

ILLINOIS POLLUTION CONTROL BOARD  
April 10, 1986

IN THE MATTER OF: )  
PROPOSED SITE-SPECIFIC WATER )  
POLLUTION RULES AND REGULATIONS ) R81-19  
APPLICABLE TO CITIZENS UTILITIES )  
COMPANY OF ILLINOIS DISCHARGE )  
TO LILY CACHE CREEK )

ORDER OF THE BOARD (by J. Theodore Meyer):

This matter comes before the Board on a March 21, 1986 motion for interrogatories filed by the Illinois Environmental Protection Agency (Agency). In response, Citizens Utilities Company (Citizens) filed a motion to strike the motion for interrogatories on March 25, 1986. The Agency filed a reply to this motion on April 7, 1986 and Citizens filed a reply to the Agency's reply on April 7, 1986. The Department of Energy and Natural Resources (DENR) filed a statement in support of the Agency's motion for interrogatories on April 7, 1986. Citizens filed a motion to strike the statement of support on April 7, 1986. Additionally, the Agency had filed a motion to the hearing officer for extension of time to file brief on March 25, 1986; in response to which, Citizens has filed an additional motion to strike addressed to the Board on March 25, 1986.

The background of these motions is as follows: on June 12, 1981 Citizens filed a petition for site-specific rule change for its discharge from West Suburban Wastewater Treatment Plant No. 1 (WSB 1) to Lily Cache Creek. After numerous hearings, the Board dismissed the petition finding the record too deficient to make a substantive decision. This dismissal was overturned by the Third District Appellate Court which remanded the proceeding for the Board's failure to make the statutorily required economic determination. Citizens Utilities Company of Illinois v. Illinois Pollution Control Board, No. 3-84-0412 and No. 3-83-0498, Consol., (June 17, 1985). In response to the court's directive and the inadequacy of the record, the Board subsequently ordered that further hearing be held on the economic impact of Citizens' proposal, Order of November 21, 1985. A hearing was held on January 28, 1986 at which Citizens stated "We have no witnesses to present today, nor do we believe it to be relevant at this time to present witnesses. We think the next step is up to the Board, either to indicate its willingness to enter a decision based upon the record as it now exists or to direct the DENR to perform additional studies." (January 28, 1986 transcript at 7).

The Agency's motion stems from procedural rule 35 Ill. Adm. Code 102.160(g) which allows a hearing officer to issue interrogatories in the name of the Board when so directed by the Board. The Agency points out that while the Appellate Court has remanded the proceeding for an economic determination so as to complete the administrative record the Board has previously determined that the existing record is insufficient for this purpose. The Agency argues that "[t]he only way to make a more complete record is to obtain answers to the deficiencies noted earlier by the Board, and nearly all of the answers must come from Citizens. (Mot. for Interrogatories at 4). Thus, the Agency has provided some suggested interrogatories to be answered by Citizens so that the Board can fulfill its mandate.

Citizens argues that the record as it stands is now complete and that the Board should now enter a decision based upon the economic impact study (EcIS) performed by DENR (Mot. to Strike at 1, 4). If the Board should determine that the record is incomplete, however, Citizens argues that "the Appellate Court has made it clear that this is not the fault of Citizens" and that "the burden of proof as to economic benefits and costs is not on Citizens." (Mot. to Strike at 4). Citizens argues that that burden is on DENR and that DENR has satisfied their obligation. However, Citizens has stated that were DENR to supplement or revise their study, "we would be happy to supply whatever information it deemed necessary to enable it to complete that study." (R. 83-84). DENR, however, has stated that it will not supplement or revise its study.

