ILLINOIS POLLUTION CONTROL BOARD
November 19, 1981

DONALD J. HAMMAN, Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent, and HARRY MATHERS, ET AL., RAYMOND GREENBERG, TOWNSHIP OF WHEATLAND, CHUCK LAMPTON and CINDY PENTZIEN, Intervenors.	)	PCB 80-153

JOSEPH H. BARNETT AND TRIS MICHAELS (PUCKETT, BARNETT, LARSON, MICKEY, WILSON, AND OCHSENSCLAGER) APPEARED ON BEHALF OF PETITIONER HAMMAN;

MARY E. DRAKE APPEARED ON BEHALF OF THE RESPONDENT AGENCY;

OLIVER S. DeBARTOLO AND VAN A. LARSON (DeBARTOLO AND DeBARTOLO) WITH CO-COUNSEL DOUGLAS F. SPESIA (MURPHY, TIMM, LENNON, SPESIA & AYERS) APPEARED ON BEHALF OF INTERVENOR GREENBERG;

ELIOT A. LANDAU AND JOSEPH M. CLEARY (LANDAU, CLEARY & KELLY) APPEARED ON BEHALF OF INTERVENORS MATHERS, ET AL; AND

DOUGLAS F. SPESIA (MURPHY, TIMM, LENNON, SPESIA & AYERS) APPEARED ON BEHALF OF INTERVENOR WHEATLAND TOWNSHIP.

SUPPLEMENTAL OPINION AND ORDER OF THE BOARD (by J. Anderson):

PROCEDURAL HISTORY

On January 8, 1981 the Board entered an Opinion and Order resolving a permit denial appeal filed August 22, 1980 by Donald J. Hamman (Hamman). The Board remanded the matter to the Illinois Environmental Protection Agency (Agency) for issuance of a permit to develop a sanitary landfill on a 145 acre site in the Township of Wheatland, Will County. This appeal involves the fifth application for permit for development of this site, the previous four having been denied for reasons not at issue here.

The site is bounded on one side by 111th Street, an admittedly inadequate east-west township road situated between Route 30 and Illinois Route 59. The permit had been denied by the Agency based on Rule 314 and Rule 316(a)(4) of Chapter 7: Solid Waste,* because "The Wheatland Township Road Commissioner has not agreed in writing for the 111th Street to be upgraded..." [by Hamman, at his own expense]. It had been stipulated at the November 19, 1980 hearing that, otherwise, Hamman "has met and satisfied all procedural and substantive requirements necessary for issuance of the requested permit" (1R. 6).** The Board noted that neither rule per se (that is, in each and every case) requires that a permit be denied where off-site roads are inadequate. It held that neither rule alone or in combination "is a sufficient reason to deny the permit under the circumstances in this case" (Opinion at 2, emphasis added).***

On February 19, 1981, the Board granted the Agency's motion for reconsideration. In part because of the major public interest expressed in this matter (see p. 7), hearing was authorized. The Board directed that "the evidence should focus on the reasons for denial."

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*Only one provision of Rule 314 addresses roads. 314(b) requires "roads adequate to allow orderly operations within the site." It was ruled to be inapplicable, as 111th St. does not lie within the Hamman site. The Agency conceded the inapplicability of Rule 314 in its opening brief on reconsideration (Agency Br. at 18).

Rule 316(a)(4) requires a permit application to include information concerning "land use and population density of the proposed sanitary landfill site and of the area surrounding the site within one mile of the site boundaries." This is part of the evidence required pursuant to Rule 316(a)

> "to prove to the Agency that the development of the sanitary landfill will not cause or tend to cause water or air pollution; will not violate applicable air and water quality standards; and will not violate any rule or regulation adopted by the Board."

**Citations to the transcript of the original November 2, 1980 hearing will be made as "1R". All other hearings are cited as "2R".

