

ILLINOIS POLLUTION CONTROL BOARD
June 19, 2008

TOM EDWARDS,)
)
 Petitioner,)
)
 v.) PCB 08-42
) (Third-Party RCRA Permit Appeal)
 PEORIA DISPOSAL COMPANY and)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondents.)

PETITIONER TOM EDWARDS APPEARED *PRO SE*;

BRIAN J. MEGINNES AND JANAKI NAIR, ELIAS MEGINNES, RIFFLE 7 SEGHETTI, P.C. APPEARED ON BEHALF OF RESPONDENT PEORIA DISPOSAL COMPANY; and

MICHELLE M. RYAN APPEARED ON BEHALF OF RESPONDENT ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

OPINION AND ORDER OF THE BOARD (by N.J. Melas):

Pro se petitioner in this matter, Mr. Tom Edwards, initiated this third-party appeal of a permit implementing the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§6901 et seq. The permit was issued November 27, 2007 by the Illinois Environmental Protection Agency (Agency or IEPA) to Peoria Disposal Company (PDC). The text of the petition framing the issue in this proceeding is a March 3, 2008 amended petition that includes 13 points, pointing out deficiencies Mr. Edwards perceives in the issued permit and overall Sate landfill oversight process.

Due to the massive size of the permit record the Agency amassed during its pre-issuance public hearing and comment period, the record was not filed until April 14, 2008, two days in advance of the April 16, 2008 public hearing held by the Board. Only PDC produced a witness at hearing. Mr. Edwards did not present sworn testimony, although he made remarks as public comment. Five Peoria County residents provided oral public comment at hearing. The Board received 182 public comments during the course of this proceeding.

In response to the request made by the Agency and PDC in their briefs, in this opinion the Board compares the issues raised in Mr. Edwards' amended petition with those that he raised during the course of the Agency hearing and public comment period prior to issuance of the permit. Under the provisions of the Environmental Protection Act (Act) 415 ILCS 5/1 et seq., (2006), the Board's procedural rules at 35 Ill. Adm. Code 101 and 105, and the Board's RCRA permit appeal rules at 35 Ill. Adm. Code 705, the Board concludes that Mr. Edwards raised only

three of the thirteen issues before the Agency issued the permit. The Board accordingly strikes the ten issues not previously raised, finding that they are not properly before the Board.

The Board then examines the three remaining issues to determine whether Mr. Edwards succeeded in proving that the permit as issued would violate the Act or Board rules. The Board finds that Mr. Edwards has not met his burden of proof as these three properly raised issues. The Board further finds that the Agency and PDC have pointed to ample evidence in the record that the permit as issued is consistent with the Act and Board rules.

The Board accordingly affirms the Agency's issuance of the permit as written.

PROCEDURAL HISTORY

The Petition For Review, As Variouslly Amended

Original Filings

This matter came before the Board on three letters filed pro se by Mr. Tom Edwards and received by the Board on January 4 and 7, 2008. Mr. Edwards sought either an extension of time to file a third-party appeal of the November 27, 2007 RCRA Part B permit, or that the Board proceed with an appeal based on his filings. The permit at issue here, as submitted by Mr. Edwards on January 7, 2008, states, in the first paragraph that:

A Part B permit is hereby granted pursuant to the Resource Conservation and Recovery Act, Illinois Environmental Protection Act, and Title 35 Ill. Adm. Code Parts 702, 703, 705, and 720 through 729 to the Peoria Disposal Company facility to construct/maintain and operate a waste management facility involved in the treatment, storage and disposal of hazardous waste and specified non-hazardous waste. Peoria Disposal Company is located at 4349 Southport Road, Peoria, Illinois. Am. Pet. Permit at 1.

By order of February 21, 2008, the Board found that Mr. Edward's filing, received January 7, 2008 but dated and postmarked January 1, 2008, was a timely-filed petition for review under the Board's "mailbox" rule at 35 Ill. Adm. Code 101.300(b)(2). The Board's February 21, 2008 order denied motions to dismiss filed by PDC and the Agency, but found deficiencies in the petition. Tom Edwards v. Peoria Disposal Company and IEPA, PCB 08-42 (Feb. 21, 1008) (hereinafter PCB 08-42). The Board ordered Mr. Edwards to file an amended remedying the deficiencies outlined in the order, and complying with all requirements for filing a permit appeal as set out in the Act, 415 ILCS 5/1 et seq., (2006), the Board's procedural rules at 35 Ill. Adm. Code 101 and 105, and the Board's RCRA rules at 35 Ill. Adm. Code 705.

Among other deficiencies noted were that Mr. Edwards did not serve respondents with his filings. Additionally, the Board found that the initial filings failed to: specify the Section of the Act under which the appeal is brought, address the requirements of 35 Ill. Adm. Code 705.212(a), and make clear whether Mr. Edwards is appearing on his own behalf or on behalf of

an organization. See 35 Ill. Adm. Code 101.400(a) specifying when a person can appear himself or must appear through an attorney at law.

March 3, 2008 Amended Petition

Mr. Edwards' amended petition (Am. Pet.) is a 3-page document, to which is attached a copy of testimony he states that he provided at the Agency hearing held February 28, 2007, and a notice of filing and proof of service. On the first page, Mr. Edwards clarifies that he is appealing on his own behalf, so that no attorney is necessary as specified in 35 Ill. Adm. Code 101.400(a)(1)¹. He states that the statutory basis for his appeal is Sections 40(b) and (c), and that he participated in the Agency's public hearing on the renewal permit as required by 35 Ill. Adm. Code 705.212(a). *Id.* As proof of his participation, Mr. Edwards attached a photocopy of a single page document headed "PDC's Toxic Waste Landfill—Testimony at EPA's Public Hearing." Am. Pet. at 4.

