BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Commonwealth Edison Company,	)	
Petitioner	)	**PCB 04-215**
	)	**Trade Secret Appeal**
v.	)	
	)	
Illinois Environmental Protection Agency,	)	
Respondent	)	

NOTICE OF FILING

To: Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, Illinois 60601

Byron F. Taylor
Roshna Balasubramanian
Sidley Austin Brown & Wood LLP
One South Dearborn Street
Chicago, Illinois 60603

Brad Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, Illinois 60601

Please take notice that today we have filed via electronic filing with the Office of the Clerk of the Pollution Control Board the Respondent's Memorandum in Opposition to Commonwealth Edison's Motion for Leave to File a Reply to IEPA Memorandum in Opposition to Motion to Compel. A copy is herewith served upon the assigned Hearing Officer and the attorneys for the Petitioner, Commonwealth Edison.

Dated: Chicago, Illinois
March 28, 2006

LISA MADIGAN, Attorney General of the
State of Illinois

MATTHEW DUNN, Chief, Environmental Enforcement/
Asbestos Litigation Division

BY: _____

Ann Alexander, Assistant Attorney General and
Environmental Counsel
Paula Becker Wheeler, Assistant Attorney General
188 West Randolph Street, Suite 2000
Chicago, Illinois 60601
312-814-3772
312-814-2347 (fax)

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Illinois Environmental Protection Agency,	)	
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MEMORANDUM IN OPPOSITION TO COMMONWEALTH EDISON'S MOTION FOR LEAVE TO FILE A REPLY TO IEPA MEMORANDUM IN OPPOSITION TO MOTION TO COMPEL

Under the Board's procedural rules, a reply memorandum will not be allowed except to "prevent material prejudice." 35 Ill. Adm. Code 101.500(e). Petitioner has utterly failed to meet that standard. Not only does Petitioner fail to substantiate its assertion that IEPA has incorrectly characterized Board authority, but in the process sets forth significant misrepresentations of its own.

The basis for Petitioner's motion is its claim that Respondent "incorrectly" represented the applicability of the Board's decision in a related matter to Petitioner in the instant matter. See Petitioner's Motion for Leave at 1. However, this conclusory charge is made without a single supporting reference to any inaccurate or misleading statement in Respondent's opposition memorandum. Although Petitioner does not acknowledge it, Respondent described the relationship between the instant matter and the related matter, Midwest Generation EME, LLC v. IEPA, PCB 04-185, in painstaking and accurate detail in its opposition memorandum. See Respondent's Memorandum in Opposition at 2-5. Specifically, respondent detailed the relationship between the underlying facts in PCB 04-185 and this matter (both matters concern documents requested by USEPA in an investigation of Com Ed and its successor Midwest Generation), and demonstrated that the Board's conclusions in PCB 4-185 apply with

equal force here. Indeed, Com Ed already took the opportunity in its original motion to acknowledge the applicability of Board's decision in PCB 04-185, however half-heartedly, in its moving papers. See Petitioner's Memorandum in Support of Motion to Compel at 5.

Respondent is confident that the information already provided to the hearing officer is sufficient to enable a determination of the applicability of PCB 04-185 to the instant matter, and that giving Petitioner a second bite at the apple is not necessary to avoid prejudice. In any event, even if Respondent's original explanation of the relationship between the two cases were somehow insufficient, Petitioner's proposed memorandum provides no new information to cure that purported deficiency. Its sole reference in the proposed memorandum to PCB 04-185 is a single paragraph that asserts, without facts in support, that Respondent's explanation of the relationship between the two cases was somehow inaccurate. Petitioner's Motion for Leave at 5-6.

The remainder of the proposed memorandum is devoted to issues that Petitioner already addressed at length in its original moving papers. Moreover, these portions of the memorandum contain significant misrepresentations on Petitioner's part concerning Respondent's position and the authority it cited in support of it.

