

ILLINOIS POLLUTION CONTROL BOARD  
March 5, 1981

COUNTY OF LASALLE, et al., )  
 )  
 Petitioners, )  
 )  
 v. ) PCB 81-10  
 )  
 ILLINOIS ENVIRONMENTAL )  
 PROTECTION AGENCY; WILLIAM )  
 CLARKE; PIONEER DEVELOPMENT, )  
 et al., )  
 )  
 Respondents. )

ORDER OF THE BOARD (by D. Satchell):

On February 13, 1981 Respondents William Clarke, Pioneer Development and Pioneer Processing, Inc. (Pioneer) filed a motion to strike and a motion in limine requesting clarification of language in Section 40(b) of the Act and recently amended Procedural Rule 503(a) concerning the scope of the hearing in third party permit appeals. Pioneer asks the Board to take official notice of the record in PCB 80-184, Alliance for a Safe Environment, et al. v. Akron Land Corp., et al. Pioneer questions certain rulings of the Hearing Officer in that matter. Petitioners filed objections to the motions on February 18 and February 27, 1981.

The Board has not decided the Akron case and declines to rule on it in this context. However, the Board will provide guidance on the general questions. The Hearing Officer in general should allow offers of proof where there is reasonable doubt as to admissibility. Extraneous material can later be stricken from the record, but omitted material will require a new hearing if it is later judged admissible by the Board or a higher court.

The uncertainty in this case lies in the application of the following language of Section 40(b) of the Environmental Protection Act (Act): "such hearing shall be based exclusively on the record before the Agency." A question arises as to what evidence may be admitted at the hearing if the Board's consideration is to be based exclusively on the record before the Agency (Menard v. Bowman Dairy Co., 296 Ill. App. 323, 15 NE 2d 1014, 1015).

The Board has long held that a similar rule applies in appeals by the permit applicant (Soil Enrichment v. IEPA, PCB 72-364, 5 PCB 715, October 17, 1972; Oscar Mayer v. IEPA, PCB 78-14, 30 PCB 397, 32 PCB 243, June 8 and December 14, 1978; Environmental Site Developers v. IEPA, PCB 80-15, 38 PCB 443, June 12, 1980).

Where a third party contests the grant of a permit there is an issue as to whether there was proof by the applicant that the facility "will not cause a violation of the Act" or Board rules. There is a further issue as to whether any conditions in the issued permit are "inconsistent with" Board regulations. The third party could seek to prove that conditions are not "necessary to accomplish the purposes of the Act," although the third party would ordinarily argue for more stringent conditions. There is also a possibility that the third party may offer additional conditions, not inconsistent with Board rules, and seek to prove that they are "necessary to accomplish the purposes of the Act" [Section 39(a) of the Act].

The Board does not require mere repetition of evidence or testimony which is already in the Agency record. If evidence outside the Agency record is offered, the Board requests that the Hearing Officer rule on its admissibility considering Section 39(a) and Section 40(b) of the Act, and the issues noted above. If the Hearing Officer admits evidence, the adverse parties may note their objections to the Board. If the Hearing Officer rules the evidence inadmissible because it was not in the Agency record, he should allow the party to proceed with an offer of proof where the proffer is otherwise relevant. In making offers of proof parties should explain why the evidence is not a part of the Agency record. At the hearing the Hearing Officer should allow a reasonable time for members of the public who are not parties to comment.


This Order is intended only to offer guidance to the Hearing Officer and parties in the conduct of the hearing. It is not intended as a holding on any of the legal questions discussed.

Petitioners should be advised that Section 40(a) of the Act provides that Pioneer may deem the permit issued unless the Board rules on the petition within ninety days of its filing. In Akron the Board held that this time may be extended only by the permit applicant. Petitioners should be further advised that Procedural Rule 504 requires them to furnish a stenographic transcript of the hearing at their expense.

The Board will decide the motion to strike 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 5<sup>th</sup> day of March, 1981 by a vote of 5-1.

  
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Christan L. Moffett, Clerk  
Illinois Pollution Control Board