On the first page of the amended petition, Mr. Edwards states in part:

Succeeding pages include:

- Amended text for this appeal (pages 2 and 3).
- Copy of original testimony of this appellant at IEPA's public hearing Feb. 28, 2007, in Peoria on IEPA's proposed new permit to replace the present one issued in 1987, (This copy was submitted at the hearing; a second also mailed to insure inclusion.). [The attachment is a photocopy of a single page document headed "PDC's Toxic Waste Landfill—Testimony at EPA's Public Hearing." Am. Pet. at 4.]
- Proof of service. Am. Pet. at 1.

The text of the "amended appeal" includes 13 points, pointing out deficiencies Mr. Edwards perceives in the issued permit and overall State landfill oversight process. The Board accepted the petition for hearing by order of March 6, 2008. The Board found that Mr. Edwards' March 3, 2008 amended petition addressed all of the petition deficiencies identified in the Board's February 21, 2008 order. The Board accepted the amended petition for hearing, finding that the petition as a whole was not duplicative or frivolous within the meaning of Section 40(b) of the Act and the Board's procedural rules. *See* 415 ILCS 5/40(b) (2006) and 35 Ill. Adm. Code 101.202. PCB 08-42 (Mar. 6, 2008). But, in accepting this matter for hearing, the Board stated that it

in no way intends to preclude the respondents from the timely filing of any motions to strike or dismiss any of the 13 points of error alleged by Mr. Edwards in the petition.(footnote omitted). The Act, the procedural rules, 35 Ill. Adm.

¹ The caption in the February 21, 2008 order listed petitioner as "Tom Edwards/River Rescue" to reflect the typewritten signature on Mr. Edwards' filings. But, the Board's Clerk had originally docketed the petitioner as "River Rescue". Beginning with the March 6, 2008 order, the caption reflects the clarification in the March 3, 2008 amended petition that Mr. Edwards is the sole petitioner.

Code 705.212(a), and precedential case law establish the proper scope of a third-party RCRA permit appeal. *Id.* at 4.

The Board assigned Hearing Officer Carol Webb to this proceeding. Ms. Webb managed the case during the pre-hearing stage.

Agency Record

While the Board had originally directed the Agency to file its record on or before April 2, 2008, the Agency was unable to make a complete filing until April 14, 2008. This late filing was pursuant to agreement of the parties, as the record is comprised of 5 full banker's boxes of documents². On or about April 1, 2008, the Agency did, however, circulate to the parties the portions of the record pertaining to petitioner's hearing comments at the Agency proceeding. PCB 08-42 (hearing officer order Apr. 2, 2008).

Board Hearing

Board Hearing Officer Bradley P. Halloran conducted a public hearing in Peoria on April 16, 2008.³ Petitioner Edwards appeared at hearing and presented only argument and public comment, declining to present sworn testimony. See Tr. 11-12, 24.

PDC presented one witness: George Armstrong, Vice President of engineering and consulting services for PDC Technical Services, Inc. Mr. Armstrong gave his professional opinion that the permit as issued would not violate the Act or Board regulations. Tr. at 45-53. The respondent Agency appeared by its counsel at hearing, but presented no case. Tr. at 54.

Five persons presented unsworn public comment articulating questions and concerns about various portions, operations, and activities at the PDC landfill and the Agency's oversight of the operation as a whole.

Briefing and Written Public Comments

At the close of hearing, the hearing officer set an agreed briefing schedule. Petitioner Edwards' brief was timely filed on May 5, 2008. Mr. Edwards also filed a supplemental brief by telefax on May 7, 2008 that had not been part of the established schedule. Mr. Edwards did not serve these documents on either respondent.

² With leave of the Board, the Agency filed the record electronically as well as in hard copy. All of the electronic documents in the Agency record have been designated with the following notation: 143812003-PDC Appeal-Doc. #__, or for large drawings 143812003-PDC Appeal-Doc. #__, or for large drawings 143812003-PDC Appeal-Inc-Doc. #__. Consistent with the citation convention in the parties' briefs, the documents in the Agency record will be referenced as "R.Doc. #". See Agency Brief at 1, n.1 and PDC Brief at 6, n.1.

³ The transcript of the Board's hearing is cited as "Tr.".

Respondents PDC and the Agency each filed briefs on May 19, 2008⁴, in which they addressed the substantive issues of the appeal as well as renewing their earlier jurisdictional objections.

Pursuant to the schedule set by the hearing officer, public comments were due on or before May 7, 2008. Including comments filed as late as May 22, 2008, the Board's Clerk has numbered and docketed 182 public comments.⁵ The gist of the comments is that area residents are concerned about the possibility of environmental harm occurring from the PDC facility, including from closed portions of the facility, active portions, and any proposed expansions.

FACTS

Agency Proceedings

PDC timely filed its application for the renewal permit at issue here on May 7, 1997; the applications consisted of 17 volumes containing roughly 5,000 pages. Tr. at 50-51. On November 27, 2007, the Agency issued a 197-page final RCRA Part B hazardous waste management permit renewal to PDC's landfill in Peoria County, Illinois:

A Part B permit is hereby granted pursuant to the Resource Conservation and Recovery Act, Illinois Environmental Protection Act, and Title 35 Ill. Adm. Code Parts 702, 703, 705, and 720 through 729 to the Peoria Disposal Company facility to construct/maintain and operate a waste management facility involved in the treatment, storage and disposal of hazardous waste and specified non-hazardous waste. Peoria Disposal Company is located at 4349 Southport Road, Peoria, Illinois. R.Doc. 133, p. 8.

