ILLINOIS POLLUTION CONTROL BOARD
March 22, 1985

WILLIAM H. CLARKE and PIONEER PROCESSING, INC.,	)	
Petitioner,	)	
v.	)	PCB 84-150
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

THOMAS J. IMMEL (BURDITT & IMMEL), RICHARD J. KISSEL (MARTIN, CRAIG, CHESTER & SONNENSCHEIN), AND WILLIAM A. SPEARY, JR. APPEARED ON BEHALF OF PETITIONERS; and

EDMUND B. MORAN, JR. AND EUGENE DOUGHERTY, ASSISTANT ATTORNEYS' GENERAL APPEARED ON BEHALF OF RESPONDENT.

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

Procedural History

This matter comes before the Board on the October 4, 1984 petition of William H. Clarke and Pioneer Processing, Inc. (hereinafter collectively "Pioneer") for review of the August 30, 1984 denial by the IEPA ("Agency") of Pioneer's application to develop a 177 acre special and hazardous waste disposal site near the Village of Naplate, LaSalle County, Illinois.

The Agency filed a "Summary of Agency Record" on November 5, 1984 listing 49 documents "submitted as the Agency record in this matter."* Following denial by the Board of various petitions to join necessary parties and to allow intervention, the Board held a hearing in this matter on February 7, 1985. At hearing, the only testimony presented was that of Michael W. Rapps on behalf of Pioneer, although arguments were presented by Pioneer and the Agency, while LaSalle County renewed its motion to intervene. Pioneer filed its brief February 8, and the Agency filed its

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*Documents listed in this Summary will be referred to as "Agency Record, Exhibit _____." The Board notes that the Agency record in this case consists of a 2 1/2 inch stack of rubberbanded documents which are not numbered, either in correspondence with the Summary or in any other respect, and which are also often illegible, making reference to these materials most tedious.
The Board hearing record will be referred to as "R. _____."

brief March 1. On March 13, Pioneer filed a reply brief a motion for leave to file instanter, which motion is granted.*

This site, commonly referred to as "Brockman II", was the subject of a previous permit appeal before the Board, County of LaSalle ex rel. Gary Peterlin, State's Attorney of LaSalle County, the Village of Naplate, the City of Ottawa, the City of Utica, Ottawa Township Boad of Trustees ex rel. the Town of Ottawa, Residents Against Polluted Environment, Rosemary Sinon; Marie Madden, and Joan Benya Bernabei v. IEPA, Williams Clarke, Pioneer Development, Pioneer Processing, Inc., and Wilmer and Edith Brockman, PCB 81-10, Order February 16, 1982, Opinion March 4, 1982. That third party appeal sought reversal of the Agency's December 22, 1980 issuance of a development permit (No. 1980-1944-DE) for the site. The Board had sustained the Agency's issuance of the permit, which Board decision was itself sustained by the appellate court in State of Illinois v. Pollution Control Board, 113 Ill. App. 3d 282, 446 N.E. 2d 915 (3rd Dist. 1982).

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*On March 21, 1985, the Board received a "Statement of the Illinois Manufacturers' Association in Support of Petitioner's Permit Appeal." This "Statement" has been made a part of the record in this case, to avoid any questions concerning its receipt in the event of any appeal of this matter. However, the Board has not considered the "Statement" in its review of this case, for the reasons that the submittal is not allowed for in the Board's rules and is in any event untimely.

The Board has no specific procedural rules concerning acceptance of public comments in permit appeals. Section 40(a)(1), cross-referencing Section 32 concerning enforcement cases, arguably requires the Board to accept written statements presented to the Board by any person at the time of hearing. This statutory requirement is discussed in Procedural Rule 103.203(a), providing that such written statements tendered at hearing "shall be subject to cross-examination", and are subject to being stricken from the record if the writer "is not available for cross-examination on timely request". The Board notes that in rulemaking proceedings, where the time of submittal of post-hearing written submissions is expressly provided for, the time is limited to "within 14 days of the close of the hearing . . . unless otherwise specified . . . by the Hearing Officer." No such specification was made by the Hearing Officer in this case.

