ILLINOIS POLLUTION CONTROL BOARD
May 7, 1992

IN THE MATTER OF:	)	
	)	
AMENDMENTS TO 35 ILL. ADM. CODE 105.102; REPEAL OF DE NOVO HEARINGS FOR APPEALS OF NPDES PERMITS	)	R90-8 (Rulemaking)

DISSENTING OPINION (by B. Forcade):

I respectfully dissent from the dismissal of this docket. I had previously articulated an approach to resolving the permit appeal procedural dilemma we face. That approach was not adopted by the majority. Since the ideas and concepts I developed in that conceptual proposal still seem valid to me, I express those concepts today in my dissenting opinion, as they were drafted for consideration earlier by the Illinois Pollution Control Board ("Board").

On February 8, 1990, the Board proposed to amend 35 Ill. Adm. Code 105.102. The proposed amendment focused on 35 Ill. Adm. Code 105.102(b)(8) which requires the Board to hold de novo hearings on disputed issues of fact in NPDES permit appeals. The proposed changes to Section 105.102 were published in the Illinois Register, Volume 14, Issue 8 on February 23, 1990. Public comments on this proposal were received from several concerned industries and organizations. A hearing on the proposed amendments was held on May 16, 1990. Recent appellate court opinions have addressed the issues concerning the review of permits. As a result of the comments, hearing and recent court opinions concerning permit appeals, it was apparent that the proposal did not fully address the problems associated with permit appeals. To address the concerns of the public and secure the Board's objective in the permit appeal process, I felt additional amendments to the Board's permit appeal regulations were required. On March 29, 1991, First Notice expired on the proposed amendments. I would have revised the previous proposal and proceeded to Second First Notice, expanding the scope of the proposed amendments.

I believe that the time may be ripe to revisit the procedures governing all permit appeals covered by 35 Ill. Adm. Code 105.102. I would have changed the caption from "Amendments to 35 Ill. Adm. Code 105.102; Repeal of De Novo Hearing for Appeals of NPDES Permits" to "Amendments to 35 Ill. Adm. Code 105.102; Amendments to Permit Appeals". My intention was to suggest one small change in the permit review process. That change is that any new information developed because the permit applicant was surprised by the final permit, or because the permit issuance process was fatally flawed procedurally, must be submitted to the Agency in a remand proceeding. I would not

intend to address or in any manner expand or contract the permit applicant's rights to submit information into the permit determination process (the change is to whom the information is submitted, not to what information can be submitted). In a similar manner, I would not intend in any manner to alter the petitioner's right to an adjudicatory hearing on permit issues. I would intend to modify the question of who gets to review the information first, the Agency informally, or this Board in an adjudicatory context. My intention would have been to express a strong preference for the former option of having the information submitted to the Agency through the informal process of permitting.