The renewal permit is sometimes known as Permit B-24R.

The Agency's pre-permit issuance procedures included an Agency public hearing, held on February 28, 2007, and an extensive public comment period prior to issuance of the subject permit. As previously stated, the Agency amassed a record of its activities consisting of 5 boxes of documents. Consistent with the requirements of 35 Ill. Adm. Code 705.211, the Agency record includes the response to public comments. R.Doc. 131.

Mr. Edwards presented limited comments at the Agency hearing. R.Doc. 71. Mr. Edwards timely filed three written comments during the public comment period which closed March 30, 2007. R.Doc. 69, 79, 83. Mr. Edwards also filed four more public

⁴ The parties' briefs are cited, respectively as "Edwards Brief", "Agency Brief", and "PDC Brief".

⁵ This total does not include the written comments submitted by public commenters Bill Cook and Joyce Blumenshine at hearing following their oral comments, as these were separately acknowledged in the April 23, 2008 hearing officer report. The Board notes that Ms. Blumenshine filed another public comment on May 7, 2008, docketed as PC 182.

comments on May 6, 2007, June 18, 2007, and July 16, 2007. R.Doc. 102, 120, 121, and 128.

Appeal to Board

Mr. Edwards' petition for review contains 13 points, some of which are also discussed in his briefs. In the interests of space, the Board does not include them in their entirety here. Each of the point has several facets, so that a short description does not include all issues that may be raised in a single point. But, at the risk of oversimplification, the following is an overview of the 13 points raised:

Amended Petition Point 1(A): Need better permit oversight; questions why permit volume limits not already reached;

Amended Petition Point 1(B): Questions continued operation, favors closure;

Amended Petition Point 1(C): Questions expansion of landfill capacity since 1987;

Amended Petition Point 1(D): Questions requested height expansion;

Amended Petition Point 2: Questions data collection by PDC, says Agency should do it;

Amended Petition Point 3, Brief Points 1 and 10: Questions representativeness of samples from monitoring wells;

Amended Petition Point 4, Brief Point 3: Questions shift from quarterly to semi-annual monitoring;

Amended Petition Point 5, Brief Point 1: Questions why permit does not spell out frequency of Agency permit inspections, and details concerning Agency site inspections;

Amended Petition Point 6, Brief Point 7: Questions Agency assertion that there is no air pollution from site, explaining he found gas vents during "an unauthorized visit";

Amended Petition Point 7, Brief Point 10: Questions why PDC tests its own well samples, suggests independent testing;

Amended Petition Point 8: Questions why permit requires only semi-annual testing for 24 chemicals, when USEPA [United States Environmental Protection Agency] authorizes deposit of 843 toxic chemicals;

Amended Petition Point 9: Requests "better surveillance and controls" of volatile chemicals;

Amended Petition Point 10, Brief Point 9: Questions lack of mercury monitoring, requests ban;

Amended Petition Point 11, Brief Point 8: Questions safety of “barrel trench,” “*i.e.* toxic waste buried in 1,000s of metal barrels” over aquifer;

Amended Petition Point 12: Questions why original permit calls only for upgradient wells, and why current permit requires only one downgradient well; and

Amended Petition Point 13: Questions Agency estimate of groundwater flow rate, suggesting flow rate “greatly accelerated” by high rate of pumpage in Peoria area

Finally, the Board takes administrative notice of several recent proceedings involving PDC that have come before the Board. Mention of these is germane, as many of the public commenters referred to events involved in these proceedings. These actions before the Board include:

- Peoria Disposal Company v. IEPA, PCB 08-25 (Jan. 10, 2008) (Board affirmed the Agency’s August 30, 2007 denial of PDC’s application for Class 3 modification of its RCRA Part B permit, finding that construction of the proposed residential waste landfill required proof of local siting approval under Section 39.2 of the Act, 415 ILCS 5/39.2 (2006) (appeal pending, No. 3-08-0030 (3rd Dist.));
- Peoria Disposal Company v. Peoria County Board, PCB 06-184 (June 21, 2007) (Board affirmed denial of siting approval for 2006 expansion application due to PDC’s failure to satisfy criteria of 415 ILCS 5/39.2(a)(i), (ii), (iii), (v) (2006) (appeal pending, No. 3-07-0435 (3rd Dist.)); and
- RCRA Delisting Adjusted Standard Petition of Peoria Disposal Company, AS 8-10 (accepted for hearing June 5, 2008) (pending petition to delist what PDC characterizes as the “stabilized residue generated by PDC from the treatment of K061 electric arc furnace dust” at PDC’s waste stabilization facility).

Board Hearing

At the Board hearing, and as a matter of public comment only, Mr. Edwards discoursed on various concerns, including the landfill expansion, queries concerning mercury-caused air and groundwater pollution, independent testing of water samples, overall oversight of the PDC operation, PDC’s acceptance of out-of-state waste, condition of the barrel trench in the old section of the landfill, Peoria County’s toxic release inventory, insufficiency of sampling generally, and belief that the Agency should cause the landfill to be closed or moved⁶. Tr. 5-25.

