

ILLINOIS POLLUTION CONTROL BOARD  
October 13, 1977

ENVIRONMENTAL PROTECTION AGENCY, )  
 )  
 Complainant, )  
 )  
 v. ) PCB 76-80  
 )  
 ALLAERT RENDERING, INC., )  
 )  
 Respondent. )

ORDER OF THE BOARD (by Mr. Young):

On May 19, 1976, a Complaint was filed charging, inter alia, that Respondent had constructed or modified a treatment works without the requisite construction permits and had operated the treatment works without an operating permit issued by the Environmental Protection Agency.

On June 22, 1977, Complainant filed a Motion to Allow an Interlocutory Appeal which the Board granted on June 28, 1977, together with a stay in the proceedings. On August 4, 1977, the Board ordered filing of the Motion on or before August 19, 1977, and which was done on August 23, 1977; Respondent's response and brief was due on or before September 2, 1977, and was filed on September 14, 1977.

Complainant appeals from an order of the Hearing Officer of June 16, 1977, to produce the Agency permit file pertaining to a Fox Valley Grease Company, Inc. and ordering deposition of Mr. William H. Busch, the then Manager of the Permit Section, and Mr. Darryl R. Bauer, an Agency permit engineer who had reviewed the Fox Valley permit application. Fox Valley Grease Company, Inc. is not a party to this proceeding; the purpose of the depositions was to inquire into Agency criteria and practices in reviewing permit applications other than the applications of the Respondent, Allaert Rendering.


Respondent argues that the depositions and Fox Valley permit file are necessary to determine the standards and guidelines utilized by the Agency in processing other permit applications so that Respondent can prepare a defense to the instant Complaint.

The issue in Counts I, II, and III of this Complaint is simply whether Respondent had or had not constructed and operated a treatment works without the requisite permits. Inquiry into Agency procedures and practices involving Agency processing and decisions on permit applications of non-parties is not material in a case arising on a complaint alleging construction and operation without a permit. The scope of discovery is derived from the issues raised by the pleadings and as limited by the nature of the action.

Section 40 of the Environmental Protection Act and Rule 502 of the Board's Procedural Rules establish the exclusive proceeding in which an Agency denial of a permit may be contested. In a permit denial appeal the Board has consistently held (Soil Enrichment Materials Corp. v. EPA, PCB 72-364, 5 PCB 715) that the scope of review includes only that information which the Agency had before it when the decision was made. New material not before the Agency at the time of the permit denial decision is explicitly excluded; the sole issue is only whether the Agency erred on the basis of what was before it; the burden of proof is on the petitioner. It would be entirely inconsistent to allow then, in an enforcement case, the introduction of new materials to contest the denial of a permit which would not have been allowed in a permit denial hearing under Section 40 of the Act. Therefore, we conclude that the Order of June 18, 1977, must be reversed as not material in this action. The Board will also lift the stay on the proceedings imposed by our Order of June 28, 1977; the matter to proceed to hearing without further delay.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Order was adopted on the 13<sup>th</sup> day of October, 1977 by a vote of 5-0.

  
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Christan L. Moffett, Clerk  
Illinois Pollution Control Board