ILLINOIS POLLUTION CONTROL BOARD
October 25, 1990

CENTRALIA ENVIRONMENTAL SERVICES, INC.,	)	
Petitioner,	)	PCB 89-170 (Permit Appeal)
v.	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

RONALD A. NIEMANN APPEARED ON BEHALF OF PETITIONER.

BRUCE L. CARLSON APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by M. Nardulli):

This matter comes before the Board on a petition for review filed October 23, 1989 by Centralia Environmental Services, Inc. (CESI) in which CESI contests the Illinois Environmental Protection Agency's (Agency) denial of a supplemental development permit and a supplemental operating permit for Area IV of CESI's landfill site. Hearings were held on December 18, 19, 20, 27 and 28 of 1989 at which no members of the public attended.

STATEMENT OF FACTS

CESI's regional pollution control facility is located on a forty acre parcel of land near Centralia, Illinois in Marion County. The site was initially permitted for development as a non-regional pollution control facility on February 9, 1984. (R. at 147-57.) This permit was issued to Industrial Salvage, Inc. and John Prior, president, as owner and operator. (Id.) Progressive development of the site was to occur throughout six portions of the site designated as Areas I through VI. (Id. at 34-40.)

In 1986, the development permit was transferred to Jackson County Landfill, Inc., d/b/a Industrial Services Inc., as operator. Ownership of the property itself remained, and still remains, with John Prior. The development permit was modified to allow site development as a regional pollution control facility. Also in 1986, an operating permit was issued for Area I to Industrial

Salvage, Inc. as owner and Jackson County Landfill, Inc. d/b/a Industrial Services, Inc. as operator. (Id. Ex. 8 at 674-90.) Area I was permitted for disposal of municipal waste and non-hazardous special waste; however, the disposal of special wastes which would yield fluid when subjected to the "paint filter test" was prohibited. Jackson County Landfill Inc. received a supplemental permit to allow the "retrofitting" of a leachate collection system so that liquid special waste could be accepted at the site. After failure to obtain Agency approval of the leachate collection system, the operator obtained a supplemental permit allowing for the removal of the leachate system.

On January 28, 1988, CESI purchased the business assets of Jackson County Landfill, Inc. (Id. at 937.) CESI submitted an application for transfer of all existing permits and for an operating permit for Areas II and III. (Id. at 835-959.) At that time, the Agency and William T. Schmidt, president of CESI, discussed the need to investigate the alleged unauthorized disposal of waste in Area II and the need for remedial action to address allegations by a former employee that waste had been disposed of below grade in a 50 feet by 500 feet section located in Areas III and IV (this area will be referred to as the "investigation area" or "remediation area"). (Id. at 835-36, 868-69, and 883.) Existing permits were transferred to CESI and the Agency issued CESI an operating permit for Areas II and III on March 21, 1988 (Permit No. 1987-299-SP). (R. at 979-1007.) In granting CESI's permit, the Agency required that CESI conduct a remedial investigation of the 50 feet by 500 feet suspect area pursuant to an Agency-approved plan of action. (R. at 980.) The Agency also required CESI to file a report detailing the extent of waste disposed of below grade. (R. at 981.) Additionally, the Agency imposed the condition that "in the event that the boring program reveals waste has been disposed of 'below grade', no operating permits for additional areas of this landfill will be issued by the Agency until an Agency approved remedial action plan is satisfactorily implemented pursuant to an issued supplemental development permit" (Permit No. 1987-299-SP condition no. 2(c)(ii)). (R. at 981.)

On June 14, 1988, CESI submitted a plan of action outlining the procedures for investigation and remediation of the suspect area as required by the March 21, 1988 permit. (R. at 1017-27.) On July 7, 1988, the Agency approved the plan of action, subject to certain modifications and clarifications. (R. at 1024-25.) After the removal process began in August of 1988, the Agency requested that CESI aid in exploring allegations that hazardous wastes had been disposed of in the area by setting aside any drums encountered in the excavation process. Twelve drums were set aside for Agency inspection. Analysis of one of the drums revealed the presence of organic solvents, including toluene, ethylbenzene and substituted benzenes. (Id. at 537-42.) In October of 1988, CESI contacted the Agency to discuss the waste removal process and

boring program for the investigation area. CESI indicated that its investigation revealed that it was likely that waste had been deposited below permitted levels and sought permission to remove the waste. The Agency agreed that the waste should be removed but also informed CESI that backfilling was not to occur until the boring program was completed. However, on October 5, 1988, CESI began filling the excavation area with recompacted clay. Following completion of the backfilling, borings were conducted in the investigation area. CESI submitted a report detailing the results of the investigation which stated that the borings did not encounter any waste. (R. at 1140-42.)

On June 29, 1989, CESI submitted a supplemental development permit application as required by the March 21, 1988 permit condition regarding the remediation plan. (R. at 1315-18.) On September 21, 1989, CESI submitted an addendum to the application seeking to strike condition no. 2(c)ii from the supplemental permit for Areas II and III (Permit No. 1987-299-SP). On September 27, 1989, for reasons to be discussed below, the Agency denied CESI's application and request to strike. (R. at 1494-96.) On August 25, 1989, CESI submitted an application for a supplemental operating permit for Area IV. (R. at 1425-65.) For reasons to be addressed below, on October 6, 1989, the Agency denied CESI's application. (R. at 1504-05.)

On October 23, 1989, CESI filed its petition for review with the Board contesting the Agency's denial of both the supplemental development permit and the operating permit. On May 10, 1990, the Board entered an interim opinion and order finding that the Agency had failed to comply with Section 39(a) of the Act which requires that the Agency set forth in its denial statements the specific sections of the Act and regulations which may be violated if the permit were granted. (Centralia Environmental Services v. IEPA, PCB 89-170 (May 10, 1990).) The Board remanded the matter to the Agency to cure this defect. On June 4, 1990, the Agency filed its amended 39(a) statement and on July 5, 1990, CESI filed its supplemental brief in response to the amended 39(a) statement.

