ILLINOIS POLLUTION CONTROL BOARD
March 21, 1996

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| ESG WATTS, INC., an Iowa Corporation, | ) | |
| | ) | PCB 94-243 |
| Petitioner, | ) | 94-306 |
| | ) | 94-307 |
| v. | ) | 94-308 |
| | ) | 94-309 |
| ILLINOIS ENVIRONMENTAL | ) | 95-133 |
| PROTECTION AGENCY, | ) | 95-134 |
| | ) | (Consolidated) |
| Respondent. | ) | (Permit Appeal - Land) |

CHARLES J. NORTHRUP APPEARED ON BEHALF OF THE PETITIONERS;

DANIEL P. MERRIMAN AND JOHN BURDS APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by C.A.Manning):

This matter is before the Board on seven consolidated permit appeals filed by ESG Watts, Inc. (Watts). These permit appeals were consolidated by a June 1, 1995 order of the Board because they involve a common issue of law: whether the Illinois Environmental Protection Agency (Agency) appropriately denied these permits based upon Section 39(i) of the Environmental Protection Act (Act). Section 39(i) requires the Agency to conduct an evaluation of the prior waste management operational experience of landfill operators in Illinois and allows the Agency to deny waste management permits to an operator who has a history of, among other things, "repeated violations of federal, State or local laws, regulations, standards, or ordinances in the operation of refuse disposal facilities or sites." (415 ILCS 5/39(i) (1994).)

Watts is the operator of three landfills in Illinois: a landfill in Viola, Illinois (Viola Landfill) which is in closure; a landfill in Springfield, Illinois (Sangamon Valley Landfill) which is temporarily closed; and a landfill in Rock Island County, Illinois, (known as the Taylor Ridge or Andalusia landfill) which is currently in operation. The seven instant permit appeals all relate to permit denials for the Rock Island County facility.[1] The Agency's

[1] Of the seven permit appeals at issue, one relates to the Agency's August 18, 1994 denial of a generic waste stream for nine waste streams (PCB 94-243). The other six appeals relate to separate waste streams permit denials for disposal of specific types of waste: wastewater treatment sludge decided October 7, 1994 (PCB 94-306); waste sulfur cement decided September 22, 1994 (PCB 94-307); button dust decided September 22, 1994 (PCB 94-308); paint sludge decided October 7, 1994 (PCB 94-309); calcium sulfite cake decided March 23, 1995 (PCB 95-133); and buffing dust waste decided February 28, 1995 (PCB 95-134).

decisions for each of the permit applications were made within the statutory time frames for Agency decision and all seven appeals were timely filed with the Board within 35 days of the Agency's decisions. In all seven permit denial letters, the Agency stated as a denial reason: "(b)ased on ESG Watts, Inc.'s prior history of repeated violations of State laws, regulations and standards concerning the operation of refuse disposal facilities or sites, the Agency, by the authority granted in Section 39(i) of the Act and to avoid violating 35 Ill. Adm. Code 807.207(a) and (b), is denying these permit applications."

While the Agency additionally set forward several technical grounds for the denial of six of the seven permits at issue, it is clear from the record and arguments of this proceeding that the major thrust of the Agency's denial is the application of Section 39(i). The Agency itself admits that these technical denial points were, in large part, the result of minor errors and omissions in the permit application which, but for the fact the permit would be denied anyway based on the Section 39(i) issue, the permit reviewer would have contacted the permittee to correct.[2] Additionally, it is clear from our review of the record that most of the information missing from the applications could have been deduced from the application in general. For these reasons, the Board finds that the technical denial reasons are neither appropriately supported by the record nor dispositive of the Section 39(i) issue. Therefore, the Board finds the technical denial reasons to be insufficient to warrant denial and they will not be examined further in this opinion.

On December 5, 1995 a hearing was held before Board Hearing Officer Deborah Frank. There were no members of the public present at that hearing. Watts filed its post-hearing brief on January 12, 1996. The Agency filed a brief on February 7, 1996. The Board granted a motion to file the brief instanter and denied a motion to exclude the brief in an order of February 15, 1996. The reply brief was timely filed by Watts on February 23, 1996. For the following reasons, the Board hereby affirms the Agency's permit denial as to all seven permit appeals.

## LEGAL FRAMEWORK

### The Permitting Process

The Environmental Protection Act establishes a system of checks and balances integral to the Illinois system of environmental governance. Concerning the permitting function, it is the Agency who has the principal administrative role under the law. Specifically, the Agency has the duty to establish and administer a permit process as required by the Act and regulations, and the Agency has the authority to require permit applicants to submit plans, specifications and reports regarding actual or potential violations of the Act, regulations or

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[2] At hearing, the permit reviewer, Krishna Brahmamdam, testified that in this case, he probably would have contacted the applicant to have Watts repair the minor deficiencies; however, he did not do so because the permit would be denied anyway. (Tr. at 137-138.)

permits. (*Landfill, Inc. v. IPCB* (1978) 74 Ill. 2d 541; 25 Ill. Dec. 602, 607, *citing*, 415 ILCS 5/4.) Further, the Agency has the authority to perform technical, licensing and enforcement functions. It has the duty to collect and disseminate information, acquire technical data, and conduct experiments. It has the authority to cause inspections of actual or potential pollution sources and the duty to investigate violations of the Act, regulations and permits. (*Id.* at 606)

Regarding permits, the Act provides that it "shall be the duty of the Agency to issue such a permit upon proof by the applicant that the facility will not cause a violation of this Act or of regulations hereunder." When the Agency makes a decision to deny a permit, the Act provides that it must transmit to the applicant a detailed statement as to the reasons for the denial. The statement shall include, at a minimum, the sections of the Act or regulations which may be violated if the permit were granted; the specific type of information, if any, which the Agency deems the applicant did not provide the Agency; and a statement of specific reasons why the Act and the regulations would be violated if the permit were granted. (415 ILCS 5/39 (a)(1)-(4)(1994).) Finally, the Act charges that the Agency "shall adopt such procedures as are necessary to carry out its duties under this [the permitting] section." (415 ILCS 5/39 (a)(1994).)

After the Agency's final decision on the permit is made, the permit applicant may appeal that decision to the Board. (415 ILCS 5/40(a)(1)(1994).) The Board then holds a hearing between the parties at which the public may appear and offer comment. The question before the Board in a permit appeal is whether the applicant has met its burden of proving that operating under the permit as issued would not violate the Act or regulations. (*Oscar Mayer v. IEPA*, PCB 78-17, 30 PCB 397, 398 (1978); *John Sexton Contractors Company v. Illinois (Sexton),* PCB 88-139, February 23, 1989; *Browning-Ferris Industries of Illinois, Inc. v. Pollution Control Board*, 179 Ill. App. 3d 598, 534 N.E. 2d 616, (2nd Dist. 1989).) It is well-settled that our review in most types of permit appeals, including this one, is not *de novo* but is limited to information submitted to the Agency during the Agency's statutory review period, and is not based on information developed by the permit applicant, or the Agency, after the Agency's decision. (*See Alton Packaging Corporation v.IPCB*, (5th Dist. 1987) 162 Ill. App. 3d. 731; 516 N.E. 2d 275, 280.) However, it is the hearing before the Board that provides a mechanism for the petitioner to prove that operating under the permit as granted would not violate the Act or regulations. Further, the hearing affords the petitioner the opportunity "to challenge the reasons given by the Agency for denying such permit by means of cross-examination and the Board the opportunity to receive testimony which would 'test the validity of the information [relied upon by the Agency]'." (*Alton Packaging Corporation v. IPCB* (5th Dist. 1989) 162 Ill. App. 3d 731; 114 Ill. Dec. 120, *quoting IEPA v. IPCB*, 115 Ill. 2d at 70.)