***Board Member Goodman would have upheld the denial, asserting that Rule 316(a)(4) should be read to allow the Agency to consider the effect of vehicular traffic on the surrounding area (Dissenting Opinion, filed January 14, 1981).

In that same Order, Township Highway Commissioner Raymond Greenberg, area resident and property owner Harry Mathers, and numerous others were granted intervenors' status. On March 19, 1981, Chuck Lampton and Cindy Pentzien were also granted leave to intervene.

On April 2, 1981, the Board denied a motion for continuance of a hearing in this matter scheduled for April 3, 1981. The Board reiterated its February direction that the hearing should focus on the reasons for denial of the permit stated in the Agency's denial letter of July 21, 1980. The Board further stated that the Hearing Officer could, in his discretion, allow by way of offers of proof the introduction of evidence "which was not before the Agency when it acted on the permit", but that "the proponent of the offer should explain why the evidence is not in the Agency record."

Hearing Officer Joseph R. Yurgine presided over hearings held on April 3 and 24, and May 8, 22 and 29 in the Will County Courthouse, Joliet, Illinois, and on June 18, 1981 at the Board's office in Chicago, Illinois. At each of these except the last, a substantial number of citizens were present, many of whom testified.*

Petitioner Hamman presented 2 witnesses, himself and project engineer Andrew Rathsack, and introduced 48 additional exhibits. Intervenors Mathers et al. presented the testimony of 22 witnesses, and introduced 42 exhibits. Intervenor Greenberg himself testified and introduced 16 exhibits. The Agency presented no additional testimony or exhibits. Some, but not all of the testimony and exhibits were admitted into evidence; the rest is in the record before the Board as offers of proof. In addition to over 1600 pages of transcript plus exhibits, the Board has also before it for consideration the previously filed Agency record of 1000-plus pages, the transcript of the original November 19, 1980 hearing at which no members of the public were present (containing testimony of Hamman, Rathsack, and James W. Crowley and Norman J. Toberman) and Hamman's 8 exhibits which had been admitted into evidence.

The ultimate issue to be determined is simply stated: should the Board reverse its previous finding, and hold that the Agency properly denied the permit for the reasons it gave to Hamman. Before that issue can be reached, however, the Board must deal with various pending motions, and objections raised and preserved at hearing, as well as the admissibility of the proof offered.

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*At the first hearing, counsel for Mathers et al. reported that at least 226 citizens, "20 public officials including 4 state legislators and 5 adversary attorneys" were present (Intervenor Mather's Br. at 20-21).

Yet, even before so doing, the Board believes that a brief review of the nature of a permit denial proceeding is a necessary and appropriate aid to the parties' comprehension of the Board's decision in this matter. This is particularly so as to the intervenors, who at hearing and in their briefs have demonstrated an understandable, if unfortunate, confusion as to the roles established for the Agency and the Board by the Environmental Protection Act.

PERMIT PROCEDURES UNDER THE ACT

Section 39(a) states that "it shall be the duty of the Agency to issue a permit [required by Board regulation] upon proof by the applicant that ...[it] will not cause a violation of this Act or regulations hereunder." However, recently enacted Section 39(f) (P.A. 81-1484, eff. Sept. 18, 1980) provides that the Agency may deny a permit to conduct any refuse-collection or refuse-disposal operation "if the prospective operator or any employee or officer of the prospective operator has a history of": 1) repeated violations of laws concerning disposal operations, 2) conviction of a felony, or 3) proof of gross carelessness or incompetence in dealing with hazardous waste. If a permit is denied for any reason, the Agency must provide "specific, detailed statements as to why the permit application was denied" including which regulations might be violated [§39(a)].

Section 40 empowers the Board to review permit denials. The Board's "final action" must be taken within 90 days of the date of the appeal's filing; if it is not, "the petitioner may deem the permit issued under this Act" [§40(a)]. A hearing must be held after 21 day notice is given to a) "any person in the county...who has requested notice of enforcement proceedings", b) "each member of the General Assembly in whose district that...property is located", and c) county residents by means of "notice in a newspaper of general circulation in that county" [§40(a)]. Section 40(c) provides that "the decision of the Board shall be based "exclusively on the record before the Agency...unless the parties agree to supplement the record (emphasis added).

