ILLINOIS POLLUTION CONTROL BOARD
January 19, 1989

VINCENT A. KOERS, alone, and in Conjunction with DANVILLE CITIZENS FOR CONTROL OF HAZARDOUS WASTE INJECTION,	)	
Petitioners,	)	
v.	)	PCB 88-163
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, and ALLIED-SIGNAL, INC.,	)	
Co-Respondents.	)	

ORDER OF THE BOARD (by J. Anderson):

This matter comes before the Board upon receipt of an October 13, 1988 Motion for Hearing and Appeal of Underground Injection Control Permit, No. UIC-WI-AC. The motion and appeal are brought by Petitioners Vincent A. Koers and the Danville Citizens For Control of Hazardous Waste Injection, who seek modification of the issued Underground Injection Control (UIC) permit to include permit conditions not required by the Environmental Protection Agency ("Agency").

On October 20, 1988, this Board, noting that the instant appeal is in the nature of a third party action, issued an Order requesting the parties to brief the issue whether such third parties have standing to challenge UIC permits and permit conditions, and to inform the Board whether this action is frivolous or duplicative of another proceeding as referenced in Section 40(b) of the Environmental Protection Act (Act), Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1040(b). The parties were given until November 15, 1988 to file their brief.

On October 28, 1988, respondent Allied-Signal, Inc. (Allied) filed a Motion to Dismiss the petition, describing its motion as "an initial response to the Board's October 20, 1988, Order" (pg. 1). On November 2, 1988, the Agency filed its Brief in Response to Board Order of October 20, 1988. On the following day, November 3, 1988, this Board issued an Order which, inter alia, deferred decision on Allied's motion pending appropriate responses and extended the briefing schedule from November 15 to November 28. The Board requested that the briefs include "some discussion of the third party appeal issue in relation to the Board's mandate to adopt rules "identical in substance" to USEPA's RCRA and UIC rules and any inter-relationship between

RCRA and UIC permits, and how it may relate to the history of adoption and amendments to Section 40(b) of the Act" (pg. 1). The Board's Order went on to specifically identify such previous Board Opinions and Orders, federal rulemakings (Federal Register) and Public Acts which appear to be germane to the issue raised by the Board (pg. 2).

Allied filed its Memorandum In Support of Allied-Signals' Motion To Dismiss on November 23, 1988. Petitioners filed their Memorandum of Law on November 30, 1988. Although Petitioners' memorandum was received two days late, it appeared to have been prepared and sent to the Board on November 24, 1988. In view of the likely delaying effect of the Thanksgiving holiday on mail deliveries, the Board will accept the Petitioner's Memorandum of Law as filed instanter.

The Agency filed no additional brief in response to the Board's November 3, 1988 Order.

Issues Presented; Jurisdiction

A number of issues are raised or alluded to by the Petitioners in their petition and by Allied in its motion; however, the threshold issue, whether a third party appeal of a UIC permit is authorized by law, is dispositive of the Board's jurisdiction to consider the remaining issues.

In their Memorandum of Law, Petitioners conclude that "[t]he term 'RCRA permit' as used in the Illinois Act, Section 40(b) is not excluding UIC permits, but in fact specifically includes them and all other forms of RCRA permitting, as provided in 40 CFR 124.19" (Pet. Memo., 5). If this is so, this Board has jurisdiction to consider other facets of this case.

As Allied indicates in its Memorandum In Support of its Motion to Dismiss, prior to the enactment of Section 40(b) of the Environmental Protection Act, it was settled law that third parties lacked any right to appeal the issuance of permits under the Act (Allied Memo., 5, citing Landfill, Inc. v. Illinois Pollution Control Board, 74 Ill.2d 541, 387 N.E.2d 258 (1978)). Effective January 1, 1980, Public Act 81-856 created subpart (b) of Section 40 to carve out an exception to this rule as follows:

> (b) If the Agency grants a permit to develop a hazardous waste disposal site, a third party, other than the permit applicant or Agency, may petition the Board within 35 days for a hearing to contest the issuance of the permit. Unless the Board determines that such petition is duplicitous or frivolous, or that the petitioner is so located as to not be affected by the permitted facility, the Board

> shall hear the petition in accordance with the terms of subsection (a) of this Section and its procedural rules governing denial appeals, such hearing to be based exclusively on the record before the Agency. The burden of proof shall be on the petitioner. The Agency and the permit applicant shall be named co-respondents.
>
> The provisions of this subsection do not apply to the granting of permits issued for the disposal or utilization of sludge from publicly-owned sewage works.

