ILLINOIS POLLUTION CONTROL BOARD
October 6, 1988

NATURAL GAS PIPELINE CO. of America,	)	
Petitioner,	)	
v.	)	PCB 87-150
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

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

This matter comes before the Board upon the motion of Respondent, Illinois Environmental Protection Agency (Agency) requesting this Board to order Petitioner, Natural Gas Pipeline Co. of America, to amend its pleadings. In specific the Agency states that Petitioner has supplemented its petition for review with data and information not presented to the Agency during the course of its permit review analysis. Because data not submitted to the Agency is immaterial in a permit appeal proceeding the Agency asks this Board to order Petitioner to amend the request for hearing and remove all data and references to data which was not earlier provided to the Agency in the original application package.

It is well established that the sole issue at any permit appeal hearing is whether the application package submitted to the Agency demonstrated compliance with the Environmental Protection Act. IEPA v. IPCB, (1st Dist. 1984) 118 Ill. App. 3d 772, 455 N.E.2d 189; City of East Moline v. IEPA, PCB 86-218, decided September 8, 1988.

Recently, this Board has ruled as follows on the issue of scope of inquiry at a permit appeal hearing:

> The hearing to contest permit denials, or to contest special permit conditions, is an adversarial hearing, providing for discovery, motions, cross-examination of adverse witnesses, argument, and briefs. It is this hearing which protects the due process rights of the applicant within the context of the Agency's decision to deny a permit or impose

special permit conditions. But it must be remembered that it is the Agency's action which is being appealed; and, consequently, the framework for, and scope of review of that Agency action is established at the moment the Agency's action occurs.

The relative burdens of the parties at a permit appeal are well established:

> "... A Petitioner ... must persuade the Board that the activity in question will not cause a violation of the Act or Board regulations. In response, the Agency may contest the facts in the application or it may choose to do either or it may choose to present nothing. ... The issue is simply whether or not, in the sole judgment of the Board, the applicant has submitted proof that if the permit is issued, no violation of the Act or regulations will result. [The] propriety of this ... procedure was reviewed and upheld by the Appellate Court, Third District in SCA Services, Inc. v. IPCB & EPA, 71 Ill. App. 3d 715, 389 N.E.2d 953." EPA v. Allaert Rendering, Inc., PCB 76-80, September 6, 1979.

In a similar case the Board held as follows:

> "Under the statute, all the Board has authority to do in a [permit appeal] hearing ... is to decide after a hearing ... 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 the regulations." Oscar Mayer & Co. v. EPA, PCB 78-14, June 8, 1978.

"Clearly, the burden is on the applicant; and at hearing the applicant's burden is to demonstrate that the Agency's denial of a requested permit is simply not justified given the data provided by the applicant. At a hearing before the Board to contest denial of a permit application, the sole question before the Board is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Environmental Protection Act would have occurred if the requested permit had been issued. IEPA v. IPCB, (1984) 118 Ill. App. 3d 772, 455 N.E.2d 189; Joliet Sand & Gravel Company v. IEPA &IPCB, (1987) 163 Ill. App. 3d 830, 516 N.E.2d 955 (3rd Dist. 1987).

In reviewing the Agency's permitting decisions, the Board considers the data submitted with the application package. But, because the Board's role is one of reviewing the Agency's action, the Board does not consider new facts and circumstances which change after the date of decision; nor does the Board consider data submitted to the Agency after the permit application is denied (this is the province of a new permit application). The Board's duty is to review the Agency's decision within the context of the data provided by the Petitioner in its permit application, and determine whether this decision was correct or incorrect. The Illinois Supreme Court has held that the Agency's (permitting) decisions are not presumptively correct upon review by this Board. IEPA v. IPCB (1986) 115 Ill. 2d 65, 503 N.E.2d 343.

Thus, by placing itself in the Agency's position -- equipped with the same application data possessed by the Agency when the decision was made -- this technically qualified Pollution Control Board decides whether the permit application should have been granted. If the answer to this is yes, the Board can either order the permit issued or unilaterally strike the improper special permit conditions. The Board, by placing itself in the Agency's position, decides anew whether the permit should have been issued. In this sense, the Board is making its determination anew; afresh; a second time. Black's Law

> Dictionary, 4th Edition. In practical terms, all this really means is that the Board does not recognize the Agency's decision as presumptively correct. The Board does not grant deference to the Agency's decision....
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> The Board does not, however, conduct a de novo review in the sense that it considers new evidence not previously presented to the Agency during its deliberation. Doing so would usurp the distinct function of the IEPA as the state permitting agency. Ill. Rev. Stat. 1987 ch. 111 1/2, pars. 1004 and 1039(a) IEPA v. IPCB (1986) 115 Ill. 2d 65, 503 N.E.2d 343." City of East Moline v. IEPA, PCB 86-218.

In view of the unbroken line of precedent discussed above, the Board cannot consider data which was not made available to the Agency during its permit application review process, that is, prior to the Agency's September 4, 1987 denial of Petitioner's permit application. As the Agency notes in its Motion to Require Amendment to Pleadings, Petitioner has inserted, as part of its October 9, 1987 and August 31, 1988 filings, information which was not before the Agency during the permit application review process and has indicated its intent to perform other activities in the future in support of its arguments for reversal of the Agency's determination. The Board will not consider such data; the Hearing Officer is directed to deny any offer of proof regarding such data.

Having this addressed the underlying issue, the Board nevertheless is reluctant to grant Respondent's motion. The Board is loathe to undertake or supervise the rewriting of petitions or other pleadings; ordering a party to redraft its pleadings sets the Board upon a course which invites challenges to its authority, encourages unnecessary delay and taxes its resources. Further, the Petitioner's petition for review in this case appears to state a prima facie cause of action; dismissal or striking of the pleadings would thus be inappropriate. The Board may require a different result in future actions should a pattern of flagrant attempts to abuse the permit appeal process emerge; it will not look kindly upon efforts to end-run established precedent, confuse the issues or taint the record of permit appeal proceedings.

For the foregoing reasons Respondent's motion to require amendment of Petitioner's pleadings is denied.

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 6th day of October, 1988 by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board