

ILLINOIS POLLUTION CONTROL BOARD
April 6, 1989

CONTAINER CORPORATION OF AMERICA,)
)
 Petitioner,)
)
 v.) PCB 87-183
)
ILLINOIS ENVIRONMENTAL PROTECTION)
AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by J. Anderson):

This matter comes before the Board on the Joint Motion To Continue Hearing To Allow For Implementation of Settlement Agreement, filed with the Board on April 3, 1989. The hearing in question is presently scheduled for April 14, 1989; the parties seek continuance to June 12, 1989. In support of this motion, the Petitioner and Respondent advise the Board that they "have reached an agreement whereby the Carol Stream Plant will be brought into unquestioned compliance with the Board's flexographic and rotogravure VOM regulations by December 31, 1990". (p. 2) The parties propose to incorporate this agreement "in a consent decree or order and have it approved either by the Board or the Circuit Court". This agreement, the Board is further advised, has been submitted to the Attorney General's office for approval. Once it has been approved (by both the Attorney General and either the Board or the Circuit Court), Petitioner will dismiss the present variance proceeding as well as the companion site-specific rulemaking petition before the Board in Docket R88-4.

Normally, this Board would welcome efforts to conserve its resources and promote speedy resolution of matters involving noncompliance with its regulations. Because the Board is not persuaded that the requested continuance will achieve or promote either of these goals in the long run, and because the proffered rationale for continuance appears to be unrelated and irrelevant to a variance proceeding, the motion is denied, and hearing shall take place as scheduled.

Some background to this Order is appropriate. This is an air pollution variance case; it was originally filed on November 30, 1987. The presently scheduled hearing is the sixth scheduled in this proceeding, yet would be only the second actually held. The previous hearing was held on December 14, 1988, only after

this Board on November 14, 1988, in response to an Agency Motion for Sanctions ordered the hearing to proceed as scheduled. That Order noted "a pattern of delay and unresponsiveness" in this case (p.3) and that it "has already taken more than a year to reach the hearing stage" (p. 4). Although the motion for sanctions was denied, such denial was due to the fact that the Agency appeared to be prepared to proceed and to the fact that granting the motion "merely invites more delay" (ibid). However, the Board instructed the Hearing Officer to deny any request for continuance (ibid).

Yet even this intention appears to have been frustrated. Two days prior to the December 14, 1988 hearing, the Board was advised by the parties that a settlement in principle in this matter had been achieved. The Board was informally asked to allow the Hearing Officer to continue this case to a date certain, to enable the parties to reduce their agreement in principle to writing and obtain necessary signature approvals. The Board acquiesced in this arrangement, which was dutifully described at the December 14, 1988 hearing by the parties (R. 3-7). In consequence of this arrangement, the December 14, 1988 hearing consisted of little more than description by the parties of the arrangement and occupied but six pages of transcribed oral statements. No evidentiary matters were presented.

The arrangement described in the instant motion is not the arrangement or outcome upon which the preceding continuance was premised. In four months, no written settlement agreement has been provided to the Board, and no motion to dismiss this proceeding is imminent; we are now offered only another contingent contingency: if the Attorney General approves the proposed settlement, then if the Board or Circuit Court approves the proposed settlement, then Petitioner "will dismiss (sic) this proceeding" (Jt. Mt. at. 2). Given the already protracted history of this docket, there is nothing in this joint motion to suggest that we are any nearer resolution of this matter than we were four months ago, or that we will be any nearer 60 days from now if the requested continuance is granted.

The Board is not concerned solely by the prospect of continuing delay, per se. As noted previously, since November 1987, the Board has scheduled public hearings in this matter six times. Of those, four were cancelled by the parties, one was convened and immediately continued on the record, and the parties now seek to cancel the sixth. On all but one occasion, cancellation or continuance of the hearing occurred after the Board had caused to be published public notice of such hearing. This has resulted in the wasted expenditure of limited Board resources. And still there is no record which would allow a Board decision.

Of even greater concern is the misinformation conveyed to members of the interested public. If today's motion to cancel is granted, none of the hearings described in the five published hearing notices will have occurred to discuss the merits of the case.

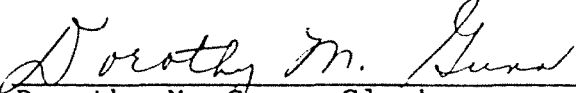
Finally, the Board senses that the parties may be misapprehending the purpose and role of a variance proceeding and are thus attempting to promote a rationale for settlement that is at odds with the statutory bases for variances. If so, the apparent outcome for which the parties labor is unrelated and irrelevant in the context of justifying delaying action in a variance proceeding. It appears that the parties contemplate a scenario in which compliance with the subject VOM regulations will be achieved in approximately 21 months pursuant to a consent decree approved by the Circuit Court. The parties are reminded that, by law, the jurisdiction of this Board in Variance cases is not extinguished by Circuit Court decrees. The Circuit Courts have no jurisdiction to grant variances; that power is reserved by law to this Board pursuant to Title IX of the Environmental Protection Act (the Act). Unlike enforcement cases, in which the jurisdiction of the Circuit Courts and this Board are essentially concurrent, there is no concurrent jurisdiction in variance matters, and thus there is no court-fashioned "equivalent" to variance relief. Such variance relief would be an essential prerequisite under the Act to issuance of a permit for the subject facility during and for such period of time as the facility remains out of compliance with applicable regulations.

The Board Order of November 17, 1988 demanded that hearings commence, and precluded the hearing officer from granting any additional continuances. That Order is specifically reaffirmed. Today, the Board demands that hearings in this matter be concluded as soon as possible, but in no event later than May 15, 1989, and that any record be promptly conveyed to the Board for decision. The Board authorizes the hearing officer to take all necessary steps to ensure that the record in this matter is completed promptly. Any failure to promptly conclude proceedings in this matter will raise the distinct possibility of Board imposed sanctions.

For the foregoing reasons, the Joint Motion for Continuance is denied.

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 6th day of April, 1989, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board