

ILLINOIS POLLUTION CONTROL BOARD
August 4, 1988

IN THE MATTER OF:)
)
PROPOSED AMENDMENTS TO) R87-6
PHOSPHORUS EFFLUENT STANDARD,)
35 ILL. ADM. CODE 304.123)

ORDER OF THE BOARD (by J. Anderson):

On June 27, 1988, the Environmental Protection Agency (Agency) moved to exclude four exhibits, 45-48,* presented by the Department of Energy and Natural Resources (DENR) and admitted by the Hearing Officer at the June 21, 1988 hearing conducted on the Economic Impact Study. The exhibits contain written correspondence from four individuals. On July 13, 1988, DENR filed a response in opposition to the Agency's motion.

None of the four persons, one of whom (Ex. 45) was a co-author of the EcIS and had been scheduled to testify, were present at hearing, and thus they neither presented sworn testimony nor gave the Agency an opportunity to examine them. The Agency argues that the rules of admissibility related to enforcement proceedings apply and, under those rules, the pieces of correspondence were not admissible as exhibits. DENR argues that in regulatory proceedings the Board's procedural rules allow the hearing officer to exercise discretion concerning admissibility, that the stricter rules of admissibility in enforcement proceedings do not apply, and that objections go to the weight given such evidence, not to admissibility.

This proceeding is governed by 35 Ill. Adm. Code Part 102, Regulatory and Other Non-adjudicative Hearings and Proceedings. Part 102 contains no provisions binding the Hearing Officer to the rules of admissibility found in Part 103 Enforcement Proceedings.

The issue is not one of admissibility but of the weight to be given to the correspondence, and the Board will review the record accordingly.

The Board also notes that it is not at all uncommon for a great variety of documents to be admitted at the Board's information gathering regulatory hearings. At the same time, the Board is quite sensitive to the Agency's concerns in this

* The correct exhibit numbers for the correspondence from persons named are Ex. 45-48, not 46-49.

particular proceeding; due to unusual circumstances, the correspondence constituted a substantive and significant portion of DENR's presentation at hearing.

The Agency also objected to the inclusion of material at the June 7, 1988 hearing in Ex. 44 insofar as, on pages 6 and 8, remarks attributed to an aquatic biologist of the Corps of Engineers made it appear, incorrectly according to the Agency, that it was an official statement on behalf of the Corps. DENR attempted, unsuccessfully, to contact the aquatic biologist for direct testimony. Instead, DENR contacted three other individuals, whose correspondence was admitted as Ex. 46, 47 and 48.

Since DENR did not clarify the Army Corps issue, the aquatic biologist's statements, while admitted, will be assumed to have been made by an individual, not on behalf of the Corps.

For the foregoing reasons, the Hearing Officer's ruling is sustained and the Agency's Motion to Exclude Exhibits is denied.

The Board notes that the Hearing Officer scheduled post-hearing opening comments by the participants to be due August 5, and replies to be due August 19. The Board is hereby rescheduling those due dates to August 19 and September 2, respectively.

IT IS SO ORDERED.

J. D. Dumelle dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 4th day of August, 1988, by a vote of 6-1.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board