Under the Act, both the Agency and the Board operate under tight statutory decision time frames. The Agency's statutory time to issue a permit decision is 90 days and for the Board, it is 120 days unless waived by the petitioner.

Section 39(i) as a Basis for Permit Denial

The permit denials pending before the Board are based on Section 39(i) of the Act which specifically provides:

> Before issuing any RCRA permit or any permit for the conduct of any waste-transportation or waste-disposal operation, the Agency shall conduct an evaluation of the prospective operator's prior experience in waste management operations. The Agency may deny such a permit if the prospective operator or any employee or officer of the prospective operator has a history of:
>
> 1. repeated violations of federal, State, or local laws, regulations, standards, or ordinances in the operation of refuse disposal facilities or sites; or
> 2. conviction in this or another State of any crime which is a felony under the laws of this State or conviction of a felony in a federal court; or
> 3. proof of gross carelessness or incompetence in handling, storing, processing, transporting or disposing of any hazardous waste. (415 ILCS 5/39(i)(1994).)

The legislative history of Section 39(i) reveals that the legislature wished to give the Agency an opportunity to examine a permit applicant's background and, in the case of repeat problems, to deny that permit applicant a permit. The legislative debate also makes clear that the legislature thought it was important to provide this opportunity at the "hearing" level and that it not be mandatory for the Agency to deny the permit when it found repeated violations to exist. The legislative debates provide the following discussion about Section 39(i):

Senator Joyce:

> This amendment . . . currently the problem with this as we read in the papers, and are hearing about that we're having trouble identifying unscrupulous dumpers or operators of waste disposal sites that . . . in the permit process. What this would do, is let the people who are granting the permits go into the applicant's background for possible previous violations, they're not a part of the application proceedings right now. A case in point, the Metropolitan Sanitary District's, Pollution Control Chief has pointed out that one of the main problems is that existing law makes no mention of an applicant's background, or possible previous violations during the application process. What this would do is . . . is let them go into the application . . . applicant's background and check on him, and if he has been creating a problem for many times, they would . . . they could not give him the . . . the permit. (P.A. 81-1484. Senate Tr. June 19, 1980.)

Senator Joyce:

> Mr. President and members of the Senate, this amendment goes along with the amendment I offered the other day. It says that no permit for refuse collection

> or refuse disposal operator shall be issued by the EPA until background for applying the operator has been evaluated. The amendment I put on the other day went along . . . said that the EPA could refuse the operator certification on this basis. Well, it turns out that the EPA is not certifying at the present time; they intend to in the future, but this would let them do the same thing with the permit. Just say, that for repeated violation of Federal, State and local regulations, convicted of a felony or proof of carelessness or incompetence in dealing with hazardous waste. (P.A. 81-1484 Senate Tr., June 23, 1980.)

Senator Grotberg:

> Yes, Senator Joyce represents it exactly the way it is. The only reason I am not violently opposing this amendment is it's permissive, and they may deny, not shall deny; but it does make sense at a hearing level to have something like this in the Statute, and I have no objection to it. (P.A. 81-1484 Senate Tr., June 23, 1980.)

The Agency has not had much experience in making decisions pursuant to Section 39(i), neither has the Board had an opportunity to review a Section 39(i) denial. The first time the Agency attempted to exercise its authority pursuant to this section, its decision was quickly challenged in the district court on constitutional grounds as it had attempted to deny permits for mere allegations of wrongdoing instead of adjudicated violations. The federal district court, in *Martell v. Mauzy*, 511 F. Supp. 729 (N.D. Ill. 1981), entered an injunction against the Agency prohibiting the Agency from applying Section 39(i) to a permit application on the basis of alleged violations. The court stated that the history of past violations must be based upon adjudicated violations, not violations in the eye of the Agency alone. The court further held that a permit holder possesses certain property and liberty interests in the renewal of a permit, and is therefore entitled to certain due process protections. (*Martell*, 511 F. Supp. at 729.) In a similar vein, this Board, on October 29, 1992 rejected a prior Agency attempt to deny seven permits to this very operator, Watts, also based upon mere allegations as opposed to adjudicated violations. (*ESG Watt, Inc. v. IEPA* (October 29, 1992) PCB 92-54, *aff'd, IEPA v. IPCB* (3rd Dist. 1993) 252 Ill. App. 3d 828, 624 N.E. 2d 402.) As the court held before us in *Martell*, we found that it was improper to deny operating permits on the basis of alleged violations rather than adjudicated ones. (PCB 92-54, Slip op. at 9.) While we do not believe the present case presents any issues of constitutional infirmity, we are nonetheless cognizant that permit applicants have a great stake in the Agency's Section 39(i) decisions.

Because this is an issue of first impression before the Board, we must first determine whether the traditional standard of review normally reserved for permit denials is appropriate for analyzing a Section 39(i) denial. The parties urge the Board to adopt a very different standard of review for the portion of the Agency's decision denying the permit based on Section 39(i). The parties ask that we adopt the exceptionally deferential "arbitrary and capricious" standard of review, which we note is normally reserved for judicial review of the

Board's decisions when we are performing a quasi-legislative function.[3] (Pet. Br. at 6-7; Ag. Br. at 11-12.) Under an arbitrary and capricious standard, our scope of review would be severely limited and we could not reverse the Agency's decisions absent a "clear error of judgment, or unless the Agency's decision is so implausible that it could not be ascribed to a difference in view or even the product of agency expertise." (*Greer v. Illinois Housing Development Authority*, 122 Ill.2d 462; 524 N.E.2d 561, 581; 120 Ill. Dec. 531, 551 (Ill. 1988), *citing*, *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.* (1983), 463 U.S. 29, 43, 103 S.Ct. 2856, 2866-67.) The parties' reasons for supporting this standard are obvious. The Agency believes that the arbitrary and capricious standard is consistent with its ability to make a purely "discretionary decision" with only limited Board review, while the petitioner believes the standard would require the Board to reverse the Agency's decision based on the Agency's lack of adopted rules or procedures for analyzing a prospective operator's prior conduct.

We decline to adopt the arbitrary and capricious standard and instead we will review the Agency's Section 39(i) decision applying the same level of deference normally accorded the Agency in permit appeals. Section 40 of the Act specifically mandates that the Board review Agency decisions made pursuant to Section 39 of the Act. Agency decisions to deny a permit pursuant to Section 39(i) are thus also reviewable by the Board pursuant to Section 40 and 35 Ill. Adm. Code Section 105.102(a). Thus it is the petitioner's burden to prove both that he is entitled to the permit and that the Agency's stated denial reasons are either insufficient or improper.

