ILLINOIS POLLUTION CONTROL BOARD
December 23, 1986

JOLIET SAND AND GRAVEL COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 86-159
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by J. Anderson):

This matter comes before the Board upon various filings addressing a Hearing Officer Order dated December 17. This Order requires, inter alia, the Agency to produce certain document discovery on or before 12:00 p.m., December 24, 1986. On December 19, the Illinois Environmental Protection Agency (Agency) filed two emergency motions which request that 1) the Order be stayed until the next regularly scheduled Board meeting, and 2) that the Order be overruled in certain respects. Also on December 19, Joliet Sand and Gravel Company (Joliet) filed a motion requesting that other portions of the Order be overruled. On December 22, the Board scheduled and noticed a special meeting to handle these matters, and advised the parties that responses should be filed on or before 11:00 a.m., December 23. Each party has responded to the other's motions.

The motion for stay is denied, as this Order disposes of the motions to overrule. The Agency's motion is granted in part and denied in part. Joliet's motion is denied.

In responding to these filings, the Board has reviewed the entire record which has presently been docketed and filed with the Board. The Board notes that this excludes transcripts of the December 8 and 15 hearings, as well as numerous deposition transcripts which have not been filed. Under such circumstances, the Board is loathe to disturb the rulings of its Hearing Officer, who is more closely attuned to the day to day development of a case in progress. However, as noted by the Board in its Order of December 18, this case must be decided by the Board within 120 days of its filing on or before January 28, 1987 consistent with the Board's duty to prevent issuance of a permit by operation of the default mechanism of Section 40(a) of the Act. The hearing is scheduled for January 13, and while substantial discovery has been had, substantial discovery requests remain outstanding.

The ultimate issue to be resolved in this case is whether the Agency correctly denied renewal of Joliet's air operating permit for the reasons stated in the denial letter, reasons which are, in essence, that Joliet had failed to provide sufficient information to prove that particulate controls for its stone crushing operation are sufficiently effective to insure compliance with the Act and specific Board regulations.

The request for discovery posed by Joliet to the Hearing Officer was essentially one for discovery of every item of information contained in the Agency's files and computer system concerning Joliet's operation, whenever generated and whether or not considered in the process of the Agency's review of the instant permit application. Other than those identified by the Agency as having knowledge of facts relevant to the denial of the application, persons requested to be produced for deposition include those knowledgeable about data input into the computer system, as well as the Director of the Agency and various named employees. See Agency Response to Interrogatories, 10-28-86, Answer 1 at pp. 1-4. The Hearing Officer's Order has narrowed the scope of material to be produced, but requires production of information which does not appear to be "reasonably calculated to lead to discovery of admissible evidence or is relevant to the subject matter involved in the pending action" (35 Ill. Adm. Code 103.161).

The Board will not address every aspect of each motion in detail, due to the short time available for preparation of this Order, although each request has been considered. The essence of the Agency's motion to overrule is that it is unduly burdensome to produce, in a one week time span, "the entire body of Agency knowledge" concerning this source and seeks further limiting of the scope of discoverable material. Joliet, for its part, essentially asserts that the Hearing Officer should be overruled insofar as he has declined to order production of information "calculated to lead to the discovery of admissible evidence".

It is beyond question that if a source receives all information concerning it which the Agency possesses, that it can absolutely assure itself that the Board is privy to all information upon which the Agency relied or reasonably should have relied. As a purely theoretical matter then, such discovery should routinely be granted; as a practical matter, such discovery cannot be routinely granted consistent with the constraints on permit appeals imposed by the legislature, the courts, and the operational needs of the Agency as well as the Board.

As aforementioned, in proceedings before the Board discovery is allowed in general to the extent that "the information sought appears reasonably calculated to lead to the discovery of admissible evidence". Section 103.161(a). However, the Hearing

Officer may enter "protective order(s) as justice requires, denying, limiting, conditioning or regulating discovery to prevent unreasonable delay, expense, harassment, or oppression, or to protect materials from disclosure by the party obtaining such materials". Section 103.161(b).

Discovery in a permit appeal must be viewed in the procedural context of such appeal. Pursuant to Section 40(a) of the Act, the Board is required to render a final decision within 120 days of the date of filing of the appeal, or a permit issues by default. In order to allow time for an orderly process of decisionmaking by the Board, hearing should be held within 60 days of filing. This allows 15 days for the filing of the transcript (Section 103.221(a)), 14 days for the filing of briefs (Section 103.223) and 30 days for Board discussion and decision. The close of discovery should be at least 10 days prior to hearing to allow time for obtaining signatures for depositions and the filing of any appropriate motions. Allowing two weeks after filing to commence discovery allows little more than a month for meaningful discovery.

What is "reasonable" discovery must be determined in the light of these practical time constraints as well as the legislative 120 day constraint of Section 40(a). Full discovery of the sort afforded in enforcement cases can be a year long process. A petitioner's insistence upon full discovery "rights" of this type could effectively preclude timely action on any appeal, at the expense of the rights of the public to have the Board determine whether issuance of a permit is environmentally proper. These competing interests must be balanced in the interests of due process.

Further limitations on the scope of discovery flow from Section 40(d) of the Act which specifically provides that in considering air permits, the Board's review is limited to the record before the Agency.

As stated by the First District Appellate Court in IEPA v. IPCB and Alburn, Inc., 118 Ill. App.3d 772, 455 N.E. 2d 188, 194, (1983), when reviewing the denial of air construction and operating permits:

> "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.)

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, IEPA v. Waste Management, Inc. PCB 84-45, 61-68, Opinion and Order of October 1, 1984, Supp. Opinion and Order of November 26, 1984, affd. sub nom. IEPA v. IPCB, 138 Ill. App. 3d 550 (3rd Dist. 1985, affd. IEPA v. IPCB, ____ Ill. 3d Docket 63062 (Ill. Sup. Ct. December 19, 1986). While Joliet correctly notes that in Waste Management the Court determined that the Board could properly determine whether the Agency reviewed all facts "available to" or "in possession of" the Agency when making its permitting decision, the Board does not construe this holding as authorizing unlimited discovery in permit appeals.

Were the Agency a natural person, Joliet's discovery requests would amount to an attempt to hold the person upside down, to shake that person, and to see what fell out of the person's pockets, without differentiating between lint and items of value. Based on the record in this case, no showing has been made that this type of discovery is not advisable, balancing the need of the Board to make a timely decision, the onerousness of production given the Agency's resources and operational responsibilities, and the lack of a compelling showing by Joliet that the information requested is reasonably calculated to lead to the discovery of admissible evidence.

For these reasons, the Hearing Officer's Order is modified at page 2, numbered items 2, 3 and 4 by adding the words "and relied upon by Respondent in acting upon the permit application which is the subject of this litigation."

The Hearing Officer ruling concerning the Mathur deposition question (p. 3, par. 1) is reversed, on grounds other than those urged by the Agency. The Board finds the question irrelevant.

The balance of the Agency's motion is denied.

As to Joliet's motion, the Board finds no merit in any of its contentions and fully affirms the challenged portions of the Hearing Officer's Order.

IT IS SO ORDERED.

B. Forcade dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 23rd day of December, 1986 by a vote of 5-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board