

ILLINOIS POLLUTION CONTROL BOARD
September 8, 1983

FRINK'S INDUSTRIAL WASTE, INC.,)
)
) Petitioner,)
)
) v.) PCB 83-10
)
)
) ILLINOIS ENVIRONMENTAL)
) PROTECTION AGENCY,)
)
) Respondent.)

ORDER OF THE BOARD (by J. Anderson):

On August 5, 1983 the Agency moved for reconsideration or, alternatively, rehearing of the Board's June 30, 1983 Opinion and Order in this matter. In that action, the Board reversed the Agency's denial of an operating permit to Frink's Pecatonica liquid waste storage and treatment facility. Frink's filed its objections to the Agency's motion on August 19, 1983. On September 1, 1983, the Agency moved for leave to file a response instanter, which motion is hereby granted.

Frink's argues that the Agency's alternative motions should be denied on the grounds of lack of jurisdiction. Frink's contention is that, since the Board took final action on this matter on the last day of the Section 40 statutory decision period as extended by Frink's waivers, absent an additional waiver, the Board has no authority to take further action.

In Hamman v. IEPA et al., PCB 80-153, 44 PCB 73, November 19, 1981 the Board rejected this contention in the context of another Section 40 permit denial appeal,

"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 pendency 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." (44 PCB at 78.)

As the Third District Appellate Court found it unnecessary to reach this issue in its review of the Hamman case in Mathers et al. v. PCB et al., No. 81-741 (June 28, 1982), slip op. at 13, there is still a lack of directly controlling authority.

The Board notes that the Modine case, albeit in the Section 38 variance context, is factually on all fours with this one. The Board had rendered its decision on the last day of the decision period as extended by Modine's waivers, and granted an Agency motion for reconsideration. The court held that "sections [5(d) and 26 of the Environmental Protection Act], when read together, provide the necessary authority for the respondent to hold rehearings as a procedure to correct any error, omission, or oversight found in its first consideration". The Board sees no reason to retreat from its holding in Hamman that it has authority to conduct rehearings and reconsiderations in Section 40 permit denial appeal actions.

The Agency's motion for reconsideration is granted. It raises several points, only some of which the Board will address, the other arguments therefore being rejected without comment.

The Agency's first point of argument concerns the Board's holding that Chapter 7, regulatory "solid waste management sites", is by its terms inapplicable to Frink's liquid waste storage and treatment facility. The Board must reject the contention that the question of applicability of the Chapter was untimely raised, and hence waived, by Frink's in its reply to the Agency brief [cf. Supreme Court Rules 341(e)(7) and 341(g)]. The Agency itself assumed the applicability of the Chapter in arguing the applicability of certain rules thereof in its own brief.

The Agency suggests that the Board may have been insufficiently aware of the consequences of its Chapter 7 ruling, as the Agency did not argue the effect upon itself and permittees of pinpointing a regulatory gap. The Agency states that it has been left "without clear standards in issuing permits", which requires a case-by-case approach to permit issuance. The Agency notes that "[s]uch a situation obviously acts to lessen public confidence in the permit system and could well lead to needless disputes between the Agency and permit applicants" (Motion, p. 3).

The Board has long been aware that Chapter 7 has not kept pace with the changes in the field of waste disposal since the Chapter's adoption in 1973. This was most recently acknowledged in the Board's June 16, 1983 Order in R82-21 and R82-22, dismissing Chapters 7 and 9 updating dockets upon Agency withdrawal of its proposal. While accepting the Agency's assessment that the rulemaking could not and should not effectively be pursued until January, 1984 because of various technical, drafting, and budgetary problems, the Board stated that it felt "an urgent need to promulgate regulations to revise existing Chapters 7 and 9,

which continue to prove themselves to be sadly out-of-date, under-comprehensive, and under-specific". The Board finds no "clear standards" in Chapter 7 applicable to the Frink's facility. Maintenance of a polite fiction that the Chapter contains standards governing a facility not contemplated at the time of the Chapter's passage would serve only to maintain false public confidence.


Concerning the integrity of Tanks 1 through 4, the Agency has requested that the Board consider new evidence contained in a discovery deposition given by Frink's consulting engineer Erwin Toerber. The deposition was given July 11, 1983 in an enforcement action pending in Winnebago County, People v. Olson and Frink's Industrial Waste, Inc., No. 82-CH-26. Frink's argues that such would constitute an improper use of a discovery deposition under the Illinois evidence rules. The Board need not reach that issue. Since 1972, the Board has consistently held that "the issue is, in a Section 40 hearing, whether the Agency erred in denying a permit, and not whether new material that was not before the Agency persuades the Board" the Agency was right or wrong, Soil Enrichment Materials Corp. v. IEPA, PCB 72-364, October 17, 1972. The Board's view of its role in Section 40 actions has been confirmed by reviewing courts e.g. Mathers, supra, slip op. at 8-10. The Board therefore cannot properly consider the Toerber deposition.

Upon reconsideration, the Board reaffirms its June 30, 1983 Opinion and Order in this matter. The Agency shall issue a permit consistent with that Opinion and Order within 15 days of the date of this Order, if no permit has been issued due to the pendency of the reconsideration motion. No stay of the instant Order will be granted by the Board pending pursuit of any appellate review of this matter.

IT IS SO ORDERED.

Board Member D. Anderson concurred.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 8th day of September, 1983 by a vote of 5-0.


 Christan L. Moffett, Clerk
 Illinois Pollution Control Board