Importantly, we wish to emphasize that the Pollution Control Board and the Agency, together, are an "administrative continuum" particularly in the area of permit issuance and appeals. Permitting decisions made by the Agency are not subject to judicial scrutiny until such time as we enter a final administrative decision. At that time the Board's decision is reviewed under the "manifest weight of the evidence" standard. (*IEPA v. IPCB*, (3rd Dist. 1985) 138 Ill. App. 3d 550, 486 N.E. 2d 293, 294; *aff'd, IEPA v. IPCB* (Ill. 1986) 115 Ill. 2d 65, 503 N.E. 2d 343.) We do not review the Agency's decision pursuant to the manifest weight standard because of the special administrative review relationship set forward in the Act. (*IEPA v. IPCB*, (3rd Dist. 1985) 138 Ill. App. 3d 550, 486 N.E. 2d 293, 294; *aff'd IEPA v. IPCB* (Ill. 1986) 115 Ill. 2d 65, 503 N.E. 2d 343.) Instead, as part of this administrative continuum, we hold hearings and allow for a development of the issues which may not have been adequately developed in the short 90-day decision deadline imposed on the Agency's permitting decisions. Since there was no hearing below, we would be abdicating our statutory

[3] Examples are the Board's promulgation of rules (*Granite City v. IPCB*, (Ill. 1993) 155 Ill. 2d 149, 613 N.E.2d 719, 184 Ill.Dec. 402); interpretation of rules and defining scope of emission standards (*IEPA v. IPCB* (1st Dist. 1983) 118 Ill. App. 3d 772, 455 N.E. 2d 188; *IEPA v. IPCB* (Ill. 1981) 86 Ill. 2d 390, 427 N.E. 2d 162, 167); and, fashioning remedies in enforcement actions *(Discovery South Group, LTD et al. v. IPCB and Village of Matteson* (1st Dist. 1995), 275 Ill. App. 3d 547, 656 N.E. 2d 51.)

responsibility if we were to examine this case with the narrow review dictated by the arbitrary and capricious standard.

However, because the information reviewed by the Agency in denying a permit pursuant to Section 39(i) is different from the information considered by the Agency in imposing conditions or denying a permit based on the merits of a permit application, the Board's review of such a denial is necessarily different in certain respects. Unlike our review of other permitting decisions wherein the Board must determine whether there will be prospective compliance with the Act and/or Board regulations, reviews of Section 39(i) decisions look solely at the operating history of the prospective operator and what has already transpired. It is therefore not necessary for the Board to analyze whether issuance of the permit will cause a violation of the Act or Board regulations in relation to a Section 39(i) denial. Additionally, Section 39(i) requires the Agency to conduct an evaluation of the prospective operator's prior experience in waste management operations and to apply the legislatively-defined criteria to the waste management record of the operator. *Therefore, it is not only the operating history of the permit applicant but the Agency's analysis thereof, which forms the record which we review in Section 39(i) decisions.* In reviewing Section 39(i) decisions, the Board must determine whether the applicant's operating history warrants denial of the requested permit due to: 1) repeated violations of federal, State, or local laws or regulations; 2) conviction of a felony in this or any other state; or 3) proof of gross carelessness or incompetence in handling, storing, processing, transporting, or disposing of any hazardous waste. The burden is on petitioner to show that the Agency incorrectly determined that denial of the permit is warranted in considering the above factors.

## FACTUAL AND PROCEDURAL BACKGROUND

### History of Adjudicated Violations

In denying the seven permits at issue here, the Agency cited only the first of the three possible statutory reasons for denial: the repeated violations of State, federal and local laws and regulations. It relied upon numerous adjudicated violations wherein Watts had been found guilty, over a period of some seven years, of violating various provisions of the Act. Clearly, the most important and egregious of those violations involved the circuit court's adjudication of numerous violations by Watts in its operation of the Sangamon Valley Landfill. Additionally, there are some 19 different administrative citations which had been adjudicated against Watts by the Illinois Pollution Control Board, concerning operations at all three of the Watts-operated landfills. In this section, the Board will examine the facts contained in the record and in the relevant proceedings concerning these matters.

#### *The Sangamon Valley Landfill Adjudication*

One of the single, highest penalties assessed against a landfill operator in the State of Illinois was levied against Watts for its operation of the Sangamon Valley Landfill. The circuit court of Sangamon County found Watts in violation of the Act and corresponding

regulations just six months prior to the Agency's first permit denial of theses instant permit appeals. (*People v. Watts Trucking, et al*, No. 91-CH-242 (Cir. Ct. Sangamon Cty Feb. 2, 1994); R. 94-243 at 128-131.) On February 2, 1994 the circuit court assessed penalties of $350,000 and found Watts liable for violating the Act and regulations on all twelve counts of an amended complaint filed by the Agency and the Illinois Attorney General and later joined by the Sangamon County State's Attorney. The complaint alleged substantial violations of the Act and regulations, and alleged facts concerning disregard of the legal requirements for operating a landfill for a period of over three years. The violations ranged from Watts' exceedence of the vertical and horizontal permit limitations for placement of waste in the landfill, to Watts' failure to construct a clay liner in certain portions of the landfill as required by the permit and the regulations, to Watts' actual allowance of leaching, which in turn, impacted the groundwater at the site and eventually caused water pollution.

A list of the violations included 44 violations of Section 21(o)(5) and (o)(6) concerning daily and intermediate cover; 35 violations of Section 21(o)(12) of the Act and the regulations at 35 Ill. Adm. Code Section 807.306 concerning litter; 36 violations of Sections 21 (o)(l), 21(o)(2), 21(o)(3) and the regulations at Section 807.314 concerning leachate flow; *continuing violations* of 12(a) for water pollution,Section 21(d) and Section 807.313, Section 620.301(a) for groundwater violations, Section 12(a) and 12(f) for NPDES violations concerning water pollution, Section 9.1(d) for asbestos NESHAP violations, Section 24 of the Act and Section 901.102 for noise violations; and additionally, violations concerning financial assurance and various fee payment provisions. (R. 94-243 at 83-127.)

While denying the complainants' request for permanent injunctive relief from further violations of the Act, the court felt that the $350,000 in penalties was necessary in order to insure Watts would bring the landfill in compliance. The court directed Watts to undertake eight specific actions in "strict compliance with Agency permits":

1. The excavation and proper construction and/or repair of all sections of the liner that have not been certified.
2. The construction of berms as required by permit.
3. The installation of best available technology for noise control on all heavy equipment.
4. The implementation of the groundwater remediation program as required by permit.
5. The excavation and appropriate disposal of all refuse previously deposited in unpermitted lateral and vertical areas of Area 1.
6. The initiation of closure of Area 1, including (but not limited to) the provisions of final cover in accordance with approved contours and the control of all leachate seeps, in compliance with the approved closure and post-closure care plan.
7. The implementation of the surface water control system as required by permit unless, in the determination of the Agency, such project is superseded by closure activities.

8. The removal from adjacent properties of all silt, debris and refuse attributable to the landfill's operations. (R. 94-243 at 129-131.)

*Administrative Citation Adjudications*

The Agency further cited 19 separate administrative citations as supporting permit denial on the basis of Section 39(i). The adjudicated violations concerned operational deficiencies at all three of Watts' landfills in Illinois over a seven-year period from 1987 through 1994. The most recent citation concerned operational deficiencies which occurred at the Sangamon Valley Landfill three months prior to the Agency's first of the seven permit denials in August of 1994. In these 19 cases, the Board, which is the only jurisdiction authorized under Section 31.1 of the Act to decide administrative citation cases, found Watts liable for 44 separate violations of Section 21(o) of the Act. Section 21(o) is the Act's general prohibition against operation of a sanitary landfill in an unlawful manner and this section lists several possible violation points from Section 21(o)(1) through (o)(13).[4] Pursuant to the administrative citation process set forward in Section 21 and Section 31.1, these final decisions were made based either on a hearing on the merits or as a result of Watts having defaulted on the cases. In addition to finding Watts liable for 44 separate violations, the Board additionally assessed Watts a total of $22,000 in penalties. These penalties are statutorily provided for in Section 42(b)(4) and upon a determination of liability, the Act requires the Board to impose a pre-set $500 fine for each of the 44 adjudicated violations of the Act.

