

ILLINOIS POLLUTION CONTROL BOARD
September 15, 1994

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

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

Consistent with the Board's order of May 5, 1994, a hearing officer and notice of hearing dated September 1, 1994 scheduled the resumption of hearings in this matter to begin on September 28, 1994. The notice of hearing stated:

We will continue consideration of the regulatory proposal made July 21, 1992, as amended June 25, 1993, by the Illinois Chapter of the Sierra Club, Citizens for a Better Environment, Lake Michigan Federation and the McHenry County Defenders [proponents]. As further explained in the attached hearing officer order, establishing prefiling requirements, additional hearing dates will be scheduled to receive testimony from other persons in response to the proposal. The proponents intend to present the following testimony:

Daniel T. McGrath - Economic Testimony prefiled on April 11, 1994: "An Analysis of Impacts to the State of Illinois Regional Economy Related to Proposed Water Toxic Rules Proposal R92-8"

Greg T. Lindsay - Technical Feasibility Testimony prefiled on June 15, 1994: "Testimony on Proposed Amendments..."

On September 9, 1994, the Illinois Environmental Regulatory Group (IERG) filed a motion for continuance of the hearing "for a minimum of 90 days". The proponents filed a response in opposition on September 14, 1994. Motions in support of IERG's request for continuance were filed on September 14, 1994 by the Chemical Industry Council of Illinois (CICI), the Illinois Fertilizer and Chemical Association (IFCA), and the Illinois Steel Group (ISG). On September 12, 1994, the Illinois Environmental Protection Agency (Agency) filed a statement that:

The Agency would be prepared to proceed with resumption of hearings on September 28-29, 1994 if the Board elects to do so. However, the Agency also does not specifically object to a continuance of the hearings if the Board determines that IERG's position as set forth in their motion for continuance is meritorious.

The Motion to Continue

In support of its motion for continuance, IERG asserts that it will be "materially prejudiced" if the economic and technical feasibility hearings scheduled are conducted on September 28, 1994, on the grounds that "IERG will be unable to retain an expert to review the pre-filed testimony and to prepare meaningful questions for submittal to the Board by the September 21, 1994 deadline [for pre-filing of questions established in the September 1 hearing officer order]". IERG states that it had not retained a consultant immediately after its receipt of the prefiled testimonies in April and June of 1994, in reliance on the Board's order of May 5, 1994 indicating that the proceedings in this matter might be deferred to address other deadline-driven proceedings¹ IERG further argues that its delay in expending significant time and resources in retaining an expert was justified given "the extended time period during which formal proceedings in this matter were inactive" at proponents' request (IERG Motion, # 16; See order of May 5, 1994 setting forth some history of this rulemaking). Lastly, IERG argues that:

IERG does not believe that the scheduling of technical feasibility and economic testimony hearings in support of the amended proposal is appropriate at this juncture. IERG asserts that, based upon the Board's procedural rules at 35 Ill. Adm. Code Parts 101 and 102, the proceedings in this matter should progress differently. IERG, together with other participants from the business community, is preparing a motion for Board consideration, suggesting an alternate progression of the proceedings. IERG is attempting to achieve a consensus with the business community as to the nature of the motion prior to its anticipated filing in the near future. (IERG Motion, #18).

CICI reiterates IERG's motion, as does the statement by IFCA. IFCA additionally asserts, however, its belief that this proceeding should resume with testimony by the proponents in support of its June 25, 1993 amended petition prior to beginning testimony concerning economic reasonableness and technical feasibility. (IFCA Statement, # 2). The Steel Group filing also concurs with IERG's filing and states its belief that economic hearings are not justified at this time. (ISG Motion, # 3).

¹ As outlined on pp 2-3 of the May 5, 1994 order, those rulemakings including various anticipated Clean Air Act rulemakings pursuant to Section 28.5 of the Act, R94-2 Underground Storage Tank rules adopted as final today, R93-29 Landscape Waste Compost rules adopted for second notice today, and R94-1 Ammonia, Nitrogen, Lead, and Mercury rules adopted for first notice today.

The Joint Proponents Response

The joint proponents request that the hearings continue as scheduled. In response to IERG's allegations of prejudice, the joint proponents assert that the preparation of meaningful questions should not be difficult because IERG has already submitted a lengthy set of questions, including economic questions in the Record; IERG's members have many professional competencies and expertise; IERG has actively participated throughout the informal and formal hearings on this matter; and IERG has had five and three months of time since receiving the pre-filed economic testimony of Mr. McGrath and Dr. Lindsay, respectively. The September 28 and 29 scheduled hearing does not prevent IERG from presenting the testimony of additional experts at a later time, nor do the scheduled hearings prevent IERG from presenting an alternative proposal, subject in both cases to the Board's procedural regulations and scheduling priorities.

The joint proponents allege that continuance of hearing would materially prejudice them and the contractual relationships which they have established with Mr. McGrath and Dr. Lindsay. The joint proponents note that they have already had to extend their contracts with these individuals due to the Board's initial delay in resuming hearings.

Joint proponents also note that their consultants have university teaching commitments which have been restructured to accommodate the present hearing schedule. In summary, the joint proponents believe that they should be allowed to present their testimony in response to pre-filed economic questions, and to finish the presentation of their rule proposal.

Board Conclusion

The motion for continuance is denied. The Board is not persuaded that material prejudice will result from going forward with the scheduled hearings. Prior to the suspension of the hearings in this matter, IERG had already identified (and pre-filed) many economic questions which they have requested be answered. Furthermore, IERG is not being required to present testimony on September 28-29, but instead to consider testimonies whose content has been known to them since April and June, respectively.

While the movants for continuance may not be as well prepared as they might like to question proponents witnesses on September 28, any harm to them is outweighed by the harm asserted by joint proponents: inability to complete presentation of their regulatory proposal due to lack of resources to allow for an additional contract extension. The joint proponents have a right to proceed; any deficiencies in their presentation may be brought to the Board's attention by other participants at this and future

hearings.

Board Member E. Dunham dissented.

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 15th day of September, 1994, by a vote of 5-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board