Respondent PDC, by its attorneys, reserved the right to renew its earlier jurisdictional objections. Tr. at 8. Mr. Armstrong, a licensed professional engineer, sponsored the three

⁶ PDC’s counsel interposed several objections to Mr. Edwards’ statements, challenging their relevancy to the 13 articulated appeal points and suggesting that Mr. Edwards was relying on facts not of record in this proceeding. *See, e.g.*, Tr. at 9, 15, and 24. The hearing officer allowed Mr. Edwards’ presentation to continue, but asked the Board to note counsel’s objections. *See, e.g.*, Tr. at 25.

exhibits presented by PDC⁷. Mr. Armstrong gave his professional opinion that the permit as issued would not violate the Act or Board regulations.

The five area residents who provided oral, unsworn, public comment, were:

- Bill Cook, a Peoria County resident, professor of chemistry and former chemist with the State Water Survey and Daley Laboratories (now associated with PDC Laboratories) voicing concerns about mercury migration from the landfill (Tr. at 26-29 and public comment submitted by the hearing officer with hearing documents (*see* PCB 08-42 (hearing officer’s hearing report, Apr. 23, 2008)));
- Joyce Blumenshine, Peoria resident and volunteer with the Heart of Illinois Sierra Club, presenting nine questions concerning generally monitoring issues, the schedule for closure of the landfill, downgradient monitoring of the “barrel trench” portion of the old landfill, and landfill elevation and expansion (Tr. at 29-35 and public comment submitted by the hearing officer with hearing documents (*see* PCB 08-42 (hearing officer’s hearing report, Apr. 23, 2008))); Tracy Fox, a Peoria County resident, suggesting remand of the permit back to the Agency for restriction on capacity expansion, increased closure and monitoring activities, and review of the activities of the waste stabilization plant (Tr. at 36-41); and
- Joyce Harrant, a resident who lives within a mile of the landfill, questioning the adequacy of the Agency’s response to public comments on the permit renewal as it relates to possible migration of contaminants from the barrel trench. Tr. at 41-44.

STATUTORY AND REGULATORY PROVISIONS

The general standard of Agency permit issuance is articulated in Section 39(a) of the Act, providing in part that “it shall be the duty of the Agency to issue. . . a permit upon proof by the applicant that the facility . . . will not cause a violation of this Act or of regulations thereunder.” 415 ILCS 5/39(a) (2006).

Agency issuance of RCRA permits is governed by Section 39(d) of the Act, 415 ILCS 5/39(d) (2006), and the procedures in the Board’s RCRA rules at 35 Ill. Adm. Code Part 705. (Under Section 7.2 and 22.4 of the Act, these rules are required to be “identical in substance” to rules adopted by the United States Environmental Protection Agency. *See* 415 ILCS 5/7.2 and 22.4.)

Section 40(b) of the Act authorizes a third-party appeal of a RCRA permit. 415 ILCS 5/40(b) (2006). The Board’s procedural rules state that:

[i] f the Agency grants a RCRA permit for a hazardous waste disposal site, a third party, other than the permit applicant or the Agency, may petition the Board for a hearing to contest the issuance of the permit. . . . 415 ILCS 5/40(b)] 35 Ill. Adm.

⁷ These exhibits were: PDC Exh.1--Resume of George L. Armstrong; PDC Exh. 2—Agency-issued Operating Permit, dated April 24, 2002, and PDC Exh. 3—Environmental Laboratory Accreditation, dated June 28, 2007.

Code 105.204(c) (italics in original, designating quotation from statutory language).

Section 40(b) provides that if the Board determines that the petition is not duplicative or frivolous and that the petitioner is so located as to be affected by the permitted facility, the Board shall “hear the petition in accordance with the terms of [Section 40(a)] and its procedural rules.” 415 ILCS 5/40(b) (2006). The Board’s procedural rules governing permit appeals are codified at 35 Ill. Adm. Code Part 105.Subparts A and B.

Section 705.212(c) of the Board’s RCRA rules further provides that:

A petition for review must include a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period (including any public hearing) . . . ; in all other respects, the petition must comport with the requirements for permit appeals generally, as set forth in 35 Ill. Adm. Code 105.

RELEVANT ISSUES AND STANDARD OF REVIEW

The question before the Board in permit appeal proceedings is: (1) whether the applicant proves that the application, as submitted to the IEPA, demonstrated that no violation of the Act would have occurred if the requested permit had been issued; or (2) whether the third party proves that the permit as issued will violate the Act or Board regulations. Joliet Sand & Gravel v. PCB, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (3rd Dist. 1987); Prairie Rivers Network v. PCB, IEPA and Black Beauty Coal Company, 335 Ill. App. 3d 391, 401, 781 N.E.2d 372, 380 (4th Dist. 2002).

The Board’s review of permit appeals is limited to information before the IEPA during the IEPA’s statutory review period, and is not based on information developed by the permit applicant, or the IEPA, after the IEPA’s decision. Prairie Rivers Network v. IEPA and Black Beauty Coal Company, PCB 01-112 (Aug. 9, 2001), aff’d sub nom. Prairie Rivers Network v. PCB, IEPA and Black Beauty Coal Company, 335 Ill. App. 3d 391, 401, 781 N.E.2d 372, 380 (4th Dist. 2002); Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987). The record must contain evidence to support the issuance of the permit and the conditions attached to that permit. The Board reviews the entirety of the record to determine (1) if the record supports the IEPA’s decision, and (2) that the procedures used by the IEPA are consistent with the Act and Board regulations. The Board does not affirm the IEPA’s decision on the permit unless the record supports the decision. Des Plaines River Watershed Alliance, Livable Communities Alliance, Prairie Rivers Network, and Sierra Club v. IEPA and Village of New Lenox, PCB 04-88, slip op. at 12 (Apr. 19, 2007), appeal pending sub nom. IEPA and Village of New Lenox v. PCB, Des Plaines River Watershed Alliance, Livable Communities Alliance, Prairie Rivers Network, Sierra Club, Nos. 3-07-575 and 3-07-0819 (cons.) (3rd Dist.).

