

ILLINOIS POLLUTION CONTROL BOARD  
April 6, 1995

IN THE MATTER OF: )  
)  
PETITION OF WASTE MANAGEMENT )  
OF ILLINOIS, INC. FOR AN )  
ADJUSTED STANDARD FROM 35 ) AS 94-12  
Ill. Adm. Code Sections ) (Adjusted Standard-Land)  
807.665(b) and 811.714(b). )

BARBARA B. GUIBORD, WILLIAMS AND ZEVNIK, PC. APPEARED ON BEHALF OF PETITIONER;

ROBERT J. SCHERSCHLIGT, ASSISTANT COUNSEL, APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY;

DAVE MARTIN, ASSISTANT STATE'S ATTORNEY, APPEARED ON BEHALF OF CHRISTIAN COUNTY SOLID WASTE MANAGEMENT.

OPINION AND ORDER OF THE BOARD (by G. T. Girard):

This matter is before the Board on a petition for an adjusted standard filed by Waste Management of Illinois (WMI). WMI asks that the Board grant an adjusted standard to the Board's rule of general applicability for financial assurance found at 35 Ill. Adm. Code 807.665(b) and 811.714(b). That requirement provides that in order to utilize an insurer to satisfy solid waste disposal facility financial assurance for closure and post-closure care, the insurer "shall be licensed to transact the business of insurance by the Illinois Department of Insurance pursuant to the Illinois Insurance Code".

WMI filed its petition on June 29, 1994. The Illinois Environmental Protection Agency (Agency) filed a response to the petition instanter on July 11, 1994. WMI waived hearing; however on July 18, 1994, the Board received a request for a hearing which was held on October 25, 1994.

Based upon the record and upon review of the factors involved in the consideration of adjusted standards, the Board finds that WMI has demonstrated that factors relating to WMI are "substantially and significantly different from the factors relied upon by the Board in adopting the general regulation". Accordingly, the request for adjusted standard is granted with conditions for the reasons discussed below.

ADJUSTED STANDARD PROCEDURE

The Board's responsibility in this matter arises from the Environmental Protection Act (Act) (415 ILCS 5/1 et seq.). The Board is charged therein to "determine, define and implement the environmental control standards applicable in the State of Illinois" (415 ILCS 5/5(b)) and to "grant \*\*\* an adjusted

standard for persons who can justify such an adjustment" (415 ILCS 5/28/1(a)). More generally, the Board's responsibility in this matter is based on the system of checks and balances integral to Illinois environmental governance: the Board is charged with the rulemaking and principal adjudicatory functions, and the Agency is responsible for carrying out the principal administrative duties.

The Act provides that a petitioner may request, and the Board may impose, an environmental standard that is different from the standard that would otherwise apply to the petitioner as the consequence of the operation of a rule of general applicability. Such a standard is called an adjusted standard. The general procedures that govern an adjusted standard proceeding are found at Section 28.1 of the Act and within the Board's procedural rules at 35 Ill. Adm. Code 106.

Where, as here, the regulation of general applicability does not specify a level of justification required for a petitioner to qualify for an adjusted standard, the Act at Section 28.1(c) specifies four demonstrations that must be made by a successful petitioner:

- 1) Factors relating to that petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation applicable to that petitioner;
- 2) The existence of those factors justifies an adjusted standard;
- 3) The requested standard will not result in environmental or health effects substantially or significantly more adverse than the effects considered by the Board in adopting the rule of general applicability; and
- 4) The adjusted standard is consistent with any applicable federal law.

#### RULES OF GENERAL APPLICABILITY

The Board's rules at 35 Ill. Adm. Code 811.665(b) provide that:

The insurer must be licensed to transact business of insurance by the Illinois Department of Insurance.