The Board must first reject Citizens' contention that the record is now complete and adequate. Although Citizens clearly desires a decision based on the record as it now exists (R. at 7), the Board clearly determined in 1983 and again in 1985 that the record did not provide an adequate basis for the Board to make the required economic determination. The Board must also reject Citizens' contention that the required findings must be based solely on the EcIS performed by DENR. Under section 27 of the Illinois Environmental Act, in making this determination the Board is to consider "those elements detailed in the Department's study and other evidence in the public hearing record . . . ." (emphasis added). Ill. Rev. Stat. 1985, ch. 111-1/2, par. 1027. Thus, while the EcIS forms part of the basis for the Board's economic finding, it is not the exclusive foundation upon which this finding must rest. This conclusion is self-evident from the language of Section 27 and from the fact that while the Board is required to make an economic finding for all regulatory proposals, DENR is not required to prepare an EcIS for certain proposals as outlined in Ill. Rev. Stat. 1985, ch. 96-1/2, par 7404. Thus, the Board must reject Citizens' reading of the court's holding that the entire burden of proof as to economic benefits and costs is on DENR. In fact, the court held only that DENR has "the legal responsibility for performing the study" and

not that it bears the entire burden of proof as contended by Citizens. Slip op. at 8.

The Board agrees that DENR has discharged its legal responsibility of performing an EcIS, however, the Board has previously found it inadequate to base an economic determination upon. The Board is unaware of any statutory authority empowering it to order a revision or supplement to this study as desired by Citizens, nor is such a revision necessary to cure the deficiencies in the record. As noted above, an economic finding may be based on elements in the public hearing record as well as the EcIS under Section 27 of the Act. It is incumbent upon Citizens to provide this information despite its contention that the Appellate Court has absolved it from any such obligation by virtue of the following language "[w]hile shortcomings in the record might in some cases be the responsibility of the appealing party . . . such is not the case here." Slip op. at 8. This language has been taken out of context. Immediately prior to this statement, the court notes that the Board cannot avoid the statutorily required economic determination and that "[w]here the administrative record is inadequate or incomplete" the proceeding must be remanded for the making of a more complete record. It is at this point that the "shortcomings in the record" are noted not to be the responsibility of Citizens. The Board concurs with the Agency's reading that the phrase "shortcomings in the record" expressly refers to the incompleteness of the administrative record on review because of the Board's failure to make an economic determination. It is this determination which is the Board's legal responsibility and is not the responsibility of Citizens. However, it is the responsibility of Citizens to provide the information to the Board necessary to make this determination. To assert that the court's language means otherwise, would lead to an absurd result: the Board would be required to make an economic finding on a record which it has found to be inadequate for such purpose, but which it has no means of supplementing short of ordering a revised EcIS which it is not empowered to do. The absurdity of such a construction is apparent.

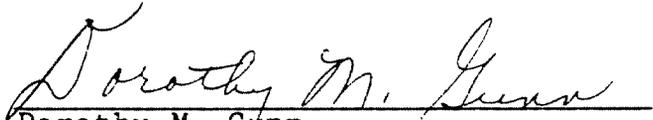
Citizens' remaining objection to the Agency's motion for interrogatories and to DENR's statement of support concerns the timeliness of these filings. Citizens contends that the filings are frivolous as they come after the hearings have been concluded, after the record has been closed and after initial briefs were due and filed. The Board rejects Citizens' arguments as to timeliness as any delay is in large part the responsibility of Citizens. Although the Board ordered additional hearing in this matter to gather necessary economic information, Citizens failed to present any witnesses and questioned the relevancy of doing so. Although Citizens expressed its willingness to provide information to DENR it refused to provide the same information to the Board directly under the mistaken position that the only way

to cure the record was through a supplemental or revised EcIS. This posture was not made apparent until the hearing. Accordingly, the hearing was fruitless and no new information was gathered. The record remains as inadequate today as it was in 1983. The Board believes the answering of interrogatories to be an advisable method of curing these deficiencies. Accordingly, the Board hereby grants the Agency's motion for interrogatories and directs the hearing officer to issue those interrogatories filed by the Agency, as well as any additional interrogatories deemed advisable by the hearing officer, in the name of the Board. Citizens' motions to strike the Agency motion for interrogatories and DENR's statement of support are hereby denied. The motion to strike motion for extension of time is directed to the hearing officer.

IT IS SO ORDERED.

R. Flemal abstained.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 10th day of April, 1986, by a vote of 5-0.

  
Dorothy M. Gunn  
Illinois Pollution Control Board