The total number of violations committed by Watts at the three landfills consisted of nine violations of Section 21(o)(1) for refuse in standing or flowing waters; two violations of Section 21(o)(2) for leachate flows entering the waters of the state; two violations of Section 21(o)(3) for leachate flows exiting the landfill confines; 20 violations of Section 21(o)(5) for uncovered refuse remaining from any previous operating day or at the conclusion of any operating day; two violations of Section 21(o)(11) for failure to submit reports required by permits or Board regulations and eight violations of Section 21(o)(12) for failure to collect and contain litter from the site by the end of each operating day. Specifically for each landfill, the Board found that Watts had committed 31 violations at the Sangamon Valley Landfill for the period from 1987 through 1994;[5] four violations at Viola in 1988;[6] and eight violations at Taylor Ridge from 1988 to 1990.[7]

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[4] Section 21(p) has been subsequently amended to Section 21(o) and therefore the administrative citations at issue show violations of Section 21(p) in the record.

[5] Specifically, at the Sangamon Valley Landfill, Watts was found liable for seven violations of Section 21(o)(1), two violations of Section 21(o)(2), two violations of Section 21(o)(3), 13 violations of Section 21(o)(5), two violations of Section 21(o)(11) and five violations of Section 21(o)(12).

[6] Watts committed two violations of Section 21(o)(5) and two violations of Section 21(o)(12).

The Agency's Permit Review Process

According to the testimony presented at hearing in this matter, the Agency has different procedures for reviewing different types of permit applications. (Tr. at 34-37.) Initially, the permit is date stamped, sent to a log-in clerk and assigned to a permit reviewer, who makes a recommendation to his or her immediate supervisor. (Tr. at 33.) If the permit applied for is a supplemental generic permit (PCB 94-243), various administrative sections within the Agency may be notified and comments may be solicited. (Tr. at 35, 102.) Comments are not mandatory, and the permit reviewer may not always receive comments. (Tr. at 39-41.) If comments are received, the permit reviewer would consider those comments in making his or her recommendation on the denial or the issuance of a permit. (Tr. at 97.) It is the permit reviewer's decision whether or not to seek out comments if none are received. (Tr. at 40-41, 107.)

If the permit is a special waste stream permit (PCB 94-306 through PCB 94-309 and PCB 95-133 and 95-134), the Agency does not routinely notify other administrative sections within the Agency that a permit application has been received. (Tr. at 36.) A final Agency decision "is based upon the record of the applications under review, the recommendations of the reviewer and the reviewer's supervisor, as well as the collective input of any others who may have been involved in the review process, or who may have made comments in response to a notification of pending Agency permit action." (Ag. Br. at 28; Tr. at 57-58, and 83.)

The seven permit applications at issue were assigned by Agency Bureau of Land Permit Section Manager, Edwin C. Bakowski, to Agency permit reviewer Krishna Brahmamdam for technical review. (Tr. at 81.) Mr. Brahmamdam recommended denial of the permit applications. (Tr. at 96 and 130.) Each recommendation to deny a permit was passed to Mr. Brahmamdam's supervisor for review and then given to Mr. Bakowski . (Tr. at 57, 133-134.) Mr. Bakowski signed the Agency denial letters which set forth the reasons for each permit denial. (R. 94-243 at 2-3; R. 94-306 at 61-63; R. 94-307 at 61-63; R. 94-308 at 61-63; R. 94-309 at 61-63; R. 95-133 at 60-62; R. 95-134 at 60-62.)

Other administrative sections within the Agency were notified about the application in PCB 94-243. (R. 94-243 at 31-48.) Mr. Brahmamdam received comments from the field operations section (FOS) on the permit application in PCB 94-243. (R. 94-243 at 61-69.) Mr. Brahmamdam considered the FOS comment, in his review of the remaining permits. (Tr. at 98, 102.)

During the technical review process, the permit reviewer may be in contact with the permit applicant to solicit additional information or seek clarification on certain points. (Tr. at

[7] Watts committed two violations of Section 21(o)(1), five violations of Section 21(o)(5) and one violation of Section 21(o)(12).

107 and 117.) The permit reviewer generally determines whether or not to call an applicant. (Tr. at 110-111.)

In *Wells Manufacturing Company v. IEPA*, 195 Ill. App. 3d 593, 142 Ill. Dec. 333, 552 N.E. 2d 1074 (1st Dist. 1990) (*Wells*) the court held that it is improper for the Agency to deny a permit based upon potential violation of the Act without providing the applicant an opportunity to submit information which would disprove the potential violation. As a result of the *Wells* decision, the Agency provides permit applicants an opportunity to respond to potential denial reasons prior to issuance of the denial letter. This letter is commonly referred to as a "*Wells* letter". The *Wells* letters were sent on February 22, 1995 and the Agency received Watt's response on March 1, 1995. (Pet. Br. at 21.)

The Agency's one common denial reason for each of the seven permit applications was Watts' history of repeated violations pursuant to Section 39(i) of the Act. The Agency's denial of the permits pursuant to Section 39(i) of the Act cited to 19 adjudicated administrative citation cases wherein Watts had been found in violation of the Act and a Sangamon County circuit court case *People v. Watts Trucking et al.*, 91-CH-242. In this case, Watts Trucking and Watts were found in violation of several sections of the Act and Board regulations for activities at the Sangamon Valley Landfill.

## ARGUMENTS OF THE PARTIES

### Sangamon Valley Landfill Adjudication

Watts maintains that the Agency's reliance on the Sangamon Valley Landfill litigation is improper because that adjudication relates to that specific landfill only, and not to Taylor Ridge. Watts argues that with multi-site operators, it is "inappropriate" to consider the problems of other facilities as conclusive judgment of operations at Taylor Ridge when the only relationship is common ownership by a corporate entity. Watts asserts that landfill personnel are different, operational requirements are different, permitting requirements are different, local conditions are different and State or county inspectors may be different. (Pet. Br. at 10.)

Additionally, Watts argues that during the time the Agency was reviewing the permit applications at issue in this appeal, significant discussions were ongoing between the Agency and Watts concerning the Sangamon Valley Landfill. (Pet. Br. at 14-15.) Watts asserts that the Agency was cognizant of the Sangamon Valley Landfill progress, yet at the same time the Agency denied the permit application at issue in this matter. (Pet. Br. at 15-16.) Watts asks, "Is the Agency taking the position that once a "bad actor" always a "bad actor" without any opportunity to revive its reputation?" (*Id.*)

In response, the Agency argues that the plain statutory language of Section 39(i) is not facility-specific and allows the Agency to deny a permit if the prospective operator has a history of repeated violations in the operation of refuse disposal "facilities or sites - plural."