PRELIMINARY ISSUES

Before addressing the substantive merits of this permit review, several matters must be addressed. In its petition for review, CESI requests that the Board "[s]trike the requirement that the Petitioner cannot receive an operating permit for Area IV until a supplemental development permit is issued as a condition of the March 21, 1988 operating permit ... ." (Petition for Review at 1.) As noted above, section 40(a)(1) of the Act provides that an applicant may seek Board review of the Agency's imposition of a condition in a permit where the applicant files a petition for a hearing before the Board within 35 days of the Agency's permit decision. (Ill. Rev. Stat. 1987, c. 111 1/2, par. 1040(a)(1).) CESI failed to seek Board review of the Agency's imposition of

condition no. 2(c)ii in the March 21, 1988 permit in a timely manner. More than two years have passed since the Agency issued the permit imposing the condition. Therefore, CESI has waived its right to challenge the imposition of that condition.

Additionally, in its post-hearing brief, CESI has included a "Memorandum In Support Of Acceptance Into Evidence Of Petitioner's Exhibit No. 50." CESI requests that the Board admit exhibit 50 into evidence and overrule the hearing officer's decision that this evidence is irrelevant and should not be admitted. Exhibit 50 is a study prepared by CESI's engineering consultants which details and summarizes the Agency's issuance of administrative citations to "landfills or dumps" between October of 1986 through May of 1989. The Agency objected to the admittance of this evidence on the basis that it is irrelevant and beyond the scope of rebuttal. (Tr. at 1095.) The hearing officer deemed the evidence irrelevant and sustained the Agency's objection. (Tr. at 1099.)

CESI argues in its memorandum in support of the introduction of this evidence that such evidence should be admitted as rebuttal to the Agency's focus at hearing on aspects of CESI's conduct which may properly be the subject of an administrative citation. CESI asserts that such matters are not a basis for a permit denial, but states that "to the extent that the Board would consider [the Agency's] arguments regarding operational history, [CESI] prays that the Board will accept exhibit No. 50 ... which goes directly to the relative value of those citations."

CESI had ample opportunity at hearing to respond to the Agency's focus on the issuance of administrative citations to CESI and to raise relevancy objections. The Board fails to see how the evidence sought to be introduced by CESI relating to the Agency's issuance of administrative citations, pursuant to section 31.1 of the Act, to other pollution control facilities throughout the state is relevant to the inquiry at hand. (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1031.1.) The issue presented here is whether CESI has demonstrated that its applications, as submitted to the Agency, establish that no violation of the Act or Board regulations would occur if the permits were granted. This Board will not dilute the record with information which is irrelevant to this inquiry. Therefore, the Board upholds the hearing officer's determination that the evidence contained in exhibit 50 is irrelevant and should not be admitted into evidence.

AMENDED 39(a) STATEMENT

As noted above, the Board entered an interim opinion and order on May 10, 1990 remanding this matter to the Agency to cure deficiencies in its 39(a) statement. The reasons for the Board's interim opinion and order must again be discussed because CESI now challenges the adequacy of the Agency's amended 39(a) statement. In its May 10, 1990 opinion and order, the Board found that the

Agency failed to comply with Section 39(a) of the Act which requires that the Agency provide the applicant with a detailed statement of the reasons for denying a permit. Section 39(a) also requires that such statement include the sections of the Act and regulations which may be violated if the permit were granted. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1039(a).) The Agency's initial 39(a) statement failed to set forth the specific sections of the Act and regulations in support of permit denial. The Board noted that the purpose of section 39(a) is to provide the applicant with the specific information upon which the Agency based its denial so that the applicant may prepare his case with an eye toward the issue on review, i. e., whether the applicant has demonstrated that no violation of the Act or regulations would occur if the permit were granted. The Board concluded that fundamental fairness dictates that the Agency give notice of the statutory and regulatory bases for permit denial. In support of its decision to remand the matter to the Agency, the Board also concluded that if it were to "plug-in" the sections of the Act and regulations which would support permit denial at the Board review level, such conduct would violate the separation of permitting functions between the Agency and the Board as set forth in the Act. (Ill. Rev. Stat. 1989, ch. 111 1/2, pars. 1004(g), 1039 and 1040.) Therefore, the matter was remanded. The Agency filed an amended 39(a) statement containing references to the Act and regulations supporting denial. CESI chose not to exercise its opportunity, as provided in the Board's interim opinion and order, to request an additional hearing, but did file a supplemental brief in response to the amended 39(a) statement.

With this background, the Board addresses CESI's contention that the Agency's amended 39(a) statement is inadequate and fails to comply with Section 39(a) of the Act. The Agency's amended statement is identical to its original 39(a) statement except that the amended statement sets forth specific sections of the Act and regulations in support of each of the reasons for denial. In order to adequately address CESI's challenge to the amended denial statement, the amended statement is summarized below:

Supplemental Development Permit

1. "No hydrogeologic justification has been provided demonstrating that the one proposed additional groundwater monitoring well is adequate (and properly located) to detect any groundwater contamination resulting from filling the trench in Area IV with waste. (Ill. Rev. Stat. 1989, ch. 111 1/2, pars. 1012(a), 1012(d), 1021(d) and 1039(a); 35 Ill. Adm. Code 807.202(a), 807,205(a) and (c), 807.207(a), 807.301, 807.313, 807.314(e), 807.315, 807.316(a)(5), (a)(7) and (a)(8) and 807.502.)

