ILLINOIS POLLUTION CONTROL BOARD
August 28, 1986

IN THE MATTER OF	)	
	)	
AMENDMENTS TO 35 ILL. ADM. CODE 211 & 215 ORGANIC MATERIAL EMISSION STANDARDS AND LIMITATIONS FOR SYNTHESIZED PHARMACEUTICAL MANUFACTURING PLANTS.	)	R86-10

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

By Hearing Officer Order dated August 12, 1986, several motions regarding the production of documents and the issuance of interrogatories were referred to the Board. These issues have been raised in filings dated March 24, April 10, 22 and 24 and August 4 and 12, 1986. The April 24, 1986, motion for leave to reply is hereby granted.

In short, the Illinois Environmental Protection Agency (Agency) argues that the information it seeks is necessary to a decision in this matter, is the type of information required to be provided by the Environmental Protection Act, and is in the sole possession of Abbott Laboratories. Abbott contends that the cost of providing that information (about $1.6 million) is unreasonable and unnecessary.

The Board recently entered an Order in R82-14 dated July 11, 1986, in which it considered a similar issue. In that Order the Board stated:

> The Environmental Protection Act ("Act") and the Board's procedural rules provide various mechanisms for gathering information in regulatory proceedings. Section 28 of the Act requires that the Board conduct public hearings and that its decisions be made on the record. Section 5(e) provides for subpoena power for both adjudicatory and regulatory proceedings. 35 Ill. Adm. Code 102.140 and 102.160 authorize the issuance of subpoenas, commands to produce documents and the issuance of interrogatories. Notably, these subpoenas, commands to produce and interrogatories are to be made in the name of the Board either through the hearing officer or the Board itself. These mechanisms, among others, are available to the Board in order to develop a complete record for decision.

Other information gathering mechanisms include questions at hearing, pre-submission of testimony, written inquiries by the Board or hearing officer, public comments and briefs.

There is a significant distinction between mechanisms for gathering information in a quasi-legislative regulatory proceeding and discovery in a quasi-adjudicatory adversarial proceeding. In a regulatory proceeding, the purpose of discovery is to develop a complete record for the Board, while in a contested case proceeding, discovery is between the parties and can be related to other purposes. The standard and focus of discovery in a regulatory proceeding should be general relevancy to "technical feasibility and economic reasonableness." In a contested case, relevancy or the likelihood that the requested information will lead to relevant information is the standard. Information obtained through discovery in a contested case is not evidence unless otherwise admissible and actually admitted. Failure to comply with discovery requests in a contested case can lead to sanctions, while in a regulatory context lack of supporting information can result in dismissal or denial for inadequacy. In the contested case context, the forum "referees" the discovery process that is ongoing between the parties, while in a Board regulatory proceeding, the Board itself must ensure a complete record by requesting information.

The Board clearly has the authority to issue interrogatories in a regulatory context, and has used this mechanism in the past (R81-19, Citizens Utilities Site-Specific, Board Order of April 10, 1986; R82-25 Dean Foods Site-Specific, Board Order of July 11, 1985, Hearing Officer Order of September 16, 1985; R82-14 RACT III - Heatset Web Offset Printing, Board Opinion and Order of May 30, 1985, Hearing Officer Order of September 10, 1985). Interrogatories are just one tool the Board may use to gather information. Perhaps the term "interrogatory" is an unfortunate word choice in that it can connote an adversarial process. While Board rulemakings are formal

> proceedings (hearings are transcribed, cross-examination occurs, decisions are made on the record and comment periods are allowed), it is not appropriate to allow matters to become too procedurally adversarial.

The Board shares with the Agency a desire for a complete record and an expeditious decision in this matter to assure approval of the State Implementation Plan. However, the Board is unconvinced that compelling the production of documents and the answering of interrogatories as requested is the best means to achieve those results at this time. So far, there is nothing in the record other than the proposal and various pleadings. It is premature to require Abbott to respond to detailed discovery at a cost which it alleges to be $1.6 million when the only stated basis is that such information is required pursuant to a rather generally worded USEPA proposal to disapprove. The Board agrees with the Agency that the Board must "possess sufficient information such that a clear and complete record can be made on this matter." (March 24, 1986 motion for production, p. 2). The Board also agrees that the requested information would be sufficient, but it is also concerned that such detail may not be necessary. As the record develops in this matter, it will be much easier for the Board, in response to any renewed request from the Agency or any other participant, or on its own motion to determine what additional information is necessary, if any, and the Board could order such additional information later in this proceeding should the need arise.

Nowhere does the Agency question Abbott's estimate of the cost to complete the requested discovery. In its August 12, 1986, response the Agency does contend that "no cost is caused this company in answering these interrogatories, for this is information which must otherwise be" provided under the Act and will be required in future permit applications. (Response, p. 1). However, there is nothing in the Act or Board rules which requires that information to be presented in this proceeding (absent a Board order); if that information is in fact required for future permit applications, it can be generated over the next few years rather than the next 28 days; and the question of whether such detailed information is necessary may be appealed to the Board when required. For all of these reasons, the Board finds this argument less than compelling.

The Board also understands the Agency's fear that it may not be able to present adequate support for its proposal if Abbott, which is the only affected facility in the state, is allowed to present only that information it desires and only when it desires to present it. The Agency alleges that this is what happened in the predecessor proceeding (RACT II) in 1980-1982. The Board believes, on balance, that this potential problem can be mitigated by requiring Abbott to submit any testimony it desires

to make part of the record at least 21 days prior to hearing at which Abbott desires to present such evidence and barring Abbott from subsequently introducing any other evidence into the record which is opposed. This should allow the Agency ample opportunity to examine the evidence presented and to rebut it or to demonstrate its incompleteness. If, at a later date, this procedure proves unacceptable, the Agency may renew its discovery request and the Board may take additional appropriate actions.

The motions to compel and produce are hereby denied and the motion for a protective order is hereby granted. However, Abbott is required to pre-submit any evidence it desires to enter into this record at least 21 days prior to the hearing at which it is presented and is barred from later entering any other information into the record which is objected to.

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 28th day of August, 1986 by a vote of 6-0.

Dorothy M. Gunn 1986.
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board