

ILLINOIS POLLUTION CONTROL BOARD
April 12, 1990

USS DIVISION OF USX CORPORATION,)
)
Petitioner,)
)
v.) PCB 90-28
) (Variance)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

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

This matter comes before the Board upon a motion to dismiss Petitioner's petition for variance filed March 23, 1990 by the Illinois Environmental Protection Agency ("Agency"). On April 2, 1990, USS Division of USX Corporation ("USS") filed its response requesting the Board deny the Agency's motion.

On March 5, 1990, USS filed a petition for variance for relief from 35 Ill. Adm. Code 302.102 (mixing zones and ZIDS), 302.208 (Numeric Standards for Chemical Constituents), 302.210 (the narrative standard), and Subpart F (Procedures for Determining Water Quality Criteria), as each rule was amended in the Board's Toxics Control regulatory proceeding, R88-21(A), January 25, 1990, effective February 13, 1990.

The Agency requests that the Board dismiss USS' variance petition because it believes that the petition is premature due to court appeals of the recent amendments from which USS seeks variance, stating that USS is establishing its request for a stay in the appellate court by filing this variance. In the alternative, the Agency submits that the variance petition is inadequate under 35 Ill. Adm. Code 104.121, alleging that USS has provided insufficient and speculative data to show violations of the standards, and that the lack of data makes it impossible for the Board to determine the effectiveness of the compliance plan or whether hardship exists or whether the requested variance would meet federal approvability requirements.

The Board finds that the filing of this variance petition is not premature simply by virtue of its being filed while appeals of the new regulations are pending. Irrespective of any motives for the filings, as USS correctly points out in its reply, there is nothing in the Act which precludes a petitioner from pursuing both variance relief from the Board and an appeal in the courts simultaneously.

As to the issue of the showing of a present violation, USS submits that the Agency is incorrect that USS must prove a present violation, stating that rather, a petitioner need only show that it cannot demonstrate compliance; i.e., to show a "present failure" to meet a regulation, pursuant to Section 104.121(e). USS points to data which it believes describes its inability to comply with the numerical standards.

USS further submits that its request for relief is not speculative since it lacks information to demonstrate compliance with the new rules, and seeks time to either demonstrate compliance or to show that further relief is necessary.

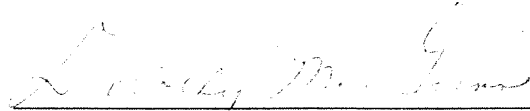
The Board observes that most of the contentions contained in the Agency's motion are of the type which are normally contained in a recommendation. Therefore, much of the discussion contained in the motion and response goes to the merits of the petition. The Board notes that several other petitions for variance, as well as petitions for adjusted standards, have been filed seeking relief from the R88-21A water toxics rules. (PCB 90-27, PCB 90-29, PCB 90-30, AS 90-2, AS 90-3, AS 90-4, AS 90-5.) The Agency has requested dismissal due to asserted informational deficiencies in each case, save for AS 90-5. Given the nature of the water toxics amendments and the fact that there is no previously established benchmark for judging the sufficiency of a petition in this arena, the Board is not prepared at this time to dismiss this petition as deficient. However, since USS bears the burden of proof, it is obvious that to the extent additional information is necessary for such proof, such information should be submitted during the course of the proceeding, and in advance of hearing.

The Board accordingly denies the Agency's motion to dismiss.

Finally, the Board must address the Agency's suggestion that the filing of this petition stays the effectiveness of the water toxics rules pursuant to Section 104.102. Section 104.102 is an old rule which was drafted to track Section 38(b) of the Act. Since the adoption of the rule, Section 38(b) of the Act was amended and now provides for an automatic stay of some newly effective rules if a petition for variance is filed within 20 days, but specifically excludes rules implementing an NPDES program. Section 104.102 cannot be read as giving greater rights than the Board's enabling statute allows. The water toxics rules can accordingly be stayed only by Order of court.

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 12th day of April, 1990, by a vote of 4-6.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board