ILLINOIS POLLUTION CONTROL BOARD
November 8, 1990

LAND AND LAKES COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 90-118
	)	(Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

DISSENTING OPINION (by J. Anderson):

For clarity and completeness regarding my dissent, I have selected the following Opinion and Order format to best express what I believe would have been the appropriate outcome and supporting rationale in this case.

* * * *

This matter comes before the Board on a Petition for Review filed by Land and Lakes Company ("Land and Lakes"). Land and Lakes seeks review of a single condition imposed by the Illinois Environmental Protection Agency's ("Agency") on its May 17, 1990 Experimental Supplemental Permit.

PROCEDURAL HISTORY

Land and Lakes filed its Petition for Review on June 20, 1990. On July 16, 1990 the Agency filed a Motion for Leave to File the Agency Record Instanter and the Agency Record. On July 19, 1990 the Board issued an order granting the Agency's motion. On July 20, 1990, Land and Lakes filed a Motion to Supplement the Agency Record. On July 24, 1990 the Agency filed a Motion for Extension of Time to Reply to Land and Lakes' Motion to Supplement the Agency Record. The Board granted the motion on August 9, 1990, and the Agency filed its Objection to the Motion to Supplement on the same date. On August 13, 1990, Land and Lakes filed a Reply to the Agency's Objection. Hearing was held on August 16, 1990 in Romeoville, Illinois. On August 30, 1990, the Board issued an order stating that it would take the Motion to Supplement the Agency Record with the case. Land and Lakes filed its post-hearing brief on September 10, 1990. The Illinois Environmental Protection Agency ("Agency") filed its post-hearing brief on September 21, 1990. On September 27, 1990, Land and Lakes filed a Reply Brief.

BACKGROUND

Land and Lakes is the operator of a sanitary landfill known as the Willow Ranch Landfill. The landfill is owned by NBD Trust Company of Illinois as trustee for JMC Operations. The site is located southeast of Route 53 and Bluff Road in Romeoville, Will County, Illinois, and consists of approximately 33 acres. It is adjacent to a quarry on one side and, on its southern edge, to the Will County Forest Reserve. (R. 121). It is permitted to accept general municipal solid waste. (R. 121).

The Agency granted Land and Lakes a Developmental Permit (Permit No. 1976-17-DE) for the site on May 13, 1976. On February 1, 1990, Land and Lakes submitted an application for an Experimental Supplemental Permit to allow it to modify the operation of the site to allow the use of a non-woven geotextile fabric (Fabrisoil) as an alternate daily cover material.

After receiving the permit application, Mr. Chris Liebman, the Agency permit analyst on this matter, sent out a memo to the various sections within the Division of Land Pollution Control (including the Field Operations Section ("FOS")) asking for comments on it. (R. 48-49, 73). He received a written comment from Mark Retzlaff of FOS, as well as a suggestion from his supervisor, Ed Bakowski, to check with Will County which has a delegation agreement with the Agency pursuant to Section 4(r) of the Act. (R. 57, 92). On May 8, 1990, Mr. Liebman telephoned Ms. Kathryn Sachtelben, the Will County landfill inspector. (R. 58, 136). Ms. Sachtelben told him that she did not have experience with the use of Fabrisoil and that she did not know if it would prevent blowing litter in heavy winds, or how it would perform in heavy rains or with regard to burrowing animals. (R. 125). She also stated that the site was adjacent to a forest reserve, that Land and Lakes had experienced some problems in the past with an experimental daily cover called Sanifoam, and that it was her understanding, from conversations with site personnel, that there was no one at the landfill on weekends or holidays. (R. 65, 79, 103, 125). She then recommended that a soil cover rather than the Fabrisoil be applied on the day before weekends and holidays because there would be no one at the site at those times to rectify any potential problems (i.e. blowing litter, odors, burrowing animals, or fires) that could arise during those times. (R. 77, 107, 108, 127-128).

On May 17, 1990, the Agency granted Land and Lakes' Application for Experimental Supplemental Permit (Permit No. 1990-056-SPX). The permit is of a two year duration, and contains sixteen special conditions and four standard conditions. Land and Lakes appeals from the imposition of Special Condition 3, which provides as follows:

> 3. At the end of the working day on days before weekends and holidays, soil rather than non-

woven geotextile fabric or Sani-Blanket shall be used as daily cover.

