

ILLINOIS POLLUTION CONTROL BOARD  
February 9, 1984

TOWN OF ST. CHARLES,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 83-228
	)	
KANE COUNTY BOARD AND	)	
ELGIN SANITARY DISTRICT,	)	
	)	
Respondents.	)	
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CITY OF AURORA,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 83-229
	)	
KANE COUNTY BOARD AND	)	
ELGIN SANITARY DISTRICT,	)	
	)	
Respondents.	)	
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THE KANE COUNTY DEFENDERS,	)	
INC., ET AL.,	)	
	)	
Petitioners,	)	
	)	
v.	)	PCB 83-230
	)	
KANE COUNTY BOARD AND	)	
ELGIN SANITARY DISTRICT,	)	
	)	
Respondents.	)	

Order of the Board (by J.D. Dumelle):

This matter comes before the Board upon a February 8, 1984 emergency motion filed on behalf of the Kane County Defenders requesting the reversal of various hearing officer rulings related to discovery. That motion indicates that service was made upon all parties at or before 9:00 a.m., on February 8, 1984. Since hearing is presently scheduled for February 16, 1984 and a Board decision is due on March 8, 1984, exigencies of time require a prompt ruling, and in turn, response time is necessarily highly limited. Therefore, the Board permitted oral argument at its February 9, 1984 meeting.

The Kane County Defenders request the Board:

1. to allow discovery into relevant issues narrowly defined by Petitioners without any prior showing that such evidence exists;
2. to permit relevant inquiry at client discovery regarding specific action taken after November 8, 1983, the date Respondent KANE COUNTY BOARD ("County Board") approved the sludge site;
3. to permit inquiry of Members of the County Board regarding ex parte contacts with employees and/or representatives of Respondent ELGIN SANITARY DISTRICT ("District");
4. to include copies of the draft Findings, Resolution and Order proposing to deny approval of the proposed site, and to permit inquiry at deposition with respect thereto.

The hearing officer's rulings are affirmed with respect to requests 1, 2 and 4 and reversed with respect to request 3. Regarding request 1, the hearing officer properly concluded that the failure to produce documents which were actually requested prior to the close of the County Board record and were not produced goes to the fundamental fairness of the proceeding. However, documents which were not so requested and which, therefore, were never properly brought to the attention of the Kane County Board, are not properly discoverable in that the County Board's actions could not have impeded the fundamental fairness of the proceeding. To the extent that such documents may impact substantive issues, they are irrelevant since they were not made part of the record upon which the County Board's decision was based.

Regarding request 2, the hearing officer properly concluded that actions taken after November 8, 1983, are not discoverable. The Kane County Defenders argues that it desired to introduce newly discovered evidence and that the County Board should have considered that evidence upon reconsideration since "an administrative agency may reopen its determination to permit the introduction of further evidence" [2 AM JUR 2nd Administrative Law § 525 (1962)]. However, such reconsideration is discretionary and the County Board did not permit it. Therefore, the record closed on November 8, 1983, and actions taken after that date are irrelevant, and no allegation was made that such discovery would lead to otherwise relevant evidence.

Regarding request 3, the hearing officer is overruled. In denying discovery regarding ex parte contacts, the hearing officer relied on a Board Opinion which was reversed by the appellate court. In that case the court specifically found

that even though the co-applicant and the local unit of government which was passing on a landfill siting issue consisted of the same persons that ex parte contacts could be improper. Here, there is not an identity of such persons and the possibility of improper ex parte contacts more closely exists (see E & E Hauling, et al. v. PCB, et al., slip op. pp. 29-30, Second District, June 15, 1983).

Regarding request 4, the hearing officer properly excluded draft findings, resolutions and orders. They are no more than written mental processes. They are not public documents put out for comment. So far as the Board can determine, they were not distributed to anyone other than County Board members and not even to all of them. While Section 11 of the Administrative Procedure Act indicates that proposed findings shall be made part of the record in a contested case, that appears to be directed to proceedings where such findings are required to be made (see Section 13 of the Administrative Procedure Act). Such was not the case here.

Finally, in response to the oral request of counsel, the Board is also addressing some of the additional issues raised by the Kane County Defenders in its February 2, 1982 Emergency Motion to Compel Discovery and for Sanctions, which had been mooted in part by a pre-hearing conference held on February 6. The Board at this time declines to impose sanctions on respondents for failure to respond to what have been highly contested, and partially misunderstood, discovery orders. The request for attorneys fees and costs will be taken and considered with the case.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 9<sup>th</sup> day of February, 1984 by a vote of 7-0.

  
Christan L. Moffett, Clerk  
Illinois Pollution Control Board