As early as 1972, the Board stated that "the issue is, in a Section 40 hearing, whether the Agency erred in denying the permit, not whether new material that was not before the Agency persuades the Board" the Agency was wrong Soil Enrichment Materials Corp. v. IEPA, PCB 72-364 (Oct. 17, 1972). As the Board noted in Oscar Meyer and Co. v. IEPA, PCB 78-14 (June 14, 1978)

> "From the beginning the Board experienced some difficulty in structuring the hearing on a Section 40 petition...[But], [i]t is obviously not an appellate review of an administrative decision, nor could it seem to be so when there has been no recorded hearing and written finding of fact at the permit issuance level.

> More importantly, the Act does not confer jurisdiction on the Board to sit in appellate review of Agency decisions" (emphasis added).

Later that year, the Supreme Court buttressed this reasoning in its decision of Landfill, Inc. v. Pollution Control Board, 74 Ill.2d 541, 387 N.E.2d 258 (1978). In that case, the Court struck down a Board procedural rule which purported to allow "[a]ny person [to] file a complaint seeking revocation of a permit" on the basis of improper issuance or other grounds. The Court noted that under the Act

> "The Board's principal function is to adopt regulations defining the requirements of a permit system [while] the Agency's role is to determine whether specific applicants are entitled to permits...Whether the basis for the proceeding under Rule 503(a) is that the Agency erred by granting a permit on evidence inadequate to show that the landfill would not cause environmental damage, the result of a 503(a) proceeding is to make the Board the permit-granting authority, a usurpation of the Agency's function." 387 N.E.2d at 264.

Section 40 requires that the Agency give a specific, detailed list of reasons for permit denial. It is precluded from raising any issues before the Board which are not raised in its denial letter IEPA v. PCB and United States Steel Corp., #54131, slip.op. at 15 (S.Ct. Sept. 30, 1981). The scope of the Board's Section 40 review of Agency permit decisions, then, would seem to be, by court interpretation, legislatively limited to consideration of whether the reasons given by the Agency for permit denial justify that denial.

If the Agency has specified one invalid reason for denial of a permit where the permit could properly be denied for another reason, under the Landfill holding an objecting citizen has another remedy.

> "The grant of a permit does not insulate violators of the Act or give them a license to pollute; however a citizen's statutory remedy is a new complaint against the polluter [under Section 31(a) alleging that the activity contemplated causes or threatens pollution], not an action before the Board challenging the Agency's performance of its statutory duties in issuing a permit." 385 N.E.2d at 265.

In short, the effect of these holdings about the Board's authority under the Act is to create a bifurcated review system. In a permit denial appeal, the Board essentially must determine whether the Agency has made a correct decision on the narrow issues it has specified as reasons for its denial. The Agency's favorable decision on the other matters involved in its permitting decision cannot be directly reviewed by the Board, although the effects of those decisions can be reviewed in the context of a Section 31(a) "causing or allowing pollution" enforcement action.

PENDING MOTIONS

By its Order of March 19, 1981 the Board deferred consideration of various motions made by Hamman. Hamman first requested that the Board declare that his permit has issued by operation of law pursuant to Section 40 as of the expiration of the 90th day, February 17, 1981. The Board finds this contention to be without merit. While there is no case directly on point concerning the Board's authority to hold a rehearing and issue a decision after the 90th day pursuant to Section 40, in Modine Manufacturing Co. v. PCB, 40 Ill.App.3d 498 (2dDist. 1976), the Board was held to have authority to so do in the context of a Section 38 variance petition. As Section 38 contains a similar 90-day deadline, also running to petitioner's benefit, the Board sees no reason why its authority under Section 40 should be differently construed. In addition, if it were determined that the 90 day clock continued to run during the pendancy of a rehearing, a petitioner who had received a ruling affirming the permit denial could petition for rehearing, and by virtue of a not unlikely combination of delay and administrative inadvertence, have the permit issue by operation of law. Adherence to the Modine rationale prevents this absurd result.