My intention was not to alter the Board's longstanding practice of allowing review petitioners to supplement the record filed with the Board by the Agency when the petitioner can demonstrate that the information existed prior to the Agency decision and that the information was or should have been in the possession of the Agency. Such information is also admitted when the parties both agree. In those cases, we allow the additional information to be submitted to the Board, without remand. With regard to the issue of supplementation, it is well recognized that, if there was information in the Agency's possession upon which it actually or reasonably should have relied, the applicant may submit such information to the Board for the Board's consideration. Waste Management, Inc. v. IEPA, PCB 84-45, 61, 68, 60 PCB 173, 201 (October 1, 1984) and 61 PCB 301, 310, 312, 313 (November 26, 1984)(monitoring data in the Agency's possession which contradicted earlier monitoring data which did not come to the attention of Agency decision makers should be included in the record), aff'd sub nom. IEPA v.IPCB and Waste Management, 138 Ill. App. 3d 550, 486 N.E.2d 293 (3d Dist. 1985), aff'd 115 Ill.2d 65, 503 N.E.2d 343 (1986); Wells Manufacturing Company v. IEPA, PCB 86-48, 71 PCB 34, 35-36 (July 11, 1986), 76 PCB 301, 303, 310 (March 19,1987)(Hearing Officer correctly allowed the testimony of Agency witnesses who were called to amplify upon joint exhibits [testimony of citizens whose forms, letters, and petitions that were on file with and available to the Agency, prior to the Agency's action in the matter] contained in the Agency record), 76 PCB 324 (March 19, 1987), rev'd and rem'd on other grounds 195 Ill. App. 3d 593, 552 N.E.2d 1074 (5th Dist. 1990); Joliet Sand and Gravel Company v. IEPA, PCB 86-159, 75 PCB 228, 232-233 (February 5, 1987)(in appeal of Agency denial of application for renewal of operating permit, documents contained in Agency's file relating to original operating and construction permits were admitted into evidence because application for renewal referenced expiring operating permit which, in turn, referenced construction permit), aff'd Joliet Sand and Gravel Company v. IPCB and IEPA, 163 Ill.App.3d 830, 516 N.E.2d 955, 958 (3d Dist. 1987); Frinks Industrial Waste, Inc. v. IEPA, PCB 83-10, 52 PCB 447, 449 (June 30, 1983)(supplements to the record had been necessary when the Agency located additional

relevant documents); Sherex Chemical Co. Inc. v. IEPA, PCB 80-66, 39 PCB 527, 530 (October 2, 1980)(Board overturned Agency's denials of both an operating and a stack construction permit based on modeling data in the record, which because of the Agency's denial letter, theoretically included only the Dames & Moore results, but which in point of fact included all prior permit application considerations), aff'd sub nom. IEPA v. Sherex Chemical Co. and IPCB, 100 Ill.App.3d 735 (1981).

STATUTORY PROVISIONS

The Illinois Environmental Protection Act ("Act"), Ill. Rev. Stat. 1991, ch. 111 1/2 par. 1001 et. seq. under Title X, provides the statutory authority for the Illinois Environmental Protection Agency ("Agency") to issue permits (§39) and the Board to review the Agency's decisions concerning permits (§40). Section 40 of the Act provides the applicant, who has been denied a permit or issued a permit with conditions, the right to petition the Board for a hearing to contest the Agency's decision. The Act does not specify the scope or content of the Board's review, except for a select group of special permits involving third party appeals from RCRA permit decisions (§40(b)), appeals (including third party appeals) from non-RCRA hazardous waste disposal permit decisions (§40(c)), and appeals from specified federal Clean Air Act-related Agency permit decisions (§40(d)). For this group of permits, the Act mandates that the Board base its review of Agency permitting decisions solely upon such facts as are in the Agency's permit decision record. However, the Act does not mandate any scope of review for other permits not specified in Sections 40(b), 40(c) and 40(d). Further, the Act does not address the situation in which an Agency permit decision is based upon information which is unknown to the applicant or to which the applicant has been denied the opportunity to respond prior to the Agency's permitting decision.

JUDICIAL INTERPRETATION OF THE STATUTE

A number of recent court cases have addressed the issue of the scope and content of Board review of Agency permitting decisions. The following listing does not represent a pronouncement on the holdings of the cases, but is simply a listing of issues to enumerate the difficulty the Board faces in attempting to accommodate the various principles implied by the many court cases:

1. The applicant has an interest in the issuance or denial of a permit and should be allowed an opportunity to protect that interest.

2. Board review is not equivalent to submitting evidence to the Agency during the application process and hearings before the Board do not cure deficiencies that occurred at the Agency level.

3. The Agency has no authority to modify or reconsider its decisions.

4. Hearings before the Board are limited to the record before the Agency, and should not consider information developed after the Agency decision.