(Ag. Br. at 14-15.) The Agency claims that if its inquiry into a prospective operator's "history of repeated violations" was limited to the facility for which the permit is sought, then any operator for a new facility could get a permit regardless of the operator's prior history. (Ag. Br. at 14-15.) The Agency states that it did consider Watts' efforts to come into compliance along with the efforts that were expended by the State in bringing about that compliance. (Ag. Br. at 25.) The Agency believes that Watts should not be afforded "special deference" because Watts took steps to comply with a court order. (Ag. Br. at 25-26.)

Administrative Citation Adjudications

Watts asserts that, in citing the 19 administrative citations, the Agency failed to consider that they do not relate whatsoever to the activities for which these permits are sought. (Pet. Br. at 9.) Watts argues that only five of the 19 citations being considered are for violations at Taylor Ridge, despite 32 inspections by Agency personnel since 1989, and even those range from six to ten years in age. (Pet. Br. at 11-12.) To bolster its argument, Watts points to *City of East Moline v.IPCB*, 136 Ill. App. 3d 687, 91 Ill.Dec. 296, 483 N.E. 2d 642 (3rd Dist. 1985), wherein the appellate court held that the age of violations could be a minimizing or eliminating factor in penalties. (*Id.*) Watts also asserts that the severity of the violations adjudicated in the administrative citations should be examined. (Pet. Br. at 11.) Watts maintains that even the Board has recognized the "minor nature of administrative citations and has often referred to them as being analogous to traffic tickets." (Pet. Br. at 12, *citing, In the Matter of: Lincoln Chamber of Commerce*, AC 89-26 (May 25, 1988) and *In the Matter of: John R. Vander*, AC 88-99 (March 9, 1989).) Watts points out that even the Agency does not believe that administrative citations in and of themselves warrant refusal of permits. (Pet. Br. at 12, *citing,* Tr. at 65.)

Watts also argues that the Agency's own rationale as to why the administrative citations were considered is without merit. (Pet. Br. at 13.) Watts points to the testimony of the Agency's solid waste branch manager, Mr. Bakowski, who testified that in considering the administrative citations, "I guess you look at the way they're considered is the quantity and the severity collectively." (Tr. at 63; Pet. Br. at 13.) Mr. Bakowski went on to testify that with regard to severity, the Agency would look to the "willful intents" and the "environmental jeopardy." (Tr. at 63-64; Pet. Br. at 13.) Watts asserts the quantity of the administrative citations should be mitigated by the age of the administrative citations. (Pet. Br. at 13.) Using the two components defined by the Agency's testimony, Watts notes that neither willfulness nor environmental jeopardy are discussed or adjudicated in the 19 administrative citations. (Pet. Br. at 13.) For these reasons, Watts argues that the Board should find that administrative citations do not form the basis for denial pursuant to Section 39(i) of the Act. (Pet. Br. at 12.)

The Agency disagrees with Watt's interpretation of Section 39(i)(1) that would classify the administrative citations as "too minor" to warrant a denial of a permit pursuant to Section 39(i) of the Act. (Ag. Br. at 19.) The Agency points to the language in subsections (2) and (3), and notes that both refer to a singular event; whereas in subsection (1) the statute refers to

"repeated violations" of several legal requirements all of which relate to the operation of a refuse disposal facility. (*Id.*) The Agency concedes that it is the cumulative effect of the "many adjudicated" administrative citations "over time, that made them relevant to the Agency's considerations of Watts' 'history of repeated violations'" and that there is no set number which automatically triggered the Agency's denial pursuant to Section 39(i).

The Agency further disagrees that the violations relied upon by the Agency bear no relationship to the permit applications. (Ag. Br. at 21.) The Agency states that the legislature requires that the repeated violations must pertain to the "operation of refuse disposal facilities or sites" without any other limitations upon the relationship between the repeated violations and the permits being sought. (*Id.*) Accordingly, the Agency believes that to impose any other restrictions is to go beyond the requirements of the Act itself. (Ag. Br. at 22.) Further, the Agency asserts that the arguments by Watts that many of the violations were for other facilities, goes to the weight the violations were given by the Agency. (Ag. Br. at 16.)

Regarding the "age" of the citations, the Agency points out that even though some of the administrative citations for Taylor Ridge are over six years old today, the first decision to deny a permit based on those administrative citations was made in 1994. (Ag. Br. at 17.) Secondly, the Agency maintains there is no age requirement in Section 39(i) regarding the history of repeated violations. (*Id.*) Finally, the Agency asserts that the arguments by Watts ignores the "very concept of examining a 'history'" which would require the Agency to examine things in the past. (Ag. Br. at 17.) The Agency maintains that in relying on *East Moline*, Watts is seeking to have the Board inappropriately adopt enforcement principles to the discretionary Section 39(i) denial process. (Ag. Br. at 18.) The Agency asserts that the goal in enforcement is future compliance; while the goal in the Section 39(i) denial is future cessation of waste management operations. (Ag. Br. at 18.)

Other Considerations

*The Wells Letters*

Watts asserts that the Agency had determined to deny the seven permit applications prior to sending the *Wells* letters making the *Wells* letters a "sham," without any "real opportunity" for Watts to respond. (Pet. Br. at 20.) In support of this argument, Watts points to the chronology of events in PCB 95-133 and PCB 95-134 which indicates that the reviewer knew the applications would be denied even before the *Wells* letters were sent, in addition to the reviewer's testimony that "(s)ince the application is being denied anyway due to past adjudicated violations, I included this deficiency as a denial point." (Pet. Br. at 20-21; Pet. Exh. 3 and 4.) Watts contends that this is not a "thought" that the permit might be denied; but a statement that the permit would be denied. (*Id.*) Further, the permit reviewer testified that he believed this case may have been one where there was some fatal defect which was not going to be corrected prior to the decision due date, therefore it did not make sense to contact them to repair the minor deficiencies if the permit was going to be denied anyway. (Tr. at 137-138; Pet. Br. at 21.)

The Agency claims that the responses to the *Wells* letters were considered. (Ag. Br. at 33.) The permit reviewer testified that he looked at the responses to the *Wells* letters, discussed the responses with others at the Agency and considered the responses in making his recommendation. (Tr. at 131-132.) The Agency contends that Watts' responses to the *Wells* letters did not contest the history of past violations, "nor did they describe measures that Watts had taken to ensure the non-recurrence of such violations." (Ag. Br. at 31.) Rather, the responses to the Wells letters informed the Agency why Watts believed the Agency should ignore the past history of violations. (*Id.*) Interpreting the reviewer's notes in PCB 95-133 and PCB 95-134, the Agency states that the permit reviewer's notes do not constitute the Agency's final decision, but at best the reviewer's thoughts of denial. (*Id.* at 32.) The Agency contends that at best the notes indicate that the reviewer "thought" the permit would be denied, and with five other applications denied based on repeated violations, "any surmise by the permit reviewer" that the permits would be denied "does not seem patently unreasonable." (*Id.*)

*Unadjudicated Violations*

Watts asserts that in this matter the Agency did in fact rely on factors "not envisioned by Section 39(i)" of the Act. (Pet. Br. at 16.) Specifically, Watts asserts that the Agency considered the failure of Watts to timely apply for a significant modification permit for the Taylor Ridge facility even though at the time of these permit denials no violation had been adjudicated for the failure to file a significant modification permit. (Pet. Br. at 17.) In support of this argument, Watts points to the "Compliance Unit Evaluation" form in PCB 94-243 and to the comments of the Agency's field operations section (FOS). (*Id.*) The FOS noted:

> FOS Peoria offers the following comments: Watts landfill has failed to submit their significant modification as outlined in Supplemental Permit No. 2993-267-SP. Also, the owner is in apparent non-compliance with Section 39(i) of the Act. Based on these facts, the application should be denied. (R. 94-243 at 60-69.)