This statutory provision was enacted, as Allied notes, more than five months prior to the adoption of the core federal regulations defining the scope and outline of the federal RCRA program (Allied Memo., 5). As Allied also notes, "[o]nce the federal RCRA and UIC program regulations appeared, the language of Section 40(b) was changed to its present form, which restricts third-party appeal rights to appeals concerning 'RCRA permits for hazardous waste disposal sites'." Allied Memo., 6, citing Illinois Public Act No. 82-320" (sic*). Specifically, P. A. 82-380 amended Section 40(b) by inserting "RCRA" before "permit" and by replacing the words "to develop" with the word "for" in the first clause. In addition, as Allied notes, this Public Act also added Section 39(d) and (e) to the Act (formerly, Sections 39(c) and (d), respectively) which separately and exclusively govern the issuance of RCRA and UIC permits (Allied Memo., 6). The Board notes that P. A. 82-380 also added Section 11(a)(3) to the Act, which makes specific reference to the Safe Drinking Water Act (SDWA), P. L. 93-523, as the basis for the UIC program, and makes no fewer than a dozen other changes in the Act establishing the UIC and RCRA programs as separate distinctively constituted and authorized programs under State law, including distinct civil penalties for violations (e.g., Sections 11(a)(6), 11(a)(8), 11(b), 12(g), 13(b)(1), 13(c), 13(d), 20(a)(4)-(9), 20(b), 22.4(a), 22.4(b), 42(b)(2) and 42(b)(3)).

In its Brief, the Agency takes a less complex approach to Section 40, but with the same results as Allied, noting simply that Petitioners in this case do not fall within the class afforded appeal rights by subsection (a) (since Petitioners are not "applicants"), subsection (b) (since the permit "was not a RCRA permit, but a UIC permit" (emphasis in original)), subsection (c) (since this was not a contested case under Section 39.3) or subsection (d) (since this was not an air pollution

* It is clear that Allied intended to refer to P.A. 82-380, rather than 82-320, in view of its reference to the original bill (SB 875), and its correct citation to P.A. 82-380 on page 7.

control permit). The Agency notes that dismissal of this proceeding does not leave the Petitioners without remedy in view of their right to institute an enforcement proceeding (Agency Br., second page).

In view of the foregoing, it is difficult for the Board to disagree with Allied's assertion that the General Assembly in crafting the amendments "clearly saw a difference between the two types of permits and drafted separate provisions to deal with each of them" (Allied Memos., 7-8). If Section 40(b) is to be construed as conferring third-party appeal rights in UIC cases, it must be founded upon some other statutory authority. The Board, as a creature of statute, cannot unilaterally, through its regulations or otherwise, expand or contravene the third-party appeal rights conferred by the Act. Hesseltine v. State Athletic Commission 126 N.E. 2d 631, 6 Ill. 2d 129 (1955); Chemetco, Inc. v. Illinois Pollution Control Board, 488 N.E. 2d 639, 140 Ill. App 3d 283 (Fifth Dist. 1986); Village of Lombard v. Illinois Pollution Control Board, 363 N.E. 2d 814, 66 Ill. 2d 503 (1977); and Illinois Power Co. v. Illinois Pollution Control Board, 484 N.E. 2d 898, 137 Ill. App. 3d 449 (appeal denied Fourth Dist. 1985).

Petitioners essentially contend that RCRA, as amended by the Hazardous and Solid-Waste Amendments of 1984 (HSWA; P.L. 94-580) has been so altered as to render the Landfill opinion "inapplicable" (Pet. Memo., 2) and to replace control of the UIC program in RCRA (Ibid, 3). This result, according to Petitioners, derives in part from the fact that Section 3.29 of the Illinois Act defines the term "RCRA Permit" as "those permits provided for in the federal RCRA (sic)" (Pet. Memo,, 3)*. The referenced HSWA amendments to RCRA, Petitioners assert, "that have added UIC control to RCRA jurisdiction, have had the effect of requiring combination of Section 39(d) and (e) of the Illinois Act" (Pet. Memo., 4).