In its Petition for Review, Land and Lakes provides three reasons for its objection to the inclusion of Special Condition 3. First, Land and Lakes argues that the condition is neither required by any regulation promulgated by the Board under 35 Ill. Adm. Code 807, nor necessary to accomplish any purpose of the Environmental Protection Act ("Act") (see Ill. Rev. Stat. 1989, ch. 111½, par. 1039(a); 35 Ill. Adm. Code 807.206(a)). (Pet. par. 6(A)). Second, Land and Lakes alleges that the Agency acted arbitrarily and unreasonably in imposing the condition because there is no technical basis, nor any basis in law or fact, for its inclusion. (Pet. par. 6(B)). Finally, Land and Lakes asserts that the Agency included the condition solely at the behest of Will County and in violation of Section 39(a) of the Act. (Pet. par. 6(C)). In support of the above allegations, Land and Lakes points to the fact that the Agency did not include a similar condition in four of its other experimental permits (see below). (Pet. par. 6(C)).

MOTION TO SUPPLEMENT AGENCY RECORD

Before reaching the substantive merits of this permit review, the Board must address the issue raised in Land and Lakes' Motion to Supplement the Agency Record.* Land and Lakes requests that the Experimental Supplemental Permits for four of its other landfills (Land and Lakes Dolton [Permit No. 1990-075-SPX dated May 14, 1990], located at 138th and Cottage Grove in Dolton, Cook County; Land and Lakes #3 [Permit No. 1990-063-SPX dated May 8, 1990], located at 122nd and Stony Island in Chicago, Cook County; Land and Lakes #1 and #2 [Permit No. 1990-062-SPX dated May 7, 1990], located in Cook County; and Land and Lakes Wheeling [Permit No. 1990-194-SPX dated May 31, 1990], located on Milwaukee Avenue just north of Lake Cook Road in Wheeling, Lake County) be included in the record because they do not contain the objectionable condition. Land and Lakes argues that the above permits must be included in the record in order for the Board to appreciate the arbitrary nature of the Agency's decision to impose Special Condition 3.

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* The Board notes that, at hearing, Land and Lakes made a motion to introduce the four experimental permits into the record. The Agency objected and argued that they were not relevant to the case. The Agency also objected to the introduction of the Wheeling landfill permit. The Agency argued that it should not be admitted into the record because it was issued after the Willow Ranch permit and the Board can only consider evidence that was available to the Agency at the time the permit was issued. The Hearing Officer in the matter allowed the introduction of the four permits into the record (see Exhibits 1, 2, 3, and 4). (R. 34-38).

In response, the Agency argues that it filed the record pursuant to 35 Ill. Adm. Code 105.102(a)(4), and that the Agency record contains the documents described in that section and all other documents which the Agency utilized in its permit review. The Agency also states that it did not utilize the other permits in its permit review and asserts that the documents are not relevant to this permit appeal.

With regard to the issue of supplementation, it is well recognized that, if there was information in the Agency's possession upon which it actually or reasonably should have relied, the applicant may submit such information to the Board for the Board's consideration. Waste Management, Inc. v. IEPA, PCB 84-45, 61, 68, 60 PCB 173, 201 (October 1, 1984) and 61 PCB 301, 310, 312, 313 (November 26, 1984)(monitoring data in the Agency's possession which contradicted earlier monitoring data which did not come to the attention of Agency decision makers should be included in the record), aff'd sub nom. IEPA v.IPCB and Waste Management, 138 Ill. App. 3d 550, 486 N.E.2d 293 (3d Dist. 1985), aff'd 115 Ill.2d 65, 503 N.E.2d 343 (1986); Wells Manufacturing Company v. IEPA, PCB 86-48, 71 PCB 34, 35-36 (July 11, 1986), 76 PCB 301, 303, 310 (March 19,1987)(Hearing Officer correctly allowed the testimony of Agency witnesses who were called to amplify upon joint exhibits [testimony of citizens whose forms, letters, and petitions that were on file with and available to the Agency, prior to the Agency's action in the matter] contained in the Agency record), 76 PCB 324 (March 19, 1987), rev'd and rem'd on other grounds 195 Ill. App. 3d 593, 552 N.E.2d 1074 (5th Dist. 1990); Joliet Sand and Gravel Company v. IEPA, PCB 86-159, 75 PCB 228, 232-233 (February 5, 1987)(in appeal of Agency denial of application for renewal of operating permit, documents contained in Agency's file relating to original operating and construction permits were admitted into evidence because application for renewal referenced expiring operating permit which, in turn, referenced construction permit), aff'd Joliet Sand and Gravel Company v. IPCB and IEPA, 163 Ill.App.3d 830, 516 N.E.2d 955, 958 (3d Dist. 1987); Frinks Industrial Waste, Inc. v. IEPA, PCB 83-10, 52 PCB 447, 449 (June 30, 1983)(supplements to the record had been necessary when the Agency located additional relevant documents); Sherex Chemical Co. Inc. v. IEPA, PCB 80-66, 39 PCB 527, 530 (October 2, 1980)(Board overturned Agency's denials of both an operating and a stack construction permit based on modeling data in the record, which because of the Agency's denial letter, theoretically included only the Dames & Moore results, but which in point of fact included all prior permit application considerations), aff'd sub nom. IEPA v. Sherex Chemical Co. and IPCB, 100 Ill. App. 3d 735 (1981).

