

ILLINOIS POLLUTION CONTROL BOARD
June 12, 1980

MISSISSIPPI RIVER GRAIN ELEVATOR, INC.,)
)
Petitioner,)
)
v.) PCB 80-19
)
ENVIRONMENTAL PROTECTION AGENCY,)
)
Respondent.)

CONCURRING OPINION (by J. Anderson):

The Agency argues that the Board's grant of variance in this matter was procedurally improper. The Agency contends that, pursuant to Sec. 37 of the Environmental Protection Act and Board Procedural Rule 407(c)(2), a hearing should have been held before decision was rendered.

Both Sec. 37 and Rule 407(c)(2) mandate the Board to hold a variance hearing when a written objection is filed within 21 days. Rule 404 establishes the 21 day filing period for objections by the Agency or any other person, while Rule 405 establishes a 30-day schedule in which the Agency is to file any Recommendation.

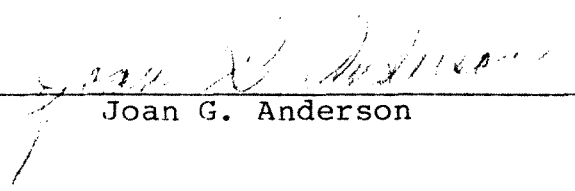
The March 28, 1980, filing of the Agency in this matter was titled a "Recommendation", and was considered by the Agency to be such. By affidavit the Agency indicated that the Recommendation was being filed 13 days after the 30 day limit established by Rule 405 had run (Affidavit Stephen B. Cherry, p. 9 of Rec. filed March 28, 1980).

A negative or conditional recommendation by the Agency is not the objection contemplated by Rule 407(c)(2), Rule 404 or Sec. 37 of the Act which triggers a mandatory hearing. If the Agency desires that hearing be held, it, as any other person, must file an objection, so titled, within the 21-day period of Rule 404. The Board's determination that an Agency recommendation pursuant to Rule 405 is not the objection contemplated by Rule 404 is buttressed by Rule 407(c) 3, which triggers a hearing when the petitioner so requests by an amended petition within 7 days after receipt of the Agency recommendation.

The Agency's reliance on Material Service Corp. v. Pollution Control Board, 41 Ill. App. 3d 192, 345 N.E. 2d 37 (3rd Dist., 1976) in support of its contention that a Rule 405 recommendation is the equivalent of a Rule 404 objection is misplaced. While the court did so find, the decision was made in the context of petitioner's appeal for review of Board dismissal without hearing

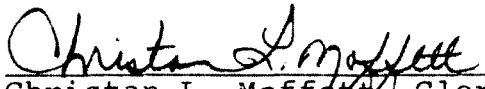
of its petition for variance. Consequently, the case must be restricted to its facts, and to the equity considerations which underlay the Court's decision to remand the case to the Board for further proceedings to provide evidentiary support for the allegations of the petitioner.

The Agency's remaining arguments seek to bring before the Board facts which should have been included in the recommendation.



Joan G. Anderson

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Concurring Opinion was submitted on the 13th day of June, 1980.



Christan L. Moffett, Clerk
Illinois Pollution Control Board