A protected property interest was found to be at stake by the Federal District court in Martell v. Mauzy, 511 F.Supp 729 (N.D. Ill E.D. 1981) where an operating permit for a landfill was denied after the developmental permit was issued. The court in Martell held that the failure to hold a "pre-denial hearing" deprived the applicant of due process of law. The Appellate Court of Illinois, in Wells Manufacturing Co. v. IEPA, 195 Ill. App. 3d 593, 552 N.E.2d 1074 (1st Dist. 1990) agreed there was an interest involved in issuing permits that gives rise to due process concerns. However, in Wells, while the court found that the denial of an application to renew an operating permit was analogous to the Martell situation, the court refused to require pre-denial hearings for permits.

The second principle listed above was developed in Wells, where the Agency denied Wells' application to renew its air operating permit and offered to "reevaluate" the denial if Wells so requested, and if additional information was submitted to the Agency. Wells elected to file an appeal with the Board so that, pursuant to the Act, it could continue operations during the appeal. Ill. Rev. Stat. 1985, ch. 127, par. 1016(b) [1]. After conducting hearings, the Board affirmed the Agency's denial of the permit. On appeal the First District reversed, determining that Wells was denied a fair chance to protect its interest due to the manner in which the Agency collected information. The court held that Wells should have had an opportunity before the Agency to protect its interest and Board review was not considered equivalent to submitting evidence during the application process.

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[1] If a complete air pollution permit renewal application is received at least 90 days prior to expiration of the old permit, the old permit's terms and conditions will remain in effect until final administrative action on the application. (§9.1 of the Act as amended by PA-87-0555, September 17, 1991)

The second principle was also discussed in Sauget v. PCB, 207 Ill. App. 3d 974, 566 N.E.2d 724 (5th Dist. 1990), and Reichold Chemicals v. PCB, 204 Ill. App. 3d 1345, 561 N.E.2d 1343 (3d Dist 1990). A description of the proceedings before the Agency and the Board in support of this principle can be found in IEPA v. Waste Management, Inc., 138 Ill. App. 3d 550, 486 N.E.2d 293 (3rd Dist. 1985) and the Supreme Court's affirming opinion, IEPA v. Waste Management, Inc., 115 Ill. 2d 65 503 N.E.2d 343 (1986).

In Sauget, the court held that the village and company (Monsanto) were denied the right to submit comments or request a hearing before the Agency concerning the proposed conditions suggested by the U.S. EPA and thus were denied the right to participate in the NPDES permit process. The court found that the procedural safeguards to which the applicant was due at the agency level were not afforded and that subsequent hearings before the Board did not cure the deficiency. In Reichold, the court followed the Wells decision and questioned the fundamental fairness of the Agency's proceedings which did not give the applicant an opportunity to submit more information.

In a permit case, the process involving the Agency and the Board is an administrative continuum. Waste Management, 138 Ill. App. 3d 550, 486 N.E.2d 293. The hearing before the Board includes consideration of the record before the Agency together with the receipt of testimony and other proofs under the full panoply of safeguards normally associated with a due process hearing. The Illinois Supreme Court, in Waste Management, 115 Ill. 2d 65, 503 N.E.2d 343 affirmed the Board decision reversing Agency denial of the permit and held that the Agency is not required to conduct hearings, therefore procedures to test the validity of the information, such as cross-examination, are not available to the applicant. The procedures before the Agency have none of the characteristics of an adversary proceeding. The safeguards of a due process hearing are absent until the hearing before the Board. Due to the nature of the previous proceedings, the Board is not required to apply the manifest-weight test to its review of the Agency's decision denying the permit.

The courts articulated the third principle for the first time in Reichold Chemicals v. PCB, 204 Ill. App. 3d 674, 561 N.E.2d 1343 (3d Dist. 1990), where the Agency offered to reevaluate the application after denying the operating permit. In Reichold, the court stated, "no such authority to modify or reconsider its decisions has been granted by statute to the Agency, and no such procedures have been provided by rule." When the Agency denies an application, the applicant's only options are to start over with a new application to the Agency or to petition the Board for review. If the Agency lacks the authority to reconsider, then the only method to reevaluate new evidence or correct obvious procedural defects seems to be a Board remand.