The Agency contends that the real focus of the Board is not what the permit reviewer "may or may not have known or considered" but rather the stated basis for denial of the permit. (Ag. Br. at 29-30.) The denial letters do not include, as a stated denial reason, failure to timely file the application for significant permit modification. (R. 94-243 at 3; R.94-306 at 61-62; R. 94-307 at 62; R.94-308 at 62; R. 94-309 at 62; R. 95-133 at 60-61; R. 95-134 at 60-61.) The testimony at hearing of the permit reviewer and Mr. Bakowski also indicate that the failure to timely file the application for significant permit modification was not relied upon for the denial of the permits. (Tr. at 87 and 98-99.) While the Agency admits that the comments from the FOS did refer to the failure to timely file the application for significant permit modification, the Agency contends that the mere fact that the permit reviewer had knowledge of the alleged violation does not mean the denial was based on the alleged

violation. (Ag. Br. at 27 and 29.) Anything a reviewer learns may subjectively enter into the reviewer's thought processes and this potential subjectivity according to the Agency is why the Agency is required to list the specific denial reasons in writing and then "stand behind" the actual selected denial reasons. (*Id.*)

Finally, Watts argues that the Agency's reliance on the Sangamon Valley Landfill adjudication was premature because the matter was on appeal and Watts would have been prejudiced had the matter been reversed. In response, the Agency argues that the decision in Sangamon County was clearly a final decision and there is no statutory requirement that all possible avenues of appeal be exhausted before the Agency can rely on an adjudicated violation under Section 39(i). (Ag. Br. at 24.) The Agency states that due process considerations were satisfied by the bench trial on the violations. (*Id.*)

*Agency's Lack of Procedures*

Watts argues that the use of Section 39(i) of the Act is a "drastic measure designed to prevent 'bad actors' from engaging in the waste disposal industry" and only significant violations should be considered in applying Section 39(i) as a denial reason. (Pet. Br. at 8-9.) Watts believes that the Agency is "advocating complete, total, and unreviewable discretion to deny permits under Section 39(i)" of the Act. (Pet. Rep. at 19.) Watts maintains that the Agency's denial of these permits based on Section 39(i) of the Act is improper because it is a discretionary process not conducted on all permit applications and without any written or unwritten policy, guidelines, or procedures relating to Section 39(i). (Pet. Exh. 13 par 10; Pet. Br. at 23.) Therefore Watts claims the Agency is not fulfilling Section 39(i). (Pet. Br. at 15 and 23; Pet. Exh. 13, par. 11.)

In response, the Agency asserts that there is no evidence in the record to support the conclusion that its lack of written procedures specific to Section 39(i) prevents it from evaluating a prospective operator's prior experience or that the evaluation was not done in this case. (*See* Ag. Br. at 36.) The Agency contends that the existing permit procedures are sufficient to ensure that a relevant evaluation is conducted prior to permit issuance. (*Id.*) The Agency asserts that Watts is attempting to add "restrictions and conditions" to the Agency's discretionary right to deny a permit pursuant to Section 39(i) of the Act, contradicting the intent of the legislation beyond any judicially imposed requirements of due process. (Ag. Br. at 13.)

## ANALYSIS

The legislature has placed an affirmative responsibility on the Agency to perform an evaluation of any prospective landfill operator who submits a waste management permit application to ascertain whether that operator has a history of repeated violations, convictions, or is otherwise responsible for gross carelessness or incompetence relating to the management of waste. Relying on the results of the evaluation, the Agency may accordingly deny the permit application if the prospective operator's historical information reveals any of the types

information delineated in Section 39(i)(1)-(3). Notably, this evaluation is not necessarily limited to information submitted on the permit application, and because the Agency must "conduct" the evaluation, the Agency may gather information from either within the Agency or outside the Agency.

In this case, the petitioner is not disputing that the Agency did in fact conduct an evaluation as required pursuant to Section 39(i). It is clear from the record that the permit reviewer did conduct a review of the permit for technical sufficiency and compliance with Section 39(i). For the generic waste stream permit (PCB 94-243), the reviewer internally solicited comments from other sections within the Agency on both the technical information in the permit application and on any pending enforcement or other significant issues relating to the facility or the operator. (Tr. at 97-102, 129.) In response, the permit reviewer received Section 39(i)-responsive comments which he considered regarding the generic permit and which he determined applied equally to the six special waste stream permits. He received written comments from both the FOS and the Division of Legal Counsel (DLC). While some of the written comments addressed matters the permit reviewer could not use in denying the permit, the DLC and the FOS brought to Brahmamdam's attention petitioner's history of violations of the Act and the regulations which eventually served as the basis for the permit denials. (Tr. at 111.) Accordingly, in this case, the Agency clearly satisfied its duty to conduct an evaluation of the operator's prior experience pursuant to Section 39(i).

Here, petitioner challenges the results of that evaluation, which show a cumulative history of a circuit court adjudication based on 12 separate counts for statutory and regulatory violations concerning the Sangamon Valley Landfill and 19 repeated administrative citation violations relating to Watts' management of waste disposal operations at three Watts-operated landfills. Watts disputes the Agency's conclusion that these violations demonstrate a history of repeated violations such that permit denial is warranted. Watts additionally challenges the method by which the evaluation was conducted, disputing whether it was performed fairly and whether the Agency has a practice of conducting the evaluation consistently on all solid waste disposal-related permits.

As there are no administrative rules adopted by the Agency to govern the Agency's processing of solid waste disposal permit applications or to govern the mandatory Section 39(i) evaluation, and since the Agency has not proposed rules to the Board for adoption, we find it helpful to examine other relevant portions of the Act and Board regulations in analyzing this case. In particular, Section 22.5 of the Act, which was adopted in the same Public Act (P.A. 81-1484) as Section 39(i), has the same apparent legislative purpose. These sections were both adopted to provide the Agency with an opportunity to review an operator's prior experience for repeated violations or other egregious acts in order to control who is operating waste disposal sites in Illinois. In the case of Section 22.5, the Board was specifically directed to adopt rules governing prior conduct certification implementing the statutory criteria for operating personnel certification. Virtually identical to Section 39(i), Section 22.5 of the Act provides:

> The Board may provide for denial of certification if the prospective operator or any employee or officer of the prospective operator has a history of :
>
> 1. repeated violations of federal, State, or local laws, regulations, standards, or ordinances in the operation of refuse disposal facilities or sites; or
> 2. conviction in this or another State of any crime which is a felony under the laws of this State or conviction of a felony in a federal court; or
> 3. proof of gross carelessness or incompetence in handling, storing, processing, transporting or disposing of any hazardous waste.

