

ILLINOIS POLLUTION CONTROL BOARD
June 22, 2000

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 99-191
) (Enforcement - Air)
PANHANDLE EASTERN PIPELINE)
COMPANY, a Delaware corporation,)
)
)
Respondent.)

ORDER OF THE BOARD (by M. McFawn):

Currently three motions are pending in this case, each filed on May 30, 2000, by complainant the People of the State of Illinois: a "Motion to Strike Affirmative Defenses," a "Motion in Limine" seeking exclusion of certain expert testimony, and a "Motion to Incorporate," seeking inclusion of the record in PCB 98-102, a permit appeal filed by respondent Panhandle Eastern Pipeline Company (Panhandle). Panhandle filed responses to the motions on June 6, 2000. For the following reasons, the Board denies complainant's "Motion to Strike Affirmative Defenses" and "Motion to Incorporate," and grants complainant's "Motion in Limine."

MOTION TO STRIKE AFFIRMATIVE DEFENSES

On June 29, 1999, complainant filed a two-count complaint alleging violations of an array of state and federal statutes and air regulations and violation of permits due to excess NO_x emissions. On July 27, 1999, Panhandle filed an "Answer and Affirmative Defenses," asserting five affirmative defenses. As noted above, on May 30, 2000, complainant moved to strike Panhandle's affirmative defenses.

Under 35 Ill. Adm. Code 101.243(a), motions to strike or challenge the sufficiency of a pleading must be filed within 21 days after service, "unless the Board determines that material prejudice would result." Complainant's motion was filed ten months late. Complainant has not identified, nor can we see, any prejudice that would justify entertaining this motion at this late date. (The parties have engaged in substantial discovery and, until very recently, the hearing on this case was scheduled to begin next week.) Complainant's "Motion to Strike Affirmative Defenses" is therefore denied as untimely.

By this order, the Board is not ruling on the validity of any of Panhandle's affirmative defenses. Complainant may of course still argue that any given defense is invalid.

MOTION IN LIMINE

By its “Motion in Limine,” complainant asks the Board to exclude “any evidence or testimony relating to recent Illinois environmental civil penalties.” This motion has its genesis, apparently, in the proposed expert testimony of Bill Forcade, as disclosed in discovery. Forcade’s proposed testimony is described in Panhandle’s discovery responses thus:

Mr. Forcade will discuss Illinois judicial and administrative civil penalties in environmental cases. He will discuss the highest penalties issued by the Board in contested air cases and in stipulated settlements of cases involving air issues. He will discuss the average penalties assessed in air and other environmental enforcement cases over time. He will testify that the \$8 million in civil penalties being sought in this matter is not only significantly greater than the highest penalties issued by the Board in other air matters, but also approximately the amount of all civil penalties levied by the Board in all matters since the Board was created in 1970. He will testify that the amounts the Board has determined appropriate penalty amounts in other enforcement cases in the past shows [sic] that the amount of the civil penalty sought by the Complainant in this matter is inappropriate.

Appended to complainant’s motion is a memorandum by Forcade discussing penalties imposed by the Board and compiling statistical data about penalties.

Complainant argues that Forcade’s testimony will not be relevant, and that discussion of past Board actions is more appropriately undertaken in a brief than in testimony. Panhandle, noting that a broad range of evidence is admissible in enforcement cases, notes the Board’s statement in Illinois Environmental Protection Agency v. Barry (May 10, 1990), PCB 88-71, slip op. at 8, that “in order to properly address the penalty issue in this case, a broad overview of Illinois, federal and some other states’ penalty determinations is necessary to guide the Board in this, and future decisions.” Panhandle asserts that Forcade’s report and proposed testimony are identical to the information the Board considered relevant in the Barry case, and consequently his testimony should be allowed.

All the factual information about which Forcade is expected to testify is public information contained in Board records, or the result of application of math to such information. A witness need not testify about this type of information for it to be considered by the Board. We agree with complainant that the matters to which Panhandle intends to have Forcade testify are more properly addressed as argument in a brief.

Accordingly, the Board grants complainant’s “Motion in Limine.” Evidence relating to recent Illinois environmental penalties will be excluded. Panhandle may, of course, cite any prior Board decisions in its argument, and may argue that earlier decisions provide guidance to the Board in this case.

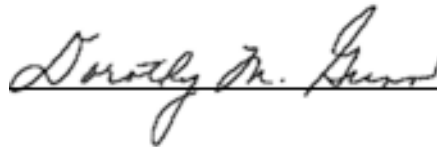
MOTION TO INCORPORATE

Through its "Motion to Incorporate," complainant seeks to incorporate the administrative record and hearing transcript of Panhandle's permit appeal, PCB 98-102. Complainant asserts that "evidence that was introduced in the preceding hearing substantially overlaps with evidence that will need to be presented in the instant action," Mot. at ¶ 3, and that inclusion of the prior record and transcript will "ensure that the resources of the Board, the Complainant, and the Respondent are not needlessly used and that administrative economy of the Board is ensured." Mot. at ¶ 4. Panhandle, while agreeing that some information from the previous proceeding may be relevant to this action, "does not agree that every single document in the Administrative Record or every statement made in the Hearing Transcript is relevant." Panhandle also challenges that incorporation of the entire record will promote administrative economy, since inclusion will merely increase the amount of material the Board must review.

The Board's procedural rule governing motions to incorporate, 35 Ill. Adm. Code 101.106, provides in subsection (a) that "[t]he person seeking incorporation shall demonstrate to the Board . . . that the material to be incorporated is relevant to the proceeding." The Board finds complainant's conclusory statement in its motion, that the evidence in the two proceedings substantially overlaps, is not sufficient to demonstrate the relevance of the entire administrative record, at least in the face of Panhandle's objection. The Board therefore denies complainant's motion. This denial, however, is without prejudice to the extent that complainant can demonstrate more concretely that the record or some portion of it is relevant in this case.

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 22nd day of June 2000 by a vote of 6-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board