The fourth principle, which limits the scope of Board review, is well established. It was recently articulated in Joliet Sand & Gravel Co. v. PCB, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (3d Dist. 1987) where the court held the standard of review in a permit appeal is as follows:

> "[T]he sole question before the Board is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Environmental Protection Act would have occurred if the requested permit had been issued." (Emphasis added)

This standard of review was repeated in Browning-Ferris Industries of Illinois, Inc. v. IEPA, 179 Ill. App. 3d 598, 534 N.E.2d 616 (2d Dist. 1989). This language properly focuses attention to the fact that it is information that is submitted to the Agency which should be under review by the Board in a permit appeal, not information developed after the Agency decision.

JUDICIAL INTERPRETATION OF BOARD REGULATIONS

For NPDES permit appeals, 35 Ill. Adm. Code 105.102(b)(8) provides for de novo hearings on disputed issues of fact. The Second District, in Dean Foods Company v. PCB, 143 Ill. App. 3d 322, 492 N.E.2d 1344 (2nd Dist. 1986), held "de novo" required the Board to entertain facts not before the Agency in its permit review. The Board reevaluated Section 105.102(b)(8) regulation and determined that "de novo" meant a "new and fresh" look at the facts before the Agency and a decision that did not grant deference to the prior Agency decision. In City of East Moline v. PCB, 188 Ill. App. 3d 349, 544 N.E.2d 82 (3d Dist. 1989), the court disagreed with the Board's new interpretation of de novo, holding that a de novo hearing required the Board to receive and consider evidence beyond the scope of the Agency record providing it was relevant to the denial of the permit. In Citizen Utilities Co v. PCB, 193 Ill. App. 3d 93, 549 N.E.2d 920 (3d Dist. 1990) the court followed the holding in City of East Moline stating, "the Act contemplates that the Board will take more than a "live" review of the record before the Agency."

Allowing the introduction of information that was not before the Agency, would interfere with the Agency role as the permit issuing entity in Illinois, a role exercised pursuant to Section 39(a) of the Act, and Village of Hillside v. John Sexton Sand & Gravel Company, 105 Ill. App. 3d 533, 434 N.E.2d 382 (1st Dist. 1982). However, the Board's interpretation of what a permit appeal should be is at odds with our existing regulatory language regarding NPDES permit appeals, according to Dean Foods, 143 Ill. App. 3d 322, 492 N.E.2d 1344, City of East Moline, 188 Ill. App. 3d 349, 544 N.E.2d 82, and Citizens Utilities 193 Ill. App. 3d 93, 549 N.E.2d 290, which allow additional evidence to be submitted for consideration by the Board.

PUBLIC COMMENTS AND HEARINGS

Public comments were received from Illinois Coal Association (PC 2), Illinois Steel Group (PC 5 & PC 10), Agency (PC 5, PC 7 & PC 9), Pekin Energy Co. (PC 6 & PC 8), Stepan Co. (PC 11) and Illinois Environmental Regulatory Group (IERG) (PC 12). At hearing testimony was received from Sid Marder of IERG, Steve Ewart of the Agency, Daniel Kucera for Citizen Utilities Co., of Illinois, Northern Illinois Water Corp., Consumers Illinois Water Co. and Illinois American Water Co., Percy Angelo for Pekin Energy Corp and Stepan Corp. and James Harrington on behalf of the Illinois Steel Group.

The comments discuss many issues raised by the proposal to repeal the requirement of de novo hearings for NPDES permit appeals. Some of the comments stated there was not a problem with de novo hearings or if there was a problem it was so minimal that a change in the procedure was not warranted. (PC 10, Tr. at p. 59). Some of the other issues raised in the testimony and comments were: Whether a de novo hearing is required by the Act or other legislation? (PC 4, 5, 6, Tr. at p. 61). Does due process require the Board to conduct de novo hearings? (PC 5, Tr. at p. 70). Whether allowing de novo hearings leads to forum shopping? (PC 5). The testimony and comments also expressed the concern of the regulated community of getting information in to the permit review when a permit condition or denial occurs too late in the Agency process for the applicant to comment. (PC 6). Some of the comments discussed a procedure for remand or reconsideration of the permit by the Agency. (Tr. at p. 29).

