

ILLINOIS POLLUTION CONTROL BOARD
August 2, 1984

CITY OF SYCAMORE,)
)
 Petitioner,)
)
 V.) PCB 83-172
)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

DISSENTING OPINION (by J. Anderson):

While I would ordinarily have agreed with the Board's action granting the Agency's motion of August 1, 1984 to extend time for filing, I dissent because I believe that the Board should have acted at the same time on the Agency's concurrent Motion to Dismiss with leave to reinstate, rather than taking it with the case.

Section 103.140(a) of the Board's Procedural Rules states, in pertinent part: "All motions by respondent to dismiss or strike the complaint or challenging the jurisdiction of the Board shall be filed within 14 days after receipt of the complaint, shall be directed to the Board and shall be disposed of prior to hearing on the complaint, subject, however, to subsection (e) (emphasis added)..." Subsection (e) states, in pertinent part, "Notwithstanding the provisions of paragraph (a) above, the Board in its discretion, may direct that hearing on the proceeding be conducted and, in its discretion, may take all motions directed to it with the case. This conditional ruling by the Board shall not foreclose a party from advancing the same contentions as to jurisdiction or adequacy of the complaint upon completion of the hearing."

This somewhat unclear language appears at the very least, to infer that the Board will act on motions to dismiss unless it has a reason to make a conditional ruling. No such reason is given here.

In its Motion, the Agency essentially argues that, even though a third amended petition has been submitted, the information from the Petitioner required to be submitted by the Board's regulations is so deficient the Agency cannot fulfill its own statutory role. If the Agency feels it lacks, or is unable to get, sufficient information to substantially exercise its statutory charge, it should make a Motion to Dismiss. Especially where a variance petition is involved, the "take with


the case" approach poses a dilemma for the Agency. A variance proceeding is not a contested case in the usual sense of that term. The Agency is a party primarily because of its statutory responsibility to make a recommendation regarding the petition. The Agency must file a motion to dismiss within 14 days, must object within 21 days (if it wishes to trigger a hearing) and must file a recommendation within 30 days whether or not there is a hearing. And the Board must make its decision within 90 days, with waiver rights accruing only to the petitioner.

Under these circumstances it makes sense to file a motion to dismiss. The Board can often cure the problem by denying the Motion and requiring an amended petition through a "more information" order. In this case, the petition is so deficient after four submittals that I believe the Board should have granted the Motion to Dismiss with leave to refile. Either way, though, the Board is not ruling on the merits of the Petition but on its lack of compliance with fundamental informational requirements, such as a compliance plan.

What is the administrative economy if the Agency has to file a negative recommendation because of lack of sufficient information to even prepare a recommendation on the merits, then use the hearing process hopefully to develop the information, then for the first time address the merits by way of an amended recommendation, all while the 90 day clock is running? If a petitioner has waived hearing, would the Board prefer that the Agency exercise its right to object in 21 days in order to trigger a hearing, or that the petitioner request a hearing after such a negative recommendation--all because of lack of information?

To defer action on the Motion to Dismiss does not make sense. An Agency Motion to Dismiss for insufficient information, if acted upon "up front," avoids delays resulting from "backending" the whole variance process, and conforms to what I believe is the clear intent of the Board's rules. In short, it avoids leaving the Agency "up a creek without a paddle."

For these reasons I dissent.


Joan G. Anderson

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was filed on the 6th day of August, 1984.

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