ILLINOIS POLLUTION CONTROL BOARD
March 4, 1982

COUNTY OF LA SALLE, ex rel. GARY PETERLIN, STATE'S ATTORNEY OF LASALLE COUNTY: THE VILLAGE OF NAPLATE, a municipal corporation; THE CITY OF OTTAWA, a municipal corporation; THE VILLAGE OF UTICA, a municipal corporation; OTTAWA TOWNSHIP BOARD OF TRUSTEES, ex rel. THE TOWN OF OTTAWA; RESIDENTS AGAINST POLLUTED ENVIRONMENT, an Illinois not-for-profit corporation; ROSEMARY SINON; MARIE MADDEN; and JOAN BENYA BERNABEI,	)	
Petitioners,	)	
v.	)	PCB 81-10
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY; WILLIAM CLARKE; PIONEER DEVELOPMENT; PIONEER PROCESSING, INC., and WILMER AND EDITH BROCKMAN,	)	
Respondents.	)	

MR. JOSEPH KARAGANIS, MR. RUSSELL EGGERT AND MR. MICHAEL HEATON OF O'CONOR, KARAGANIS, & GAIL, LTD; MR. TIMOTHY CREEDON OF HOFFMAN, MUELLER & CREEDON; AND MR. GARY PETERLIN, LA SALLE COUNTY STATE'S ATTORNEY, APPEARED ON BEHALF OF PETITIONERS.

MR. DELBERT D. HASCHEMEYER, ATTORNEY, APPEARED ON BEHALF OF RESPONDENT ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.
MR. THOMAS J. IMMEL AND MR. LEE K. ZELLE OF BURDITT AND IMMEL APPEARED ON BEHALF OF RESPONDENTS WILLIAM CLARKE, PIONEER DEVELOPMENT, AND PIONEER PROCESSING, INC.

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

This Opinion supports the Board's Order of February 16, 1982 entered in this matter affirming the Illinois Environmental Protection Agency's (Agency's) granting of a developmental permit to William Clarke, Pioneer Development, Pioneer Processing Inc., and Wilmer and Edith Brockman on December 22, 1980.

PROCEDURAL BACKGROUND

William H. Clarke, Pioneer Development, Pioneer Processing, Inc., and Wilmer and Edith Brockman, (hereinafter Pioneer) applied on July 1, 1980, for a transfer of permits previously issued to Wilmer and Edith Brockman for a tract of land in Ottawa Township in the County of LaSalle, Illinois. They also sought approval for a modification in the development approved in that permit.

The land on which the proposed site is to be located consists of 177 acres situated off Moriarty Hill Road and is approximately one and one-half miles to the west of the Village of Naplate. Specifically, the land is located in part of the south one-half of the northwest quarter of Section 17, and the northeast quarter of Section 18.

The applicants for the transfer of the permit and a supplemental permit are William H. Clarke, Pioneer Development, Pioneer Processing, Inc., and Wilmer and Edith Brockman. William H. Clarke is an Illinois resident who is the representative of Pioneer Development, an Illinois partnership. Wilmer and Edith Brockman are the interim (or present) owners of the 177 acre tract of land and the holders of Permit #1975-23-DE, which was the permit sought to be transferred. The Brockmans have entered into a lease - purchase agreement which has transferred control and will transfer ownership of the property to the other applicants. Pioneer Processing, Inc. is an Illinois corporation which would be responsible for the proposed site's management and operation. Four individuals, John Vanderveld, Jr., William H. Clarke, Harold Flannery and Louis E. Wagner, own complete control of Pioneer Development and Pioneer Processing, Inc.

The modification the applicants have sought would be basically to allow the processing and/or solidification of certain special and hazardous waste streams at the subject site. Certain modifications to the development of the site were also requested. Finally, no waste streams would be disposed of at the site in a liquid state; all waste streams would be solidified prior to disposal.

The Agency held public hearings on the application on November 21 and 22, 1980 in Ottawa, Illinois and the Agency record was closed on December 12, 1980. A developmental permit was issued on December 22, 1980 as, alternatively, a transferred or a new permit. That permit was appealed to the Board upon a January 26, 1981 petition for review and revocation. A Board hearing on the matter was scheduled for April 6, 1981.