2. "CESI's application suggests that the possibility of

groundwater contamination by organic compounds is not of concern and therefore proposes to construct the additional well using PVC and to omit organics as monitoring parameters for the groundwater. The possibility of organic contamination is of substantial concern and consequently the groundwater must be monitored for organics.. Constructing monitoring wells of PVC is not acceptable for purposes of conducting such monitoring." (Ill.Rev. Stat. 1989, ch. 111 1/2, pars. 1012(a), 1012(d) and 1039(a); 35 Ill. Adm. Code 807.202(a), 807.205(a) and (c), 807.207(a), 807.301, 807.313, 807.314(e), 807.315, 807.316(a)(7) and (a)(8), 807.316(a)(12) and 807.502.)

3. Pursuant to 35 Ill. Adm. Code 807.661, an annual evaluation of the trust fund serving as the instrument of financial assurance for closure/post-closure care should have been submitted to the Agency by February 23, 1989. Also, documentation of an annual payment of the trust fund should have been submitted by March 25, 1989. The Agency has not received either of these submittals." (Ill.Rev.Stat. 1989, ch. 111 1/2, pars. 1021(d), 1021.1 and 1039(a); 35 Ill. Adm. Code 807.205(a) and (c), 807.207(a), 807.301, 807.302, 807.601 and 807.661.)

Operating Permit for Area IV

1. The boring logs and permeability tests provided with the application were not adequate to demonstrate the presence of the clay liner with a minimum thickness of 10 feet and a maximum permeability of 1x10 -7 cm/sec required by condition no. 6 of Permit No. 1987-194-Sp because: (1) the location of boring no. 7 (monitoring well) is not given on the sketch showing the location of the test probes; (2) the surface elevations of the probes are not provided on the boring logs; (3) the brown sandy clay found between 7 and 10 feet of depth of boring ST-4 has not been tested for permeability; and (4) boring logs nos. 9-11 of the remedial action report dated October 31, 1988 show porous materials within ten feet of the top of the liner. (Id. at 1504.) (Ill. Rev. Stat. 1989, ch. 111 1/2, pars. 1012(a) and (d), 1021(d) and 1039(a); 35 Ill. Adm. Code 807.205(a) and (c), 807.207, 807.301, 807.302, 807.313, 807.314(e), 807.315 and 807.316(b).)

2. A September 25, 1989 pre-operational inspection performed by the Agency revealed the following deficiencies: (1) material deposited on top of the clay liner in the eastern quarter of Area IV so that no visual inspection could be made; and (2) failure to construct drainage controls and haul roads in accordance with the

plans included in Permit No. 1984-3-DE. (Id. at 1504-05.) (Ill. Rev. Stat. 1989, ch. 111 1/2, pars. 1012(a) and (d), 1021(d) and 1039(a); 35 Ill. Adm. Code 807.202(a), 807.205(a), 807.207, 807.301, 807.302, 807.313, 807.314(b) and (e), 807.315 and 807.316(b).)

3. Pursuant to 35 Ill. Adm Code 807.661, the Agency stated that CESI failed to submit an annual evaluation of the trust fund serving as the instrument of financial assurance for closure/post-closure care by the requisite date of February 23, 1989 and failed to submit documentation of an annual payment to the trust fund by March 25, 1989. (Id. at 1505.) (Ill. Rev. Stat. 1989, ch. 111 1/2, pars. 1021(d), 1021.1 and 1039(a); 35 Ill. Adm. Code 807.205(a) and (c), 807.207(a), 807.301, 807.302, 807.601 and 807.661.)

4. CESI had not obtained a supplemental development permit as required by condition no. 2(c)ii of Permit No. 1987-299-SP for the remedial area and, therefore, could not obtain an operating permit for Area IV. (Id.) (Ill. Rev. Stat. 1989, ch. 111 1/2, pars. 1012(a) and (d) and 1021(d) and 1039(a); 35 Ill. Adm. Code 807.202(a), 807.205(a), 807.207, 807.301, 807.302, 807.313, 807.314(e), 807.315 and 807.316(b).)

5. Since Area IV is an integral part of this facility, an operating permit for it cannot be issued until the existing problems of Areas I, II and III have been remediated. These problems include the increased potential for erosion, run-off, leachate migration and groundwater contamination caused by over-filling and over-steepening the slopes of Areas I, II and III. (Id.) (Ill. Rev. Stat. 1989, ch. 111 1/2, pars. 1012(a) and (d), 1021(p)(6), (p)(7), (p)(9) and (p)(10) and 1039(a); 35 Ill. Adm. Code 807.201, 807.202(a), 807.205(a) and (l), 807.207, 807.210, 807.301, 807.302, 807.303, 807.305, 807.310(b), 807.313, 807.314(e), 807.315, 807.316(b), 807.502, 807.504 and 807.621(e).)

CESI argues that the amended denial statement does not satisfy principles of fundamental fairness and that "[t]he Board and [CESI] remain in the dark as to the actual statutory and regulatory basis for denial ... ." (CESI Supp. Brief at 5.) CESI argues that the Agency has "thrown the book" at CESI "with instructions to [CESI] and the Board to 'take your pick'" and that by so doing, the Agency has deprived CESI of its opportunity to meet its burden of proof on this permit appeal. (Id. at 5, 7.) According to CESI, "[t]he manner of itemizing possible violations ... does not permit [CESI] the chance to refute all the possible combinations." (Id. at 8.) CESI also alleges that the amended letter is inadequate because it fails to specify "why the Act and regulations might not be met if

the permits were granted, as is clearly required by Section 39(a)(4)." (Id. at 5-6.)

The Board recognizes that in amending its 39(a) statement, the Agency has cited numerous sections of the Act and Board regulations which it states may be violated if the permits were granted. The "Section 39(a) denial statement requirements" are designed to provide the applicant with sufficient information to determine the bases for the Agency's permit denial. (City of Metropolis v. IEPA, PCB 90-8 (February 22, 1990).) The information in the denial statement frames the issues on review should the applicant chose to challenge the Agency's decision. In a permit appeal review before the Board, the burden of proof is on the applicant to demonstrate that the reasons for denial detailed by the Agency in its 39(a) denial statement are inadequate to support a finding that permit issuance will cause a violation of the Act or regulations. (Technical Services Co., Inc. v. IEPA, PCB 81-105 at 2 (November 5, 1981).)