Specifically, the Petitioners note: 1) that RCRA Section 3004(k), which was added by HSWA, includes injection wells within the definition of land disposal; 2) land disposal of hazardous wastes is subject to RCRA; 3) Federal regulations under RCRA include 40 CFR 124.19, which expressly authorizes third-party appeals of both RCRA and UIC permits; and 4) other federal

* For the record, Section 3.29 of the Act states as follows:

> "RCRA PERMIT" means a permit issued by the Agency pursuant to authorization received by the Agency from the United States Environmental Protection Agency under Subtitle C of the Resource Conservation and Recovery Act of 1976, (P.L. 94-580) (RCRA) and which meet the requirements of Section 3005 of RCRA and of this Act."

RCRA/HSWA regulations adopted under RCRA/HSWA on December 1, 1987 (52 FR 45788-45799) make clear that corrective action requirements for RCRA facilities apply equally to hazardous waste injection wells: USEPA states that "[h]azardous waste injection wells seeking UIC permits are simultaneously seeking RCRA permits" (Pet. Memo., 4-5, quoting USEPA at 52 Fed. Reg. 45792-45793).

For its part, Allied paints a different picture of the interrelationship between the RCRA and UIC programs at the federal level. Allied first notes that State rule 35 Ill. Adm. Code 705.212(b) is not "identical in substance" with its federal counterpart, 40 CFR 124.19(a), since the State rule does not contain the federal provision giving third-parties appeal rights in UIC permit decisions. Allied contends that in this regard the State rule need not be "identical in substance" to the federal rule for two reasons. First, Sections 13(c) and 22.4 do not require adoption of regulations identical in substance to all federal RCRA and UIC regulations. Since, under 40 CFR 145.11(a) and 271.14, the federal third party appeal provisions of 40 CFR 124.19(a) are not included within the "core set of UIC and RCRA regulations that generally must be included in State regulations" in order for the State to obtain authorization for these permit programs, it is not necessary for the State to adopt the federal requirement in this regard. Second, Allied contends, even if the mandates of Sections 13(c) and 22.4 could be considered as authority for adoption of the federal requirements, such general authority must yield to the express specific contrary provisions of Section 40(b), consistent with current case law (Allied memo., 10-11, citing People ex. rel. Myers v. Pennsylvania R. R. Co., 19 Ill. 2d 122, 129, 166 N.E.2d 86 (1960) and First Bank of Oak Park v. Avenue Bank and Trust Co. of Oak Park, 605 F.2d 372 (7th Cir. 1979)).

Allied next argues that the so-called "permit by rule" conferred by operation of 40 CFR 270.60(b) and 35 Ill. Adm. Code 703.141(b) upon UIC-permitted injection wells does not amount to a RCRA permit. Allied acknowledges that hazardous waste injection well operators are subject to the RCRA permit requirements enumerated in 40 CFR 270.1(c)(1)(i) and 35 Ill. Adm. Code 703.122(a). However, Allied contends, this approach was undertaken by USEPA as a means to obviate the need for overlapping permits governing a single regulated activity. As Allied sees it, to the extent that UIC permitting requirements lacked RCRA-required provisions, "the missing RCRA provisions could be imposed directly through the regulations without the need for separate RCRA permitting" (Allied Memo., 11-13). The permit by rule thus, according to Allied, "confers RCRA permit status by operation of the regulations; it does not provide that a UIC permit in any sense is a RCRA permit" (Allied Memo., 14; emphasis in original). This is particularly so, Allied urges, where, as here, the UIC permit at issue specifically recites that

it does not confer RCRA permit status by rule (Allied Memo., 15-16).

The Board is persuaded that Sections 13(c) and 22.4(a) cannot be viewed as requiring the result for which Petitioners contend. Under Petitioners' view, changes in federal laws and regulations under HSWA require a meaning which places the mandates of these Sections at odds with the specific language of Section 40(b). This is not the case.

First, as Allied and the Agency both noted, Section 40(b) addresses only "RCRA permits". It does so solely in connection with a special and narrow exception to the general rule that third-party appeals of permit decisions is not allowed. There is no mention of UIC permits or of the so-called "permit by rule".