A permit appeal is not the proper forum for a citizen to generally challenge the Agency’s performance of its statutory duties. *See, e.g.,* Landfill Inc. v. PCB, 74 Ill. 2d 541, 387 N.E.2d 258, 265 (1978).

Preliminary Matters

Objections to Lack of Service of Edwards' Briefs

Mr. Edwards timely filed a 5-page closing brief on May 5, 2008. On May 7, he re-filed those 5 pages, amended by handwritten references to various numbered exhibits. The numbered exhibits are some 13-pages of “reference exhibits” accompanying the May 7, 2008 filing. The “reference exhibits” include newspaper articles, letters from Mr. Edwards addressed to Peoria County and to the Agency Director, and various charts: these documents contain identifiers and editorial comments in Mr. Edwards’ handwriting. There is no proof of service accompanying these documents

In their briefs, both the Agency and PDC state that Mr. Edwards did not serve them with his briefs. Agency Brief at 4-5, PDC Brief at 9. Noting that the Board had previously admonished Mr. Edwards about the service requirements of 35 Ill. Adm. Code 101.304(b) in its February 21, 1008 order in this case, the Agency suggests that the Board should sanction this behavior. The Agency states that, as a result, the Board should strike these “briefs” as provided by 35 Ill. Adm. Code 101.304(d) and 101.800(b)(5).

While the Board historically affords *pro se* litigants a certain amount of latitude as regards strict compliance with procedures, the Board finds here that petitioner Edwards has consistently disregarded his obligations as a petitioner in a quasi-judicial proceeding. Respondents are correct that the Board could justifiably strike Mr. Edwards’ briefs due to his failure to serve them with his briefs, particularly in light of the Board’s earlier admonition to him on this point. But, the Board will not strike these briefs, and will address any properly raised issues, given the level of public interest in this facility.

Motions to Strike Issues Not Properly Raised During Agency Proceeding or Otherwise Not Properly Before the Board

Agency Motion. In its brief, the Agency argues that several of the issues raised in Mr. Edwards’ briefs were not raised in his amended petition, and should be stricken as untimely raised. Agency Brief at 5. Moreover, the Agency argues, many of the issues Mr. Edwards raised in his petition, at hearing, and in his briefs were not raised during the Agency public comment period as required by 35 Ill. Adm. Code 705.212(c). *Id.* at 6. All of the issues the Agency believes should be stricken are those regarding:

- Leaks from new landfill section—Edwards Brief at 2, Item 4;
- Mercury volatilizing—Edwards Brief at 2, Item 9;
- 30 day reporting limit—Edwards Brief at 2, Item 4;
- Better oversight and independent inspections—Am. Pet., Item 1A, Edwards Brief at 2;
- Capacity, acreage, height—Am. Pet., Item 1, Edwards Brief, at 2,Item 2;
- “Pre-law” (older, closed) landfill section monitoring—Am. Pet., Item 1(A), Edwards Brief at 2;

- PDC collecting its own data and using its own lab for analysis—Am. Pet., Item 2, Edwards Brief at 4, Item 10; and
- Groundwater flow rate—Am. Pet., Item 13.

PDC Motion. In its brief, PDC also suggests that various points were never raised at the Agency hearing or in even late-filed comments during the Agency public comment period. PDC identifies these points as Amended Petition 1(A) (request for better Agency oversight), 1(C) improper capacity expansion), 2 (PDC vs. Agency data collection), 3 (Agency insurance of representative sampling), 4 (requested continued quarterly sampling), 5 (IEPA inspection frequency), 7 (gas venting), 10 (mercury testing), 11 (barrel trench safety), 12 (barrel trench testing), and 13 (groundwater flow). PDC Brief at. 8.

Mr. Edwards' Non-response. Petitioner's brief did not directly respond to either respondent's motions. Under Section 101.500(d) of the Board's procedural rules, a party may file a response to a motion within 14 days of service. But, the rule goes on to state that "[i]f no response is received, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board in its disposition of the motion." 35 Ill. Adm. Code 101.500(d). Accordingly, Mr. Edwards is deemed to have waived objection to the granting of the motion.

Board Analysis. The Board's order of March 6, 2008 accepting the amended petition for hearing specifically stated that the Board would entertain motions to strike or dismiss any of the 13 points of error alleged by Mr. Edwards in the petition. PCB 08-42, slip op. at 4 (Mar. 6, 2008). As the Agency's voluminous record had not been filed, neither the respondents nor the Board could at that time adequately verify that Mr. Edwards had properly complied with the standing requirements of 35 Ill. Adm. Code 705.212(c).

Having compared the amended petition with the transcript of the Agency hearing and all public comments Mr. Edwards filed, the Board agrees with the respondents that several issues are not properly before the Board. The Board accordingly strikes the following items from the amended petition: Item 1 in its entirety, Item 2, 3, 4, 5, 7, 10, 11, 12, and 13. The Board will not discuss or consider arguments concerning these points.

The result here is consistent with prior Board precedent. *See American Bottom Conservancy v. IEPA and United States Steel Corporation - Granite City Works*, PCB 06-171, slip op. at 5-6 (Sept. 1, 2006) (dismissing portions of petition for permit review under 415 ILCS 5/40(e)(2006) where issues not raised in Agency proceeding), appeal pending sub nom. *United States Steel Corporation and IEPA v. PCB and American Bottom Conservancy*, No. 5-07-0285 (5th Dist.).