CESI's challenge to the amended denial statement appears to be twofold: (1) that the sheer number of cited sections of the Act and regulations renders the amended denial statement inadequate under Section 39(a); and (2) that the amended denial statement fails to comply with Section 39(a)(4). Contrary to CESI's contention, the number of cited sections of the Act and regulations alone does not invalidate, or render inadequate, the Agency's amended denial statement. Given that this matter is dealing with two permit denials and eight stated reasons for denial, it is conceivable that numerous sections of the Act and regulations may be involved. CESI has made no attempt to support its contention that the Agency has simply "thrown the book" at CESI by arguing which sections of the Act and regulations cited by the Agency are an erroneous bases for permit denial. The Board cannot say that an applicant is denied fundamental fairness merely because the Agency's denial statement is complicated and requires a detailed analysis by the applicant in order to present his case on review. Therefore, the Board rejects CESI's contention that the amended denial statement fails to comply with Section 39(a) simply because the denial statement details numerous sections of the Act and regulations.

CESI's second contention is that the amended denial statement fails to comply with Section 39(a)(4) of the Act. Section 39(a)(4) provides that the denial statement shall include "a statement of specific reasons why the Act and regulations might not be met if the permit were granted." (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1039(a)(4).) The amended denial statement is paraphrased above. The Board finds that the eight points contained in the amended denial statement coupled with the cited section of the Act and regulations sufficiently set forth the reasons why the Act and regulations might not be met if the permits were granted.

DISCUSSION

Section 40(a)(1) of the Illinois Environmental Protection Act (Act) provides that an applicant who has been denied a permit may petition the Board for a hearing to contest the Agency's denial of the permit application. (Ill. Rev. Stat. 1987, c. 111 1/2, par. 1040(a)(1).) In such a permit appeal, the sole question before the Board is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Act would occur if the permit was granted. (Joliet Sand & Gravel v. IPCB, 163 Ill. App. 3d 830, 516 N.E.2d 955, 958 (3d Dist. 1987).) Before beginning its analysis, the Board notes that its review of this complex case has been made even more difficult by both parties failure to set forth complete arguments on the issues presented and their failure to cite to the record in support of the arguments raised.

To properly review this matter, it is necessary to understand how the permit of March 21, 1988 (Permit No. 1987-299-SP), which transferred the existing permits to CESI and permitted operations of Areas II and III, relates to the two instant permit denials. As a result of concerns that waste had been improperly disposed of above and below grade in the remediation area, when transferring the existing permits and granting the operating permits for Areas II and III, the Agency imposed several conditions in the March 21, 1988 permit. (R. at 979-989.) The Agency required that an approved remedial investigation of this 50 x 500 feet area take place and that all "above-grade waste be removed in accordance with an Agency approved plan of action." (R. at 980.) In the event that this investigation revealed that waste was disposed of below grade, CESI was to submit a report detailing the extent of waste disposed of below grade (Special Condition 2(c)(ii)). (R. at 981.) This condition also required that "[t]his report is to include a remedial action proposal and be in the form of a supplemental development permit application." (R. at 981.) Furthermore, "no operating permits for additional areas of this landfill [would] be issued by the Agency until an Agency approved remedial action is satisfactorily implemented pursuant to an issued supplemental development permit." (R. at 981 (emphasis added).)

CESI submitted a plan of action to investigate and remediate the suspect area which was approved as modified by the Agency. CESI asserts that the Agency directed CESI to do things not required in the approved plan and the Agency asserts that CESI failed to comply with all the terms of the approved plan of action.

On June 29, 1989, CESI submitted an application for a supplemental development permit "to fulfill Special Condition 2(c)(ii) of Permit 1987-299-SP [i.e., the March 21, 1988 permit]." (R. at 1315.) This application reported the extent of waste disposed of below grade and set forth a remediation plan. (Id.) The Agency denied CESI's application for a supplemental development

permit. (R. at 1494-96.) CESI then submitted an application for an operating permit for Area IV. (Agency Rec. at 1425-26.) In denying the supplemental operating permit for Area IV, the Agency gave as one of its denial reasons, the failure to satisfactorily implement a remedial action for the suspect area in accordance with a supplemental development permit as required by Condition No. 2(c)(ii) of the March 21, 1989 permit. (Agency Rec. at 1505.) Because a supplemental development permit was not obtained, the Agency denied the application for a supplemental operating permit for Area IV. (Id.)

The above discussion is intended to illustrate how the instant permit denials are tied to the conditions imposed in the March 21, 1988 permit. An understanding of this interrelatedness is also important in addressing CESI's contention that the Agency has improperly used the permit process as a substitute for enforcement. Because the Board agrees to some extent with this contention, we will discuss first those denial reasons which the Board finds to be an improper use of the permit process as a means of enforcement and, therefore, an insufficient basis for permit denial.

Denial reason no. 4 relating to the supplemental operating permit refers to condition 2(c)(ii) of permit no. 1987-299-SP and basically states that the operating permit is denied because the supplemental development permit for remedial action was denied. As noted above, CESI waived its right to challenge the imposition of condition 2(c)(ii) in the March 21, 1988 permit. However, this waiver does not prevent the Board, in the instant permit appeal, from reviewing the propriety of the Agency's denial reason premised on that same condition. The Board finds that condition 2(c)(ii), which holds hostage any future operating permits pending Agency approval of the remedial plan for dealing with below-grade waste in the remediation area, constitutes an impermissible use of the permit process as an enforcement tool. As such, the denial reason no. 4, which is premised upon condition 2(c)(ii), is an insufficient basis for denying the supplemental operating permit for Area IV.