In the case at hand, it is undisputed that the four permit applications were in the Agency's possession at or about the same time as the Willow Ranch permit application. (R. 18, 35). It also appears that the experimental permits for the four landfills were issued at or about the same time as the Willow Ranch

permit. (R. 19, 21, 36). The question now becomes whether Mr. Liebman should have included the four other permits as part of its review.

At hearing, Mr. Liebman testified that he had not seen the permits for the four other landfills. (R. 96). He also testified, however, that although he could not remember if he was aware that the other four permit applications were at the Agency at the time of his review of the Willow Ranch permit, it is typical for Land and Lakes, when asking for a permit to allow for a certain activity at one facility, to ask for a similar permit for its other facilities. (R. 97-98). It is also apparent from reading the transcript that permit applications are circulated in the Division of Land Pollution Control, that Mr. Liebman gives his first draft of a permit to his immediate supervisor, Mr. Ed Bakowski, for review, and that a final draft is submitted to the head of the Division of Land Pollution Control's Permit Section, Mr. Larry Eastep, for his review and signature. (R. 48-49, 73, 77, 85).

After considering the fact that all the permit applications were at the Agency at the same time, that Mr. Liebman was aware that it was typical for Land and Lakes to ask for similar permits for its various landfills, and that permit applications are typically circulated in the Division of Land Pollution Control and given to Mr. Bakowski and Mr. Eastep for review, the Board concludes that it is not unreasonable to expect Mr. Liebman to have been aware of and to have examined those permits that were issued prior to the Willow Ranch permit (Land and Lakes Dolton, Land and Lakes #3, and Land and Lakes #1 and #2). He could not have examined the Wheeling permit, however, because it was issued after to the Willow Ranch permit and thus, was unavailable to him. Accordingly, the Board grants Land and Lakes' Motion to Supplement the Record, but only with respect to the permits for Land and Lakes Dolton, Land and Lakes #3, and Land and Lakes #1 and #2. Moreover, the Board overturns the Hearing Officer's ruling with respect to the Wheeling permit.

BURDEN OF PROOF

Permits are granted by the Agency pursuant to Section 39(a) of the Act which sets forth the requirements for securing a permit as follows:

> When the Board has by regulation required a permit...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....In granting permits the Agency may impose such conditions as may be necessary to accomplish the purposes of this Act, and as

> are not inconsistent with the regulations promulgated by the Board hereunder.

This standard is reiterated in the Board's waste disposal regulations, with one important exception. Specifically, 35 Ill. Adm. Code 807.207 provides:

> The Agency shall not grant any permit, except an Experimental Permit under Section 807.203, unless the applicant submits adequate proof that the solid waste management site: (a) will be developed, modified or operated so as not to cause a violation of the Act or the rules, or has been granted a variance pursuant to Title IX of the Act....(emphasis added)

When examining 35 Ill. Adm. Code 807.203, it becomes clear that experimental permits are exempt from the standard set forth therein. 35 Ill. Adm. Code 807.203(a) provides:

> To best aid the improvement of solid waste management technology, the Agency may issue Experimental Permits for processes or techniques that do not satisfy the standards for issuance set forth in Section 807.207, if the applicant can provide proof that the process or techniques has a reasonable chance for success and that the environmental hazards are minimal.

Although both parties refer to the above sections, there is some dispute and confusion regarding the applicable section and thus, the burden of proof that must be met in this case.

