

ILLINOIS POLLUTION CONTROL BOARD
June 30, 1988

VILLAGE OF SAUGET,)
)
) Petitioner,)
)
) v.) PCB 88-18
)
) ILLINOIS ENVIRONMENTAL)
) PROTECTION AGENCY,)
)
) Respondent.)

ORDER OF THE BOARD (by J. Marlin):

On June 13, 1988, the Illinois Environmental Protection Agency (Agency) filed a Motion for Leave to File Instanter a Supplement to the Agency's Recommendation. The Village of Sauget (Sauget) filed a Response and a motion to file that Response instanter on June 27, 1988. Sauget represents that the Agency has no objections to the instanter motion. The Board grants Sauget's motion to file its Response.

By its motion, the Agency is seeking to supplement its March 2, 1988 Recommendation with certain materials. First, the Agency is seeking to introduce discharge data which would update previously submitted data with effluent information as current as April, 1988. Secondly, the Agency provides a March, 1988 report by the U.S. Environmental Protection Agency (USEPA) on the toxicity of Sauget's discharge.

In its Response, Sauget objects to the Agency's submittal of the updated data. Sauget contends that it introduced at hearing "complete summaries of all available discharge data and from the commencement of operation of the AB [American Bottoms] Plant through May of 1988." Sauget asserts that the data it submitted at hearings is more complete than that provided by the Agency. However, Sauget points out that for three data points concerning phenol levels, the Agency's numbers are more accurate. Sauget also claims that three other figures presented by the Agency concerning pH and Mercury levels, are inaccurate.

Next, Sauget contends that the USEPA toxicity report is irrelevant to this proceeding and would constitute hearsay because "Sauget has never had the opportunity to cross examine anyone on the accuracy, reliability, or authenticity of that report or its conclusions."

In summary, Sauget requests that the Board deny the Agency motion to supplement.

In its Response, Sauget asserts it first received the Agency's motion on June 14, 1988 just prior to the hearing in this matter. It is Sauget's position that the Agency is attempting to supplement its Recommendation in an effort to present information to the Board without having to introduce evidence at hearing. The Agency presented no witnesses at hearing and introduced only one exhibit which contained data generated by a Sauget witness.

This motion was filed with the Board on June 13th. Apparently, Sauget did not receive a copy of the motion until just before the hearing on June 14th. The most recent discharge data presented in the Agency's supplement is from April, 1988. In addition, the March 1988 USEPA Report is date-stamped as being received, presumably by the Agency Compliance Section, on March 23, 1988. The Board does not see why the Agency waited until June 13th before attempting to introduce this material into this record.

The Board's procedural rules for variance proceedings, found in 35 Ill. Adm. Code 104, mandate the submission of an Agency Recommendation. Although this Recommendation shall include "[a]llegations of...facts the Agency believes relevant to the disposition of the proceeding" (Section 104.180(3)), the procedural rules provide that the Recommendation be filed with the Board well in advance of the hearing. The Agency Recommendation is to be filed within 30 days after the filing of a variance petition (Section 104.180(a)), and the hearing in a variance proceeding shall be held within 60 days of the filing of a variance petition (Section 104.200(a)). This sequence of events is not accidental; it serves an important purpose. The Recommendation is required to be filed before the hearing so that the hearing may address issues of contention between the variance petitioner and the Agency. Section 104.180(b) even states:

Failure of the Agency to timely file its Recommendation shall be grounds for the Hearing Officer to adjourn the hearing to a date which will allow reasonable time to prepare.

Although the procedural rules do not address the issue of the Agency amending or supplementing its Recommendation, it has been the practice of the Board to allow such action on a case by case determination. The Agency's filing of its Motion to Supplement one day before the hearing certainly runs counter to the intent behind the Board's procedural rules. Such a submittal does not give the petitioner much of an opportunity to prepare and present a substantive response at hearing. This in turn could force the necessity for another hearing. In short, the process does not work smoothly or efficiently when the Agency seeks to substantively alter its Recommendation one day before the hearing. Even though the Agency has merely sought to present

additional information to support its March 2nd conclusion (that the variance be denied), the timing of the submittal was inappropriate.

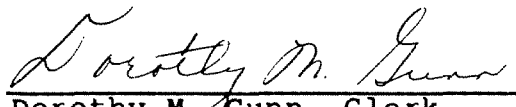
Notwithstanding these concerns, the Board will grant the Agency's motion.

Although there are apparently discrepancies between the Agency's data and Sauget's, the Agency claims in its motion that it is presenting updated data that was monitored and reported to the Agency by Sauget. Also, it appears from the Agency's filing that the USEPA mailed its toxicity report to one of Sauget's attorneys on April 19, 1988. (At that time, a copy was also apparently sent to the Agency attorney). Although all of this information had not earlier been introduced into this record, Sauget apparently did have knowledge of this information long before it was presented with the Agency's June 13th motion. In addition, the Board finds that the materials contained in the Agency's Supplement are relevant to this proceeding. The Board recognizes that this information was introduced without any opportunity for Sauget to cross-examine. Accordingly, it will be given the proper weight when the Board deliberates this matter.

The Board will allow Sauget to file a response to the Agency's Supplement. Such a response shall be filed with the Board no later than July 11, 1988. If Sauget desires an additional hearing in this matter, the Board will consider any such request in the context of the decision deadline for this case.

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 30th day of June, 1988, by a vote of 7-0.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board