The fifth reason given by the Agency for denying the supplemental operating permit for Area IV is that "[s]ince Area IV is an integral part of this facility, an operating permit for it cannot be issued until the existing problems of Areas I, II and III have been remediated." Permit issuance is mandatory upon proof that a particular portion of a facility will not cause pollution. (Waste Management v. IEPA, PCB 84-45, 84-61 and 84-68 at 37 (October 1, 1984).) Any existing problems with Areas I, II and III should be addressed by the Agency's enforcement of those permits already issued to the three areas of the facility. If the Agency has groundwater concerns as a result of the operation of areas other than Area IV, the proper mechanism to address those concerns is an enforcement action rather than the denial of a permit for Area IV. The Board has repeatedly stated that permit denial cannot

take the place of an enforcement action. (See e.g., Waste Management v. IEPA, PCB 84-45, 84-61 and 84-68 (October 1, 1984); Frink's Industrial Waste, Inc. v. IEPA, PCB 83-10 (June 30, 1983).) The denial of a permit for Area IV should stand or fall on whether CESI has proven that no violations of the Act or regulations would occur if that area was issued a permit; problems with the existing permitted areas should not be determinative of whether Area IV should be issued a permit. Therefore, the Board finds that denial reason no. 5 is an insufficient basis for denying the supplemental operating permit.

Denial reason no. 2 pertaining to the supplemental operating permit for Area IV provides that a pre-operational inspection of Area IV revealed the following deficiencies: (a) "[m]aterial has been deposited on top of the clay liner in the eastern quarter of Area IV and therefore no visual inspection could be made. All waste disposed of ... must be removed and disposed of at a properly permitted facility"; (b) "[t]he drainage control structures ... and the haul road have [not] been constructed in accordance with the plans included in Permit No. 1984-3-DE." This denial reason appears to have been taken almost verbatim from the inspector's report. (Agency Rec. at 1486.) Subsection (a) refers to conduct which has already taken place which the Agency apparently feels was improper, i.e., that waste was deposited on top of the clay liner. The Agency states in its brief that "[t]his was not waste from the investigation area, but was rather waste deposited in Area IV by CESI without a permit." (Agency Brief at 14.) The Board finds this allegation is properly the subject of an enforcement action and that such allegations are an insufficient basis for permit denial. Moreover, to the extent that such conduct is properly the subject of a permit denial, this matter appears to be addressed by denial reason no. 1 relating to the adequacy of the clay liner. Similarly, subsection (b) is based upon an alleged failure to comply with the terms of a previously granted permit. As such, these matters are the subject of an enforcement action rather than a bases for permit denial.

The Agency has cited 35 Ill. Adm. Code 807.601 and 807.661 as a basis for denying both the supplemental development permit and the supplemental operating permit for Area IV. Section 807.601 provides that "financial assurance is required of all sites which, on or after March 1, 1985, accept waste for disposal ... ." Section 807.661 provides that financial assurance may be met by establishing a trust fund. The Agency states that CESI has violated section 807.661 by failing to submit "an annual evaluation of the trust fund ... by February 23, 1989" and by failing to provide "documentation of an annual payment of the trust fund ... by March 25, 1989."

On February 23, 1988, CESI established a trust fund for financial assurance. (Agency Rec. at 938-48.) The calculated closure and post-closure amounts were based upon those costs

associated with Areas I, II and III which were permitted in March of 1988. (Id. at 940-42, 951-53.) While the Agency has not specifically stated the subsection of section 807.661 that would be violated if the permits were granted, based upon the date the trust fund was established and the dates stated in the Agency's denial letters, the Agency is apparently relying on subsections (d)(5) and (e) of section 807.661. Section 807.661(d)(5) provides that "[s]ubsequent annual payments must be made no later than 30 days after each anniversary of the first payment"; hence, the Agency's statement that no annual payment was received by March 25, 1989. Section 807.661(e) provides that "[t]he trustee must evaluate the trust fund annually as of the day the trust was created ... [and] must notify the operator and the Agency of the value within 30 days after the evaluation date."

CESI admits that it has failed to make a timely subsequent annual payment into the trust fund, stating that approximately $4,000 needs to be deposited into the fund. (Tr. at 698-700; CESI Brief at 28-29.) CESI argues, however, that its failure to comply with the requirements of section 807.661(d)(5) and (e) is not a proper basis for denying its permit applications. According to CESI, the "trust fund requirement" is a "pre-existing condition unrelated to the permit request." (Id.) CESI asserts that, to the extent it is in violation of the financial assurance requirements, such a violation is properly the subject of an enforcement action rather than a reason for denying its permit applications. Additionally, CESI cites section 39(a) of the Act which provides that "[e]xcept as otherwise provided in this Act, a bond or other security shall not be required as a condition for the issuance of a permit" and asserts that this section prohibits denial of the applications for the failure to submit adequate financial assurance. (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1039(a).)

CESI's reliance upon section 39(a) is misplaced. Section 39(a) specifically provides that no bond or security shall be required by the Agency as a condition to a permit unless the Act so provides. Regarding waste disposal operations, the Act does so provide as evinced by section 21.1(a) of the Act. (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1021.1(a).) Therefore, the Board rejects CESI's argument that section 39(a) of the Act prohibits requiring CESI to post security as a permit condition.

The Board now addresses CESI's argument that failure to comply with the financial assurance provisions is not a proper basis for permit denial. Section 21.1(a) of the Act provides that no person shall conduct any waste disposal operation without first posting a performance bond or other security for the purpose of insuring closure of the site and post-closure care in accordance with the Act and regulations adopted by the Board. (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1021.1(a).) Subpart F of the Board's regulations sets forth the procedures for satisfying the financial assurance requirement of section 21.1 of the Act and section

807.661 of that subpart provides for the establishment of a trust fund as an alternative means for meeting those requirements. "[T]he operator must make the first annual payment prior to the initial receipt of waste for disposal ... [and] ... must also, prior to such receipt of waste, submit to the Agency a receipt from the trustee for the first annual payment." (35 Ill. Adm. Code 807.661(d)(4).) As noted above, subsequent annual payments are due no later than 30 days after each anniversary of the first annual payment. (35 Ill. Adm. Code 807.661(d)(5).)