However, on March 20, 1981 Petitioners LaSalle County and Rosemary Sinon filed suit in LaSalle County Circuit Court (Thirteenth Judicial Circuit, No. 81-MR-16) seeking a declaratory judgment that the permit was void and asking for a preliminary injunction prohibiting Pioneer from development of the site. A

preliminary injunction was issued on March 25, 1981 and on the day of the Board's scheduled hearing an order was entered enjoining the Board and the parties from further proceedings in this matter, despite the fact that the Board was not a party to the circuit court action. By Order of the Board of April 16, 1981 the Board stayed these proceedings effective April 6, 1981 pending final adjudication of the injunction.

The Third District Appellate Court dissolved the injunction and ordered the circuit court case dismissed for failure to exhaust administrative remedies, but issuance of the mandate was stayed pending appeals to the Supreme Courts of Illinois and the United States. Both courts denied review, the mandate issued, and the case returned to the Board on January 25, 1982.

Hearings were held on February 6 and 8, 1982 which lasted for a total of twenty-five hours. Mr. Thomas Cavanagh and Mr. Terry Ayers, both of the Agency, and Mr. Michael Heaton, one of Petitioners' attorneys, presented testimony as did several citizens. One hundred and eight exhibits were offered into evidence, most of which were admitted. The transcripts of the hearings (totaling 751 pages) were filed with the Board on February 9 and 10, 1982. The Board affirmed the Agency's granting of a developmental permit for the site on February 16, 1982, which is within the Board's statutory decision period under Section 40(a) of the Act.

Pioneer has argued that the permit has issued by operation of law since the Board did not reach its decision within ninety days of the date of filing for review and since Pioneer never waived that statutory period. They argue that, since the Board was not a party to the injunction action in circuit court and never received actual notice of it, the Board was not bound by it. The Board disagrees, and reaffirms its Order of April 16, 1981 which stayed the proceedings. The Board did have knowledge of the injunction, was specifically named therein, and was therefore bound to abide by it until it was dissolved. That did not occur until January 25, 1982.

While the effect of that injunction upon the ninety day decisional period is unclear, the Board's decision was reached within the tightest possible reasonable time period. Since an injunction must maintain the status quo, the injunction must be construed at a minimum to have acted as a stay during its entire effective period. Since the computation of time proceeds from the day after the applicable act or event occurs, the decisional period recommenced on January 26, 1982 and the last day for decision, under the tightest assumption would have been February 15, 1982. However, that day was a federal holiday pursuant to P.L. 90-363 such that the final day for decision became February 16. See Procedural Rule 105 and Ill. Rev. Stat. Ch. 1, Par. 1012.

DEFAULT

Pioneer makes a somewhat related argument that the permit should have been affirmed on the basis of the failure of Petitioners to make a timely appearance at the originally scheduled April 6, 1982 hearing. It argues that that hearing was called to order and adjourned prior to Board knowledge of an issued injunctive order, that Petitioners presented no evidence and, therefore, defaulted. Under the facts of this case, the Board must again disagree.

The Board in general attempts to construe its procedures liberally. In this case there is no showing of bad faith on the part of the Petitioners (they were, apparently, in the circuit court receiving the injunctive order at the time of hearing and arrived less than an hour late) nor is any material prejudice shown. Finally, the Board was in fact able to reschedule the hearing and reach a timely decision. Therefore, the Board finds that there was no default, and will proceed to consider Petitioners' arguments.

ADMINISTRATIVE PROCEDURE ACT APPLICABILITY

Most of Petitioners' arguments center around the applicability of the Administrative Procedure Act (Ill. Rev. Stat. Ch. 127, Par. 1001; APA) to the proceedings at the Agency level prior to the granting of the permit in this matter. Petitioners argue that the APA applies and that the Agency violated the APA in numerous instances.

