

ILLINOIS POLLUTION CONTROL BOARD
November 12, 1982

UNITY VENTURES,)
)
) Petitioner,)
)
) v.) PCB 80-175
)
)
 ILLINOIS ENVIRONMENTAL PROTECTION)
 AGENCY,)
)
) Respondent.)

ORDER OF THE BOARD (by I. G. Goodman):

On October 5, 1982 the Board ordered that Unity respond to the Interrogatories and Requests to Produce Documents filed by the Agency on June 11, 1982 and the Request for a Witness List filed on July 22, 1982 no later than October 12, 1982 and further ordered that any additional discovery be completed within forty-five days of that Order. On October 12, 1982 Unity filed with the hearing officer Motions to Strike the Interrogatories and the Request to Produce. As for the requested Witness List, Unity responded that it had not yet identified the witnesses it intends to call at hearing.

On October 18, 1982 the Agency filed a Response in Opposition to Unity's October 12th motions, a Motion to Compel Discovery and a Request for Sanctions, and a Motion to Set Hearing Date. On October 22, 1982 the Agency filed a Motion to Compel Responses to Requests for Admissions of Fact and a Request for Sanctions, and a Motion to Strike Certain Responses to the Request for Admission of Facts. Both pertain to the Responses filed by Unity on August 10, 1982, and the latter was filed before the hearing officer. Unity has not responded to the Agency's motions of October 22nd. It has, however, on November 3, 1982, filed a Motion for Leave to File Instanter and a Response in Opposition to the October 18th Agency motions. On that same day and before the hearing officer, Unity filed a Motion to Set a Pre-hearing Date. No response to this last motion has been filed by the Agency; time to respond not yet having expired.

On its own motion, the Board will consider the two Motions to Strike filed by Unity on October 12, 1982, along with the pleadings subsequently generated.

In its October 12th Motions to Strike the Interrogatories and Requests to Produce Documents, Unity avers that the answers to the Interrogatories can be obtained by "alternative means,"

which were not specified in that pleading; that the Requests to Produce were neither relevant, nor likely to produce relevant material; and that both discovery requests were burdensome. Thus, Unity moves to strike both discovery requests, filed by the Agency four months ago, in their entirety.

In its Response, the Agency explains that the relevancy of its requests is premised on the issue of arbitrary and unreasonable hardship should variance not be granted; identifies that adequate proof of the same must be provided before variance may be granted; and notes the five extensions of time to respond have been granted Unity. The Agency's accompanying motion requests that Unity be compelled to answer immediately, and should it not, that sanctions be imposed.

On July 1, 1982 the Board denied a Motion for Order by the Agency since Discovery, including the Interrogatories and Requests to Produce in question, had recently been served on Unity and should have sufficed. Since that date, four of the five time extensions have been granted to Unity. Unity has never before raised an objection to the discovery, let alone to the scope or relevancy of the information sought. Even now, Unity's objections to the Interrogatories are not based on relevancy.

Pursuant to Ill. Rev. Stat., 1981, ch. 111½, §35, adequate proof of arbitrary and unreasonable hardship must be provided in order to receive a variance. This being a variance proceeding, the identity of the petitioner; the funds expended on the project as a whole, and on individual units; and the persons or entities expending such funds are relevant. Presumably the Petitioner would provide this information, since it is seeking the variance and is privy to such information. Since the same is not already contained in the Petition for Variance, the Board assumes that it would be forthcoming. However, to avoid surprise or confusion at hearing, the Board denies Unity's Motion to Strike the Interrogatories and Motion to Strike the Request to Produce Documents.

In addition to its opposition to the Motion to Strike, the Agency filed a Motion to Compel Discovery. Unity filed a Response in Opposition, accompanied by a Motion to File Instanter--which is hereby granted. Unity argues that the Motion to Compel should be before the hearing officer. In fact, Unity raises the incongruous argument that since it was not provided its right to respond to the Agency's August Motion to Strike the Responses to the Admissions of Fact as being untimely filed, this Motion to Compel should be before the hearing officer. The Board notes that the previous Motion to Strike was denied on September 2, 1982, and after reconsideration, it was again denied on October 5, 1982. It is unclear how the Board's customarily ruling on a Motion to File Instanter along with the accompanying Motion, after time has been allotted for a Response, means that this Motion to Compel should be before the hearing officer. Furthermore, since the Board's hearing

officers issue no opinion, the Board purview often includes ruling on pre-hearing disputes--and, if necessary, by its own motion. As stated above, the Board shall attempt to resolve the recurring disputes as to discovery in this matter.

For the same reasons Unity's Motions to Strike are denied, the Agency's Motion to Compel is granted in part. Unity is ordered to respond on or before November 19, 1982, the original date for discovery to be completed. Should Unity fail to respond by that date, the Board shall impose sanctions pursuant to 35 Ill. Adm. Code 107.101(c).

The Agency's Motion to Compel also requested that it be awarded the amount of reasonable expenses incurred in opposing Unity's motions. Although Unity did not address this issue, it is denied. The imposition of sanctions, if necessary, is deemed sufficient.

By motion of October 18, 1982, the Agency requested that a hearing date be set. On November 3, 1982, Petitioner filed a Response, but offered no specific reason why hearing should not be set. Petitioner also filed a waiver of the decision period until March 1, 1983, and Motion to Set a Pre-hearing Date. The Agency Motion to Set a Hearing Date is granted. Hearing shall be scheduled by December 15, 1982 and take place no later than January 15, 1983. As for pre-hearings, that will be left to the parties and hearing officer to set as necessary. The Board also orders that Unity identify the witnesses, if any, it intends to call for hearing on or before December 15, 1982.

As mentioned above, Unity had filed its Responses to the Admissions of Facts on August 10, 1982. Said Response was filed late, and the Agency moved to strike it, but was denied by Board Order of September 2, 1982. Now before the Board is an Agency Motion to Compel Responses to the Admissions of Fact. No response to this Motion has been filed by Unity.

In responding to the Admissions of Fact, Unity alleged that fifteen of the Admissions of Fact were irrelevant, and two of the fifteen were also immaterial. Admissions Nos. 11, 13, 14, 16-20, 29-30 pertain to Hobson Greene Unit I, while the variance sought pertains to Hobson Greene Unit II. Nevertheless, in its original variance petition, Unity ties the two units together and states that it would not have proceeded with the project if it "were unable to develop Units I and II along a parallel timeframe." (Petition, pg. 7)

35 Ill. Adm. Code 103.161(a) of the Board's Procedural Rules allows discovery of evidence if it appears reasonably calculated to lead to discovery of evidence admissible at hearing. Since development plans, funding, etc. of the two units appear linked, the Board finds that Nos. 11, 13, 16-20, 29-30 are relevant for purposes of discovery. However, the Board finds that Nos.

38-40 which pertain to zoning issues, are immaterial. Therefore, the Agency's motion is granted in part, and denied in part. Unity is ordered to respond to Nos. 11, 13, 14, 16-20, and 29-30 on or before November 19, 1982.

As for the Agency's Motion to Strike Responses 4-9 of the Request for Admission of Facts, which was filed before the hearing officer pursuant to the September 2nd Board Order, it shall remain in his jurisdiction as previously directed.

IT IS SO ORDERED.

Board Member D. Anderson abstained.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 12th day of November, 1982 by a vote of 4-0.



Christan L. Moffett, Clerk
Illinois Pollution Control Board