

ILLINOIS POLLUTION CONTROL BOARD
September 17, 1992

GOOSE LAKE ASSOCIATION,)
)
 Complainant,)
)
 v.) PCB 90-170
) (Enforcement)
)
 ROBERT J. DRAKE, SR., and)
 FIRST BANK OF JOLIET as)
 TRUSTEE, Trust No. 370,)
)
 Respondents.)

ORDER OF THE BOARD (by J. Anderson):

Currently before the Board are the following two motions: 1) an August 17, 1992 motion to reopen proofs or to supplement proofs filed by Goose Lake Association (Association) and 2) an August 25, 1992 motion for an extension of time to respond to the Association's motion filed by Robert J. Drake, Sr. and the First Bank of Joliet as Trustee, Trust No. 370 (respondents).

Respondents' Motion for Extension of Time

In its motion for extension of time, respondents ask the Board to grant them a 25-day extension in which to file a response to the Association's motion. In support of their motion, respondents stated that the extension is necessary because their attorney would be out of state until August 24, 1992, and because considerable investigation would have to be done before a response could be formulated.

On August 28, 1992, respondents filed their response to the Association's motion. As a result, respondents' request for a 25-day extension is moot.

Association's Motion to Reopen Proofs

As previously stated, on August 17, 1992, the Association filed its motion to reopen proofs. The Association also filed the affidavit of Mr. James W. Holman with its motion. On August 28, 1992, respondents filed a response to the Association's motion. On August 31, 1992, the Association filed a reply to respondents' response. Attached to the reply is some of the evidence that the Association wishes to have introduced into the record in this case.

In its motion to reopen, the Association asks that the Board allow it to submit aerial photos and letter opinions or, in the alternative, reopen the proofs in this case so that the Association can submit the new information and allow respondents

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the opportunity for cross-examination. In support of its motion, the Association states that, in the last month, it has come into the possession of aerial photographs and a description and interpretation of the photos by Mr. Mike Vice of the United States Department of Agriculture (Department) which were previously in the possession of the Department and thus, not available to the Association. The Association argues that the new information would materially aid the Board in determining the natural drainage of the property at issue and the appropriateness of the individual sanitary system applications to the property. More specifically, the Association argues that the new information substantiates its position that a substantial portion to the property would drain in a west-southwesterly direction rather than north to the lake. In fact, the Association notes that the new information has caused its civil engineer, Mr. Don Eddy, to modify his opinion regarding the flow of the natural drainage water on the property at issue.

As for the affidavit attached to the Association's motion, Mr. Holman, a member of the Association, states that he and other Association members subpoenaed and requested, pursuant to the Illinois Freedom of Information Act, all documents relating to the natural drainage or water flow from the property in question. He also states that, on July 30, 1992, Mr. Vice provided the Association with the aerial photographs after he attended an Association meeting that related to pollution and drainage problems within the Association's properties. Mr. Holman adds that at no time prior to or directly after the hearing was the Association aware of the Department possessing, at the Grundy County Soil and Water Conservation District, the aerial photographs.

In response, respondents first argue that 35 Ill. Adm. Code 103.202 does not provide for the reopening or supplementing of proofs following the conclusion of a hearing. Respondents also argue that, even if the Board's regulations allowed for the reopening of proofs, the Association had more than 16 months to prepare its case for hearing and the documents at issue were available at the time the Association filed its complaint and at the time of hearing. Respondents add that the documents are not relevant in this case because no issue was raised in the complaint or at hearing regarding the direction of flow of surface waters from the property at issue. Rather, respondents note that the Association, in its complaint, alleged only that the operation of private sewage disposal systems in the property would cause pollution to the adjoining lake because of the soil types and ground water level within the property. Respondents add that the new evidence would be relevant only to an allegation that the developers of the property in question had altered the drainage of surface waters on the property and that such an allegation would be the subject of a civil suit rather than a complaint before the Board. Finally, respondents argue that the

letters which the Association seeks to introduce are hearsay declarations and that due process requires that they be allowed the opportunity to cross examine any witnesses called by the Association.

At the outset, the Board notes that 35 Ill. Adm. Code 101.241(c) provides that a moving party shall not have the right to reply except as permitted by the Board to prevent material prejudice. In the instant case, the Association's reply is not accompanied by a motion for leave to file the reply. Moreover, a review of the reply indicates that, other than copies of the documents at issue, it is simply a restatement of the information that is contained in the Association's initial motion. Accordingly, the Board hereby strikes the Association's reply based upon the fact that its admission is not necessary to prevent material prejudice.

35 Ill. Adm. Code 103.202, entitled "Order of Enforcement Hearings", does not provide for the reopening or supplementing of proofs following the conclusion of a hearing. 35 Ill. Adm. Code 103.241(b)(1), however, provides that the Board may relieve a party from a final order for newly discovered evidence which by due diligence could not have been timely discovered. Although we recognize that a final order has not yet been entered in this matter, an argument can be made that the "due diligence" standard should apply in situations where new evidence is presented after the hearing has been held and post-hearing briefs have been filed, but before a final order has been written. If such were not the case, parties conceivably could continue a matter indefinitely via attempts to present "newly discovered" evidence that was already in existence at the time of hearing but not discovered.

In the situation at hand, the documents that the Association seeks to introduce were in existence at the time of hearing. We cannot say that it would have been unreasonable to have expected the Association to have contacted such departments as the Grundy County Soil and Water Conservation District, or the Departments of Agriculture, Conservation, Public Health, etc. in an attempt to obtain information. As respondents correctly point out, the Association had more than 16 months to prepare its case for hearing and the documents at issue were available at the time the Association filed its complaint and at the time of hearing. Accordingly, the Board hereby denies the Association's motion.

IT IS SO ORDERED.

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I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that on the 17th day of September, 1992, the above order was adopted by a vote of 7-0.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board