

ILLINOIS POLLUTION CONTROL BOARD
May 5, 1993

STATE BANK OF WHITTINGTON,)
)
 Petitioner,)
)
 v.) PCB 92-152
) (UST Fund)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by J. Anderson):

This matter is before the Board on the May 3, 1993 Illinois Environmental Protection Agency's (Agency) "Response to the [Board's March 11, 1993] Order Supplementing the Record." As an initial concern, the Board notes that the Agency's May 3, 1993 filing is well over one month late, and also is not accompanied by a motion to file instanter. Given the time-driven circumstances here - the decision deadline requires that this matter be decided at the Board's May 20, 1993 Board meeting - the Board will accept the Agency's filing. In order to avoid prejudice, the Board will decide this matter today.

By way of background, on March 11, 1993, the Board granted a motion by the State Bank of Whittington (Bank) to supplement the record. The Agency had not filed a response to the Bank's motion. In part, the Board directed the Agency to submit, within 14 days of its March 11, 1993 order, the original color photographs of the excavation activities that were submitted to the Agency prior to its decision in this matter.

The Agency did not file the color photographs ordered by the Board. The Agency stated that it had only the one set of photographs submitted to it by the petitioner, and that surrender of possession would "violate Agency policy and result in a violation of Section 3 of the State Records Act, 5 ILCS 160/3". (Agency Resp. at 2.) The Agency, citing a "right of public access" provision of 5 ILCS 160/4 and the Board order, offered substitutes. The Agency filed a) copies of "enhanced" zeroxed black and white prints, and b) two color photographs from the Agency's Administrative Record, taken at different times and admittedly not identical with the two photographs requested, that the Agency nevertheless asserts "do depict the same subject matter and are taken from approximately the same view". (Agency Resp. at 3.)

The provision of the Public Records Act cited by the Agency to support its refusal, section 160/3, is not applicable on its face. The section is titled, and so addresses, "Reports and

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records of obligation, receipt and use of public funds as public records". The "right of public access" provision is not applicable either. That section, 160/4, addresses the right of any person to have access to "any public records of the expenditure or receipt of public funds".

Regarding the Agency's assertion that compliance with the Board's order violates Agency policy, we note that this is the first time that the Agency has raised such an issue. Even assuming that such a policy exists, in that the Agency had failed to file any objection to the Bank's motion to supplement, the Agency has waived its right to make such an assertion at this juncture.

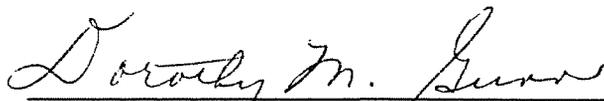
Even if the Agency had timely raised this issue, the Agency's proffered substitutes are unacceptable. We note, and so find, that the Agency's desire to preserve its records cannot serve to deny this Board evidence when the Board is acting in its quasi-judicial capacity, any more than would be the case with a court.

The Agency is ordered to submit the two colored photos no later than 5 days after the date of this order, i.e., Monday, May 9, 1993. The Board reminds the Agency that any further delay in completing the record can affect the resolution of the issues in this case.

The Board instructs the Clerk to return the photos, upon Agency request, when this appeal is finally resolved.

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 5th day of May, 1993, by a vote of 5-0.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board