. It is therefore logical, and proper, that in some circumstances a variance determination would include matters such as consideration of the applicability of the rule to a particular facility (i.e., the meaning of the rule together with the scope of its applicability) prior to the determination of whether such regulations impose an arbitrary or unreasonable hardship upon a petitioner. Such determinations might also necessarily include relevant evidence from the rulemaking record. However, this is not to say that any and all questions a petitioner may have regarding a regulation are properly addressed within a variance proceeding.

It is a matter of stare decisis that a variance by its nature constitutes temporary relief from the need to comply with regulations. For example, in commenting on the nature of the variance process, the Illinois Supreme Court has concluded:

> Compliance by all polluters with board regulations is an ultimate goal. The variance provisions afford some flexibility in regulating the speed of compliance, but a total exemption from the statute would free a polluter from the task of developing more effective pollution-prevention technology and would impair the ability of the Board to protect health, welfare, property, and the quality of life. Obviously, this would be inconsistent with the Act's objectives. (Monsanto v. Pollution Control Board, 67 Ill.2d 276,287 (1977); emphasis added).

Since a variance can only provide for temporary relief, it follows that findings which would permanently excuse a polluter from compliance with an otherwise applicable regulation would be inimical to the variance process. It further follows that it is beyond the authority of the Board to grant permanent relief in a variance proceeding, and that arguments directed towards permanent relief cannot be entertained therein.

Based upon the foregoing, the Board finds that the issue regarding the validity of the regulations as applied is limited within the variance proceeding to matters concerning uncertainty of meaning of the regulations.

The Board next turns to the issue of the burden of proof. Section 37 of the Act clearly states that in a variance proceeding, "the burden of proof shall be on the petitioner". This notwithstanding, JSC contends that the Agency should have the burden of coming forward with evidence which shows that the rules are valid as applied and that the rules were validly adopted. This contention can be given no weight. For the reasons noted above, much of what JSC would require the Agency to prove is not germane in a variance proceeding. Moreover, rules and regulations promulgated by the Board have the force and effect of law, and like statutes, are presumed valid. Celotex Corporation v. IPCB, 94 Ill.2d 107, 445 N.E.2d 752 (1983); citing Eastman Kodak Co. v. Fair Employment Practices Co., 86 Ill.2d 60, 71, 55 Ill. Dec. 552, 426 N.E.2d 877 (1981). Policy considerations further mandate that the Agency not be required to reprove a regulation each time a petitioner may wish to challenge it; the time, energy, and expense involved in rejustifying an already presumptively valid regulation would be beyond reason.

Consistent with the above, the Board finds that such burden of proof as may exist in the instant matter resides with Petitioner.

Lastly, the Board addresses the issue of standards of review as they apply in the instant matter. In its brief JSC opines:

> In determining whether or not Subpart P rules are invalid as applied to Smurfit's Bedford Park Plant, the Board should determine whether there is any technically feasible and economically reasonable means by which Smurfit can comply with those rules. If the Board finds that no such means exist, it should rule that the Subpart P regulations are invalid as applied to the Bedford Park Plant because they impose an arbitrary and (sic) unreasonable hardship. (emphasis added).

The Board notes that JSC thereby attempts to introduce into the instant matter two distinctly different standards of review. The first is the technically feasible and economically reasonable standard, which is the standard of review imposed upon the Board in regulatory proceedings pursuant to Section 27(a) of the Act. The second is the arbitrary or unreasonable hardship standard, which is the standard of review imposed upon the Board in variance proceedings pursuant to Section 35(a) of the Act.

The Board does not believe that it has the authority to entertain a standard of review other than that specifically provided for in the Act. The Act does not provide for a technically feasible or economically reasonable standard of review in variance proceedings, and therefore the Board cannot entertain that standard.

Moreover, if the Board were to find rules invalid using the same standard as it uses in a variance determination, and based upon criteria used in rulemaking determinations, anyone who made such a showing could then have the rule declared "invalid" as applied to them. This was not the standard that was used by the Cary court, which affirmed that the standard of review of Board rules is whether such rules are arbitrary, unreasonable or capricious (Cary citing Monsanto, supra). The Board could not therefore logically or equitably declare a general rule invalid for one facility using a variance standard, and at the same time cause it to be applied to another facility on a basis of a regulatory standard. Such action would, of itself, constitute an arbitrary and capricious action. Moreover, the Board concurs with the rationale of the Agency, which stated in its brief:

> [T]he invalidity of a Board regulation is not to be determined by the impact that the rule has on a particular facility. Compliance with a particular regulation may create an unreasonable and arbitrary hardship for an individual facility, but this does not automatically render that regulation invalid. All this does is create a basis for seeking variance

relief under Section 35 of the Act (Ill. Rev. Stat. ch. 111 1/2, par. 1035 (1985)) (Agency Brief at 13).

The Hearing Officer is hereby directed to proceed with hearing in a manner consistent with this Order.

IT IS SO ORDERED.

Board Member Bill Forcade concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Interim Order was adopted on the 16th day of June, 1988, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board