Second, it is clear to this Board that the "permit by rule" is not, per se, a RCRA permit at all, but is rather a status, an administrative convenience by which, as Allied contends, multiple overlapping permit requirements can be avoided. In this connection, the Board is mindful of the consequences of a contrary view: specifically, what would be the nature of such a "permit by rule"? Would it be enforceable under Section 42(b)(2), or under Section 42(b)(3), which prescribes a substantially higher penalty?

Third, were the "control" of UIC permits passed to RCRA/HSWA as Petitioners contend, why was it necessary for the December 1, 1987 rulemaking, upon which Petitioners place great reliance, to specifically and separately provide for UIC facilities? A close examination of the language quoted by Petitioners discloses that USEPA's comments were taken out of context by Petitioners. Those comments were made in response to suggestions from several commenters to the effect that RCRA/HSWA Section 3004(a) should not apply at all to permit-by-rule facilities (e.g., permitted Class 1 injection wells). In rejecting this position, USEPA notes that permits issued under Section 3005(c) "include those for any facility conducting or planning to conduct treatment, storage or disposal of hazardous wastes" and that none of the adverse commenters had argued that Class 1 wells are "outside the bounds of the activities described" (52 Fed. Reg. 45792). USEPA then states, as Petitioners note, that "hazardous waste injection wells seeking UIC permits are simultaneously seeking RCRA permits". (52 Fed. Reg. 45792-45793). Viewed in this context, it is clear that USEPA is addressing solely the applicability of the Section 3004(a) requirements to UIC wells. That section, which was added by HSWA, requires the Administrator of USEPA to expeditiously amend the standards under Section 3004 regarding corrective action required at facilities for the treatment, storage or disposal of hazardous waste so as "to require that corrective action be taken beyond the facility boundary where necessary to protect human health and the environment..." USEPA,

consistent with this mandate, thereupon proposed and adopted the regulations of December 1, 1987. At 52 Fed. Reg. 45793, USEPA describes the UIC permit-by-rule device as follows:

> "The permit-by-rule was established to acknowledge that the standards already established under the Safe Drinking Water Act would constitute acceptable standards for RCRA Section 3005(c)".

The Board finds that this description more nearly matches the interpretation of the permit-by-rule advanced by Allied than that of Petitioners. In addition, even the rules adopted by USEPA on December 1, 1987 distinguish between a RCRA permit and a RCRA permit-by-rule. For instance, 40 CFR 144.1(h) states that a hazardous waste injection well's interim status terminates "upon issuance to that well of a RCRA permit, or upon the well's receiving a RCRA permit-by-rule under Section 270.60(b) of this chapter" (emphasis added). Finally, the Board observes that Section 270.60(b) was amended at that time to accord permit-by-rule status to UIC permits issued after November 8, 1984 only if they comply with 40 CFR 264.101 (amended simultaneously to include the "corrective action" requirements mandated by RCRA/HSWA Section 3004(a)) and with 40 CFR 270.14(d). This suggests that RCRA permit-by-rule status is conditional upon demonstrated equivalence with "regular" RCRA permits. In sum, while a RCRA permit-by-rule is the functional equivalent of a RCRA rule, it is not the same thing. The Board thus finds that it is not necessary to read into the federal laws or regulations such an overtaking of the UIC program by the RCRA program as Petitioners suggest.

One last point which the Board must make is in response to Petitioners' repeated assertions to the effect that "federal rules will prevail in any conflict between federal and state legislation" (Pet. Memo., 5). This view appears to fundamentally misapprehend the relationship between federal and state law and the functions of this Board and other State agencies. Absent state statutory authority, it is not the function of state agencies to enforce and implement federal law. Were it otherwise, there would be no necessity for the Board to undertake expedited rulemaking under either Section 13(c) or 22.4(a). There would, in fact, be no need for Sections 13(c) and 22.4(a).

In view of the foregoing, it is clear to this Board that Petitioners are not entitled as a matter of law to petition the Board for review of Allied's UIC permit. Accordingly, the Petition for Hearing and Appeal will be dismissed.

ORDER

The Petition for Hearing and Appeal in this matter is dismissed.

IT IS SO ORDERED.

B. Forcade concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 19th day of January, 1989, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board