The "Statement" was received on Thursday, March 21, well after the Monday, March 18, 5:00 p.m. cut-off date for filings to be considered on the agenda for this week's Board meeting (see, Environmental Register No. 304, March 8, 1985, p. 8-9. "There simply have been too many last minute filings for thorough consideration by Board Members and staff prior to decision.").

The IMA, of course, may participate in the APA hearing to be held by the Agency (see infra, p. 6).

However, these decisions were reversed by the Illinois Supreme Court in Pioneer Processing, Inc. v. Environmental Protection Agency, 102 Ill. 2d 119, 464 N.E. 2d 238 (1984). The Court found that "that the permit which the Agency issued to Pioneer is void for failure to comply with the contested case provisions of the APA [Illinois Administrative Procedure Act, Ill. Rev. Stat. ch. 127, par. 1016(a)] . . . ." As to issues not disposed of in its Opinion, the Court's instructions were that

> "(s)ince we have determined that Pioneer's permit is void, the issue of the possible location of the hazardous-waste-disposal site within 1,000 feet of a private well must be considered on remand during a properly conducted hearing where all the parties can present evidence regarding whether the permit should issue. These causes are remanded to the . . . Agency for a new hearing which is to be conducted according to the contested-case provisions of the APA."

The Supreme Court issued its mandate in this matter on June 11, 1984. The Agency permit denial letter was issued on August 30, 1984 (Agency Rec. Exh. 1). The substance of that letter was that the Supreme Court's holding of March 23, 1984 was based on an interpretation of Section 39(c) of the Environmental Protection Act (Act) Ill. Rev. Stat., ch 111 1/2, par. 1001 et seq., as Section 39 (c) existed on December 22, 1980. The Agency noted that the language of "old" Section 39 (c) of the Act had been deleted from the statute effective November 12, 1981 with the adoption of P.A. 82-682 (also known as SB 172), which created local site location suitability procedures and requirements for new regional pollution control facilities (hereinafter RPCF) (see current Section 39(c) and 39.2. The Agency also noted the addition of a new Section 39.3 to the Act effective January 5, 1984, adopting various new notice and hearing procedures for applications for Agency permits to develop new RPCF's for the disposal of hazardous waste", or to modify existing sites to "allow the disposal of hazardous waste for the first time."

The Agency stated that as a result of the Supreme Court's decision and remand,

> "The Agency has determined that the application is incomplete under the requirements applicable to this permit application at this time. As such the above referenced permit application is hereby denied. Once the deficiencies specified . . . have been corrected and a complete application submitted . . . the Agency will provide notice and hearing, if requested . . . "

The reasons specified for denial were that:

1. Pioneer was proposing to develop a new RPCF, and the application did not contain proof of LaSalle County approval pursuant to SB 172;

2. Pioneer was seeking a permit to allow for disposal of hazardous waste for the first time, and the application did not contain proof that Section 39.3(b) notice requirements had been met; and

3. Since plans and specifications were more than four years old, the Agency would not have assurance that no violation of the Act or regulations would occur absent submission of a new permit application.

Pioneer requests that the Board reverse the Agency's 1984 denial of the permit, asserting six "points of error" made by the Agency:

1. Brockman II is not a "new" RPCF subject to Section 39.2, because it had been previously permitted to dispose of special and hazardous wastes;

2. Since Brockman II is not "new," Section 39.3 does not apply;

3. Section 39(c) as it existed in 1980 governs this remand;

4. The Agency improperly failed to consider the application because of its "age";

5. The Agency's denial is a nullity because of its failure to conduct a new hearing;

6. The permit has issued by operation of law.

The Agency disagrees with each contention.

The Resolution

The Board will not address the parties' arguments on various points in detail, as the Board finds it clear that the Agency's decision to deny this permit is void, since it has failed to conduct an APA hearing pursuant to the direction of the Supreme Court. The Court's ruling in this matter did not void Pioneer's 1980 application; rather, it voided the Agency's 1980 permit decision. The Court's decision did not expunge any of the written record which had been previously developed, "expunging" only Agency reliance on "information which was never publicly disclosed, and which was never subjected to adversarial testing or scrutiny."