It is true that the Agency has stipulated that it was required by law to follow the APA contested case provisions in these proceedings and that the APA had not been completely followed (Pet. Ex. 35). It is not true that that stipulation, presented to the circuit court, disposes of the applicability issue. First, not all parties accepted the stipulation. Pioneer has argued strenuously that it cannot be bound by it and that, in fact, the APA is inapplicable. Second, even if the Agency were to determine that the APA is applicable in any given case, it is for the Board, not the Agency, to reach a conclusion of law as to the propriety of that determination.

Before proceeding with the Board's reasoning, and since all parties embrace the same case as demonstrating the validity of their arguments, a brief discussion of Borg Warner Corp. v. Mauzy, 100 Ill. App. 3d 862, 427 N.E. 2d 415 (1981) is appropriate. That case interpreted Section 16 of the APA as it applies to the NPDES provisions of Section 39(b) of the Environmental Protection (Act) and Board Chapter 3: Water Pollution Rules, and found that Borg Warner was not entitled to an adjudicatory hearing prior to final Agency action on the basis that Section 39 required only a discretionary hearing and did not thereby trigger APA applicablity under Section 16 of the APA. Therefore, the court never reached the question of what sort of mandatory hearing would trigger that provision.

Since a public hearing is mandated in this case under Section 39(c) of the Act, the Board must proceed to the next step, i.e. whether that public hearing is the type of hearing which is considered a contested case under the APA. To that question Borg Warner gives no direction.

Therefore, the Board must reach its own conclusion as to the applicability of the APA to the Agency's hazardous waste landfill permitting procedures. The Board concludes that the APA is not applicable in that context, based upon an examination of the APA and the Act.

All parties agree that the Agency's hazardous waste landfill permitting process constitutes "licensing" as defined in Section 3.04 of the APA. The Board also agrees. As defined by Section 3.02, a "contested case" in pertinent part means "an adjudicatory proceeding, not including...informational or similar proceedings, in which the individual legal rights... of a party are required by law to be determined by an agency only after an opportunity for hearing." Licensing is neither expressly included nor excluded from this definition, though Pioneer argues persuasively that its non-inclusion should be considered as an exclusion.

Since no party has argued to the contrary, the Board will assume for purposes of this argument, but without deciding, that the Agency is an agency as defined by the APA. Therefore, for the APA to be applicable to the Agency, this licensing proceeding must be adjudicatory rather than an "informational or similar proceeding" and the legal rights of a party must be determined only after an "opportunity for hearing" which is "required by law."

Section 39(c) of the Act provides that "the Agency shall conduct a public hearing" prior to the issuance of a permit for a hazardous waste disposal site. The question then becomes whether such a hearing is adjudicatory or informational. The Board concludes that the public hearing required in this context is not adjudicatory. There are several factors which lead to this conclusion.

First, there are no "parties" at the Agency level of the permitting process. As defined in Section 3.06 of the APA, a party is "each person or agency admitted as a party, or properly seeking or entitled as of right to be admitted as a party." No such persons or agencies were admitted as parties, and in fact it would be impossible to align the participants prior to an Agency decision in that the Agency does not take a position in conformity with or adverse to the permit applicant prior to reaching a decision on the disposition of the permit application. Only after such a decision is reached do the participants have the right to become parties, and that right accrues before the Board, not before the Agency.

Second, while Petitioners argue that a hearing is a hearing and that any hearing triggers the contested case provisions, that simply is not true. The drafters of the Act clearly distinguished

a "hearing" from a "public hearing." In regulatory matters, the Board is instructed to hold "public hearings" (Section 28). Such hearings are not adjudicatory. On the other hand, in adjudicatory actions (enforcement cases, variances, and permit appeals) the Board is to schedule "hearings" (Sections 31(b), 37(a) and 40(a), respectively). A "public hearing" is informational, a "hearing" is adjudicatory. A "public hearing" is for the public and the agency, not simply a hearing to be held in public.

Third, while Petitioners contend that an adversarial hearing is necessary before the Agency in the context of permit grants because there is no opportunity for an adversarial hearing before the Board, the Board again disagrees. This case has been nothing if it has not been adversarial, and the overall review process (including Agency and Board proceedings) for third party permit appeals for hazardous waste sites will not be construed to more greatly limit the participant's procedural rights than does the permit denial appeal process of Section 40(a). Such must have been the intent of the legislature in adopting Section 40(b).