The Board adopted regulations implementing Section 22.5 pursuant to the Illinois Administrative Procedures Act in *Prior Conduct Certification for Waste Disposal Site Personnel: 35 Ill. Adm. Code 745*, (September 4, 1987) R81-18, 81 PCB 101. In addition to adopting procedures for the processing of prior conduct certifications of such applications by the Agency, the Board also set specific standards for denial of these applications and articulated mitigating factors that the Agency may rely upon to determine whether to grant certification. Although the regulations at 35 Ill. Adm. Code 745 do not apply specifically to Section 39(i) decisions, we find the regulations provide helpful guidance to our decision. In pertinent part, Section 745.141(a)(1) provides that the Agency shall deny prior conduct certification to any person who has been repeatedly found, after opportunity for an adversarial proceeding before any judicial or administrative body, to be in violation of any federal, State or local laws, regulations or ordinances governing the operation of waste disposal sites in any state. As for factors in mitigation, Section 745.141(b) provides:

> The Agency may, in its discretion, grant prior conduct certification if mitigating factors exist such that certification should issue. Mitigating factors include:
>
> 1. The severity of the misconduct;
> 2. How recently the misconduct took place; and
> 3. The degree of control exerted over waste disposal operations at a site by the applicant at the time misconduct described in subsection (a)(3) was committed.

The Sangamon Valley Landfill Adjudication

In denying the permit, the Agency concluded that the circuit court's Sangamon Valley Landfill decision coupled with the 19 administrative citations was sufficient reason to justify denying the seven permits pursuant to Section 39(i). The Agency's Bureau of Land Permit Section Manager, Mr. Bakowski, indicated at hearing that the Sangamon Valley Landfill litigation was a major factor in the Agency's decision. He further testified that the Agency not only considered that the court had found this Watts-operated landfill in violation, but that the State had to expend considerable effort to bring about compliance at the site. Bakowski testified that the Agency specifically considered:

> . . . the seriousness of the violations and the efforts by the applicant before and after the case - of how reasonable his efforts were before, how reasonable his efforts were afterwards, and then the reasonableness of what level the Agency had to go through to promote that sort of compliance or efforts to comply. (Tr. at 74.)

Our reading of the order shows that while the court found Watts had taken some steps to abate the violations at the site, the court determined it was still necessary to assess a $350,000 penalty ($250,000 to the State of Illinois and $100,000 to Sangamon County) to bring Watts in compliance with the Act and regulations. Additionally, the court mandated a series of eight specific actions that Watts was to perform to immediately bring about "strict compliance with Agency permits." These actions included repairing the clay liner, constructing berms, addressing noise control problems, implementing a groundwater remediation program, excavating and disposing of refuse from the unpermitted portions of the landfill and initiating closure for certain areas of the landfill, implementing a surface water control system, and finally removing debris from neighboring properties. In the event that Watts could not bring the landfill into compliance as directed in the order by May 31, 1994, Watts was to advise the court as to its status and present justification for noncompliance. Additionally, the Agency was directed in the order to keep the court informed as to Watts' progress.

We believe the seriousness of the violations that occurred at the Sangamon Valley Landfill, together with the 19 adjudicated administrative citations against Watts, are sufficient cause to justify the Agency's denials in this case. It was appropriate for the Agency to factor in the repeated violations present at Sangamon Valley Landfill in order to make a determination on the propriety of Watts' continuance as an operator at other landfills in the State. None of the mitigating factors raised by Watts, nor any of the mitigating factors delineated in Section 745.141(b), persuade us to question the Agency's reliance on Sangamon Valley Landfill litigation to deny the permits. The violations are severe, very recent and, significantly, Watts exerted control as the operator over the Sangamon Valley Landfill. It is uncontested that Watts was primarily responsible for making the management decisions which brought about the problems at the Sangamon Valley Landfill. We find it relevant that in order to provide Watts with an "incentive" to come into compliance at the site, the court found it necessary to assess a $350,000 penalty. Under the facts of the Sangamon Valley Landfill circuit court case, there is nothing inappropriate about the Agency considering that litigation, particularly in light of the Agency's difficulty in bringing about compliance with the Act and regulations.

It is noteworthy that Watts does not raise any argument that the types of violations that occurred at the Sangamon Valley landfill are not severe. Watts does not argue that the violations were not within the control of Watts as the operator. Instead, the petitioner argues that there are different personnel at the Sangamon Valley Landfill than the Taylor Ridge Landfill, and that it is improper for the Agency to consider historical information stemming from any landfill other than the one at issue in the permit applications pending before the Agency. We do not find either of the petitioner's arguments meritorious. Section 39(i)(1)

clearly contemplates that the Agency may need to look outside of the current facility for information relating to the operator's prior experience at other disposal sites and it was proper in this case to do so. Section 39(i)(1) is clearly operator-specific and not facility-specific.

The 19 Administrative Citation Adjudications

The Agency additionally denied the seven permits based on Watts' having been found in violation of the administrative citation provisions of the Act in 19 separate cases adjudicated by the Board from 1987 to 1994. The Agency witnesses testified that the Agency considered the citations as adjudicated violations, and additionally considered both the "quantity and severity" of the citations. Bakowski stated at hearing that no single citation was given special consideration or particular weight, rather it was the cumulative effect of the many adjudicated citations which was relevant to the Agency's consideration. (*See* Tr. at 62-65.) While no single administrative citation, nor any handful, is sufficient to warrant denying a RCRA or solid waste management-related permit based on Section 39(i), we believe the Agency's consideration of the citations "in the aggregate" coupled with the factually-egregious Sangamon Valley Landfill adjudication, together, is sufficient to invoke Section 39(i).

We disagree with Watts that the citations are too minor in this case to be considered by the Agency. While the administrative citation process is designed to be a simpler mechanism for achieving enforcement and it avoids the lengthy and complex litigation which may accompany a traditional enforcement action, administrative citation violations can range from litter control problems to more serious concerns such as with leachate flow. The Agency is specifically charged in Section 39(i) with evaluating the operator's prior experience in managing these waste disposal facilities and the administrative citations are telling in that they give the Agency a picture of Watt's operational control over the three landfills managed by Watts. In this case, the seven years of administrative citations show a history of nine violations for refuse in standing or flowing waters; two violations for leachate flow entering the waters of the State; two violations for leachate flow exiting the landfill confines; 20 violations for uncovered refuse remaining from any previous operating day or at the conclusion of any operating day; two violations for failure to submit reports required by permits or Board regulations and eight violations for failure to collect and contain litter from the site by the end of each operating day.

Watts argues that, because the citation process is designed to be a simpler mechanism for enforcement, it is, therefore, inappropriate to consider administrative citations in relation to waste management operating permits. We, however, find this argument without merit. In the case of the Sangamon Valley Landfill litigation and as part of assessing the $350,000 in penalties, the court found Watts in violation of several of the same statutory provisions of the Act (Sections 21(o)(1)-(3), (5) (9), (11) and (12)) which were also at issue in the administrative citation cases before the Board. Clearly the court found these violations significant enough to serve as a factor in assessing a $350,000 penalty; therefore, we are hard pressed to conclude that the same violations are unimportant merely because they were prosecuted via the administrative citation route. Additionally, it is particularly relevant that the court ordered

Watts to pay $3,000 in administrative citation penalties which Watts had failed to pay and which were assessed in the citation cases before the Board. (*See* Sangamon Cty Cir. Ct. Order of February 2, 1994, R. 94-243 at 130.)