Although the Board disagrees with CESI's argument relating to section 39(a), the Board does agree that CESI's failure to update its annual payment in accordance with section 807.661(d)(5) is not a proper basis for denying either permit application. CESI's obligation to submit a subsequent annual payment exists independent of its desire to obtain a supplemental development permit and a supplemental operating permit. Any initial additional payments required to be paid into the trust fund as a result of issuance of the two requested permits would not be governed, at this time, by section 807.661(d)(5). If the requested permits were granted they would of necessity contain the condition that "the operator provide financial assurance in accordance with Subpart F." (35 Ill. Adm. Code 807.206(c)(6).) Financial assurance becomes due "before receipt of waste for disposal", not at the time of filing an application for a permit. (35 Ill. Adm. Code 807.602.) It cannot be said that issuance of the supplemental development permit and the operating permit would cause a violation of section 807.661(d)(5). By denying CESI's applications for a supplemental development permit and operating permit on the basis that it is in arrears in the trust fund, the Agency is improperly attempting to do by way of permit denial what is properly the subject of an enforcement action. Again, this Board has consistently rejected the propriety of such action on the part of the Agency. (See, WMI v. IEPA, PCB 84-45, 84-61 and 84-68 (consolidated) at 36-38; Frink's Industrial Waste, Inc. v. IEPA, PCB 83-10 at 13 (October 1, 1984).) The Board concludes that the Agency incorrectly based its denial of both requested permits on section 807.661(d)(5).

The Agency also erred in relying on section 807.661(e) as a basis for denying the requested permits. This section imposes a duty upon the trustee, not the operator, to submit its annual evaluation of the trust fund. (35 Ill. Adm. Code 807.661(e).) Therefore, the Agency's reliance upon this section as a basis for denying the requested permits is misplaced.

The Board will now address the remaining three denial reasons. The first reason given by the Agency for denying the supplemental development permit is CESI's alleged failure to provide hydrogeologic justification demonstrating "that the one proposed additional groundwater monitoring well is adequate, and properly located, to detect any groundwater contamination resulting from filling the trench in Area IV with waste." According to the

Agency, "[g]iven the fact that the procedures for determining the extent of waste filling in the trench area were not carried out in accordance with the plan approved by the Agency or the instructions given by the Agency, the groundwater monitoring needs to be designed to deal with the potential that waste was disposed of directly on top of the bedrock and that leachate from this waste may have contaminated the groundwater." In support of its denial, the Agency has cited various sections of the Act and regulations pertaining to standards for Agency issuance of permits and water pollution.

CESI states in its supplemental development application, which is in essence its remediation plan for dealing with waste disposed of below grade, that "[a]t the Agency's request a shallow drift well will be installed at the location specified by the Agency during our April 5th meeting. ... the shallow well will be situated outside of and hydraulically downgradient of the landfill's Area I. The Agency selected the location based upon the depth of refuse identified in the 10/31/88 Report of Investigation." (Agency Rec. at 1317.) CESI argues that the evidence shows that waste was not disposed of directly on top of the bedrock and that, therefore, the proposed well is sufficient.[1]

The Agency argues that, contrary to CESI's application, the Agency did not select the location of the additional well as proposed in CESI's application. According to the Agency, Mr. Liebman testified that the Agency did not specify the location of the well. The Agency also argues that the evidence indicates that waste was deposited on top of the bedrock causing concerns of groundwater contamination and that, therefore, the proposed additional well is insufficient to guard against such contamination.

Initially, the Board notes that the instant argument is another example of the parties' failure to cite to the record in support of their arguments. CESI has failed to cite to the record in support of its claim that the well location was agreed upon at an April 5th meeting. Similarly, the Agency relies upon Mr. Liebman's testimony but fails to cite to the record in support of that contention. Again, the parties' failure to reference the record where appropriate has made the Board's review of this matter

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[1] In support of this argument CESI has included with its brief several documents relating to the site's groundwater monitoring system ("Attachment 2"). These documents were never offered into evidence at the Board hearing and have been presented for the first time in CESI's brief. Therefore, the Board will not consider this information in its review of the permit denial because such information is outside the permit review record.

more burdensome and time consuming than necessary.

The agreed upon plan of action for investigating waste disposed of below grade was to remove the waste, map the excavated areas, complete the boring program which would determine the extent of the buried waste and liner material and, lastly, refill the area with recompacted clay. (R. at 1139.) CESI admits that it did not follow this course of action, but instead refilled the area with recompacted clay prior to conducting the boring program because of "inclement weather". (R. at 1141.) CESI points to the October 31, 1988 report of CESI's engineering consultant which states that the borings were observed by Gary Steele, investigator for the Agency who modified three boring locations, that boring B-1, which penetrated 20 feet below ground surface did not identify the top of hard bedrock and that the "borings identify no waste at the specified locations between the ground surface and top of bedrock." (R. at 1142; Tr. at 382-83.) This information and the boring logs were included with the supplemental development permit application. The Board's review of the record reveals one document which refers to an April 5th meeting, but does not refer to the contents of that meeting. (R. at 1319.) However, Mr. Timothy Sheehan, a professional engineer for Rapps Engineering, testified that he attended a meeting with Agency personnel on April 5, 1989 at which time the report was discussed. (Tr. at 397.) According to Sheehan, it was suggested "that if the supplemental [development] permit application was to include one additional monitoring well at a certain location ... that was adequate. We did not submit any [hydrogoelogic] justification as part of the application." (Tr. at 420.)

