

ILLINOIS POLLUTION CONTROL BOARD  
August 10, 1984

WASTE MANAGEMENT, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 84-45
	)	84-61
ILLINOIS ENVIRONMENTAL	)	84-68
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by J. D. Dumelle):

In summary, this Order disposes of the following motions and responses pending before the Board:

1) The Agency's July 27 Motion for leave to file addendum to the record, and Waste Management's July 30 response in opposition to "motion to supplement the record." This motion is granted.

2) Waste Management's July 31 Emergency Motion to expunge a hearing officer order of July 27 allowing the Agency to file instant late responses to request to admit facts, subject to verification of denials. The Agency filed the missing verifications August 7, and its response in opposition to the Motion to expunge on August 9. This motion is denied on its merits, the Board granting leave for interlocutory appeal on its own Motion.

3) The Agency's August 1 Emergency Motion for leave to file interlocutory appeal, to vacate a July 23 ruling releasing certain notes claimed to be subject to an attorney-client privilege, and to prohibit use of said notes. The notes in question were taken by the Agency's Larry Eastep, permit manager for the division of land pollution control, during the course of an April 12, 1984 meeting held between personnel of the Agency and the Office of the Attorney General. Waste Management's response in opposition was filed August 8. The motion for interlocutory appeal is granted. The motion to vacate and the motion in limine are denied.

4) Waste Management's July 16 Motion for default and second emergency motion for sanctions, the Agency's responses in opposition of July 20 and 23, and Waste Management's July 31 reply thereto. These motions are denied.

Concerning the first and third motions, it is axiomatic that, in order to determine the correctness of an Agency permitting decision "based exclusively on the record before the Agency", the Board must have placed before it the full record. The Board has allowed the filing of laboratory reports as part of the record over petitioner's objection that the Agency has recited only that they "may have been relevant to the Agency's decision making process" (emphasis added). Given the amply demonstrated fact that pieces of information rightfully contained in the "Agency record" have been discovered in various locations within the Agency, the Board prefers, at this stage, to include the laboratory tests in the record.

As regards the Eastep notes, it is clear from the filings that there is no question concerning the relevance of the notes to the Agency decision, the only issue being that of whether the notes are subject to an attorney-client privilege. The Board has not reviewed the document in question, but has reviewed the points and authorities provided by the parties to the hearing officer in aid of his in camera review of this material. The Board holds that the factual basis for Agency decision-making on permits does not result in an expectation of confidentiality. However, to the extent that the subject of the April 12 meeting and the notes dealt with PCB 84-45, filed April 9, this information would properly be subject to the attorney-client privilege. Based on the information presented to the Board, the Board finds no reason to reverse the decision of its hearing officer. In this context the Board notes the actions of the hearing officer on July 23 were proper given the exigencies of the situation.

Finally, the Board also finds that the hearing officer, as facilitator of the discovery process, did not abuse his discretion in allowing a late Agency response to requests to admit. As the Agency noted, this action is amply supported by case law, and Waste Management has made no compelling showing of prejudice. However, in so holding, it is not the intention of the Board to encourage other than strict adherence to discovery deadlines.

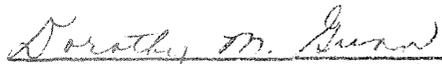
The Board's disinclination to impose sanctions at this time is similarly not intended to reward failure to make production in response to legitimate discovery requests. As discovery requests by each party have been voluminous, and some discovery matters have been presented to the Board for resolution, the Board has given respondent the "benefit of the doubt." However, Waste Management may renew its motion in the future, as and if it deems necessary. The Board notes that it would not favor use of the default mechanism in permit appeals as a sanction for any **discovery** default by respondent, as the effect would be forfeiture of the citizens' right to a healthful environment.

In conclusion, the Board notes that, as of the August 9 filing of Waste Management's request for ruling, the Agency had not complied with the hearing officer's July 20 oral ruling that the Agency designate which of the documents filed as the "record" apply to which of th three consolidated cases on or before July 27. The Board orders the Agency to accomplish this designation on or before August 17 by so indicating on each document.

IT IS SO ORDERED.

Board Members J. Anderson and B. Forcade concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 10<sup>th</sup> day of August, 1984 by a vote of 6-0.

  
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Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board