First, the proposed reply memorandum asserts, bizarrely, that Respondent's quoted language from the Board's decision in Oscar Mayer & Co. v. Environmental Protection Agency, PCB 78-14 (June 8, 1978) "does not relate to the parameters of discovery." Petitioner's Motion for Leave at 3. A copy of that decision, which Respondent cited for the proposition that the Board does not allow discovery concerning unrelated matters in record-only cases such as this one, is attached for your reference as Appendix 1, with relevant portions highlighted. The *entire decision*, in fact, concerned

the scope of discovery. It was issued in response to an IEPA appeal from a hearing officer order compelling answers to interrogatories that – like Petitioner's discovery here – concerned prior unrelated decisions by the Agency. Appendix 1, p. 1. The Board, in reversing the hearing officer's order, held that "[t]he scope of discovery . . . is controlled by the general issue presented." Appendix 1, p. 3. The discussion of the Board's standard of review cited by Petitioner in its proposed reply (Petitioner's proposed reply at 2; Appendix 1, p. 4) defines the "general issue presented" in that matter, which the Board then concludes – in the language quoted in Respondent's opposition memorandum – does not concern the prior IEPA decisions requested in the interrogatories.

Second, the proposed reply memorandum states that IEPA "appears to suggest" that communications regarding Sierra Club's FOIA request are the only discoverable and relevant information, because such communications are the only documents we provided in our response. Petitioner's Motion for Leave at 4. In fact, as Respondent IEPA made quite clear in its discovery response and Memorandum in Opposition – and is equally clear in the Board's ruling in related matter 04-185 – we consider relevant any information that either should have been included in the record (i.e., was considered by the Agency in its decision) and was not, or any new information that was unavailable to either IEPA or Petitioner at the time the decision was made. The documents concerning the Sierra Club FOIA request that IEPA provided in discovery were the only relevant documents that were not already included in the administrative record filed earlier.

Since the misrepresentations are on Petitioner's part, not Respondent's, rejection of the proposed reply memorandum would not prejudice Petitioner, but its acceptance would prejudice Respondent.

Conclusion

For the foregoing reasons, Respondent IEPA requests that Petitioner's proposed reply memorandum be rejected.

Dated: Chicago, Illinois
March 28, 2006

Respectfully submitted,

LISA MADIGAN, Attorney General of the State of Illinois

MATTHEW DUNN, Chief, Environmental Enforcement/
Asbestos Litigation Division

BY: _____

Ann Alexander, Assistant Attorney General and Environmental Counsel
Paula Becker Wheeler, Assistant Attorney General
188 West Randolph Street, Suite 2001
Chicago, Illinois 60601
312-814-3772
312-814-2347 (fax)

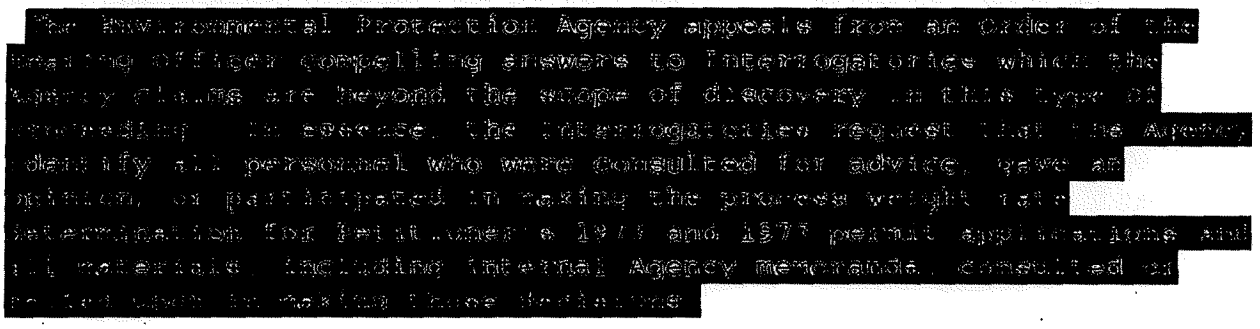
APPENDIX 1

Illinois Pollution Control Board
State of Illinois

*1 OSCAR MAYER & CO., PETITIONER
v.
ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT
PCB 78-14
June 8, 1978

INTERIM ORDER OF THE BOARD

On May 9, 1978, the Environmental Protection Agency filed a Motion for an Interlocutory Appeal and for stay of a ruling by the Hearing Officer in a matter concerning the scope of discovery in an action under Section 40 of the Act to contest Agency denial of a permit. Petitioner filed a Response on May 19, 1978, objecting to the Agency's Motions. On May 25, 1978, the Board granted the Agency's Motion for Interlocutory Appeal together with a stay in the proceedings.