The Board notes that petitioners do not stipulate to the completeness of the Agency record as here certified (Pet. Brief, p. 3 note), and notes that the record here is considerably smaller than the which the Agency certified as providing the basis for its grant in 1980 of permit No. 1980-1944-DE (see generally the Board's references to the Agency's November, 1980 public hearings, and factual findings in County of LaSalle, supra, PCB 81-10). As no hearing was held on remand, no persons have had an opportunity to question or comment upon the Agency's expurgation of the record.

In its denial letter, the Agency expresses its belief that Section 39.3 applies to this application, states its opinion that the application is incomplete for failure to give the notices required, and concludes that it therefore need not hold an APA hearing. The Board notes that current Section 39.3 was in effect at the time of the Supreme Court's voiding of the Agency's 1980 decision to issue permit No. 1980-1944-DE. The Court did not direct the applicant to file a new application pursuant to Section 39.3. It instead directed the Agency to hold a new hearing on the application which was the subject of its review. While the Agency arguably may have had an option to reject a newly filed application as incomplete under new Section 39.3 without a hearing, it has none under the mandate issued by the Supreme Court.

One of the obvious purposes of the APA hearing requirement articulated by the Supreme Court and by the legislature in Section 39.3 is to allow for the inclusion and proper alignment of parties in the debate concerning hazardous waste permit issuance. Agency failure to hold a hearing has frustrated that intent here, since there has been no mechanism by which interested members of the public have been able to participate as parties in this permit denial action at the Board level (see Orders of December 20, 1984, January 24, 1984, and February 7, 1985.)

Another purpose of the APA hearing requirement is to allow for full articulation of and debate concerning the basis for the Agency's permitting decisions, be those decisions positive or negative. Much of the discussion in the parties' briefs concerns whether the site is a new RPCF within the meaning of either or both Section 39.2 and 39.3 of the Act, arguments being made by both parties concerning implications of the Agency's actual implementation of the development/operating/supplemental permitting systems. The Attorney General has objected to introduction of testimony of then-Agency personnel concerning the meaning of notations on a permit application which is a document of record (see R. 16-27 and Resp. Brief, p. 26-27). The Board finds introduction of such evidence here concerning interpretation of the Agency record proper; what is improper is argument concerning what the unrebutted witness "had to know" (see Resp. Brief, p. 27, n. 11). In any event, this is the type of factual dispute which would be properly and more fully addressed within the context of an APA hearing.

In conclusion, then, the Board finds the Agency's denial of this permit application void for failure to comply with the terms of the Supreme Court's mandate in Pioneer Processing. The Board will make no disposition of the legal conclusions urged by the parties, since they are based on an incomplete record. This matter is remanded to the Agency for a new hearing to be held prior to any final decision on this permit. While the Board has not ruled on the applicability of Section 39.3 to this matter, the Board would suggest that Agency adherence to the procedures specified in Section 39.3(c-f) would likely constitute compliance with the Supreme Court's mandate in this matter, since such procedures appear compatible with procedures under "old" Section 39(c) and the APA.

The Board additionally notes that the Agency has here asserted as reasons for denial only failure on Pioneer's part to comply with certain statutory pre-conditions to the Agency's authority to issue a permit. In so doing, the Agency has arguably waived any technical objections it might otherwise have to the site, although as previously noted the extent of the technical record upon which the Agency now relies is at best unclear. To insure a full and adequate record for review and action by the Board and any subsequent reviewing court, on remand the Agency is encouraged to fully articulate its reasons for its legal conclusions and technical determinations.

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

ORDER

This permit application is remanded to the Agency for an APA [Illinois Administrative Procedure Act, Ill. Rev. Stat. ch. 127, par. 1016(a)] hearing consistent with the above Opinion.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board hereby certify that the above Opinion and Order were adopted on the 22nd day of March, 1985 by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board