ILLINOIS POLLUTION CONTROL BOARD
January 19, 1989

KENNETH K. GETTY,	)	
	)	
Complainant,	)	
	)	
and	)	
	)	
EDWIN and SUE KOZOYED, ET AL.,	)	
	)	
Intervenors,	)	
	)	
v.	)	PCB 86-181
	)	
VILLAGE OF RIVERSIDE,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by B. Forcade):

The Village of Riverside ("Riverside") filed a December 15, 1988 motion to strike the December 13, 1988 post-hearing reply brief of the Intervenors. The Intervenors responded to the motion on December 23, 1988. That motion raises two bases for striking the brief.

First, Riverside asserts that the Intervenors waived their right to challenge certain evidentiary rulings of the hearing officer when they failed to "immediately come before this Board for clarification." Motion to Strike at 2. Riverside asserts that it is improper to obtain review of evidentiary rulings and plead matters in a reply brief that a petitioning party omitted from its initial post-hearing brief. The Board agrees with the Intervenors: "It is in fact common Board procedure to review evidentiary and procedural rulings, especially where review is specifically requested, with its consideration of the substantive issues in the case." Response to Motion at 1.

Initially, the Board notes that this issue largely involves evidence admitted by the hearing officer over objection. This is distinguishable from a situation where a party seeks to upset a hearing officer exclusion of evidence. Where a party seeks to have the Board overturn an evidentiary exclusion, that party must act promptly. At hearing, an offer of proof is necessary whenever the substance and character of the evidence is not apparent from the record. See People v. Hoffee, 354 Ill. 123, 188 N.E. 186 (1933) and Schusler v. Fletcher, 74 Ill. App. 2d 249, 219 N.E.2d 588 (1966). The Board in many cases is subject to severe time constraints. In such cases, a hearing officer's decision to exclude evidence, if subsequently overturned by the

Board, could result in the matter being remanded for addition hearings under unacceptably short time frames or in the expiration of statutory deadlines for Board action (e.g., Section 40(a)(2) of the Act). This is not at issue here. Where the evidence is part of the record, and the challenging party has had an opportunity to cross-examine or rebut that evidence, the need for prompt action is not as acute, and the chance of creating prejudice and undue delay is not as great.

The Board must remain free in its final disposition of a proceeding to strike or disregard objectionable evidence admitted at hearing. The proper function of a brief is to present arguments regarding facts adduced at hearing, and this would necessarily include arguments as to the weight and effect the Board should give particular items of evidence. A motion to strike an exhibit or testimony is tantamount to a formal request to thoroughly disregard such.

Finally, the Board observes that the arguments in Intervenors' September 30, 1988 post-hearing brief and Riverside's November 10, 1988 response brief both make citation or reference to nearly all items involved in the Intervenors' December 13, 1988 reply brief. This is notwithstanding the consistency or inconsistency of the arguments relating to those items. Since the Intervenors' December 13 motion for Board ruling thus did not, in fact, raise new matters, Riverside was not prejudiced.

Second, Riverside asserts that the Intervenors' reply brief "contains improper, prejudicial and scandalous matter, calculated to prejudice this Board against [Riverside]." Motion to Strike at 2. Riverside cites four examples of such matter. Two examples are arguments regarding the weight the Board should attach to particular evidence. In view of the foregoing discussion, the Board disagrees with Riverside's conclusions as to the nature of these arguments as "improper, prejudicial and scandalous matter."

Two other examples address arguments relating to the quality of the parties' conduct through this proceeding and outside the public hearings. These example arguments also involve assertions of facts not a part of the record. Since these arguments involve facts not of record, the Board will grant the motion to strike as it pertains to these facts. The Board will strike the facts asserted by counsel for the Intervenors at paragraph 9 on pages 17 and 18, including footnote 9 of Intervenors' Reply Brief. The Board will not physically remove the improper portions of the brief, so as to maintain the record for any appeal.

Riverside's motion to strike is hereby denied in part and granted in part. Paragraph numbered 9 on pages 17 through 18 of Intervenors' Reply Brief is hereby stricken in its entirety. The

Board will reserve all issues relating to the weight and effect to be given evidence for its final disposition of this matter.

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 19th day of January, 1989, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board