In support of its denial, the Agency cites to the testimony of Agency inspector Gary Steele; however, the citation is actually to the testimony of Christian Liebman, an Agency engineer. (Tr. at 816.) Mr. Liebman testified that "Gary Steele of our Field Operations Section had prepared some cross sections from the data that we had been provided with the submittal, and it showed that in the center of the trench area the clay had been completely breached and the bedrock had been exposed." (Id.) Mr. Liebman also testified that he did not recall Agency personnel directing CESI to locate the additional well at a particular location. (Tr. at 817-18.) Lastly, the Agency points to the testimony of CESI's consultant who stated that because the backfilling was done prior to the boring, he could not determine how much liner was remaining prior to backfilling. (Tr. at 431.)

Absent a specific regulation requiring all permit applicants to present hydrogeologic justification, the Agency's denial based upon CESI's failure to provide such information must be premised upon evidence in the permit record indicating that potential problems exist justifying the requirement that such information be submitted. However, the only evidence on this point which the Board has found in the record is that of CESI which establishes

that the borings did not indicate the presence of waste on top of the bedrock. The only refutation of CESI's evidence is the Agency's assertion that one of its inspector's "prepared some cross sections from the data ... [submitted] and it showed that ... the bedrock had been exposed." (Tr. at 816.) The Agency does not point to where in the record these "cross sections" exist, if indeed they do, nor has the Board's review of the record uncovered such a document. The Agency's denial reason raising the failure to provide hydrogeologic justification is premised upon its statement that such justification is needed because waste was disposed of on top of bedrock. The Board finds that the evidence indicates that waste was not disposed of on top of bedrock and, therefore, the Agency's stated denial reason is insufficient.

The second reason given by the Agency for denying the supplemental development permit is that CESI's application proposes to construct the additional well using PVC and to omit organics as monitoring parameters for the groundwater. The Agency asserts that the possibility of organic contamination is of substantial concern and consequently the groundwater must be monitored for organics. The Agency also finds the use of PVC in constructing the wells to be unacceptable. The Agency cites many sections of the Act and regulations in support of this denial reason the most important of which is 35 Ill. Adm. Code 807.314(e) which provides that "no person shall cause or allow the development or operation of a sanitary landfill which does not provide adequate measures to monitor and control leachate."

CESI contends that, while an analysis of the exhumed drums during the investigation of the remediation area revealed the presence of toluene and ethylbenzenes, use of PVC casing is appropriate particularly in light of the fact that there is no regulation prohibiting the use of PVC. (CESI Brief at 26-27.) CESI also notes that it was first informed of the presence of these organics at the permit hearing. (Id.) Without citing to the record, the Agency relies upon the testimony of Mr. Liebman as to why organic parameters should be included in the monitoring program and why PVC is inadequate. (Agency Brief at 21.)

The record establishes that a laboratory analysis of one of the drums staged during the investigation of the remediation area revealed the presence 310 ug/g (ppm) of toluene and 10 ug/g (ppm) of ethylbenzene. (R. at 537-42.) Agency field inspector Gerald Steele also testified about the contents of this report. (Tr. at 956-57.) Mr. Liebman also testified as to the need for monitoring for organics. (Tr. at 818-19.) According to Liebman, such monitoring is necessary because "groundwater can be heavily impacted by organics, and if all the groundwater is being tested for is inorganic parameters, that contamination would never be picked up." (Tr. at 818.) Liebman also testified that monitoring for organics is necessary because waste accepted at the site "typically contains organic compounds. The drums ... tested showed

that at least some of them contained organic compounds, and finally, ... there was some indication that T.O.C. at his site was elevated. By testing for specific organic compounds [it would be possible to] identify whether the source of this T.O.C. was the landfill or some other source." (Tr. at 818-19.)

The record establishes the legitimacy of the Agency's concern regarding possible groundwater contamination by organic compounds. The remaining question is whether the Agency properly denied CESI's application because it proposes the use of PVC in constructing the monitoring wells. Mr. Liebman testified that wells constructed with poly vinyl chloride (PVC), which is an organic compound, can impact the water that collects within the well. "When this happens, it is not possible to tell whether the PVC that is being detected is due to contamination of the groundwater by the landfill, or by the wellcasing." (Tr. at 819-20.)

The Board rejects CESI's contention that the Agency may not deny its permit application on the basis that CESI proposes use of PVC because there is no specific regulation prohibiting use of PVC. In Waste Management, Inc. v. IEPA, PCB 84-45, 84-61 and 84-68 at 18-19 (October 1, 1984), the Board noted the following:

> Part 807 itself does not specifically require groundwater monitoring, containing only a prohibition against development or operation of a site if 'damage or hazard will result to waters of the state' ... and an application requirement for a description of groundwater condition ... [and] an appraisal of the effect of the landfill on groundwater ... .' Groundwater monitoring was, however, clearly within the intent of Chapter 7 upon its adoption ... .

The Agency has the authority to deny a permit when the applicant has failed to demonstrate compliance with the Act or regulations. Here, the Agency found that CESI's proposed use of PVC would interfere with the groundwater monitoring system and would therefore fail to ensure that operation of the landfill would not result in water pollution in violation of 35 Ill. Adm. Code 807.313 and 807.315. Rejecting the use of PVC under the instant circumstances because such use would interfere with the groundwater monitoring of the site is a valid reason for denying CESI's application for a supplemental development permit.

The final denial reason to be addressed is the first reason given by the Agency for denying CESI's application for an operating permit for Area IV. The Agency states that the boring logs and permeability tests provided with the application are not adequate to demonstrate the existence of a clay liner with a minimum thickness of 10 feet and a maximum permeability of 1 x 10 -7 cm/sec required by condition no. 6 of permit no. 1987-194-SP for the following reasons: 1) the location of boring no. 7 (monitoring

well) is not given on the sketch showing the location of the test probes; 2) the surface elevations of the probes are not provided on the boring logs; 3) the brown sandy clay found between 7 and 10 feet of depth in boring ST-4 has not been tested for permeability; and 4) boring logs nos. 9, 10 and 11 of the Remedial Action Report of October 31, 1988 show porous materials (i.e., sand and sandstone) within 10 feet of the top of the liner.