In most permit appeals, a petitioner must show that the condition imposed by the Agency is arbitrary and not necessary to accomplish the purposes of the Act. Stated alternatively, a petitioner must establish that its permit, absent the condition, will not result in any future violation of the Act and the condition is, therefore, arbitrary and unnecessary (see John Sexton Contractors Company v. IEPA, PCB 88-139, 96 PCB 191, 196 (February 23, 1989), aff'd in part, rev'd in part and rem'd sub nom. John Sexton Contractors Company v. IPCB and IEPA, No. 1-89-1393, slip op. at 15 (4th Dist. June 29, 1990); Browning-Ferris Industries of Illinois, Inc. v. PCB et al., 179 Ill. App. 3d 598, 534 N.E.2d 616, 620, 622 (2d Dist. 1989); Sexton Filling & Grading Contractors Corporation v. IEPA, PCB 88-116, 100, PCB 189, 194, 197 (June 22, 1989); Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 516 N.E.2d 275, 279 (5th Dist. 1987); EPA v. PCB, 118 Ill. App. 3d 722, 780, 445 N.E.2d 188, 194 (1st Dist. 1983). Once a petitioner establishes a prima facie case that the condition is unnecessary, it becomes incumbent upon the Agency to refute the prima facie case. John Sexton Contractors Company v. IPCB and IEPA, No. 1-89-1393, slip op. at 15 (4th Dist. June 29,

1990); Marathon Petroleum Co., IEPA, PCB 88-179, 101 PCB 259, 274 (July 27, 1989). In order to do this, the Agency must prove that the condition is necessary to achieve compliance with the Act and is not merely a condition of convenience. Fred E. Jurcak v. IEPA, PCB 85-137, 103 PCB 506-507 (September 28, 1989).

Because experimental permits have a two year maximum duration (see 35 Ill.Adm. Code 807.203(c)), the burden of proof (i.e. in terms of risk) is less than that of Section 39(a) of the Act. In other words, a petitioner who is granted an experimental permit pursuant to 35 Ill. Adm. Code 807.203 need not prove that the permit, as proposed, will not result in a violation of the Act. Rather, the petitioner has a burden to show that the experimental process or technique, as proposed, has a reasonable chance of success and minimizes the environmental hazards and that the disputed condition, therefore, is unnecessary. Once the petitioner has met his burden of proof, the burden then shifts to the Agency to show that the condition is necessary.

DISCUSSION

As previously stated, the main issue in this case, and the question that the Board must ask, is whether the use of Fabrisoil, as proposed (i.e. at all times), has a reasonable chance of success and minimizes environmental hazards. In other words, the issue is whether Special Condition 3 is unnecessary.

In its briefs, Land and Lakes argues that the condition is arbitrary and unnecessary for several reasons. First, Land and Lakes notes that its permit application did not contain any information or reveal any special circumstances that would justify the imposition of Special Condition 3. Second, Land and Lakes states that there was no technical or factual basis for the inclusion of the condition. Rather, Land and Lakes argues that the Agency improperly delegated its authority because it imposed the condition solely at the behest of Will County. Third, Land and Lakes argues that there is nothing about the Willow Ranch facility that in any way differs from the other four landfills which would necessitate or require the imposition of Special Condition 3.

For its part, the Agency asserts that Fabrisoil is an unproven technology in Illinois, and that the burden of proof that Fabrisoil is an effective daily cover material is on Land and Lakes and not the Agency. According to the Agency, the only information that Land and Lakes submitted to the Agency regarding the effectiveness of Fabrisoil as a daily cover was a "self-serving" brochure from the manufacturer of the product. Because Land and Lakes did not submit any documentation from sources independent from the manufacturer as to the effectiveness of the product, the Agency concludes that it had no reliable information at the time of the permit application, either from Land and Lakes or elsewhere, that Fabrisoil would control litter, vectors, fire, or odors consistently and under all weather conditions.

In addition to the above reasons, the Agency asserts that it was justified in issuing an experimental permit pursuant to 35 Ill. Adm. Code 807.203 and imposing Special Condition 3 because the landfill was adjacent to a forest reserve and, as a result, had a higher susceptibility to burrowing animals than other sites, and because the site was unattended on weekends and holidays and no one would be available to correct any problems that could arise during those times.

