ILLINOIS POLLUTION CONTROL BOARD
June 8, 1978

OSCAR MAYER & CO.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 78-14
	)	
ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

INTERIM ORDER OF THE BOARD (by Mr. Young):

On May 9, 1978, the Environmental Protection Agency filed a Motion for an Interlocutory Appeal and for stay of a ruling by the Hearing Officer in a matter concerning the scope of discovery in an action under Section 40 of the Act to contest Agency denial of a permit. Petitioner filed a Response on May 19, 1978, objecting to the Agency's Motions. On May 25, 1978, the Board granted the Agency's Motion for Interlocutory Appeal together with a stay in the proceedings.

The Environmental Protection Agency appeals from an Order of the Hearing Officer compelling answers to Interrogatories which the Agency claims are beyond the scope of discovery in this type of proceeding. In essence, the Interrogatories request that the Agency identify all personnel who were consulted for advice, gave an opinion, or participated in making the process weight rate determination for Petitioner's 1973 and 1977 permit applications and all materials, including internal Agency memoranda, consulted or relied upon in making those decisions.

Section 39 of the Environmental Protection Act provides that the Agency shall issue a permit on proof by the applicant that the permitted activity will not cause a violation of the Act or of regulations adopted in accordance with the Act. Section 40 of the Act provides that an applicant who has been refused a permit by the Agency may petition the Board for a hearing to contest the decision of the Agency and that the burden of proof in such hearing shall be on the applicant.

While a very few of the Section 40 petitions filed with the Board have involved a dispute between the applicant and the Agency over the validity of the facts contained in

an application, most Section 40 petitions arise from a difference in interpretation of a regulatory definition. Since there is no provision in the Act under which the Board might provide an advisory opinion in such a controversy, the Section 40 petition affords the only avenue to secure a Board interpretation of its regulations or a finding of fact, short of an enforcement action.

From the beginning the Board experienced some difficulty in structuring the hearing on a Section 40 petition.(1) One of the continuing reasons therefore has no doubt been the early styling of the proceeding in Board practice as a "permit denial appeal." It is obviously not an appellate review of an administrative decision, nor could it seem to be so when there has been no recorded hearing and written finding of fact at the permit issuance level. More importantly, the Act does not confer jurisdiction on the Board to sit in appellate review of Agency decisions. Neither is a Section 40 hearing available for a rehearing or contest of the adoption of Board regulations or as a review of Agency policy and procedure in the exercise of its permit authority under Sections 4 and 39 of the Act. Under the statute, all the Board has authority to do in a hearing and determination on a Section 40 petition is to decide after a hearing in accordance with Sections 32 and 33(a) whether or not, based upon the facts of the application, the applicant has provided proof that the activity in question will not cause a violation of the Act or of the regulations.

In a hearing on a Section 40 petition, the applicant must verify the facts of his application as submitted to the Agency, and, having done so, must persuade the Board that the activity will comply with the Act and regulations. At hearing, the Agency may attempt to controvert the applicant's facts by cross examination or direct testimony; may submit argument on the applicable law and regulations and may urge conclusions therefrom; or, it may choose to do either; or, it may choose to present nothing. The written Agency statement to the applicant of the specific, detailed reasons that the permit application was denied is not evidence of the truth of the material therein nor do any Agency interpretations of the Act and regulations therein enjoy any presumption before the Board. After hearing, the Board may direct the Agency to issue the permit, or order the petition dismissed, depending on the Board's finding that the applicant has or has not proven to the Board that his activity will not cause a violation of the Act or regulations.

(1) Currie, David P., "Enforcement Under the Illinois Pollution Law," 70 N.W. Univ. L.Rev. 389, 475-479 (1975).

The Board opinion most frequently cited on the question of the scope of a hearing on a Section 40 petition is Soil Enrichment Materials Corporation v. EPA, 5 PCB 715 (1972). Much therein is still applicable; however, it must be kept in mind that Section 39 of the Act was amended subsequent to that decision by Public Act 78-862, approved September 14, 1973. P.A. 78-862 established, in Section 39(a), definitive criteria for a detailed Agency statement to the applicant of the specific reason for the denial of a permit application.