The Board's rules at 35 Ill. Adm. Code 811.714 provide in pertinent part that:

- a) An owner or operator may satisfy the requirements of this Subpart by obtaining closure and post-closure care insurance which conforms to the requirements of this Section and submitting an executed duplicate original of such insurance policy to the Agency.
- b) The insurer shall be licensed to transact the business of insurance by the Illinois Department of Insurance pursuant to the Illinois Insurance Code (Ill. Rev. Stat. 1991, ch. 73, pars. 613 et. seq. [215 ILCS 5/1 et. seq.]).

The Board originally adopted this provision in 1990, in the Board's rulemaking proceeding In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills, R88-7, 114 PCB 483, (August 17, 1990)<sup>1</sup>. The Board in R88-7 developed and adopted comprehensive statewide regulations concerning the operation of landfills. The financial assurance provisions were one small section of these regulations. The Board has since amended the landfill regulations to include the provisions adopted by the USEPA under the Resource Conservation and Recovery Act (RCRA) Subtitle D in R93-10 RCRA Subtitle D Amendments (Amendments to 35 Ill. Adm. Code Part 811 and 814).

In adopting the RCRA Subtitle D requirements the Board proceeded pursuant to Sections 7.2 and 22.4 of the Act. Under Section 7.2 of the Act, the Board may only adopt those regulations identical-in-substance to the regulations adopted by the USEPA. In R93-10, the Board specifically responded to a comment from the Agency regarding financial assurance through the insurance mechanism. The Agency commented on the differences between the Board's landfill regulations and the federal requirements. The Board stated:

To the extent the Illinois regulations specify the person who must regulate the trustee, issuer of a letter of credit or the insurer, without more the Board perceives that the Illinois regulations go beyond the scope of the federal regulations. Without regard to the Agency's assertions that most Illinois sites have provided financial assurance that does not comply with the requirement, the Board cannot amend these provisions in the way requested without a proposal from the Agency that would initiate a "regular" rulemaking on the merits. (R93-10, September 15, 1993 at 18.)

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<sup>1</sup> References to the Board's prior rulemaking proceedings will be cited as "R @@, date at \_\_\_"; the petition will be cited as "Pet. at \_\_\_"; the Agency response will be cited as "Ag. Rec. at \_\_\_".

FACILITY DESCRIPTION

WMI is a solid waste management company which owns and operates a number of waste disposal facilities throughout Illinois. (Pet. at 5.) Since early 1991, closure and post-closure insurance has been issued by National Guaranty, a wholly-owned subsidiary of WMX Technologies. (Pet. at 2.) WMX Technologies, Inc. is the parent corporation for WMI. (*Id.*) For the past three years the Agency has accepted the insurance policies issued by National Guaranty from WMI as being in compliance with the Board's regulations. (Pet. at 3.)

National Guaranty was established in 1989 to provide insurance coverage to the its parent WMX Technologies, Inc and affiliated companies. (Pet 5-6.) National Guaranty provides primarily surety bonds and financial assurance policies written on a claims-made basis and the policies relate specifically to the basic operations of WMX. (Pet. at 6.) National Guaranty is known as a "surplus lines carrier" based on the type of coverage National Guaranty underwrites. (*Id.*) Surplus lines carriers underwrite coverage which "is excess or surplus to the 'admitted' or traditional insurance market, that is, coverage which licensed or admitted carriers are not prepared to underwrite". (*Id.*)

WMI asserts that because of the 30-year minimum time frame required for closure/post-closure insurance, the traditional insurance market remains essentially unwilling to underwrite closure and post-closure coverage. (Pet. at 6.) WMI argues that the closure/post-closure coverage is the type of coverage traditionally handled by surplus carriers. (*Id.*) If facilities cannot use insurance issued by surplus carriers to meet financial assurance, as a practical matter insurance will not be available for closure/post-closure coverage. (Pet. at 6.)