Section 39 of the Environmental Protection Act provides that the Agency shall issue a permit on proof by the applicant that the permitted activity will not cause a violation of the Act or of regulations adopted in accordance with the Act. Section 40 of the Act provides that an applicant who has been refused a permit by the Agency may petition the Board for a hearing to contest the decision of the Agency and that the burden of proof in such hearing shall be on the applicant.

While a very few of the Section 40 petitions filed with the Board have involved a dispute between the applicant and the Agency over the validity of the facts contained in an application, most Section 40 petitions arise from a difference in interpretation of a regulatory

definition. Since there is no provision in the Act under which the Board might provide an advisory opinion in such a controversy, the Section 40 petition affords the only avenue to secure a Board interpretation of its regulations or a finding of fact, short of an enforcement action.

From the beginning the Board experienced some difficulty in structuring the hearing on a Section 40 petition. [FN1] One of the continuing reasons therefore has no doubt been the early styling of the proceeding in Board practice as a ""permit denial appeal." It is obviously not an appellate review of an administrative decision, nor could it seem to be so when there has been no recorded hearing and written finding of fact at the permit issuance level. More importantly, the Act does not confer jurisdiction on the Board to sit in appellate review of Agency decisions. Neither is a Section 40 hearing available for a rehearing or contest of the adoption of Board regulations or as a review of Agency policy and procedure in the exercise of its permit authority under Sections 4 and 39 of the Act. Under the statute, all the Board has authority to do in a hearing and determination on a Section 40 petition is to decide after a hearing in accordance with Sections 32 and 33(a) whether or not, based upon the facts of the application, the applicant has provided proof that the activity in question will not cause a violation of the Act or of the regulations.

***2** In a hearing on a Section 40 petition, the applicant must verify the facts of his application as submitted to the Agency, and, having done so, must persuade the Board that the activity will comply with the Act and regulations. At hearing, the Agency may attempt to controvert the applicant's facts by cross examination or direct testimony; may submit argument on the applicable law and regulations and may urge conclusions therefrom; or, it may choose to do either; or, it may choose to present nothing. The written Agency statement to the applicant of the specific, detailed reasons that the permit application was denied is not evidence of the truth of the material therein nor do any Agency interpretations of the Act and regulations therein enjoy any presumption before the Board. After hearing, the Board may direct the Agency to issue the permit, or order the petition dismissed, depending on the Board's finding that the applicant has or has not proven to the Board that his activity will not cause a violation of the Act or regulations.

The Board opinion most frequently cited on the question of the scope of a hearing on a Section 40 petition is Soil Enrichment Materials Corporation v. EPA, 5 PCB 715 (1972). Much therein is still applicable; however, it must be kept in mind that Section 39 of the

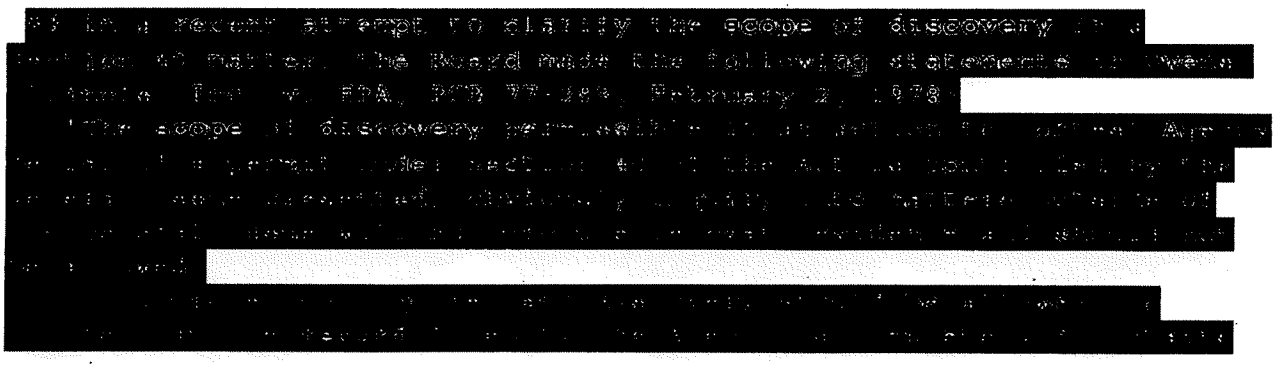
Act was amended subsequent to that decision by Public Act 78-862, approved September 14, 1973. P.A. 78-862 established, in Section 39(a), definitive criteria for a detailed Agency statement to the applicant of the specific reason for the denial of a permit application.

