

ILLINOIS POLLUTION CONTROL BOARD
January 26, 1995

IN THE MATTER OF:)
)
PROPOSED AMENDMENTS TO 35 ILL.) R92-8
ADM. CODE SUBTITLE C (WATER) (Rulemaking-Water)
TOXICS & BIOACCUMULATION)

ORDER OF THE BOARD (by R. C. Flemal):

This matter comes before the Board on the following filings: December 22 and 27, 1994 requests for hearing filed separately by the Illinois Environmental Regulatory Group (IERG) and the Illinois Fertilizer and Chemical Association (IFCA); a December 27, 1994 statement in support of the IERG request filed by the Chemical Industries Council of Illinois (CICI); and the January 17, 1995 motion for leave to file instanter and response in opposition filed by the joint proponents, the Sierra Club of Illinois, the Lake Michigan Federation, Citizens for a Better Environment, and the McHenry County Defenders (joint proponents). The joint proponents' motion for leave to file instanter is granted.

PROCEDURAL BACKGROUND

The IERG and IFCA hearing requests were filed consistent with the hearing officer's order of September 30, 1994. In that order, the hearing officer explained that:

At the close of the September 28-29, 1994 hearings, ... the joint proponents stated that there was nothing more they wished to present in support of their proposal, absent order of the Board. [The hearing officer] stated that in the ordinary course, our next step in the process would be the scheduling of hearings for testimony and comment in response to the proposal.

After off-the-record consultation with all participants present, we learned that there was some feeling that participants had had insufficient opportunity to pose questions concerning the June 25, 1993 amendments to the July 21, 1992 proposal, and that answers to questions would facilitate preparation of testimony in response to the proposal. The joint participants suggested that written questions be posed, to which they would respond in writing.

With participants' concurrence, a filing timetable was established. Consistent with the timetable, questions were prefiled on and before November 1, 1994 by the IFCA, the Illinois Farm Bureau, Growmark, IERG, and the law firm Gardner, Carton & Douglas. The joint participants filed answers on December 5, 1994. IERG, IFCA, and the joint proponents filed the hearing requests and response as detailed at the beginning of this order.

REQUESTS & RESPONSE

The gist of the IERG, IFCA, and CICI filings are that the joint proponents':

"answers are not responsive to many of the questions posed by the hearing participants. Additional clarification through a verbal question/answer process is necessary so that the record will reflect the joint proponents' intent and justification for the amended proposal".

IERG and other participants in this rulemaking will be materially prejudiced if required to proceed in this rulemaking absent an opportunity to question and elicit responsive answers from the joint proponents concerning the substantively revised portions of the amended proposal. Such additional questioning is necessary so that the record will reflect the intent of the joint proponents and their responses to questions regarding the substantively revised portions of the proposal. Proper development of this record is necessary so that the Board can make a reasoned and informed decision in this matter. Additionally, such development is also necessary to facilitate IERG's and other participants' constructive participation in the proposed adoption of rules which will profoundly affect their interests. (IERG Request, Para. 7, 13; see also IFCA Request, Para. 5-8; CICI Statement, Para. 3.)

The essence of the joint proponents' response concerning the alleged inadequacy of their answers is that their June 25, 1993 amended proposal consists of deletions, typographical corrections, and clarifying changes. It is the joint proponents' contention that:

These revisions were made in response to questions and comments made during the first five days of the seven days of hearings, and

reflect a re-arrangement of some aspects of the Joint Proponents' proposal, rather than substantive changes.

The Joint Proponents respectfully point out that another hearing would not change the Joint Proponents' intent. To the extent that IERG, or CICI or IFCA, has objections to the Joint Proponents' position, such concerns can be properly raised during future hearings where testimony in opposition, as well as in support, can be presented.

In the course of these proceedings, the Joint Proponents have made every effort to provide information to assist the Board in considering the proposed rule amendments. The proposed amendments to the water quality rules were designed to limit further and eventually eliminate the discharge of toxic and bioaccumulative pollutants, establish more enforceable water quality criteria, and develop effective plans for limiting pollution in watersheds seriously affected by nonpoint pollution. The intent of the proposed amendments to reduce loading of bioaccumulative and toxic pollutants into Illinois waterways has not changed. The Joint Proponents do not believe that additional hearings on the intent of the proposal will provide substantially more information to the Board. (Joint Proponents Response, Para. 8, 10, 14)

BOARD RULING

After consideration of the participants' arguments, the Board finds that no useful purpose would be served by requiring the joint proponents to appear at yet another hearing to defend their proposal. At the close of the September 28-29 hearings, the joint proponents essentially "rested their case"; their response reiterates their belief that additional hearings concerning their intent will not provide substantially more information to the Board. The proponents have apparently made as much of a record as they can, or are willing to, make given resource constraints. As joint proponents suggest, any remaining concerns other participants may have concerning the sufficiency of the proposal can be expressed during the next phase of hearings where "testimony in opposition, as well as in support, can be presented."

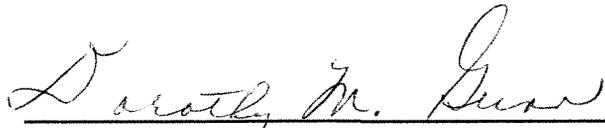
The Board denies the December 22 and 27 requests for hearing. However, the Board directs the hearing officer to

expeditiously schedule hearings at which all other participants may present their testimony in response to the record made the joint proponents. Once this set of hearings is complete, the Board will determine whether first notice of any proposal, this proposal, or some variation of it, will be published in the Illinois Register, or whether this docket will be closed.

IT IS SO ORDERED.

E. Dunham and M. McFawn dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 26th day of January, 1995, by a vote of 5-2.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board