National Guaranty is "fully authorized to operate in the State of Illinois under the statutory Surplus Lines Exemption, 215 ILCS 5/445". (Pet. at 7.) National Guaranty is required to operate through a licensed surplus lines agent or broker. Under Illinois law the broker or agent must establish that diligent efforts have been made to place the coverage with admitted insurance companies before the coverage can be placed with a surplus lines carrier. (*Id.*) Also under Illinois law, National Guaranty "must meet stringent capital standards and other regulatory requirements imposed upon surplus lines carriers doing business in Illinois." (Pet. at 8.)

WMI maintains that surplus lines insurance can provide financial assurance that is just as reliable as that provided by other mechanisms authorized in the regulations. (Pet. at 6-7.) In support of this position, WMI points out that under Illinois

law surplus lines standards require a policy holder surplus of at least \$5 million. (Pet. at 8.) WMI states that National Guaranty's surplus is in excess of \$170 million and far exceeds capital requirements of many licensed insurance carriers. (Pet. at 8.)

#### RELIEF REQUESTED

WMI is seeking an adjusted standard from 35 Ill. Adm. Code 807.665(b) and 811.714(b) to allow National Guaranty to provide financial assurance insurance for WMI's facilities in Illinois. Specifically, WMI is asking that the standard for WMI state:

financial assurance would include closure and post-closure financial assurance from an insurance carrier which is licensed to transact business of insurance by the Illinois Department of Insurance or is eligible to provide insurance as an excess or surplus lines insurer in the State of Illinois. (Pet at 9.)

#### AGENCY RESPONSE

The Agency asserts that the petitioner has correctly stated the level of justification required for this adjusted standard to be granted, and also appropriately does not discuss the quantitative and qualitative impacts on the environment. The Agency agrees with WMI that the adjusted standard is consistent with federal law. (Ag. Rec. at 2.)

The Agency "concedes" that it has allowed WMI to use captive insurance for the past three years to meet the financial assurance requirements of Sections 807.665(b) and 811.714(b). (Ag. Rec. at 2.) The Agency in general supports the granting of an adjusted standard and recommends that the standard be conditioned on WMX Technologies, Inc. being required to pass the financial test of 35 Ill. Adm. Code 811.715(b)(3). (Ag. Rec. at 4.) The Agency is not suggesting that WMI be required to provide a bond or promise to pay in accordance with Section 811.715(c). (*Id.*) Rather, the Agency suggests that WMX Technologies, Inc. annually be required to meet the financial requirements of Section 811.715(e)(1) as provided in Section 811.715(e)(2). (Ag. Rec. at 4.) Thus, the Agency is recommending that the adjusted standard include a condition which will require WMX Technologies to annually provide documentation of its financial status.

The Agency does not challenge the sufficiency of National Guaranty's capitalization at this time. However, the Agency is concerned that the financial position of National Guaranty could deteriorate in the future. Therefore, the Agency is recommending the above mentioned condition. (*Id.*)

#### COMPLIANCE ALTERNATIVES

WMI has begun to use the "Financial Test/Corporate Guaranty" mechanism for financial assurance while seeking this adjusted standard. WMI asserts that the use of the "Financial Test/Corporate Guaranty", as provided in Section 811.715, will cost "approximately \$95,000 more per year than insurance from National Guaranty". (Pet. at 9 citing Affidavit at para. 10.) WMI argues that these costs constitute an undue burden on the parent company WMX because the increased costs do not "result in any corresponding increased protection for the environment". (Pet. at 9.)

#### HEALTH AND ENVIRONMENTAL EFFECTS

WMI maintains that the granting of the adjusted standard will have "no adverse environmental impact or health effects". (Pet. at 14.) WMI states that if there is concern over the viability of a surplus lines carrier, National Guaranty is sufficiently capitalized and has "established a three-year 'track record' in Illinois to allay such concern". (Pet. at 10-11.)

#### CONCLUSION

Section 28.1(c) of the Act requires that in order for a petitioner to receive an adjusted standard the petitioner must demonstrate that:

Factors relating to that petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation applicable to that petitioner.

