

ILLINOIS POLLUTION CONTROL BOARD
October 12, 1984

IN THE MATTER OF:)
)
FINANCIAL ASSURANCE FOR) R84-22
CLOSURE AND POST CLOSURE)
CARE OF WASTE DISPOSAL SITES)

ORDER OF THE BOARD (by J. D. Dumelle):

This matter comes before the Board upon a September 27, 1984 motion for review of Hearing Officer's Order filed on behalf of Illinois Power Company (IPC). IPC requests that the Board reverse the order entered by the Hearing Officer on the record at the September 24, 1984 hearing in this matter. IPC argues that, given the lack of adequate notice and meaningful opportunity to comment which was provided on certain issues, these issues should be severed from consideration in this proceeding. The Hearing Officer denied this motion and directed that any participants who wished to address the Board's authority to promulgate regulations concerning the issues objected to should do so by submitting written comments to the Board or by submitting testimony at the hearing held September 28, 1984 in Carbondale.

The regulations under consideration in this proceeding were made available for public comment by their publication in 8 Ill. Reg. 14145 (August 10, 1984). The Proposed Regulations stated that no permit would be required "for any person conducting a waste-storage, waste-treatment or waste disposal operation for wastes generated by such person's own activities which are stored, treated or disposed within the site where such wastes are generated" (Section 807.202(b), 8 Ill. Reg. 14155, August 10, 1984). They also provided that the closure and post-closure care requirements contained in Subpart E of the Proposed Regulations would apply only to "the owner and operator of a waste management site required to have a permit pursuant to Section 21(d) of the Act or Section 807.202." Section 807.501(a) of the Proposed Regulations, 8 Ill. Reg. 14160 (August 10, 1984).

Two recommendations for amending proposed Sections 807.202(b) and 807.501(a) were made orally at hearing by the Board Assistant who was assigned to assist in the drafting of the proposed regulations. IPC argues that these recommendations could dramatically alter the scope of this rulemaking, but that they were stated in such broad terms that the public has not been provided with adequate notice of what regulatory action the Board intends to take or with any meaningful opportunity to comment.

IPC further argues that these two provisions, as published for "first notice", [Sections 807.202(b) and 807.501(a)], accurately reflected the statutory mandate of Section 21(d) of the Environmental Protection Act [Ill. Rev. Stat. 1983, ch. 111½, §1021(d)]. Since the preamble which accompanied the publication of the Proposed Regulations in the Illinois Register indicated that only amendments concerning definitions and permit requirements to be considered in this rulemaking would be those "to reflect the terminology of Section 21(d)" [8 Ill. Reg. 14146 (August 10, 1984)] no further changes are necessary.

As the Hearing Officer properly pointed out in the September 24th Order, neither the Environmental Protection Act nor the Administrative Procedure Act (APA)

requires that possible revisions raised and discussed at hearing be publicly noticed. Under Section 28 of the Act, the Board has the authority to 'revise the proposed regulation before adoption in response to suggestions made at hearings, without conducting a further hearing on the revisions.' (Ill. Rev. Stat. 1983, ch. 111½, par. 1028). At 35 Ill. Adm. Code 102.22: Revision of Proposed Rulemaking, this authority is restated with the further requirement that the Board specify 'the portions of the final form of the regulations that differ from the proposal on which the hearing was held . . .'. The APA anticipates changes in the text of the rules as proposed at First Notice in that it requires the agency adopting the rules to notify the Joint Committee on Administrative Rules of such changes. [Ill. Rev. Stat. 1983, ch. 127, par. 1005.01(b)(1).]

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Both proposed Sections 807.202 and 807.501 were published for First Notice, adequately notifying the public that the existing Section 807.202 and the new Section 807.501 would be considered at hearing. Since determining which facilities legally require permits is fundamental to the rulemaking and both the Sections addressing permit and closure plan requirements were published, the public was put on notice that these issues would be addressed at hearing, which they were. It was at the very first hearing in this matter that the suggestions and rationales for including judicial interpretations of Section 21(d) in the permit requirement rule and requiring closure plans were addressed. There is no statutory requirement that the language proposed for First Notice be identical to that which is adopted at Second Notice. That would defeat the purpose of hearings.

Furthermore, the Board has not, as of yet, taken any position on whether the recommended changes should be made final. The recommendations made by a Board Assistant became part of the record in the case, subject to cross-examination, comment, or rebuttal testimony, as the hearing officer properly allowed and, indeed, requested. As with any rulemaking, if the Board decides to modify the rules as presently proposed, it will at that time determine whether the modifications so alter the proposal as to deny the public its full due process rights, and if the Board determines that it has, it will take appropriate action.

The Hearing Officer's September 24, 1984 Order in this matter is hereby affirmed.

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 October, 1984 by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board