Regarding CESI's failure to provide the location of boring no. 7, Mr. Rapps testified that this boring log was inadvertently included in the development permit application and that this boring log properly belonged in the supplemental operating permit application. (Tr. at 507-09.) Apparently, the Agency was not aware that this information was incorrectly included in the development permit application at the time it rendered its initial denial statement. (Tr. at 774-75.) However, given that CESI is not relying on boring no. 7 in support of its application for an operating permit for Area IV, the Board will not uphold the Agency's denial reason premised upon the failure to specify the location of boring no. 7.

CESI contends that the boring logs included with its application for an operating permit establish the existence of a suitable clay liner and that the surface elevations of those borings are not required to establish compliance with the Act and regulations. The Agency asserts that the failure to provide surface elevations on the boring logs renders uncertain the existence of the requisite liner material. According to the Agency, 10 feet of clay with a maximum permeability of 1 x 10 -7 cm/sec is necessary to ensure adequate measures to monitor and control leachate as required by 35 Ill. Adm. Code 807.314(e). (Tr. at 773.) CESI does not challenge the necessity of the clay liner as required by the Agency and, therefore, the only question remaining is whether the surface elevations are needed to establish the existence of a liner of sufficient thickness.

The Agency's denial for failure to provide surface elevations has merit. While the boring logs submitted by CESI show the thickness of different soils encountered while doing the boring and the depth of the boring, it is impossible to establish the vertical elevation of the boring. (R. at 1444-50.) Without this information, it is impossible to establish where a certain soil layer begins and ends. The Agency is concerned that while it is possible that ten feet of clay existed initially, that ten feet may have been located above the permitted elevation for the top of the liner when the area was excavated to permitted elevations. Consequently, the requisite clay liner material may no longer exist. The Board finds the Agency's concern that the failure to provide surface elevations on the boring logs raises uncertainties as to the adequacy of the clay liner is a valid basis for denying CESI's application for an operating permit for Area IV.

The Agency also relies upon the fact that the "brown sandy clay" found between 7 and 10 feet in boring no. ST-4 was not tested for permeability in support of its assertion that CESI failed to establish that the clay liner would have the requisite permeability. (R. at 1447.) CESI contends that, given the voluminous soil and permeability testing done at the site, the failure to test the permeability of the sandy soil in this single boring is not a sufficient basis for denying the permit. (Tr at 510.)

CESI submitted with its application a report of permeability tests done on the soil borings. (R. at 1442.) While the silty clay in ST-4 was tested for permeability, the sandy soil was not tested. Christian Liebman, an Agency engineer, testified that brown sandy soil would have a higher permeability than silty clay and that by failing to test the sandy soil, CESI was selectively sampling the soils for permeability. (Tr. at 777-78.) According to Liebman, the borings done in relation to the application for the operating permit are required to be closer together than the borings done in relation to the development permit because the former are designed specifically to demonstrate the requisite permeability of the liner. (Tr. at 778-79.) Liebman also testified that differences in geology exist from boring to boring at the site. (Tr. at 779.)

The Board finds that the Agency properly denied CESI's application because it failed to include the requisite information to establish the existence of liner material of a sufficient permeability. As noted above, CESI does not challenge the Agency's liner requirements for protecting groundwater. The Board finds that the Agency's information requirements are reasonably related to controlling leachate and the protection of groundwater. (35 Ill. Adm. Code 807.313, 807.314(e) and 807.315.)

Lastly, the Agency states that boring logs nos. 9, 10 and 11 of the remedial investigation report of October 31, 1988 establishes the existence of porous materials (i.e., sand and sandstone) within 10 feet of the top of the liner. (R. at 1140-61.) CESI asserts that this information was not submitted in support of its application for an operating permit for Area IV but was submitted in connection with the application for the supplemental development permit. (Tr. at 515-17.) According to CESI, these borings were taken after the excavation of the remediation area so that the liner was missing at the time these borings were performed. (Tr. at 517.) CESI points to the boring ST-1 submitted with its application which was taken after the backfilling occurred in support of its assertion that adequate liner material exists. The Agency has not attempted to refute CESI's contention that the information contained in the October report is superseded by the boring logs submitted with the application for an operating permit. The record supports CESI's assertion in this regard and, therefore, the Board finds that the

Agency's reliance on the borings contained in the remedial action report are an improper basis for denying the permit for failure to establish the sufficiency of the clay liner.

In summary, while revocation of a permit may be a proper remedy in an enforcement action, in many instances in this case the Agency is using permit denial as a method of enforcement. For the reasons stated above, the Board concludes that denial reason no. 2 relating to testing for organics and rejection of PVC in monitoring for groundwater contamination is a valid basis for denying CESI's application for a development permit. The Board also concludes that denial reason no. 1 relating to the adequacy of liner material is a sufficient basis for denying the operating permit for Area IV. All other remaining denial reasons are an insufficient bases for permit denial in this instance. Therefore, the Agency's denial of both permit applications is affirmed.

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

ORDER

For the reasons given above, denial reason nos. 1 and 3 relating to CESI's application for a supplemental development permit are reversed and denial reasons nos. 2, 3, 4 and 5 of the relating to the supplemental operating permit for Area IV are reversed. The remaining two denial reasons are upheld and, therefore, the Agency's denial of both permits is affirmed.

IT IS SO ORDERED.

J. D. Dumelle and B. Forcade concur.

Section 41 of the Environmental Protection Act (Ill. rev. Stat. 1989, ch. 111 1/2, par. 1041) provides for the appeal of final Orders of the board within 35 days. The Rules of the Supreme Court establish filing requirements.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 25th day of October, 1990 by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board