Watts also raises as a "mitigating" factor the fact that the administrative citations are not recent enough to be relevant to any consideration of the Watts' operational and management history. While we are not persuaded that the "staleness" of the citations is enough to warrant a reversal of the Agency's decision, we do believe that ordinarily, the age of the violations may be an important consideration. It is the responsibility of the Agency to ensure that when it is decided an operator's history of repeated violations warrants terminating operating rights via the permit denial, that the basis for the decision bears a rational relationship to the Agency's concerns. It is not reasonable to deny an operator either prior conduct certification ("age of the violation" is listed as a mitigating factor in Section 745.141(b)(2)) or a waste management permit based on ancient history without there being additional reasoning for the decision. In this case, when we examine the historical record of Watts' landfill operations across the State, we find a record replete with operational violations and noncompliance. Notably, the most recent adjudicated violations occurred in the administrative citation cases in May of 1994 (three months prior to the Agency's first permit denial) and in the Sangamon Valley Landfill litigation, in February of 1994 (six months prior to the Agency's permit denials). Therefore, there is nothing inappropriate about the 19 administrative citations, in the "aggregate," together with the Sangamon Valley Landfill litigation, serving as the basis for the Agency's decision to deny the seven permits pursuant to Section 39(i).

Other Considerations

*The Wells Letters*

Watts argues that the Agency's use of the *Wells* letters is evidence that the Agency did not give appropriate consideration to Watts' operational history when it made the decision to deny the permits. Watts believes the *Wells* letters merely show that the Agency had already determined the permits would be denied, and that the Agency provided no "real opportunity" for Watts to respond to the letters. The Board finds that the Agency appropriately used the Wells letter in these seven permit applications. In the *Wells* case, the court held that the Agency should allow an applicant the opportunity to respond to allegations that the issuance of the permit may violate the Act or Board regulations. It is undisputed that *Wells* letters were sent to Watts citing various adjudicated violations as potential rationale for denial of the permits. It is further undisputed that Watts replied to those letters. The dispute arises over how the Agency evaluated the Watts' reply to the Wells letters. The Agency permit reviewer testified that he reviewed the response received from Watts and discussed the response with others at the Agency. Therefore, the record establishes that the Agency considered the responses to the Wells letters.

*Unadjudicated Violations*

Watts also alleges that the Agency improperly relied on unadjudicated violations when deciding to deny the permits. The Board finds that the record does not support Watts' allegation. The FOS did, in fact, recommend to the permit reviewer that the permit be denied because Watts had failed to submit a timely application for significant permit modification. However, the FOS is not responsible for making a recommendation on whether to grant or deny the permits. The permit reviewer may have "considered" the fact that the application for significant permit modification had not been filed; however, the permit reviewer testified that he "considered" several matters in recommending denial. The Agency's denial letters articulate the specific reasons for denial which included Watt's past history and certain technical deficiencies. The denial letter does not state among the list of violations the failure to timely file the significant modification permit. It is well settled that the Agency denial letter frames the issues in a permit appeal. *(Pulitzer Community Newspapers, Inc. v IEPA,* PCB 90-142, at 6 (December 20, 1990*)*; *Centralia Environmental Services, Inc. v. IEPA*, PCB 89-170, at 6 (May 10, 1990); *City of Metropolis v IEPA*, PCB 90-8 (February 22, 1990).)

Additionally, Watts argues that it is somehow unfair that the Agency considered the Sangamon Valley Landfill litigation when the case was clearly on appeal during the pendancy of the permit applications before the Agency. The Board disagrees with the petitioner's argument in this regard. For purposes of the Section 39(i) and in satisfaction of *Martell*, all that is necessary is that an adversarial hearing be held where the permit applicant had an opportunity to contest the alleged violations and that the violations be adjudicated as a result of that hearing. This requirement has become the "adjudicated violations" requirement in *Martell*. In this case, Watts received a hearing before the Sangamon County circuit court and received added due process protection in a hearing before the Board concerning the Agency's permit denials. Perhaps if the circuit court's order been reversed by the appellate court, then we may have a different case at bar on the issue of the severity of the Sangamon Valley Landfill violations; however, the circuit court was affirmed on all counts including the $350,000 penalty. (*People and County of Sangamon v. Watts Trucking Service, Inc. and ESG Watts, Inc.* (July 14, 1995) No. 4-94-0414 (Rule 23 Order).)

*Agency's Lack of Procedures*

We agree with Watts that the Agency's practices might lead to an inconsistent application of Section 39(i). There are no adopted rules for routinely conducting 39(i) evaluations in the context of the Agency's permit review process. Equally obvious is the fact that seeking and offering "past history" comment in the context of the Agency's permit review process involves a discretionary case-by-case judgment on the part of Agency personnel. We note that the lack of consistent 39(i) procedures is a most troublesome aspect for the Board in its review of this case and, indeed, is largely responsible for a division within the Board as to the outcome. Nonetheless, we do not believe that the method by which the Agency conducted the evaluation of Watts' prior violations rises to a level which warrants reversal under the facts of this particular case.

Rather, we are persuaded that the history of past violations contained in this record so clearly demonstrates an example of an appropriate use of Section 39(i), that Watts' argument concerning unfair treatment begs the real issues concerning the extent and context of its past violations. The Agency's decision in this case is, quite simply, supported by a clear record of severe and repeated violations of the Act and regulations on the part of Watts. In a less obvious case, the Agency's Section 39(i) denial might have warranted reversal had the Agency employed the same procedures used in this case. While we agree that it would behoove the Agency, if it expects to prevail upon review of a Section 39(i) decision in the future before this Board, to develop a more consistent process and more specific standards to evaluate permittees for prior history of violations (such as the Section 745.141 factors that we relied upon) we cannot agree that the procedures utilized in this case call for a reversal of the Agency's decision.

## COSTS

In an order of February 15, 1996, the Board accepted the Agency's late-filed brief and imposed sanctions against the Agency for the late-filing. The Board imposed the reasonable costs of Watts' attorney in preparing the motions and responding to the late-filed brief. The Board directed Watts to file such costs with the reply brief. On February 23, 1996, the Board received an affidavit of costs from Watts. Watts asks for $125 per hour for ten hours totaling $1,250 for costs. The cost of $125 is reasonable here and the Board directs the Agency to pay to Watts the sum of $1,250.

## CONCLUSION

In denying a permit pursuant to Section 39(i) of the Act, the Agency is to evaluate the operator's history and determine if there are repeated violations which warrant the denial of a permit. In this case, the Agency properly considered 19 administrative citations and a circuit court case in finding that the operator has a history of repeated violations. Therefore, the Board affirms the Agency's denial of these seven permits.

The Agency also listed several technical denial point on six of the seven permit applications. The Board finds that the six applications which were denied for technical denial reasons were sufficient to establish that no violations of the Act or Board regulations would occur if the permits were issued.

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

## ORDER

1) The Board finds that the Illinois Environmental Protection Agency properly denied ESG Watts the seven permits in the following cases:

PCB 94-243
PCB 94-307

PCB 94-306
PCB 94-308
PCB 94-309
PCB 95-133
PCB 95-134

2) All dockets are closed.

3) The Illinois Environmental Protection Agency is hereby ordered to pay the sum of $1,250 as sanctions for the late filing of its brief to the Charles J. Northrup, attorney of record for ESG Watts within 60 days of the date of this order.

IT IS SO ORDERED.

J.T.Meyer, G.T.Girard and E.Dunham dissented.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (*See* also 35 Ill. Adm. Code 101.246 "Motions for Reconsideration.")

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 21st day of March, 1996, by a vote of 4-3.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board