At hearing the potential problem of a permit applicant withholding information until the de novo review was discussed, as well as the potential for forum shopping. Ms. Angelo testified that there is a distinct preference for presenting information directly to the Agency:

> ....."There is no one in their right mind in the regulated community who would rather deal with these issues in an evidentiary process before the Pollution Control Board where you cannot talk to the people making the decision, rather than through the Agency where you can go down, you can bring your materials, you can have a meeting, you are not subject to evidentiary standards.
>
> You just make your pitch to the people who have to make the decision. That is by far the better solution to the problem. The idea that people would rather bring these cases to the Board is just unrealistic.
>
> We would all rather try and convince the Agency first, and that's why you see the process whereby people file

their permit appeals and than they try to negotiate with the Agency. The fact of the matter is it is very hard to get the Agency's attention until you file your permit appeal, and then they will answer your phone calls."

(Tr. at p. 88-89)

* * * * * *

....."It is much safer, much more conservative, much less risky for the client to go down and have a technical discussion with the Agency about the issues that are of concern to both parties.

There may be Agency lawyers and your lawyers there. But that is a more preferable way to discuss these issues and handle these problems. You can't discuss technical issues in a give and take direct and cross examination. Even lawyers who do it would never choose that as the ordinary way to try to make your point to someone.

....."You would always rather discuss it with the Agency and have them reach the same conclusion that you do on the basis of the information you present to them in a meeting or written submission, or something like that."

(Tr. at p. 102-103)

PROPOSAL

My intention would have been to create a standard remand procedure to allow the applicant the opportunity to supplement the record of the Agency in a proceeding before the Agency, where previous action on the part of the Agency precluded the information from being submitted or where the permit process was fatally flawed procedurally. My ideas would also establish that, except for remand situations, the Board's review shall be based solely upon the record available to the Agency at the time the permit determination was made. It would further make the scope of NPDES permit appeals the same as that for all other Agency permit determinations. Burden of proof language was also added to the permit appeal regulation. This language is directly from Section 40(a)(1) of the Act. Similarly, statutory language regarding the burden of going forward was added to the NPDES regulatory language.

My hypothetical amendments provide the applicant with the option to request, at the time of filing a petition for review, that the proceeding be remanded to the Agency for review or further action. The remand procedure provides the applicant with a means to supplement the record when the applicant has been denied the opportunity to protect its interest. The remand procedure also allows the Agency to review its decision considering the newly submitted information and does not put the Agency in the position of defending a denial of a permit without the opportunity to analyze the additional information. Supplementing the record gives the applicant the opportunity to protect its interest and will cure deficiencies from the previous proceedings. Remanding the proceeding prevents the applicant from having to restart the permit application procedure or be subject to a review by the Board, where the Board does not consider information that was not before the Agency when the permit was denied. This procedure will also provide the Board with a complete record on which to base its review and the Board will not be reviewing information which the Agency did not have the opportunity to consider in reaching the permitting decision.

My hypothetical changes to the regulation would not eliminate the applicants right to a hearing. They would merely allow a permit application to be remanded to the Agency for reconsideration prior to any hearings being held, based on motions and affidavits of the parties. In a case whose factual situation requires the Board to remand to the Agency, conducting hearings prior to remanding is unnecessary and additionally burdens the financial and time resources of the applicant, the Agency and the Board. If after remand, the Agency reaches a decision unfavorable to the applicant, the applicant could again appeal, but the additional information submitted on remand would be part of the new Agency record.

