ILLINOIS POLLUTION CONTROL BOARD
August 18, 1988

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

ORDER OF THE BOARD (by B. Forcade):

On July 29, 1988, Container Corporation of America ("CCA") filed a Motion to Reconsider or Certify Question. That motion requests that the Board review and modify its June 2, 1988 Interim Order which defined the degree of regulatory review that would be allowed in this proceeding, or to certify the issue for interlocutory appeal. The Illinois Environmental Protection Agency ("Agency") filed a response on August 17, 1988

The Board grants reconsideration, but declines to expand the scope of regulatory review or certify the question for review.

CCA contends that the Board has misunderstood the relevant law, and that the statutory language and applicable Court Opinions all recognize CCA's ability, in a variance proceeding, to challenge the validity of a regulation as applied. CCA asserts that Village of Cary v. Pollution Control Board, 82 Ill. App. 3d 793, 403 N.E. 2d 83 (1980), requires this Board to entertain challenges to regulations in a variance proceeding. In a similar manner other practitioners assert that Celotex v. Pollution Control Board, 94 Ill. 2d 107, 445 N.E. 2d 752 (1983), requires this Board to entertain challenges to regulations in a permit appeal. Upon reconsideration, the Board affirms the reasoning and analysis of its June 2, 1988 Interim Order. As explained below, the Board believes that the new Section 29 (b) of the Environmental Protection Act ("Act") provides added support to the Board's view that it is not required to entertain post-promulgation challenges to the validity of its regulations within a variance proceeding.

The prior arguments and opinions on whether regulations may be challenged before the Board have been affected by recent action of the General Assembly. On June 27, 1988, the General Assembly passed SB-1834 which was signed by the Governor on July 14, 1988. That bill included the following amendment adding Section 29(b) to the Act:

> Action by the Board in adopting any regulation for which judicial review could have been obtained under Section 41 of this Act shall not be subject to review regarding the regulation's validity or application in any subsequent proceeding under Title VIII, Title IX or Section 40 of this Act.

The Act has always specifically and clearly allowed adversely affected persons to seek judicial review of Board regulations pursuant to Section 41. That Section requires that a Petition for Review be filed within 35 days of the final order. The Act has previously not addressed whether or to what extent the validity of a regulation may be challenged after that 35 day period. As some regulated entities raised such challenges, the Courts were called upon to speak where the Act was silent. Cary and Celotex represent the seminal cases in which the courts have addressed the possibility of post-promulgation challenges to the validity of a regulation. Both cases involve a court engaging in the interpretation of statutory language, and both courts specifically noted the absence of statutory language to conflict with their interpretation.

In Cary the court stated, "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 [citation omitted], and no section of the Environmental Act provides otherwise." (Emphasis added) Cary at 89. In Celotex the Supreme Court stated, "The Act provides for judicial review of denials of permits. There is nothing in the statute to indicate that the General Assembly intended to deprive one of an opportunity to challenge a regulation that is being applied to deny him a permit simply because he did not contest the regulation immediately after its adoption." (Emphasis added) Celotex at 756.

Since Section 29 (b) represents the General Assembly's first and only utterance on post-promulgation review, the Board concludes that the new section represents the General Assembly's original intent. Subsequent enactments may be used to help determine the legislature's original intent, particularly where the amendment is enacted shortly after the interpretation of the statute it amends comes into dispute. Central Illinois Public Service Company v. Pollution Control Board, 116 Ill. 2d 397, 507 N.E.2d 819 (1987), In re Marriage of Semmler, 107 Ill. 2d 130, 137, 481 N.E.2d 716 (1985). Although the Cary and Celotex cases are respectively eight and five years old, assertions regarding the validity of regulations as applied to particular facilities based on these cases have been recently presented before the Board. Since interpretation of Section 29 and 41 review have been of recent dispute, it follows that the Legislature's original intent is shown by the enactment of Section 29 (b). The fact that the SB 1834 revisions to the Act do not become

effective until January 1, 1989 has no bearing on a showing of intent. Since the Act has now been specifically revised to deny subsequent review, neither Celotex nor Cary, to the extent that they may or may not have allowed for post-promulgation challenges to the validity of a regulation, remain good law.

The Board further notes that CCA has raised its concerns about the validity of the particular regulation at issue in at least three proceedings so far: In R85-21B, CCA participated in the general rulemaking proceeding and opposed adoption of regulation for essentially the same reasons asserted here today; In R88-4 CCA is requesting that the Board adopt site-specific regulatory language exempting CCA from the general rule adopted in R85-21B for the same reasons; In this proceeding CCA is asserting that the rule adopted in R85-21B cannot be validly applied to CCA.

CCA is not the only facility to seek review of a single fundamental regulatory conflict in multiple proceedings before the Board. In the last six months the Board has docketed at least ten variance or permit appeal proceedings filed by entities that challenge the validity of a recently adopted regulation. These post-promulgation adjudicatory challenges raise the same technical and economic arguments against the regulation's validity as the entity asserted in the recently completed regulatory proceeding. Some of those entities have now docketed a permit appeal, a variance, and a site-specific regulatory proposal. The Board is not convinced that CCA or any other facility must be given three or four opportunities to present evidence and seek judicial review of the Board's position on a single concept.

These multiple reviews present logistic problems if nothing else. The record in R85-21B comprises two full file boxes of pleadings, exhibits, public comments, and transcripts. Under the theory of Cary the Board should "consider" this evidence of the variance hearing for purposes of judicial review". Cary at 89. Under the theory articulated by CCA the Board would have great difficulty in simply reproducing the respective regulatory records into the subsequent variance and permit appeal cases. Thorough review and consideration of such voluminous evidence by the Board in the limited time frames allowed by statute for the adjudicatory proceeding poses unworkable problems.

The Board believes that the issues presented here and in the June 2, 1988 Order do not involve a question of law of which there is substantial ground for a difference of opinion, and that immediate appeal would prolong the termination of this litigation, rather than advance it. Therefore, the Board declines to certify the questions posed by CCA for interlocutory appeal.

In conclusion, the Board believes that the language of Section 29 (b) is clear and unambiguous in its meaning, and that

it absolutely precludes the type of post-promulgation challenge to the validity of a regulation which CCA asserts here. The regulation at issue was promulgated by the Board on November 20, 1987. Not only could review of the regulation in question have been obtained, but as the Board noted in its June 2, 1988 Interim Order, review is currently pending in the Second District (No. 2-87-1143).

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 18th day of August, 1988, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board