WMI has established that National Guaranty is a viable company capable of providing adequate financial assurance in Illinois. WMI has shown that use of a mechanism other than National Guaranty would be more costly with no additional benefit to the health or environment in Illinois. Therefore, the Board will grant the adjusted standard to WMI. The Board is however also going to include the conditions recommended by the Agency. The Board believes that it the conditions are necessary to insure that National Guaranty remains a viable surplus lines carrier.

On March 22, 1995, the Board received a filing in this proceeding which indicated that WMI would be required to purchase non-refundable insurance on March 31, 1995. The filing indicated that WMI had asked the Agency for an extension of that date. As a general rule the Board grants an adjusted standard effective as of the date of the Board decision. However, the Board has granted retroactive relief in variance proceedings where unusual or extraordinary circumstances exist. DMI, Inc. v. EPA, PCB 90-227, 128 PCB 241 (December 19, 1991). The Board is convinced that such extraordinary circumstances exist here. The purchase of non-refundable insurance would be a significant financial

expense when in effect there is only six days between March 31 and today's date. Further, the Board's own schedule was such that a decision after the March 22, 1995, filing and today was not practicable. Therefore, the Board will grant the adjusted standard effective March 31, 1995.

The Board notes that the Board has recently granted an adjusted standard to the financial assurance requirements at 35 Ill. Adm. Code 811.710 and 811.713. (In the Matter of: Petition of Winnebago Reclamation Service, Inc., AS94-11, (December 1, 1994) (Winnebago)). In Winnebago, the petitioner set forth several factors which were substantially and significantly different from those considered by the Board when adopting the general rule. Those factors included the fact that the petitioner had already supplied financial assurance to the USEPA and the fact that the petitioner was under a consent decree.

The Board has also recently declined to grant an adjusted standard in Browning-Ferris Industries of Illinois, Inc., Browning-Ferris Industries of Iowa, Inc., and BFI Modern Landfill, Inc., AS 94-13 (December 14, 1994). In that case the Board found that:

BFI has presented the type of information which could lead to a rule change; however such a change, absent a showing of substantially and significantly different factors, is not appropriate for the adjusted standard proceeding. The factors related by BFI, in part, were considered by the Board as recently as the Board's proceeding in R93-10. Therefore, the Board denies BFI's request for an adjusted standard.

As stated above, WMI has demonstrated that the factors relating to WMI are substantially and significantly different than those relied on by the Board in adopting the financial assurance standards. Therefore, the Board will grant the adjusted standard with conditions.

This opinion constitutes the Board findings of facts and conclusion of law.

#### ORDER

The Board grants the following adjusted standard to Waste Management of Illinois effective March 31, 1995:

1. Instead of the Board's rules of general applicability for financial assurance found at 35 Ill. Adm. Code 807.665(b) and 811.714(b), the following shall apply:

Financial assurance would include closure and post-closure financial assurance from an insurance carrier

which is licensed to transact business of insurance by the Illinois Department of Insurance or is eligible to provide insurance as an excess or surplus lines insurer in the State of Illinois.

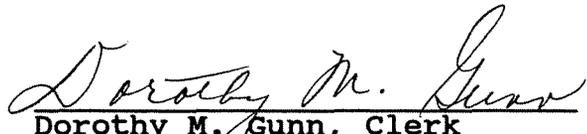
2. WMX Technologies, Inc. shall annually pass the financial test of 35 Ill. Adm. Code 811.715(b)(3); specifically providing annual proof that WMX Technologies, Inc. meets the financial test set forth at 35 Ill. Adm. Code 811.715(e)(1).

Board Member J. Theodore Meyer dissents.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/40.1) provides for the appeal of final Board orders within 35 days of service of this decision. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also, 35 Ill. Adm. Code 101.246, Motions for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 6<sup>th</sup> day of April, 1995, by a vote of 6-1.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board