Hamman also objects to the Board's granting the various petitions to intervene, on the grounds that the motions were untimely filed by persons not party to the action, after the first hearing and after entry of the January 8 Order. Under Rule 310, any person who may be adversely affected by the Board's Order may be allowed to intervene. While petitions to intervene should be filed at least 48 hours before the first hearing, intervention may be allowed "at any time before the beginning of the hearing where good cause for delay is shown." Given the issue raised concerning adequacy of notice of the pendancy of this appeal, the Board reaffirms its finding that a later grant of intervenor's status was the result of justifiable delay. [Cf. Farmer v. IEPA et al., No. 80-337, (5th Dist., Order only, Oct. 14, 1981)]. While the Board is aware that this action, as any other, would have proceeded more expeditiously without the presence of the intervenors (see Order of Apr. 2, 1981), the Board continues to believe intervention is proper "considering the intense interest evidenced by the public in this matter, and the inherent thrust of the Act to maximize public input into the Board's deliberations" (Order of Feb. 19, 1981).

Finally, on August 26, 1981 Intervenors Mathers et al. and Wheatland Township moved the Board to supplement the record by admitting a report, first available to the public on August 24, 1981, prepared by the Illinois Legislative Investigating Commission and entitled "Landfilling of Special and Hazardous Waste--A Report to the Illinois General Assembly." As this document addresses classes of waste not at issue in this case, has not been subject to cross-examination, and since it may contain innaccuracies or unclear statements, it will be added to the record only rather than as evidence in this action.

ISSUES RAISED AT HEARING

In addition to the ultimate issue--whether the Agency correctly denied the permit for the reasons stated--other issues and objections were raised at hearing. The bulk of them deal with the scope of the hearing itself.

The intervenors argue that notice of the November 19 hearing was constitutionally and statutorily defective. Therefore, in their belief "the November 18, 1980 Agency stipulation and the November 19, 1980 hearing were invalid and void and so was any action flowing from them including the January 8, 1981 Board decision, the limitation of the scope of the later hearings, and any use of the material and information offered on November 19th by anyone not later produced by the Petitioner at the subsequent hearings" (Int. Mathers Br. at 35).

Beginning with the cited notice defects, the intervenors object to the form of the notice itself, which stated simply that

> "Notice is hereby given that a public hearing has been scheduled in the matter of PCB 80-153, Donald Hamman v. EPA, a permit appeal, on April 3, 1981 at 9:00 A.M. in the Will County Courthouse, Grand Jury Room, 14 West Jefferson St., Joliet, Ill."

They argue that "it was so worded as to defy even a person of above average intelligence from identifying the nature of the matter involved and the geographic area concerned" (Br. at 22).

The Board is also faulted for its publication of the notice in the Joliet Herald News. It is not disputed that the Joliet Herald News is a newspaper of general circulation in Will County. The noted problem is "that the residents of Wheatland Township do not generally read the Joliet Herald. Rather, they read the Chicago Tribune's Suburban Trib, the Naperville Sun, the Plainfield Enterprise, and the Aurora Beacon-News (in that order) [which] with the exception of the Plainfield Enterprise, are all published outside of Will County" (Int. Mathers' Br. at 20).

Notice to the legislators is also alleged to be deficient, in that the Board relied on publication of the hearing date in its Environmental Register, rather than sending personal letters to the legislators concerned. At the April 31 hearing, State Senator George Sangmeister and State Representative Harry D. Leinenweber, both from the 42nd Legislative District which includes all of Wheatland Township, each testified that he was unaware of the November hearing, at which each would have been present to testify. Neither legislator was sure whether his office received the Register, but thought not (2R. 31-52). [In a February 9, 1981 letter requesting rehearing, State Representative Jack Davis (42 Dist.) advised the Board that he had not received notification of the November hearing date.]