Respondents' Other General Objections

Agency. The Agency has also raised other general objections to the way Mr. Edwards has presented his case, both at hearing and in his briefs. The Agency states that Mr. Edwards has failed to anywhere assert that the permit will violate the Act or Board regulations. The Agency contends that:

By failing to even assert the very claim upon which Petitioner holds the burden of proof, Petitioner has waived any argument on that issue, and the Board must find in favor of IEPA and PDC. Agency Brief at 3.

The Agency goes on to remark that, since Mr. Edwards has not provided any sworn testimony, his statements can be afforded only the lesser weight given to statements not subject to cross-examination, as provided in 35 Ill. Adm. Code 101.628 (b).

Because they were all given as Public Comment, IEPA was not allowed to cross examine Petitioner on any of his statements. This hinders IEPA's ability to assist the Board in determining whether any real legal issues exist in this case. Petitioner almost entirely failed to cite to any portion of the record in this case, making it further difficult to parse out any potentially valid concerns from general dislike of the landfill. Mere assertions of error without supporting argument or citation do not merit consideration and can be rejected outright. *Prairie Rivers*, supra, 781 N.E.2d at 408-09. Petitioner's unsworn statements do not meet his burden to prove that the permit would violate the Act or regulations. IEPA generally supports the right of the public to make comments. However, Public Comment without any supporting references or citations should not be allowed as the entire basis for an appeal. Agency Brief at 3.

PDC. For its part, PDC also believes that two classes of issues raised in the amended petition are not within the scope of permit issuance or review:

Mr. Edwards is apparently seeking either changes to the law of permit issuance and Agency oversight (points 1, 6, 11 and 13) or amendment of Permit B-24R to provide for gratuitous additional testing, without stating the basis for same (points 2-5,7-10 and 12). Neither of these requests poses a proper issue for permit review. PDC Brief at. 6.

PDC also commented on Mr. Edwards' failure to provide sworn testimony, noting that the only sworn testimony in the record is that of its witness, Mr. Armstrong. Mr. Armstrong testified that it was his professional opinion that "the permit as issued will not violate the . . . Act or Board regulations", and "Mr. Edwards' amended petition provides no reasonable basis for finding that the permit would violate the . . . Act or Board regulations." Tr. at 51-52. PDC seems to suggest that this undisputed testimony should be dispositive of the case.

Board Analysis. A petitioner's failure to present sworn testimony in support of his case is not necessarily fatal to his claim. The Board's review of permit appeals is limited to information before the Agency during the statutory review period, and is not based on information developed by the permit applicant, or the Agency, after the Agency's decision. . Prairie Rivers Network v. IEPA and Black Beauty Coal Company, PCB 01-112 (Aug. 9, 2001), aff'd sub nom. Prairie Rivers Network v. PCB, IEPA and Black Beauty Coal Company, 335 Ill. App. 3d 391, 401, 781 N.E.2d 372, 380 (4th Dist. 2002); Alton Packaging Corp. v. PCB, 162 Ill.

App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987). Based on this precedent, the Board on its own motion strikes the “reference exhibits” attached to the Edwards’ brief, on the grounds that he has failed to demonstrate that these materials were in the Agency record.

Mr. Edwards’ failure to assert how the Act or Board rules would be violated by the Agency’s issuance of this permit is unacceptable, and could be fatal to a petitioner’s claim. As the Agency points out above, this leaves it up to the respondents and the Board to “parse out any potentially valid concerns from general dislike of the landfill.” Agency Brief at 4. Mere assertions of error can be rejected outright, as the Prairie Rivers court said, see 781 N.E.2d at 408-09. But, the Board will not do so in this case. Given the depth of the public interest in this case, the Board will examine the evidence in the record on those issues Mr. Edwards raised before the Agency.

While agreeing with PDC and the Agency that Mr. Armstrong’s undisputed opinion testimony is the only sworn testimony in this case, the Board cannot find that it disposes of the issues. While the Board credits the sworn testimony of opinion witnesses, the Board is not bound by any witness’ opinions on the ultimate issues of law or application of law to fact in a case.

PDC correctly notes that some of Mr. Edwards’ points of contention involve suggested changes to the law of permit issuance and Agency oversight. To the extent that the Board has not stricken these points, the Board will discuss them below.

ISSUES PROPERLY BEFORE THE BOARD

The Board sets out below, verbatim, the complete text of the issues Mr. Edwards properly raised. All emphasis is in the original text, and no citations have been omitted. Following each point are the respondents’ arguments concerning the point, and the Board’s disposition of the point.

Amended Petition Point 6, Brief Point 7

[I]EPA firmly asserts there is no air pollution from the site. HOWEVER, [I]EPA was totally unaware that PDC has vents on the side to release gaseous fumes to the air. In an unauthorized visit, I found such vents, smelled their extremely acrid emissions, and reported their location to the [I]EPA. (To his credit, when I told the [I]EPA inspection manager he acknowledged he was unaware of the vents and asked me where they were.)

[I]EPA has said there is some dust around where the waste hauling trucks unload, says it is captured, and that elsewhere on the site any dust pollution is inconsequential.

BUT new research elsewhere shows gaseous toxic air pollutants from such landfills are very consequential to unborn babies and older people. Am. Pet. at 2-3, Edwards Brief at 3.

Agency. The Agency asserts that it does not contest that Mr. Edwards may have smelled something unpleasant on the site, and that he may have seen pipes. But, the Agency states, there is no evidence in the record of “secret gas vents”. The site plans indicate the presence only of leachate collection sumps and manholes, as well as groundwater monitoring wells and piezometers. R.Doc. Inc. 33; Agency Brief at 9-10.

