

ILLINOIS POLLUTION CONTROL BOARD

April 17, 1997

PEKIN ENERGY COMPANY,)	
)	
Petitioner,)	
)	PCB 97-145
v.)	(Variance - Water)
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

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

On February 26, 1997 Pekin Energy Company (PEC) filed a petition for variance from 35 Ill. Adm. Code 309, or in the alternative, a ruling that a variance is not necessary because no permit is needed for its ash settling pond. On March 21, 1997 the Illinois Environmental Protection Agency (Agency) filed a motion to dismiss the variance petition. PEC filed an initial response to the motion on March 28, 1997.¹

The Agency contends that PEC is requesting a directed verdict under the guise of a variance proceeding, and that the Board lacks jurisdiction over such issues. The Agency contends as well that a declaration of nonliability for past conduct is improper, the instant issues should be resolved in an enforcement action, PEC has alternative relief routes, and the variance petition is insufficient.

PEC responds that it is indeed seeking a variance, not declaratory judgment, and that the petition as submitted is sufficient as to the requirements in 35 Ill. Adm. Code 104.121. PEC argues that the Board has the jurisdiction, which it has exercised in the past, to determine what law applies in order to establish eligibility for a permit, adjusted standard or variance, citing Illinois Power Company v. Illinois Environmental Protection Agency (January 23, 1997), PCB 97-35 and Frederick Cooper Lamps, Inc. v. Illinois Environmental Protection Agency (August 15, 1996), PCB 96-158. (Resp. at 4.)

PEC is correct that in the past the Board has found it necessary to make determinations, in a variance context, regarding the applicability of regulations when petitioner claims the regulations are arbitrary, unreasonable or capricious as applied to them. This determination must be made by the Board prior to ascertaining the appropriate or necessary relief. When squarely faced with the issue, the Appellate Court supported this reasoning in Village of Cary v. IPCB et.al. and found:

¹ On March 25, 1997 PEC filed a motion for extension of time to file a response, that motion is hereby denied.

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, 67 Ill.2d 276, 288-91, 10 Ill. Dec. 231, 367 N.E.2d 684, 689-90 (1977)), and no section of the Environmental Protection Act provides otherwise. We conclude that 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.

(403 N.E.2d 83, 89, 82 Ill. App.2d 793 (2nd Dist. 1980).)

The Board has often found it necessary to approach variance requests in this manner. In Amerock Corporation v. IEPA (September 20, 1985), PCB 84-62 the Board initially had to determine that Amerock needed an NPDES permit for its stormwater discharges, before it was able to go on to consider variance relief. In Precision Coatings, Inc. v. IEPA (February 20, 1985), PCB 84-117, the Board stated that petitioner had clearly chosen to request variance to avoid a possible enforcement action but has not agreed that the rule from which variance has been requested is applicable to it. This is a proper procedural mechanism which results in the question of applicability of the rule becoming the threshold issue. If the rule is inapplicable, no variance is necessary and no inquiry into arbitrary or unreasonable hardship need be made .

The Board further enunciated its reasons for accepting variances in these circumstances when, quoting comments made by the author of what was ultimately to become the Illinois Environmental Protection Act, Professor D. Currie, it stated that the elimination of the Board remedy for determining the applicability of a regulation seems to have created a gap in the statute. 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 . (Container Corporation of America v. Environmental Protection Agency (June 2, 1988), PCB 87-183.)

More recently in JLM Chemicals, Inc. (formerly BTL Specialty Resins Corporation) v. Illinois Environmental Protection Agency (September 7, 1995), PCB 95-98 the Board was faced with facts similar to the case at hand. In JLM Chemicals the Agency determined that the byproduct from JLM/BTL's phenol production unit was a K022 waste and accordingly was required to be treated as a hazardous waste. The Board was asked to make a determination that the byproduct was not a K022 hazardous waste, and if the Board determined it was, to grant a variance. The Board found that the T105 bottoms material produced by JLM/BTL was a K022 listed hazardous waste, and only then was it able to reasonably analyze the sufficiency of the petition for variance. After considering the record as a whole, including the evidence presented at hearing, the Board denied the variance request.

A motion to dismiss, like a motion for summary judgment, can succeed where the facts, taken in a light most favorable to the party opposing the motion, prove that the movant is entitled to dismissal as a matter of law. To dismiss in this instance, there can be no material facts in

dispute that could reasonably support PEC's position that its ash pond does not require a permit pursuant to 35 Ill. Adm. Code 309.204. The Board finds that this determination cannot be made at this time, without the benefit of a complete record established at hearing. Consistent with prior case law, the Agency's motion to dismiss is hereby denied. This matter will proceed to hearing as expeditiously as possible to accumulate the information necessary for the Board to make a decision in this matter.

The hearing must be scheduled and completed in a timely manner, consistent with Board practices and the applicable decision deadline. The Board will assign a hearing officer to conduct hearings consistent with this order, and the Clerk of the Board shall promptly issue appropriate directions to that assigned hearing officer.

The assigned hearing officer shall inform the Clerk of the Board of the time and location of the hearing 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, a statement regarding credibility of witnesses, and all actual exhibits to the Board within five days of the hearing.

Any briefing schedule shall provide for final filings as expeditiously as possible and, in time-limited cases, no later than 30 days prior to the decision due date, which is the final regularly scheduled Board meeting date on or before the statutory or deferred decision deadline. Absent any future waivers of the decision deadline, the statutory decision deadline is September 26, 1997; the Board meeting immediately preceding the decision deadline is scheduled for September 18, 1997.

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. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible.

IT IS SO ORDERED.

Board Member Kathleen M. Hennessey abstained.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the _____ day of _____, 1997, by a vote of _____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board