Further, despite the fact that the Section 40(a) hearing is not expressly limited to being "based exclusively on the record," that language can easily be viewed as a recognition of the Board's often repeated holding that a Section 40(a) permit appeal must be decided on the basis of what was before the Agency at the time of decision regarding the permit (Owens-Illinois, Inc., v. IEPA; PCB 77-288; February 2, 1978). "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" (Soil Enrichment Materials Corp. v. IEPA; 5 PCB 715; October 17, 1972). Since the Agency record is to include all material and relevant facts upon which the Agency relied in making a determination as to whether a permit should be granted, the requirement that a Section 40(b) hearing be based exclusively on the record does not become a limitation upon the due process rights of any party any more than does the Section 40(a) interpretation of the Board. In fact, Section 40(b) gives greater protection in that a public hearing is mandated at the Agency level, thereby allowing additional input to the Agency, such that any person can participate and insure that all relevant, material facts are made part of the record and can be relied upon during review by the Board.

Thus, the Board concludes that the "public hearing" requirement of Section 39(c) is not the sort of hearing which would trigger the contested case provisions under Sections 16(a) or 3.02 of the APA and that the Agency's permitting decision under Section 39 of the Act does not determine the legal rights of a "party" as defined in Section 3.06 of the APA. For these reasons, as well as other reasons advanced in Pioneer's brief, the Board concludes that the APA is inapplicable to Agency hearings on the siting of hazardous waste landfills.

DUE PROCESS

Petitioners argue that the basic elements of the APA's "contested case" provisions are simply reflections of the constitutional requirements of due process under the Fourteenth Amendment. Therefore, the argument continues, even if the APA were held inapplicable, the Agency would still be required to disclose all rules and evidence, to allow full cross-examination rights, avoid ex parte contacts, and include all materials in the record presented to the Board. Each of these allegations will be separately addressed.

Petitioners contend that the Agency illegally used secret rules of decision. To be more specific, they allege that the Agency required a maximum permeability of 1×10^{-8} cm/sec for landfill liner material (meaning that the flow through the liner material can be go greater than this speed) despite having never publicly disclosed that "rule". Citing Section 4(a) of the APA, they allege that the Agency failed "to make available for public inspection all rules adopted by the Agency." Such an argument is without merit. Even if the APA is assumed to merely codify due process procedures, the "requirement" that a hazardous waste landfill have a maximum permeability of 1×10^{-8} cm/sec has never been adopted by the Agency and, therefore, need not be made available to the public. In fact, the Agency probably lacks the power under the Act to adopt such a "rule". Rulemaking authority under the Act is reserved solely to the Board, except as to the distribution of funds generated from grants, gifts and loans. Under APA Section 3.09 a "rule" is any "agency statement of general applicability that implements, applies, interprets, or prescribes law or policy." The Agency's "rule", however, does none of those things. It is applied on a case-by-case basis. Its application can be rebutted as improper under the facts of any given case (though this was not done in the case at issue), and there is no presumption before the Board that a hazardous waste landfill site would violate the Act if it failed to meet the 1×10^{-8} cm/sec standard. It, therefore, is not a "statement of general applicability."

A more proper interpretation of that "rule" is that it represents the thinking of the Agency as to what permeability is necessary for a hazardous waste landfill liner to assure the non-violation of the Act, which finding the Agency is required to make prior to permit issuance under Section 39 of the Act. Neither the applicant nor the Board is bound by such thinking. If an applicant could prove that a liner with a permeability of 1×10^{-7} cm/sec is sufficient for a given site to meet the mandates of the Act and the regulations thereunder, the Agency could not properly refuse to grant a permit for the site simply because a permeability of 1×10^{-8} was not met. Thus, since the "rule" is not binding, it need not be made available for public inspection.