At 5 PCB 715, the Board said:

> "Clearly the issue is whether the Agency erred in denying the permit, not whether new material that was not before the Agency persuades the Board that a permit should be granted."

A cursory reading of that sentence might indicate to some that the burden of the applicant in a Section 40 proceeding is to prove that the Agency made an error in law, a misinterpretation of fact or a failure in procedure in arriving at the Agency decision to deny the permit. To do so ignores the requirement of Section 39 that a permit issues only on proof by the applicant that the activity in question does not cause a violation of the Act or regulations. The Agency errs in denying a permit only when the material, as submitted to the Agency by the applicant, proves to the Board that no violation of the Act or regulations will occur if the permit is granted. The requirements of a Section 40 petition as set forth in the Board's Procedural Rule 502(a)(2) further indicate the Board's conclusion as to the dictates of the statute.

Procedural Rule 502(a)(4) requires that in a Section 40 proceeding the Agency must file within 14 days of notice, the entire record of the permit application, including the application, correspondence, and the denial. The application is necessary to establish the facts which were before the Agency for consideration. The correspondence file, if any, supplements the application insofar as it provides additional facts. The denial statement is necessary to verify that the requirement of Section 39(a) of the Act has been fulfilled. This material, in the opinion of the Board, should be sufficient to frame the issue of fact or law in controversy in any hearing on a Section 40 petition.

In a recent attempt to clarify the scope of discovery in a Section 40 matter, the Board made the following statements in Owens-Illinois, Inc. v. EPA, PCB 77-288, February 2, 1978:

> "The scope of discovery permissible in an action to contest Agency denial of a permit under Section 40 of the Act is controlled

> by the general issue presented; obviously inquiry into matters outside of the general issue will not produce relevant evidence and should not be allowed.
>
> It is proper to inquire, and discovery should be allowed, to insure that the record filed by the Agency is complete and contains all of the material concerning the permit application that was before the Agency when the denial statement was issued.
>
> If the Agency knows or ascertains, during the pendency of a permit application, that either the facts or conclusions presented by the applicant are inaccurate or incomplete, the Agency must disclose such information in writing during the statutory permit review period or in the detailed written statement of the reasons for denial required by Section 39 of the Act. The Agency may not at hearing assert reliance on any material not included in the record, and disclosed to the applicant in the manner described above, as the basis for Agency denial of the permit, any more than the applicant may introduce new material in support of the application that was not before the Agency at the time of denial."

The ultimate question to be decided by the Board in this matter is whether or not emissions from the process for which the permit was denied exceed the limitations of Rule 203(b) of Chapter II of the Board's regulations. Central to the resolution of the question is a determination by the Board of the actual weight of the material introduced into the process per hour, as defined by Rule 201 of Chapter II of the Board's regulations. To do so the Board needs to know only the weight of each material involved; the Board can then determine which of those materials the Board intended, by Board regulation, to be included in the proper calculation of the actual weight introduced into the process per hour. How or why the Agency arrived at a different conclusion on the same facts is simply not relevant to the Board determination.

For the reasons set forth above, the Board, having reviewed the Order of the Hearing Officer entered on May 8, 1978, sustains the Order of the Hearing Officer in regard to Interrogatories 7 and 8 of Petitioner's Interrogatories to the Respondent dated

March 14, 1978. The Order of the Hearing Officer is sustained as to Interrogatories 1(a) and 2(a); the Order of the Hearing Officer is reversed as to Interrogatory 1(b) through 1(g); Interrogatory 2(b) through 2(g), and Interrogatories 3, 4, 5, 6, 9 and 10.

The matter is remanded to the Hearing Officer for revision of his Order of May 8, 1978, consistent with the foregoing.

IT IS SO ORDERED.

Mr. Werner dissented.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Interim Order was adopted on the 8th day of June, 1978 by a vote of 4-1.

Christan L. Moffett

Christan L. Moffett, Clerk
Illinois Pollution Control Board