At 5 PCB 715, the Board said:

"Clearly the issue is whether the Agency erred in denying the permit, not whether new material that was not before the Agency persuades the Board that a permit should be granted."

A cursory reading of that sentence might indicate to some that the burden of the applicant in a Section 40 proceeding is to prove that the Agency made an error in law, a misinterpretation of fact or a failure in procedure in arriving at the Agency decision to deny the permit. To do so ignores the requirement of Section 39 that a permit issues only on proof by the applicant that the activity in question does not cause a violation of the Act or regulations. The Agency errs in denying a permit only when the material, as submitted to the Agency by the applicant, proves to the Board that no violation of the Act or regulations will occur if the permit is granted. The requirements of a Section 40 petition as set forth in the Board's Procedural Rule 502(a)(2) further indicate the Board's conclusion as to the dictates of the statute.

Procedural Rule 502(a)(4) requires that in a Section 40 proceeding the Agency must file within 14 days of notice, the entire record of the permit application, including the application, correspondence, and the denial. The application is necessary to establish the facts which were before the Agency for consideration. The correspondence file, if any, supplements the application insofar as it provides additional facts. The denial statement is necessary to verify that the requirement of Section 39(a) of the Act has been fulfilled. This material, in the opinion of the Board, should be sufficient to frame the issue of fact or law in controversy in any hearing on a Section 40 petition.



[redacted]

If the Agency knows or ascertains, during the pendency of a permit application, that either the facts or conclusions presented by the applicant are inaccurate or incomplete, the Agency must disclose such information in writing during the statutory permit review period or in the detailed written statement of the reasons for denial required by Section 39 of the Act. The Agency may not at hearing assert reliance on any material not included in the record, and disclosed to the applicant in the manner described above, as the basis for Agency denial of the permit, any more than the applicant may introduce new material in support of the application that was not before the Agency at the time of denial."

[redacted]

For the reasons set forth above, the Board, having reviewed the Order of the Hearing Officer entered on May 8, 1978, sustains the Order of the Hearing Officer in regard to Interrogatories 7 and 8 of Petitioner's Interrogatories to the Respondent dated March 14, 1978. The Order of the Hearing Officer is sustained as to Interrogatories 1(a) and 2(a); the Order of the Hearing Officer is reversed as to Interrogatory 1(b) through 1(g); Interrogatory 2(b) through 2(g), and Interrogatories 3, 4, 5, 6, 9 and 10.

The matter is remanded to the Hearing Officer for revision of his Order of May 8, 1978, consistent with the foregoing.

IT IS SO ORDERED.

Mr. Werner dissented.

Mr. Young

FN(1) Currie, David P., "Enforcement Under the Illinois Pollution Law," 70 N.W. Univ. L.Rev. 389, 475-479 (1975).

1978 WL 9190 (Ill.Pol.Control.Bd.)

END OF DOCUMENT

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Respondent	)	

CERTIFICATE OF SERVICE

I hereby certify that I did on the 2nd day of March, 2006 send by United States mail a copy of Memorandum in Opposition to Commonwealth Edison's Motion for Leave to File a Reply to IEPA Memorandum in Opposition to Motion to Compel, to:

Byron F. Taylor
Roshna Balasubramanian
Sidley Austin Brown & Wood LLP
One South Dearborn Street
Chicago, Illinois 60603

Dated: Chicago, Illinois
March 28, 2006

LISA MADIGAN, Attorney General of the
State of Illinois

MATTHEW DUNN, Chief, Environmental Enforcement/
Asbestos Litigation Division

BY: _____

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