The Petitioners also contend that the Agency record as filed was incomplete. This allegation serves as a prime example of how the overall hazardous waste landfill permitting system protects

due process rights without the necessity of applying the APA to the Agency proceeding. While Board review under Section 40(b) of the Act is to be "based exclusively on the record," that review is meaningless if the Agency has complete control over what constitutes the record. The Agency could pre-decide most any permit action, place only those materials in the record which support that decision, and then rely on the record, as presented, to support that decision. If there were no Board review, the only remedy would be a reversal by the courts. However, the bifurcated hearing procedures for hazardous waste landfill siting allow for review by the Board of the question of sufficiency of the Agency record as submitted. Petitioners have the right to establish at the Board hearing that the record, as submitted, is incomplete. In turn, the Board procedures allow for the curing of record deficiencies and for the determination of whether the record, as corrected, supports the Agency's permitting decison. In this way, Petitioners' due process rights are protected. Therefore, the Board concludes that even if it were proven that the Agency record, as filed, was incomplete, Petitioners were given adequate opportunity to cure any and all defects at the Board hearing, and such incompleteness fails to give rise to a due process violation.

Petitioners next argue that the Agency illegally relied on secret evidence and illegally accepted post-hearing evidence. Again, assuming for the sake of argument that the Agency did rely upon materials which were not made part of the record or which were submitted to the Agency after the Agency hearings, and which, therefore, were not subject to cross-examination at the Agency level, these defects were cured by Board review. In a Section 40(b) proceeding before the Board, a petitioner has the opportunity to complete the record and to demonstrate that the record failed to support the Agency's decision. That right includes the right to rebut or cross-examine in appropriate cases, e.g. where, through no fault of the petitioner, petitioner was unable to do so at the Agency level.

Petitioners also argue that the Agency was involved in improper ex parte contacts, again citing the APA as authority for reversal. This argument is also without merit. Petitioners simply misconstrue the hazardous waste siting procedures under the Act. The permitting process, at the Agency level, is not controlled by the APA and in fact if the APA were held applicable, the Agency might well be much less able to fulfill its responsibility to protect the environment under the Act. Further, the Board has held that there are no true parties at the Agency level. Therefore, there can be no such thing as ex parte contacts.

The permitting process, at the Agency level, involves considerable give and take. Examination of an application gives rise to questions to which only the applicant may be able to adequately respond. Written comments may give rise to further questions, and the public hearing itself may well give rise to even more, as may comments submitted after hearing. To cut off communications with the applicant at any time prior to the closing of the record might well result in the inability of the Agency to reach a fully informed decision.

The alternative, to give "notice and opportunity for all parties to participate" in the contact (under APA Section 15) would be an unreasonable burden for several reasons. The first problem would be to determine whom to notify. Prior to hearing would all commenters have to be notified? After hearing would all present at hearing have to be notified? All who testified? Further, the Agency is under a 180 day statutory time limit to reach a decision under Section 39 of the Act. If these "fully participated" contacts were held to be necessary, the Agency might well be put in a position of either refraining from asking useful questions, having the permit issue by operation of law, or denying the permit and starting over from square one, simply to receive some information that could be obtained through a phone call.

Petitioners may still argue that if such action is necessary to protect their due process rights, then that is what must be done. However, that is not necessary. Any so-called "ex parte" contacts, if relied upon, should be made part of the record before the Board. If they are not made part of the record, the petitioner has the right to demonstrate to the Board that they should have been. If the Board agrees, the petitioner can then argue that they demonstrated that the Agency's decision was wrong. In that way the due process rights are again protected.

Petitioners next contend that the Agency failed to give notice and an opportunity to contest the technical and scientific facts it relied upon, once again citing the APA (Section 12(c)). While the substance of the allegation is rather difficult to determine, apparently Petitioners are arguing that any Agency expertise relied upon must be made part of the record. No support is given for this proposition being required by due process, and its scope is not delineated. Further, there are no material, specific allegations of technical or scientific facts which were lacking from the Agency record and which were not cured during Board review. The Board, therefore, rejects this argument.