The time to file a motion for remand would be limited to the initial filing of the permit appeal. Limiting the time for filing a motion for remand would prevent delays in the review process. If a motion to remand were filed later, the parties would have prepared to go to hearing and any scheduled hearing would need to be cancelled. The proceedings would only be remanded when action on the part of the Agency prohibited the applicant from participating in the permitting process. This would prevent an applicant from using the remand procedure as a means to control the submission of information to the Agency. The remand procedure would allow information to be submitted directly to the Agency. At the Agency level, information is normally submitted in an informal manner by the applicant's technical personnel. On appeal to the Board information is normally received in a formal adversarial proceeding. Allowing the applicant to submit information to the Agency on remand instead of to the Board during the appeal process would result in time and cost savings for the applicant, Agency and Board.

This concept would also provide additional time and cost savings by reducing the number of time-consuming and costly hearings that result in the permit review being remanded back to the Agency. In Wells, 195 Ill. App. 3d 593, 552 N.E.2d 1074, the Board conducted two hearings and the permit appeal lasted in excess of four years before the Appellate Court remanded the case for further proceedings. The deficiency in the Wells case was known by the applicant at the time of the initial filing of the appeal. To cure the deficiency, the permit appeal needed to be remanded to the Agency for further action. My conceptual amendments provide for remand to the Agency based on motions from the applicant and the Agency prior to conducting discovery or hearings. If a case factually similar to Wells were filed with the Board today, in the absence of a remand procedural rule, the Board would be obligated to conduct largely useless hearings and then would be obligated to remand the matter to the Agency.

The Board could construe the Order granting the motion to remand as restarting the Agency's statutory time clock to reach a permit determination as if a new permit application were filed with the Agency. For construction, installation or operating permits, the Agency would then have the statutory 90 days to reconsider the permit (Section 39a). For permits to develop a landfill the Agency would have 180 days (Section 39a) to reach a permit decision. The Agency could be provided with the same amount of time to reconsider the permit as it was allowed to make its original determination.

I would have included language that, the board "may" remand the proceeding to the Agency for review or further action. This language would allow the Board to use its discretion in granting or denying a motion for remand. The motion may satisfy all of the requirements but other circumstances of the case may result in the motion being denied. This leeway would limit any possible abuse of the remand procedure.

While the factual circumstances where a motion to remand could be granted are numerous, several situations already mandate remand to the Agency. Where the facts of the case are similar to those presented by Wells or Sauget, the Board would be obligated to remand. Some examples of recent adjudicatory cases in which the Board has remanded the proceeding include, Grigoleit v. IEPA, PCB 89-184; Clean Quality Resources v. Marion County Board, PCB 91-72; Douglas Furniture v. IEPA, PCB 90-22; Centralia Environmental Services v. IEPA, PCB 89-170; DiMaggio, et. al. v. SWANCC, et. al., PCB 89-138; Modine Manufacturing v. IEPA, PCB 86-124; City of Rockford v. Winnebago County, PCB 87-92; and Earl Bradd v. IEPA, PCB 90-173.

In those circumstances where remand is appropriate, the Board would need to determine its authority to remand, the procedures regarding remand, and the obligations (including time

constraints for decisionmaking) that remand would place on the Agency. My conceptual proposal is an attempt to address those issues in a prospective manner by regulation, rather than in the ad hoc manner of case by case determinations.

My conceptual proposal limits the scope for all permit reviews to the Agency record at the time that the permit decision was made. This is equivalent to the procedure that is currently provided by statute for the review of third-party appeals from RCRA permit decisions (§40(b)), appeals (including third-party appeals) from non-RCRA hazardous waste disposal permit decisions (§40(c)) and appeals from specified federal Clean Air Act-related Agency permit decisions (§40(d)). The Agency record is comprised of all the information that the Agency was or should have been in possession of, on or before the date of the permitting decision.

This idea eliminates the requirement of de novo hearings for NPDES permit appeals making the scope the same as in other permit appeals. In other permit appeals, the Board does not allow a hearing based on totally new factual material not previously before the Agency. The Board looks at the evidence and determines if it supports denial of the permit or the application of conditions to a permit. Allowing new material to be submitted directly to the Board denies the Agency the opportunity to analyze the new material in a non-adversarial setting.