In response to Land and Lakes' argument regarding improper delegation, the Agency contends that there is no evidence to show that Mr. Liebman delegated his permit responsibility to Will County. Rather, the Agency notes that permit reviewers commonly seek the input of Agency field inspectors as well as county inspectors, where the county has a delegation agreement with the Agency pursuant to Section 4(r) of the Act, in making permitting decisions. The Agency adds that Mr. Liebman simply sought information concerning the site in accordance with this common practice and then exercised his independent judgment before placing Special Condition 3 in the permit.

The record reveals that the Agency added Special Condition 3 to guard against the possible risks of blowing trash, odors, animal burrowing, and fires, and that the Agency's actions were based on the conclusion that there was no reliable information that Fabrisoil would control such occurrences. However, at no time did the Agency contend that Special Condition 3 was needed (i.e. necessary) to assure that Fabrisoil would have a reasonable chance of success. In fact, as Ms. Sachtelben testified, Special Condition 3 was added not because Fabrisoil did not have a reasonable chance of succeeding without the condition, but because neither she nor the Agency were certain it would succeed:

> With an experimental permit I feel it's an opportunity to safeguard against problems in the future so I recommended that we be cautious, that we do not have--I did not have experience with the use of Fabri-soil and to my knowledge the Agency did not have experience, their field operations people did not have experience with the use of Fabri-soil, that clay or dirt cover is more tried and true, and because of these reasons that we don't know how it performs in blowing conditions, heavy winds, if it would cause blowing litter or allow for blowing litter in heavy wind conditions that we did not have any proof of how it would perform in the field regarding borrowing animals or heavy rains. (Emphasis added).
>
> (R. 125, 133, 137).

It is also clear that there was nothing at the landfill that would justify the imposition of Special Condition 3. Mr. Wierec testified that there was nothing about the landfill in terms of the types of refuse it accepted, or its location and the surrounding environment that would require the use of soil before a weekend or holiday as opposed to Fabrisoil. (R. 22-23, 39). He also stated that there was nothing about Special Condition 3 that would enhance or improve the environmental conditions at the landfill. (R. 22-23). Ms. Sachtelben testified that she thought there may be some type of problem at the landfill if Fabrisoil was used before weekends and holidays, she was unable to specify what that problem might be. (R. 124-127). Although she suggested that animals from the forest reserve could burrow at the site, she testified that she had never before seen burrowing animals at the site. (R. 137-139, 140). Moreover, she testified that she did not know of any problems with blowing litter, odors, or fires at the site, nor did she ever issue an administrative citation to the site or know of any complaints lodged against the site. (R. 130-131, 143-144). Mr. Liebman even confirmed the fact that the condition was added not because of past problems with blowing litter, nor because the feared problems had any basis in technical data or literature. (R. 106, 109).

It also becomes apparent that Special Condition 3 is unnecessary in light of the fact that Special condition 10 already guards against the possibility of potential hazards. Special Condition 10 provides that:

> If weather or other conditions exist that adversely affect the ability of the alternate cover to prevent blowing litter, susceptibility to fire, odors, or vectors, six inches (6") of daily cover soil shall be used.

Moreover, we note that Special Condition 3 is not "rationally related" to the Agency's reasoning for imposing the condition (i.e. to guard against potential problems when the site was unattended). For example, the Board is at a loss to understand the Agency's distinction between week nights as opposed to weekends and holidays in light of the fact that many potential problems (i.e. wind and burrowing animals) are as likely to occur during a week night as during a weekend or holiday. Also, if the purpose of issuing an experimental permit for this landfill was to see whether Fabrisoil worked, the Board is puzzled as to how the Agency thought it was going to obtain information about the effectiveness of the product if it was not going to be used under those circumstances normally encountered in the field, including weekend use. Thus, it would have been more appropriate for the Agency to have, for example, allowed the use of Fabrisoil at all times and required Land and Lakes to have a person conduct periodic checks during weekends and holidays if it were concerned about potential problems.

