

ILLINOIS POLLUTION CONTROL BOARD
January 12, 1987

JOLIET SAND AND GRAVEL COMPANY,)
)
 Petitioner,)
)
 v.) PCB 86-159
)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by J. Anderson):

This matter comes before the Board upon an emergency motion filed by Joliet at approximately 4:15 p.m. on Friday, January 9, 1987. Joliet requests that the Board overrule a Hearing Officer Order dated January 8 concerning witnesses required to appear at the hearing which is scheduled for January 13, 1987. In this Order, the Hearing Officer ordered the Agency to produce five witnesses: Messrs. Telford, Tiffin, Zenisek, Desai and Mathur; remaining individuals whose names appear on the November 21, 1986, November 24, 1986 and the January 5, 1987, notices, as well as previously subpoenaed witness Miller, were not required to appear. The Hearing Officer's rationale for this ruling was that:

Petitioner has failed to persuade this Hearing Officer that these remaining named individuals can provide relevant admissible testimony regarding facts relating to the denial of Petitioner's application for permit, or that said individuals can provide relevant, admissible testimony regarding the decision to deny Petitioner's application for permit. ...The bounds of relevant, admissible evidence for this Hearing are determined by the Order and Opinions of the Illinois Pollution Control Board in this and other cases, and by the courts of the State of Illinois.

Joliet objects to the Order on the grounds that it had no notice prior to the entry of the Order, that the Hearing Officer has established a "burden of persuasion" which is contrary to rules, statute, and the law of the case, and that the Order violates due process rights to select and present witnesses and their testimony, either directly or via offers of proof. For these reasons, Joliet submits that the Hearing Officer's Order should be overruled.

The Board again notes, as it did in its Order of December 23, 1986, that pursuant to the 120 day decision deadline established by Section 40, the Board must render decision on this matter on or before January 28, 1987 to prevent issuance of a permit by default. It is the duty of the Hearing Officer to manage the discovery and hearing processes in light of the due process rights of the litigants as well as of the due process rights of the public to have the Board make a timely and considered decision concerning the environmental and procedural issues presented on appeal. The Board finds that the Hearing Officer has properly performed that function given all of the circumstances of this case, and the Board accordingly affirms the Hearing Officer's Order for the reasons outlined below.

First, the Board notes that the Hearing Officer's Order of January 8, 1987 ordered that the same five witnesses be presented for hearing for essentially the same reasons as did his Order of December 17, 1986. This portion of the Order was affirmed in the Board's Order of December 23. The Hearing Officer has therefore applied what is in fact the law of the case.

Next, given the time constraints in this case, the Board finds meritless Joliet's complaints about lack of notice prior to entry of the January 8 Order limiting the number of witnesses to be produced on January 13. The January 8 Hearing Officer Order defined the Hearing Officer's understanding of the Agency's production obligations at hearing in a timely fashion which has in fact allowed Joliet to seek review of the Order.

Finally, there remains Joliet's assertion of violation of its due process rights to call to hearing any witness who arguably can present relevant testimony and to have questions concerning relevancy of that testimony determined at hearing. Joliet in essence asserts that this right is an absolute one; the Board cannot so find, as exercise of such a right could violate the public's right to a timely decision.

In this case, for example, hearing is being held within two weeks of the deadline for decision not due to failure by the Board to timely schedule a hearing, but instead due to inability/failure to earlier complete discovery. In similar circumstances, in a worst case scenario, once hearing commences, it would be hypothetically possible for a petitioner to filibuster its way to issuance of a default permit: if a hearing is not concluded within the decision period, it could be argued that a default occurred because it was not petitioner's "fault" since he was "merely" exercising an absolute right. See, Illinois Power Co. v. PCB, 137 Ill. App. 3d 449, 484 N.E.2d 898 (1985) and Marquette Cement Manufacturing Co. v. IEPA, 84 Ill. App. 3d 434, 405 N.E.2d 512 (1980). Similarly, a hearing could be protracted so that it would not be humanly possible for the Board to receive transcripts of the final day of hearing, which again prevents a

timely decision. The Board cannot allow petitioner's "rights" to extinguish rights of the Agency and the public.

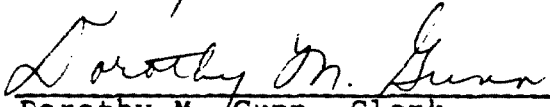
Finally, the Board notes that on January 9, Joliet filed a supplement to its January 5 hearing notice, naming Christopher Romaine as an additional witness. As the Hearing Officer has not ruled concerning this supplement, the Board will not do so either, with the result that this notice to appear stands.

In summary, then, this Order requires the Agency to produce the following witnesses at hearing tomorrow, January 13, 1987:

Messrs: Anton Telford, Martin Tippin, William Zenisek, Harish B. Desai, Bharat Mathur and Christopher Romaine.

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 12th day of January, 1987 by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board