In summary, I would have proposed the following language for public comment. Since the Board would not adopt such an approach, I respectfully dissent. The language I would have proposed is as follows:

TITLE 35: ENVIRONMENTAL PROTECTION
SUBTITLE A: GENERAL PROVISIONS
CHAPTER I: POLLUTION CONTROL BOARD

PART 105
PERMITS

Section

105.101 Setting Standards
105.102 Permit Appeals
105.103 Permit Review
105.104 Cost of Review

APPENDIX A Old Rule Numbers Referenced

AUTHORITY: Authorized by Section 26 of the Environmental Protection Act (Ill. Rev. Stat. 1979, ch. 111½, par. 1026) and implementing Sections 5, 39, 40 and 40.1 of the Illinois Environmental Protection Act (Ill. Rev. Stat. 1979, ch. 111½, pars. 1005, 1039, 1040 and 1040.1, as amended by P.A. 82-682).

SOURCE: Filed with Secretary of State January 1, 1978; amended 4 Ill. Reg. 52, page 41, effective December 11, 1980; codified 6 Ill. Reg. 8357; amended in R90-8 at _____ Ill. Reg. _____, effective _____.

Section 105.102 Permit Appeals

a) Permit Appeals Other than NPDES (National Pollutant Discharge Elimination System) Permit Appeals:

1) If the Agency denies the permit, it shall advise the permit applicant in writing in accordance with the requirements of Section 39(a) of the Act.

2) In the case of a denial of a permit or issuance by the Agency of a permit with one or more conditions or limitations to which an applicant objects, an applicant who seeks to appeal the Agency decision shall file a petition for a hearing before the Board within 35 days of the date of mailing of the Agency's final decision. The petition shall include:

A) Citation of the particular standards under which a permit is sought;

B) A complete and precise description of the facility, equipment, vehicle, vessel, or aircraft for which a permit is sought, including its location;

C) A complete description of contaminant emissions and of proposed methods for their control; and

D) Such other materials as may be necessary to demonstrate that the activity for which the permit is sought will not cause a violation of the Act or the regulations.

3) The method of filing service shall be in accordance with Sections 103.122 and 103.123.

4) The Agency shall appear as respondent in the hearing and shall, within 14 days, upon notice of the petition, file with the Board the entire Agency record of the permit application, including:

A) The application;

B) Correspondence with the applicant; and

C) The denial.

5) The decision of the Board in reviewing any denial or condition of a permit by the Agency shall be based exclusively on the record before the Agency at the time that the permit was denied. THE BURDEN OF PROOF SHALL BE ON THE PETITIONER. (Section 40 of the Act.)

6) An applicant wishing to assert that Agency actions have precluded the applicant from raising or responding to a material issue of fact or law on the record or assert that Agency procedural errors have rendered the permit determination invalid, may file a motion for remand with the Board. Such a motion and affidavits must be filed at the same time as the initial petition for review in the proceeding. Such a motion must be supported by affidavit, stating the Agency action, the information involved, when the applicant became aware of the information, and its asserted effect on the validity of the permit decision. The Agency shall file a reply to the applicant's motion to remand within 14 days from the Agency's receipt of the motion, which may include opposing affidavits.

7) If the Board, after reviewing a motion to remand and affidavits, determines that the permitting process was procedurally flawed or that the applicant was precluded from raising or responding to a material issue of fact or law, the Board may remand the proceedings to the Agency for review or further action. The Order to Remand will be considered as the filing of a new permit application for purposes of determining the time period for the Agency to reconsider the permit.

8)~~5)~~ The Clerk shall give notice of the petition and hearing in accordance with Part 103.

9)~~6)~~ The proceedings shall be in accordance with the rules set forth in Part 103.

b) NPDES Permit Appeals:

1) If the Agency denies an NPDES Permit, it shall advise the permit applicant in writing in accordance with the requirements of Section 39(a) of the Act.