Finally, Petitioners argue that the Agency failed to make legally required findings of fact. Again, aside from the APA, no support is given for the proposition that due process requires such findings. Further, the Agency did, in fact, voluntarily issue findings and, while these were not reduced to writing until almost two months after this case was filed, Petitioners had access to them for nearly eleven months prior to Board decision in this matter and more than ten months prior to the Board hearings.

In summary, the Board has concluded that the APA is inapplicable to proceedings at the Agency level concerning hazardous waste landfill permit decisions and that all due process rights have been protected by the Board's review of the permitting process.

Fundamental fairness in the context of a third party permit review of a hazardous waste site must be viewed in terms of the overall process, including both the Agency and the Board proceedings. The Board review can serve as a vehicle for curing any defects in procedure that occurred at the Agency level. That is, the Board is not constrained to simply sit in judgment of whether the Agency acted completely properly; otherwise there is no apparent reason for a hearing at the Board level. It would simply be oral argument.

In this case there were certainly procedural shortcomings at the Agency level, but that is to be expected when the statutory mandate is so recent. The parties, the Agency, and the Board have all grappled with a large number of unknowns. The Agency record as filed with the Board could certainly have been more complete and some hearing officer rulings may have been questionable. However, all relevant information has been brought before the Board, the record has been supplemented, and all parties have had the opportunity to present their arguments. Any remaining difficulties with the overall proceeding have been of a minor nature and constitute nothing more than harmless error. Thus, the Board finds that this process has been fundamentally fair and any error was non-prejudicial and harmless.

RESOURCE CONSERVATION AND RECOVERY ACT ISSUES

Petitioners argue that development of the site would violate The Resource Conservation Recovery Act (P.L. 94-580; RCRA) and, therefore, would violate the Act, such that the Agency cannot grant a permit for the site. Their entire argument is premised upon the definition of sanitary landfill which under Section 3(w) of the Act is a facility which must meet "the requirements of the Resource Conservation and Recovery Act." Petitioners further argue that no extrinsic evidence can be considered regarding this definition since the language is plain.

Petitioners' argument overlooks the fact that to be a sanitary landfill a facility must also be "permitted by the Agency for the disposal of waste on land" (Section 3(w)). The site at issue here is, therefore, not a sanitary landfill and cannot become one prior to issuance of an operating permit, since it has only been permitted for development, not for the disposal of waste. Further, the Agency has conditioned the permit upon Pioneer obtaining all necessary RCRA permits. Surely, the intent of the State's hazardous waste program is to insure that a site complies with all applicable federal and state regulations prior to the development of any hazardous waste site. The Agency's actions in this case have just as surely fulfilled that intent. Pioneer cannot develop the site in reliance upon the State permit until RCRA regulations have been complied with.

Petitioners next argue that because USEPA has recently denied "interim status" to Pioneer, Pioneer cannot use the state development permit and it should, therefore, be revoked (see 40 CFR §122.22(b) and SCA Services v. PCB, 71 Ill. App. 3d 715, 389

N.E. 2d 955 (1979)). However, USEPA's denial was on January 20, 1982, while the permit was issued by the Agency on December 22, 1980, and the Board is constrained to review the permitting decision on the basis of what was before the Agency at the time of decision. Finally, even if "interim status" had been denied prior to December 22, 1980 the Board would find that fact to be immaterial in that such denial does not preclude future granting of a RCRA permit to Pioneer.

NEW OR TRANSFERRED PERMIT

Petitioners argue that the Agency violated their statutory rights in that the permit could not properly have been transferred and that notice and hearing requirements were not met for the granting of a new permit. The Board need not reach the question of whether the Agency properly transferred the permit because it finds that the permit was properly issued as a new permit.

Petitioners contend that the Agency's purported issuance of a new permit must be reversed for a failure by the Agency to meet the mandates of Section 39(c) of the Act. Their argument proceeds as follows: Pioneer first requested that its application be treated as a request for a new permit on December 12, 1980, that Section 39(c) contains certain notice and hearing requirements, and that those requirements were not met after that request.