With regard to the question of the Agency's delegation of authority, the Board has no quarrel with the Agency's attempt to seek whatever information it judges will or may be of use to it when it is evaluating a permit application. It makes sense that the Agency would ask about the experiences of a county inspector functioning under a delegation agreement. However, Section 4(r) of the Act does not allow the Agency to delegate its permit responsibilities and, in this sense, the Board does not accept the Agency's argument that a county inspector's involvement in a permit review is no different from that of an Agency employee. In other words, the Agency cannot absolve itself of the responsibility to evaluate the merits of a recommended permit condition. Thus, it cannot add a permit condition solely because it was asked to do so. Here, only Ms. Sachtelben ever considered the necessity of Special Condition 3. Mr. Liebman never quizzed Ms. Sachtelben about the basis for her concerns, nor did he consult with any outside authorities about the necessity of Special Condition 3. (R. 80-83, 99). In other words, we cannot discern where Mr. Liebman exercised independent judgment. Rather, he acceded to the county's suggestion without any further review. Had the Agency probed and evaluated the underlying rationale for placing Special Condition 3 in the permit, it might have itself concluded that the condition was inappropriate and inapposite to the purpose of issuing the experimental permit in the first place.

The Board does not agree, however, with Land and Lakes' supposition that the absence of the Special Condition 3 in the experimental permits for the other landfills is an indication of the arbitrary nature of the Agency's decision to impose the condition in this case. In order for the Board come to such a conclusion, there must be an evidence that the topography and operations at the Willow Ranch landfill are similar to the other landfills. Although Mr. Wierec testified that there was nothing about this landfill in terms of the types of refuse it accepted or its location and the surrounding environment that would require the use of soil rather than Fabrisoil before a weekend or holiday, there is no evidence in the record that indicates any similarity between the landfills in terms of operating procedures. Specifically, there is no evidence whether there is oversight at the other facilities during the weekends and holidays. This lack of evidence defeats Land and Lakes' attempt to draw a comparison between the landfills.

Finally, we note that it appears that the Agency did not give Land and Lakes any indication that it was going to impose such a condition. Thus, Land and Lake had no opportunity to discuss Special Condition 3 with the Agency. In Wells Manufacturing Company v. IEPA, 195 Ill. App. 3d 593, 552 N.E.2d 1074 (1st Dist. 1990), the Appellate Court concluded that the Agency violated Wells' due process rights when it denied the company's application for renewal of an air operating permit on the basis of an alleged air pollution violation. The Court concluded that because the company had certified that information

in previous construction and operating permits was accurate and unchanged at the time of the renewal application, the Agency should have approved the renewal application or given the company an opportunity to submit evidence during the application process that it was not violating the Act and air pollution regulations. (See also Reichhold Chemicals, Inc. v. IPCB and IEPA, No. 3-89-0393 (3d Dist. October 12, 1990), involving the Agency's denial of Reichhold's application for an air operating permit on the basis that the company might violate the Act. The Appellate Court cited Wells and expressed concern over the Agency's denial because the Agency did not give the company an opportunity to submit information before the denial.)

In the instant matter, Mr. Liebman, on direct examination, testified that there was never a discussion between the Agency and Land and Lakes regarding the imposition of Special Condition 3 or the permit before the permit was issued. (R. 24). He then stated, during cross-examination, that he had talked with Land and Lakes about the imposition of the condition. (R. 83-85).

Mr. Dan Wierec, an engineer for Land and Lakes, testified that the Agency did not contact him or, to his knowledge, anyone at Land and Lakes, to discuss the Agency's underlying concerns leading to imposition of Special Condition 3. (R. 23-24). Mr. Ambrosm (sic), Land and Lakes' environmental manager, testified that he talked with Mr. Liebman about Special Condition 16, but not about Special Condition 3. (R. 154-155).

After reviewing the testimony of Mr. Liebman, Mr. Wierec, and Mr. Ambrosm, the Board is persuaded that there was no contact between the Agency and Land and Lakes regarding the imposition of Special Condition 3. Although we recognize that this case differs from Wells and Reichhold in that it involves an experimental supplemental permit rather than the renewal of an operating permit or a first-time operating permit, we, like the Appellate Courts in Wells and Reichhold, are concerned with the fundamental fairness of the Agency's procedures. Because Land and Lakes certified in its permit application that there were no other modifications at the site other than the change in daily cover, the Board concludes that it would have been in the interest of fairness if the Agency had given Land and Lakes an opportunity to submit evidence that there would have been no danger if it used geotextile fabric before weekends and holidays.

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

ORDER

The Board strikes Special Condition 3 of Land and Lakes' Experimental Supplemental Permit (Permit No. 1990-056-SPX) dated May 17, 1990.

Section 41 of the Environmental Protection Act, Ill.Rev. Stat. 1989, ch. 111½, par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

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It is for the reasons expressed in Opinion and Order format above that I respectfully dissent.

Joan G. Anderson
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was submitted on the 28th day of November, 1990.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board