2) In the case of the denial of an NPDES Permit or the issuance by the Agency of an NPDES Permit with one or more conditions or limitations to which the applicant objects, the applicant may contest the decision of the

Agency by filing with the Clerk of the Board a petition for review of the Agency's action in accordance with this Section.

3) Any person other than the applicant who has been a party to or participant at an Agency hearing with respect to the issuance or denial of an NPDES Permit by the Agency, or any person who requested such a hearing in accordance with applicable rules, may contest the final decision of the Agency by filing with the Clerk a petition for review of the Agency's action.

4) The petition shall be filed and notice issued within 30 days from the date the Agency's final decision has been mailed to the applicant and all other persons who have right of appeal. The method of filing and service shall be in accordance with Sections 103.122 and 103.123.

5) The Agency shall appear as respondent and shall file an answer consisting of the hearing file of any hearing which may have been held before the Agency, including any exhibits, and the following documents: NPDES Permit application, NPDES Permit denial or issuance letter, and all correspondence with the applicant concerning the application.

6) All parties other than the petitioner who were parties to or participants at any Agency hearing shall be made respondents.

7) The petition shall contain a statement of the decision or part thereof to be reviewed. The Board upon motion of any respondent shall, or upon its own motion may, require of the petitioner a specification of the errors upon which the petitioner relies in his petition.

8) ~~The hearings before the Board shall extend to all questions of law and fact presented by the entire record. The Agency's findings and conclusions on questions of fact shall be prima facie true and correct. If the Agency's conclusions of fact are disputed by the party or if issues of fact are raised in the review proceeding, the Board may make its own determination of fact based on the record. If any party desires to introduce evidence before the board with respect to any disputed issue of fact, the Board shall conduct a de novo hearing and receive evidence with respect to such issue of fact.~~ The decision of the Board in reviewing under this Section any denial or condition of a permit by the Agency shall be based exclusively on the record before the Agency. THE

BURDEN OF PROOF SHALL BE ON THE PETITIONER. IF, HOWEVER, THE AGENCY ISSUES AN NPDES PERMIT THAT IMPOSES LIMITS WHICH ARE BASED UPON A CRITERION OR DENIES A PERMIT BASED UPON APPLICATION OF A CRITERION, THEN THE AGENCY SHALL HAVE THE BURDEN OF GOING FORWARD WITH THE BASIS FOR THE DERIVATION OF THOSE LIMITS OR CRITERION WHICH WHERE DERIVED UNDER THE BOARD'S RULES. (Section 40 of the Act.)

9) An applicant wishing to assert that Agency actions have precluded the applicant from raising or responding to a material issue of fact or law on the record or assert that Agency procedural errors have rendered the permit determination invalid, may file a motion for remand with the Board. Such a motion and affidavits must be filed at the same time as the initial petition for review in the proceeding. Such a motion must be supported by affidavit, stating the Agency action, the information involved, when the applicant became aware of the information, and its asserted effect on the validity of the permit decision. The Agency shall file a reply to the applicant's motion to remand within 14 days from the Agency's receipt of the motion, which may include opposing affidavits.

10) If the Board, after reviewing a motion to remand and affidavits, determines that the permitting process was procedurally flawed or that the applicant was precluded from raising or responding to a material issue of fact or law, the Board may remand the proceedings to the Agency for review or further action. The Order to Remand will be considered as the filing of a new permit application for purposed of determining the time period for the Agency to reconsider the permit.

11) This proceeding shall be in accordance with Part 103.

12) The order of the Board entered pursuant to hearing may affirm or reverse the decision of the Agency, in whole or in part, may remand the proceeding to the Agency for the taking of further evidence, or may direct the issuance of the permit in such form as it deems just, based upon the law and the evidence.

Bill S. Forcade
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was filed on the 8th day of May, 1992.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board