The Agency also notes that the RCRA permit at issue has addressed air pollution issues as well as it can, given that there is no specific provision in the RCRA rules for air monitoring at a hazardous waste landfill unit. *See generally*, 35 Ill. Adm. Code 724.101-724.201 and 724.400-724.417. The Agency states that Section 9(a) of the Act, 415 ILCS 5/9(a)(20060, prohibits a person from “causing or allowing air pollution in Illinois”, and that this requirement is included verbatim in the permit. R.Doc. 133 at Page V-5, Section C.18. The Agency further notes that its Bureau of Air also has permitting responsibility at this site, as evidenced by the Lifetime Operating Permit issued by IEPA’s Bureau of Air for this facility, which PDC introduced at hearing. PDC Exh. 2. Accordingly, the Agency concludes there is no evidence in this record that this permit will violate Section 9(a) of the Act, or any related requirements.

PDC. PDC additionally adds that there is no general requirement in the Act or Board regulations that a permit issued by the Agency Division of Land address air pollution with the exception of compliance with 35 Ill. Adm. Code 724. Subparts AA, BB, and CC. PDC asserts that the PDC No. 1 facility is exempt from these Subparts because PDC does not operate any of the processes subject to Subpart AA or accept the types of wastes which would render Subparts BB or CC applicable.” *See R. Doc. 131 the Agency's Response to Public Comments at 25.* Land and air are dealt with separately by the Agency under the Act and Board regulations. Therefore, PDC concludes that the fact that Permit B-24R does not address air pollution does not constitute a violation of the Act or Board regulations. PDC Brief at 18-19.

PDC also challenges the correctness of Mr. Edwards' assertion that there is air pollution emanating from the site. PDC asserts that it is in full compliance with its air permit, and cites the Agency conclusion in its Response to Public Comments that “[t]his landfill represents a very small source of air emissions and has a negligible effect on air quality.” R.Doc. 131 at 36; *see also* 22-23.

Board Analysis. The Board finds that Mr. Edwards has failed to prove that the permit as issued will violate the Act or Board regulations. Based on the evidence in the record, the Board finds that issuance of the RCRA permit is consistent with requirements of the Act and Board rules.

Amended Petition Point 8

The federal EPA authorizes 843 toxic chemicals to be put in this landfill. Yet still another, unauthorized and worrisome PCBs, have been reported there, too. But just semi-annual checking for only 24 chemicals is mandated under the revised permit. Am. Pet. at 3.

Agency. The Agency explains that the permit requires a minimum of 50 constituents to be monitored each year, with approximately one-half of those being monitored semi-annually. R.Doc. 133 at VI-6 – VI-8. The RCRA regulations do not require monitoring for all possible constituents in a waste management unit, but rather an approved list of “indicator parameters,” which are designed to be a reliable indicator of hazardous constituents in the groundwater. 35 Ill. Adm. Code 724.198(a). This regulation provides four factors to be considered in determining indicator parameters, including waste constituents and how they behave, detectability and background levels. Agency Brief at 11.

The Agency states that these factors were explored by PDC in its application and evaluated by the Agency in reviewing the application. R.Doc. 008 at 22-30. The Agency included indicator parameters that met the required criteria in the permit. R.Doc. 133 at VI-6 – VI-7, Lists G1 and G2. In addition, if there is statistically significant evidence of contamination, PDC is required to monitor all wells for the entire Appendix I list, consisting of over 200 constituents. 35 Ill. Adm. Code 724.198(g); R.Doc. 133 at VI-14, J.10. The Agency notes that PDC has actually conducted such monitoring in the past. See R. Doc. 010 at 356-364. The Agency accordingly concludes that petitioner’s objection to testing for “only 24 chemicals” (Am. Pet. at 3, Item 8) is baseless. Agency Brief at 11 (emphasis in original).

The Agency also addressed the related concern about the change from quarterly to semi-annual monitoring. See Am. Pet. Point 4, Edwards Brief Point 3. PDC requested the change. R.Doc. 008 at 20, 30, 32. The Agency noted that the RCRA rules require monitoring “at least semi-annually” in both detection and compliance monitoring programs. See 35 Ill. Adm. Code 724.198(d) and 724.199(f). The Agency states that the permit accordingly complies with applicable law.

PDC. PDC relates that, under its RCRA permit, it is in the “detection monitoring” program of 35 Ill. Adm. Code 724.198. R.Doc. 133 at VI-I; see also 35 Ill. Adm. Code 724.198.

Only those facilities that can demonstrate that no impacts to groundwater have occurred are allowed to operate in the detection monitoring program. (*See* discussion of higher intensity “Compliance Monitoring” in the Agency’s Response to Public Comments, R.Doc. 131 at 19, 31, 35-36). PDC has more than 25 years of experience with monitoring and reporting groundwater quality at its facility. Thousands of parameter analyses have occurred including analysis of the entire 40 CFR Appendix IX list of hazardous constituents. Based on the 25 plus years of groundwater quality monitoring, and the fact that PDC is in detection monitoring, the Agency selected appropriate parameters for the routine detection monitoring program. Again, the parameter selection is consistent with Illinois law and regulation. The Agency may at any time require modification of Permit B-24R to include additional parameters should the Agency determine it is necessary to protect human health and the environment. (*See* R.Doc. 133 at VI(K)). Therefore, the fact that Permit B-24R requires analysis of groundwater monitoring samples for 33 parameters semiannually and 67 parameters annually does not violate the Act or Board regulations. PCB Brief at 22.