Intervenors allege that the proof of the constitutional and statutory deficiency of the notice is the contrast between the fact that no members of the public attended the November 19 hearing, whereas great numbers attended the April-May rehearings. The Board finds that, to the extent there existed a defect in actual notice, that the deficiency has been cured during the rehearing process. The Board further finds that the notice which it gave satisfies the statutory requirements which leave within the Board's discretion which county newspaper in which to run notices, and how to provide legislative notice.*

Had the Board found differently, and agreed that the November hearing was invalid as were its subsequent Orders, the result would likely be that the permit would be deemed issued by operation of law, for failure of the Board to hold a hearing and render its decision within the 90 day period [see Marquette Cement Co. v. IEPA, No. 79-851 (3rd Dist. May 30, 1980), interpreting Section 38]. Contrary to the intervenors' belief, invalidation of the Board's November hearing would not result in the holding a "de novo" hearing before either the Agency or the Board of the sort the Agency had promised (but is not statutorily required) to hold if it had not denied the permit for "technical reasons."

Under the present statutory scheme, the Agency has the exclusive discretion to determine how it will build its record for review, how it will clerically maintain it, and what sort of public hearing, if any, it will hold to consider those issues about which it seeks additional input. [See Village of South Elgin v. Waste Management of Illinois, 62 Ill.App.3d 815, 379 N.E.2d 349 (2nd Dist. 1978).] The scope of an Agency hearing has no statutory limits, beyond relevance.

The Board's hearing must be based "exclusively on the record before the Agency...unless the parties agree to supplement the record." In this action there was no such agreement by Hamman or

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*The Board wishes to comment that the notice given in this action was that given in every such action since the Board's inception, and concerning which this is the first case in which objection has been made. Finding that, as a matter of good government if not of law, some of these objections are well founded, the Board has since begun to notify legislators of the pendancy of permit appeals by letter and has somewhat expanded the form of its notice. While publication of a synopsis of each case in every notice of hearing would convey the best possible sort of notice, given the Board's case volume, its budgetary constraints, and the high cost, even of "tombstone" ads, such action is impossible at this time. The Board supplements these abbreviated notices by publication of its biweekly Environmental Register (available at no cost) which lists scheduled Board hearings and briefly summarizes new cases as they are filed, and by availability of its staff for consultation.

the Agency, who instead chose to enter into a stipulation that the hearing was to be restricted to the issue of roads--the sole issue which the Agency pinpointed for the Board's review in its denial letter. The Board accordingly sustains the evidentiary rulings of its Hearing Officer, and rejects all offers of proof of fact not relating to the lack of an agreement for the upgrading of 111th Street.*

THE 111TH STREET ISSUE

The issue presented to the Board for review, as refined in the Agency's November 18, 1981 stipulation, and further refined by its recent concession of the inapplicability of Rule 314, is whether Rule 316(a)(4) supports the Agency's denial of a permit "based solely upon Petitioner's failure to present any evidence of agreement by the Wheatland Township Road Commissioner for the upgrading of 111th Street in accordance with the specifications set forth in the April 25, 1980, traffic analysis of 111th Street prepared by Planning Horizons."

At the outset, the Board reaffirms its earlier holding that Rule 316(a)(4) could serve as the basis of a permit denial if supported by a sufficient finding of fact in the denial letter. For example, if the Agency specifically found that an adopted land use plan had called for maintenance of an undeveloped rural road in this area as part of a concerted effort through zoning and other means to preserve an exclusive agricultural use for prime farmland, then it is possible that permit denial would be proper because development of the road to specifications required for landfill use would violate an adopted land use plan. Here, however, citation to Rule 316(a)(4) is supported by no such specific findings.