This argument, much as the RCRA argument, has much better form than substance. It ignores the fact that the notice and hearing requirements for a supplemental permit (which was initially requested and upon which the Agency originally purported to act) are the same Section 39(c) requirements as for a new permit. Since there is no allegation that these requirements were not met when Pioneers' request for a permit transfer and supplemental permit was made, any technical violation of Section 39(c) regarding a new permit could not have been prejudicial.

RULE 316 REQUIREMENTS

Petitioners have alleged that the permit application was incomplete because certain requirements of Rule 316 of Chapter 7: Solid Waste, were illegally waived by the Agency. Specifically, they contend that the requirements of Rule 316(a)(6) concerning soil sample data and Rule 316(a)(8) concerning monitoring were improperly waived. This impropriety allegedly resulted from the lack of evidence that such information is inapplicable to the proposed landfill, the failure to disclose decisional criteria, and the lack of notice of the intent to waive. The Board finds these allegations to be devoid of merit.

Rule 316 provides in pertinent part that an "application shall include, unless waived in writing by the Agency," the information specified. It does not, however, require a finding of inapplicability, decisional criteria or notice. Certainly, if Petitioners had presented proof that the waiver rendered the

application insufficient to support a finding that the site would not violate the Act or regulations thereunder, the Board would have to rule on that issue. However, no such allegation was made, nor was it alleged that there was no written waiver.

OWNERSHIP ISSUES

Petitioners have made much of the fact that an adjacent landfill site, which is owned and operated by the Brockmans has been operated in an environmentally unsound manner. They argue that since the Brockmans owned the site at issue here at the time of permit issuance that their operating record precludes issuance of this permit under Section 39(f) of the Act. The Board disagrees.

Even if Petitioners had proven that the Brockmans operated the adjacent site in the worst possible manner, the conditions of the granted permit and other facts of this case demonstrate that Section 39(f) cannot properly act to preclude the permit grant. The Brockmans were named participants at the Agency level in a nominal manner only since they were the present owners. The conditions of the permit preclude any operating responsibilities over the site at issue and they are contractually required to relinquish ownership rights upon completion of the permitting process. There is no showing that those who will own and operate the site at the time the site becomes active have done anything which would preclude them from receiving a permit under Section 39(f).

NAPLATE AND THE WELLS

Section 21(g) of the Act prohibits a hazardous waste disposal site located within a mile and a half of a municipality in a county of 225,000 or more without a waiver from the governing body, or within a thousand feet of a private well or the existing source of a public water supply.

The Village of Naplate, therefore, had to have waived the requirement for a permit to be granted, and it did in fact execute such waiver. There is no evidence in the record before the Board that it acted to rescind that waiver prior to the Agency's decision to grant the permit (see R. 531-537). As noted above, the scope of the Board's review of permit appeals is limited to the record before the Agency at the time of decision. Therefore, any later rescission is not presently before the Board and the Board need not reach the question as to what effect a rescission subsequent to the granting of developmental permit would have on the granting of an operating permit after a purported rescission.

Petitioners further allege that Section 21(g) prohibits the site because it is both within one thousand feet of existing wells and directly above an area aquifer which supplies drinking water.

Under Section 21(g) of the Act no hazardous waste landfill site can be located within a mile and a half of a municipality without its approval, within one thousand feet of an existing private well or water supply, above a shaft or tunneled mine, or within two miles of an active fault in the earth's crust. The two former prohibitions have been discussed above. The two latter prohibitions have not been argued as applicable to this site, and the Agency record establishes the inapplicability.

Ronald Landon, who conducted the subsurface geologic investigation, testified that no underground shafts or tunnels were observed and that no deep mining or tunneling had been conducted (Agency TRI, pp. 53-54). He further testified that published geologic reports and maps fail to show any active fault or seismic activity within two miles of the site (Agency TRI, p. 53). This was further confirmed by the Department of Energy and Natural Resources.

