ILLINOIS POLLUTION CONTROL BOARD
July 11, 1986

WELLS MANUFACTURING COMPANY, Petitioner,	)	
v.	)	PCB 86-48
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

ORDER OF THE BOARD (by J. Anderson):

This Order addresses three motions filed by Wells Manufacturing Company (Wells) on June 26, 1986, and the responses filed by the Illinois Environmental Protection Agency (Agency) on July 1, 1986.

The motion for rescheduling of the then-scheduled July 10, 1986, hearing is denied as moot, as hearing has since been rescheduled for July 31, 1986. (See Hearing Officer Order of July 3, 1986.)

The motion to certify the Board's June 20, 1986, Order for interlocutory appeal is denied. Supreme Court Rule 308 provides, in summary, that such certification may be made where the order "involves a question of law as to which there is substantial ground for difference of opinion", and immediate appeal "may materially advance the ultimate termination of the litigation." Wells' arguments fail to persuade the Board that either of these tests have been met; the "material advancement" test has not even been addressed. As to the question of law, and Wells' assertion that the Board has misinterpreted the affidavit of Delbert Haschemeyer, the Board notes that neither the Agency nor the Attorney General has asserted that the Board's interpretation was erroneous.

Wells' final motion is a motion for review of a June 20, 1986, Hearing Officer Order. That Order denied Wells' June 16, 1986, motion to strike discovery requests made by the Agency on June 4, 1986. These discovery requests included 28 requests to admit facts, 8 interrogatories, and 9 document requests, covering a time span both prior and subsequent to issuance of the first operating permit in 1981, the renewal of which is the subject of this appeal.

Wells had moved to strike on the basis that discovery of materials not in the Agency record was irrelevant, and that the

requests were generally onerous, burdensome, harassing and intended to gather information for a contemplated enforcement case. In response, the Agency argued that the requests were proper because this appeal involves a de novo hearing, and that the information requested is relevant or may lead to relevant information. The Hearing Officer Order found, in pertinent part, that "the discovery requested falls within the parameters of the Board's regulations governing discovery and is not otherwise onerous or burdensome."

The Board grants the motion to review the Order in order to address a fundamental misconception of the scope of this permit appeal hearing, and related issues of relevance which the Agency has advanced and which Wells has not countered. While the Agency is correct in citing Dean Foods Company v. PCB and IEPA, No. 2-84-1125, Appellate Court of Illinois, Second District, April 7, 1986, for the proposition that hearings de novo are provided for by Board rule and required in NPDES permit appeals, this holding cannot be extended to appeals of other types of permits. The controlling case in air permit appeals remains IEPA v. PCB and Alburn, Inc., 118 Ill. App. 3d 772, 455 N.E.2d (1983) (hereinafter "Alburn"), which was cited and distinguished in Dean Foods as involving "a permit for a liquid waste incinerator. Appeals regarding such permits are controlled by Section 40(d) of the Act...which limits Board review to the record before the Agency" (slip op. at p. 11).

In Alburn, the First District Appellate Court reviewed the Board's reversal of the Agency's denial of air construction and operating permits for the facility. The court stated that:

> "The sole question before the Board in a review of the Agency's denial of a permit is whether the petitioner can prove that its permit application as submitted to the Agency establishes that the facility will not cause a violation of the Act...The Board may not be persuaded by new material not before the Agency that the permit should be granted." (Emphasis in original, citations omitted.) 455 N.E.2d at 194.

The corollary to this holding is that the Board may not be persuaded by information not before the Agency that a permit denial was proper. In IEPA v. Waste Management, Inc., PCB 84-45, 61-68, Opinion and Order of October 1, 1984, pp. 25-27, Supp. Opinion and Order of November 26, 1984, pp. 3-4, 10-12, in the context of the appeal of land division waste disposal operating and monitoring permits, the Board held that the Agency's attempt to introduce testimony and evidence from witnesses which had not been before the Agency at the time of the permitting decision was improper, and that neither the Act nor Board rules provided for

de novo hearings at the Board level for this type of appeal. This holding was among those affirmed by the Third District Appellate Court in IEPA v. IPCB and Waste Management, 138 Ill. App. 3d 550, 486 N.E.2d 293 (1985) (appeal pending, No. 63062, Ill. Sup. Ct.). This case was mis-cited in Dean Foods based on that court's inability to determine from a reading of the Third District's brief opinion "precisely what kind of permit was involved", and the Dean court's resulting erroneous belief that the Third District Court's "comments indicate that it was either an NPDES...or a similar permit which called for a de novo hearing." (Dean, supra, slip op. at pp. 10-11.) The Board views the Waste Management holdings to be as operative in this case as in land permit cases, as the case, in part, restates law developed by the Board since 1972 in various types of non-NPDES permit appeals.

The purpose of discovery is to produce information which is either itself relevant or which may lead to relevant information. Relevance, obviously, is defined by the issues before the Board, and may, perhaps, be limited by the scope of information which may be properly considered by the Board. Neither Alburn nor Waste Management was cited to the Hearing Officer by the parties, and the Hearing Officer's Order, on its face, does not indicate whether the ruling was made in recognition of this controlling case law as it effects principles of relevance. The Board finds it desirable to have this record accurately reflect the basis of the Hearing Officer's ruling. Accordingly, the motion to strike is remanded to the Hearing Officer for reconsideration in light of this Order. Upon reconsideration, the Hearing Officer may, at her option, affirm, reverse, or otherwise modify the present ruling on the basis of the existing pleadings, or may establish supplemental briefing schedules, if such seems desirable, prior to taking any further action. In so ruling, it is not the intention of the Board to either preclude or to dictate commencement of the July 31 hearing as scheduled, but instead to leave the matter to the discretion of the Hearing Officer, who is more closely attuned to the scheduling needs of this action.

The Clerk of the Illinois Pollution Control Board is requested to advise the parties of the entry of this Order by telephone today, and to provide service via first class mail.

IT IS SO ORDERED.

B. Forcade and J. T. Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 11 day of July, 1986, by a vote of 4-2.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board