Raymond Greenberg, Township Highway Commissioner, testified that 111th Street is a "public highway," which currently carries the traffic of heavy trucks hauling grain, gravel, steel, and fertilizer, at various volumes during various times of the year (2R. 1263). Other testimony by various residents describes it as a "narrow gravel road with very little ditching on the side capable of handling water" (2R. 163), which is just wide enough for one-way traffic at some points. Much of the road is subject

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*The Board notes that most of the evidence offered is duplicative of evidence already in the Agency record concerning issues which have been under consideration since the filing of Hamman's first permit application. This is not a case in which, because the record is so spotty, or so devoid of the information in areas other than those involving the stated reasons for denial, that the Board must wrestle with the question of what authority, if any, it has to remand the case to the Agency for development of an adequate record.

to flooding as evidenced by testimony (e.g. 2R. 196) and the U.S. Geological Survey Map (Greenberg Ex. 6), as well as other exhibits (Greenberg Ex. 7, 13). There exist visibility problems at the angled (27°) intersection of U.S. Route 30 and 111th Street due to a rise in Route 30 near that point (2R. 148, 149, 204, 252-254). A short distance east of this point, two unprotected E.J. & E. railroad crossings bisect 111th Street at a point where the road is approximately 12 feet wide, and visibility poor (2R. 634, 635).

The Board agrees that the trucks servicing the Hamman landfill would increase the volume of traffic on 111th Street, although such traffic is not different in nature from that the road currently carries. The Board need not reach the issue of whether the Agency could and should require Hamman to improve 111th Street himself, as part of its consideration of the use of the land in the area.* Hamman has, in effect, agreed to issuance of a development permit with a condition that he upgrade 111th Street from Route 30 east to its intersection with Normantown Road, and further east to a portion where 111th Street is presently paved (2R. 1150-51, 1228, 1241), "if, and when the Township agrees to the improvement" (Pet. Reply Br. at 21). The question then becomes whether the Agency can deny issuance of a permit because of lack of a written agreement with the Township Road Commissioner, on the basis of Rule 316(a)(4).

The Illinois Highway Code (Ill.Rev.Stat.Ch.121) was enacted in part "to provide for improvement of highways" with "the cooperation of State, county, township and municipal highway agencies" (§1-102). The duties enjoined upon a township highway commissioner include one "to have general charge of the roads of his district, keep the same in repair to improve them so far as is practicable..." (§6-201.8, emphasis added). As Greenberg alluded to in his testimony, the availability of funds is the primary restraint on "practicability".

Hamman and Greenberg agree that the township commissioner is empowered to accept what amounts to free road improvement, as "any person or persons interested...is or are authorized to offer

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*Any such ruling would have little or no precedential value. SB 172, P.A. 82-06-82, "An Act relating to the location of sanitary landfills and hazardous waste disposal sites" was signed by the Governor November 12, 1981, the General Assembly having completed acceptance of his amendatory veto of September 24, 1981 on October 28, 1981. Under the terms of that bill, counties or municipalities would be given the authority to deny approval of "site location suitability" (and thereby block issuance of Agency permits) for "regional pollution control facilities" based upon a number of what may be called "traditional land use considerations" which were attempted to be asserted in this action, including the "traffic patterns to or from the facility."

inducements to the highway commissioner...by entering into contract with the commissioner..." (§6-310). There is some disagreement as to which portion of the Highway Code establishes all of the necessary procedures (compare Pet. Br. at 8-9 with Greenberg Br. at 11-13 concerning applicability of the petition procedure of 6-303 et seq.). However, it is agreed that Hamman has not submitted an inducement contract to Greenberg (2R. 1160-1162, 1232, 1268-1269), although the two discussed the issue at several public meetings, and corresponded concerning it (2R. 1369, 1377, 1403, 1404, 1405, Pet. Ex. 1-4).