Turning to other aspects of the geologic and hydrogeologic issue, the Board finds the site generally suitable for the treatment and disposal of special and hazardous waste because of the exceptionally high containment qualitites of these geologic and hydrogeologic conditions. The site is located in a strip-mined area near the Illinois River. Twenty to thirty feet of mine spoil generally overlies the St. Peter Sandstone. The spoil is relatively homogeneous and can be described as a silty clay (.002mm), 71% silt (.002 - .05mm) and 3% sand (.05 - 2.0mm). Recompacted samples of the spoil have exhibited permeabilities from 1×10^{-8} cm/sec to 2.3×10^{-9} cm/sec. Since the developmental permit issued to this site requires 10 feet of recompacted spoil liner with a maximum permeability of 1×10^{-8} cm/sec, (ATT-3), water will not move through the spoil liner for hundreds of years. Any contaminants which the water contained will be attenuated through chemical ion-exchange with the spoil liner or will be filtered out by the fine-grained spoil well before it passes through the spoil liner. This travel time should be further extended due to permit conditions requiring pumping to keep the secure cells dry and synthetic liners.

Petitioners have supplemented the record with information allegedly showing that the permeability of the site is considerably greater than 1×10^{-8} cm/sec. However, these allegations were adequately rebutted through the testimony of Thomas Cavanagh (R. 657-698). He testified, essentially, that maximum permeability tests will yield varying results depending upon the compaction and upon the required permeability limits for the type and use of the site involved. That is, if a specific material is shown to have a permeability of 1×10^{-6} cm/sec under certain conditions, it does not necessarily follow that the permeability cannot be lessened. Further, if a site is found to be unsuitable for hazardous waste disposal under one set of engineering plans, it does not necessarily follow that it would be unsuitable under other plans.

Petitioners have also argued that the solidification process to be used at the site is unproven, that the technical data supporting the process were not made available for inspection, and that Petitioners were not allowed to cross-examine any witnesses regarding that process. This argument, however, ignores the fact that the Agency found, based upon considerable test data, that the site will be environmentally sound without the use of the solidification process. Further, before any wastes can be disposed of at the site, under the conditions of the permit, a supplemental permit must be obtained.

Since it is not yet known what particular substances will be disposed of at the site, the Agency would have been unable to run meaningful tests on the process prior to the time of permit issuance, and review of the process would be largely meaningless. The proper time for such review is when the materials are known. That is at the time of application for the supplemental permit.

The Agency's finding that the site is hydrologically sound is supported by a report which was submitted as part of the application (pp. 31-94), which included the results of tests based on thirty-four soil borings and five monitoring wells. Possible contamination of the St. Peter Sandstone aquifer was fully considered and found to be highly unlikely given the geological and hydrological findings and the precautions against leachate which are required to be taken with respect to the development of the site.

The landfill is located in a sparsely populated area which has been extensively strip mined. It is presently a barren and largely unvegetated tract of land. Upon closure of the site a cap is to be put in place and seeded, thus ultimately enhancing the aesthetics of the area. During operation screening berms and natural vegetation will conceal the site from public view.

The Board finds that the Agency has adequately considered objections to the site that were raised at the Agency level and has properly concluded that such objections were without substantial merit.

CLOSING NOTE

Nothing in our environment is risk free. And there is probably no one in the State who would prefer to live next to a landfill rather than a lake or a forest, even though these also create risk. However, until society decides that the benefits of modern production are being outweighed by its costs, or until technology advances to a point where safer, economically reasonable alternatives to landfilling exist for all hazardous wastes, the hazardous wastes will have to be buried under as carefully controlled conditions as possible.

The Board has always felt that public participation in its proceedings is beneficial, if often emotional. The public can bring forth overlooked facts and can insure that a complete

record is presented to the Board such that it can make a fully informed decision. The Board then must face the difficult issue of whether the Agency's permitting decision should be affirmed or reversed. In making that decision it must act objectively, for if it did not, no permit could be issued. The constant flow of hazardous wastes would continue and go somewhere, but probably not safely.

Based on the record in this case the Board has concluded that the Agency properly granted the developmental permit to Pioneer.

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

IT IS SO ORDERED.

Board Member D. Anderson abstained.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion was adopted on the 4th day of March, 1982 by a vote of 3-0.

Christan L. Moffett, Clerk
Illinois Pollution Control Board