Board Analysis. The Board finds that Mr. Edwards has failed to prove that the permit as issued will violate the Act or Board regulations. The Board finds that both the Agency and PDC have pointed to record evidence demonstrating that the monitoring regime contained in the permit is consistent with the Act and regulations.

Amended Petition Point 9

The 843 allowable hazardous chemicals are predominantly volatile, *i.e.*, will evaporate into the air, we are informed. We need better surveillance and controls. Am. Pet. at 3.

Agency. The Agency did not specifically address this point. It did, however, generally address the fact that air monitoring is not required in RCRA permits. Agency Brief at 9.

PDC. PDC asserts that the Act and Board regulations concerning monitoring for particular constituents take into account the volatility of certain of those constituents. Citing to the Agency Response to Public Comment, PDC notes that it may not accept hazardous waste requiring treatment prior to disposal that cannot be treated through the inorganic waste stabilization processes used at the facility. R.Doc. 131 at 23. Because the PDC No. 1 facility is not designed to treat hazardous organic wastes, PDC is prohibited from receiving hazardous organic wastes that need treatment for organic constituents prior to disposal. PDC asserts that, as required by the conditions in Permit B-24R, an incoming hazardous waste therefore will have an average volatile organic chemical concentration of less than 500 parts per million by weight, or 0.05%. R.Doc. 131 at 23-24

PDC also remarks that disposal of these volatile wastes has been factored into the air permit for the PDC No. 1 facility issued by the Agency, Division of Air Pollution Control. PDC Exh. 2. Therefore, PDC concludes that the fact that Permit B-24R does not require additional surveillance and controls to account for the alleged volatility of certain constituents at the facility does not violate the Act or Board regulations.

Board Analysis. The Board finds that Mr. Edwards has failed to prove that the permit as issued will violate the Act or Board regulations.

CONCLUSION

The Board strikes 10 of the 13 objections to the PDC permit made by petitioner Edwards in his amended petition, finding that he had not properly raised them to the Agency at hearing or in public comment as required by 35 Ill. Adm. Code 705.212(c). As to the remaining three issues properly before the Board, the Board finds that Edwards has failed to demonstrate that issuance of the permit would violate the Act or Board rules. On the other hand, the Agency and PDC have pointed to ample evidence in the record demonstrating that permit issuance is consistent with the Act and Board regulations. The Board accordingly affirms the Agency's issuance of the permit as written.

The Board agrees with the parties that many of the concerns expressed by Mr. Edwards and echoed by oral and written public comments go to the general structure and growth of the landfill siting and regulatory system in Illinois; these concerns are best addressed to the legislature.

The Board appreciates the public concern about the continued existence of this landfill, the belief that the original landfill could have been placed in a better location, and the fear that “something could go wrong” if the landfill is not immediately closed. But, it is the long-established Illinois precedent that the Agency cannot lawfully deny the requested renewal permit here on the basis of general concerns.

In an early permit appeal involving a hazardous waste landfill, the Board found that the Agency improperly denied two permits and added impermissible conditions to another in Waste Management of Illinois, Inc. v. IEPA, PCB 84-45, 84-61, 84-68 (cons.) (Oct. 1, 1984 and Nov. 26, 1984), aff’d. sub nom. IEPA v. IPCB, 115 Ill. 2d 65, 503 N.E.2d 343 (1986). As the Board held in 1984,

In its resolution of the Frink’s case [Frink’s Industrial Waste, Inc. v. IEPA, PCB 83-10 (June 30, 1983)], the Board had previously determined that permit issuance was mandatory upon proof that a particular portion of a facility . . . would not cause pollution. Here, as in that case, the Board can find no factual nexus, or linkage, suggesting that there is some specific and particular previous design or operation aspect . . . [in the application]—as opposed to any general objection based on their mere existence—that indicates that [the facility] has not been designed or will not be operated to meet RCRA standards.

Again as in Frink’s, the Board found that permit denial could not take the place of an enforcement action revoking permits to close a facility about which the Agency had groundwater concerns related to another, closed, portion of the facility. Waste Management of Illinois, Inc. v. IEPA, PCB 84-45, 84-61, 84-68 (cons.) (Oct. 1, 1984 and Nov. 26, 1984)), aff’d. sub nom. IEPA v. IPCB, 115 Ill. 2d 65, 503 N.E.2d 343 (1986).

The Board accordingly ordered issuance of two permits and struck some (but not all) conditions of the third permit. In its review of the Board’s decision, the Illinois Supreme Court found that

Having conducted our own review of these conditions, we agree with the appellate court, which affirmed the board’s finding, that the conditions imposed usurped the Board’s rulemaking authority, the public’s right to participation, and WMI’s due process right to contest findings which would trigger administrative action. IEPA v. IPCB, 115 Ill. 2d at 72.

Here, the record fails to demonstrate that the Agency permit was issued in violation of the Act or Board rules. In the event something does “go wrong” at the landfill, the problems can and must be addressed consistent with the permit. If not, an enforcement action can be initiated under

Section 31 of the Act and Part 103 of the Board's procedural rules. 415 ILCS 5/31 (2006) and 35 Ill. Adm. Code 103.

This opinion constitutes the Board's findings of facts and conclusions of law.

ORDER

The Board affirms the November 27, 2007 RCRA Part B permit renewal issued by the Illinois Environmental Protection Agency to Peoria Disposal Company, finding that petitioner Edwards has failed to demonstrate that issuance of the permit will cause a violation of the Environmental Protection Act or the Board's regulations.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2006); see also 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; see also 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on June 19, 2008, by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board