Denial of the Hamman permit for failure of a local official, for whatever reason, to agree to do that which he is empowered to do, and has the duty to do--improve township roads--at the cost of a permit applicant, was improper. The Board is persuaded that in so doing, the Agency has unlawfully delegated its permitting authority. The bar, if any in fact will prove to exist, to the upgrading of 111th Street, is one of the "locally imposed conditions which the courts have found to be inconsistent" with the basic purpose of the Act--'to establish a unified state-wide program supplemented by private remedies' Carson v. Village of Worth, 62 Ill.2d 406, 343 N.E.2d 493, 499 (S.Ct. 1975) and cases cited therein. (See also County of Cook v. John Sexton Contractors, 75 Ill.2d 494, 389 N.E.2d 553, applying this rationale to non-home-rule units.)

To the extent that the Agency's denial was a result of environmental concerns rather than traffic control or other concerns, the environmental concerns could have been satisfied by issuance of a permit containing a condition that 111th Street be improved by Hamman at his expense, as Hamman has repeatedly agreed to do. In denying the permit for reasons related solely to lack of a written agreement, the Agency has a) allowed local distaste for the Hamman site to over-ride its acceptance of Hamman's showing of an area-wide need for a new landfill, and b) has cut-off access by Hamman and any other affected individual to available "private remedies" to insure that the area's environmental needs, waste disposal needs, and traffic control needs are each met.

Regardless of any personal interest or bias against the Hamman landfill permit which Greenberg may feel as a private individual (R. 1245-1263)* the Board accepts at face value his

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*The Board notes this portion of the transcript as containing one of the few proper, professionally pursued attempts to develop such information. It is in marked contrast to much of the rest of this transcript, which contains much of what was correctly characterized as "inappropriate attorney comment and characterizations, argument [and] baseless objection", as well as "insult[s] and malicious attack[s upon] the character of Petitioner, Petitioner's attorneys, engineers, and...business associates... (footnote continued on next page)

statement to the effect that as Highway Commissioner, he would perform his statutory duties and agree to permit Hamman to improve the road if all proper, statutory procedures are followed (R. 1243, 1253). Even had not such a statement been made, remedies and appeal routes for failure to fulfill statutory duties are potentially available to Hamman and any other citizen under the Highway Code and in equity by action of writ of mandamus. In addition, if use of the road in and of itself causes or threatens pollution, a remedy is available under the Act itself [see Bailey v. Village of Mill Shoals, PCB 80-6 (September 18, 1980), finding the Village of Mill Shoals in violation of Section 9(a) and requiring the reduction of dust on a no-longer-oiled Village Street].

Finally, the Board wishes to again comment that, in its opinion, final action concerning this permit was taken on January 8, 1981. Reference should be made to that date in determining the applicability of any legislative enactments subsequent to the Agency's denial decision of July 21, 1980, regardless of the date on which the Agency completes the now-ministerial task of issuing the permitting paper.

This Supplemental Opinion and Order constitutes the Board's supplemental findings of fact and conclusions of law in this matter.

ORDER

Upon reconsideration, the Board clarifies its Opinion and re-affirms its Order of January 8, 1981, and all Orders entered in this cause thereafter. This matter is remanded to the Agency for issuance of a developmental permit subject to lawful conditions.

IT IS SO ORDERED.

(footnote from page 11 continued)

[and] contempt for the Board and its Hearing Officer" (Pet. Reply Br. at 14). While the Board appreciates that the flow of adrenalin runs high at this sort of hearing, it feels the bounds of professional decorum were often transgressed despite the commendable efforts, under the circumstances, of its Hearing Officer and most participating counsel.

Board Members J. Dumelle and I. Goodman dissented.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Supplemental Opinion and Order was adopted on the 19th day of November, 1981 by a vote of 3-2.

Christan L. Moffett, Clerk
Illinois Pollution Control Board